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EXPRESSING CONCERN over the high level of economic concentration of American business and the trend toward an even higher level of concentration through the use of the merger device,[1] Congress, in December of 1950, amended Section 7 of the Clayton Act to prohibit the acquisition by one corporation of the stock or 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] (Emphasis supplied) Through this amendment, Congress intended "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions"[3] by prohibiting these practices when coupled with monopolistic tendencies.[4] This same Congressional purpose, that of arresting, by prohibiting specific trade practices having monopolistic tendencies, the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation,[5] had attended the original enactment of the Clayton Act in 1914. Section 7, however, prior to the 1950 amendment had never provided an effective restraint on corporate growth by merger.

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1 H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949).

2 64 Stat. 1125 (1950), 15 U.S.C. Sec. 18 (1953). Prior to the amendment, Section 7 prohibited only acquisitions of stock or other share capital where the effect might be "to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731 (1914), 15 U.S.C. Sec. 18 (1946).

3 Senate Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).

4 Id., at 4.

5 Id. at 4-5.

Several factors contributed to this near-total ineffectiveness of the unamended Section 7. Of chief importance was the complete failure of the section to prohibit either outright or indirect acquisitions of corporate assets.[6] The vitality of the section in respect to acquisitions of capital stock was seriously impaired by decisions of the Supreme Court holding that the authority of the administering agency, the Federal Trade Commission, was limited to an order requiring divestiture of stock illegally held by the violating corporation *at the time the Commission's final order was actually issued.*[7] Timely disposal by the violator of illegally held stock ousted the Commission of jurisdiction, even though the method used in disposing of the stock vested title to the physical assets of the acquired company in the violating corporation.[8]

Old Section 7 prohibited only those acquisitions the effect of which might be "to substantially lessen competition *between the corporation whose stock is so acquired and the corporation making the acquisition.*"[9] (Emphasis supplied) A literal application of this test of illegality would have made unlawful nearly every merger between direct competitors on the ground that competition between them not only would be lessened substantially, but would be completely eliminated. To avoid this result, the courts, in addition to retaining the statutory requirement of a substantial lessening of competition between the acquiring and acquired corporations,[10] construed the section to require a lessening of competition in the industry as a whole.[11] Thus, only horizontal acquisitions, those between direct competitors, which were large

[6] 38 Stat. 731 (1914). Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 291 U.S. 587 (1934). Some proponents of the amendment to Section 7 contended that the omission of assets was unintentional, either purely inadvertent, Hearings on H.R. 2357 at 4, 15 (1949), or simply an historical accident resulting from the fact that prior to 1914 the common method of obtaining control over a corporation was by stock acquisition, H.R. Rep. No. 1191, 81st Cong., 1st Sess. 4 (1949). The better explanation for the omission would seem to be that the purpose of Section 7 was to prevent formation of holding companies which exercised corporate control through stock ownership. H.R. Rep. No. 627, 63d Cong., 2d Sess. 17 (1914).

[7] Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, supra note 6; Thatcher Manufacturing Co. v. Federal Trade Commission, 272 U.S. 554 (1926).

[8] Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, supra note 6.

[9] 38 Stat. 731 (1914), 15 U.S.C. Sec. 18 (1946).

[10] International Shoe Co. v. Federal Trade Commission, 280 U.S. 291 (1930).

[11] International Shoe Co. v. Federal Trade Commission, supra note 10; V. Vivaudo, Inc. v. Federal Trade Commission, 54 F. 2d 273 (2d Cir. 1931).

enough to produce the proscribed effect on competition within the entire industry affected by the acquisition were within the purview of the section.[12] The section, so construed, proved to be completely ineffective as a deterrent to corporate integration.

In amending Section 7, Congress made two basic changes. The loophole respecting corporate asset acquisitions was closed.[13] More important, perhaps, the "acquiring-acquired" qualifying language was deleted and a new test of illegality substituted: an acquisition is now unlawful if "in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition."[14] This qualifying language used by Congress in formulating this statutory test of illegality is not new to the Clayton Act, but is virtually identical to the language previously used in formulating similar tests under Sections 2 and 3 of the Act. Section 2 prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce."[15] Section 3 makes unlawful the use of tying or requirements contracts the effect of which "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[16]

The legislative history makes it clear that Congress intended that this new standard of illegality be stricter than the acquiring-acquired test as applied under old Section 7.[17] By altering the qualifying language of the section, Congress removed those provisions which appeared "to reach situations of little economic significance,"[18] thereby intending to secure a "broader construction of the more fundamental provisions that are retained than has

[12] "Substantial lessening" was defined to require a showing that the effect of the merger would be injurious to the public. U.S. v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935).

[13] Section 7 now provides: "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." 64 Stat. 1125 (1950); 15 U.S.C. Sec. 18 (1953).

[14] Ibid.

[15] 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13 (1953).

[16] 38 Stat. 731 (1914), 15 U.S.C. Sec. 14 (1953).

[17] Senate Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950); H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8-9 (1949).

[18] Senate Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950).

been given in the past."[19] The members of the Senate Committee reported a belief that the acquiring-acquired language of the old section had been largely responsible "for the tendency of the courts in cases under the section to revert to the Sherman Act test."[20] In the application of this new standard to cases arising under the amended Section 7, decisions of the courts applying this identical language to price discriminations, tying contracts and requirements contracts under Sections 2 and 3 of the Clayton Act can hardly be ignored. The mere fact that Congress chose to adopt language which had acquired a specific meaning in respect to other sections of the Clayton Act would support an inference that the qualifying clause should be applied in a manner similar to applications under those other sections. The House Report seems to indicate such an intention in discussing this statutory standard:

> Under H.R. 2734, a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition or (b) tending to create a monopoly. *These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.*[21] (Emphasis supplied)

It is with the application of this statutory standard, in the light of decisions construing the same language in cases arising under Sections 2 and 3 of the Clayton Act, that this article is primarily concerned.

Applications of the qualifying clause in cases arising under Sections 2 and 3.

Sections 2 and 3 of the Clayton Act both deal specifically with trade practices encountered only in the marketing and distributing phases of commerce. Section 2 deals with price discriminations, which, within the meaning of the Act, occur when a seller charges different prices for goods of "like grade and quality."[22] Such a discrimination is unlawful if it has the proscribed effect

[19] Ibid.
[20] Ibid., Authorities generally agree that the acquiring-acquired test as applied by the courts was the same as, or very similar to, the test applied in Sherman Act cases. See generally Handler, Industrial Mergers and the Anti-Trust Laws, 32 Colum. L. Rev. 179, 264 (1932).
[21] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).
[22] Supra note 15.

on competition, *i.e.*, "may be substantially to lessen competition or tend to create a monopoly in any line of commerce,"[23] unless it is justified by one of the specific factors set out within the section, such as "cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."[24] The Supreme Court has interpreted this section so that a mere showing that quantity discounts result in price differentials between competing purchasers, sufficient in amount to influence the resale price of the product involved, is adequate to support a finding that the effect of such price discrimination may be substantially to lessen competition.[25] Thus, the effect of every price differential, however minute, is, *per se*, to lessen competition, and if this differential is sufficient in amount to influence the resale price, the effect of the discrimination, *per se*, may be *substantially* to lessen competition in the line of commerce involved. The qualifying language of Section 2 is satisfied by proof that a discrimination has been made, plus proof that the amount of the discrimination is sufficient to influence the resale price.

Section 3 of the Clayton Act prohibits the use of tying and requirements contracts, the effect of which "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[26] Through the use of a tying contract, a supplier can transmit a lawful monopolistic control, as in the case of a patent or copyright, into related fields by refusing to sell or lease the controlled item unless the purchaser or lessee agrees to take a specified quantity of a "tied" product which is also available from competitive sources. A typical example of a tying contract is presented in the case of *International Salt Co.* v. *United States*.[27] International Salt owned patents on certain salt-dispensing machines which were valuable for use in manufacturing processes. These were leased to manufacturers on condition that only salt products of the lessor company would be used in the machines. Sales of salt products under these contracts amounted to $500,000 in 1944. Finding that the contracts foreclosed from competitors of the defendant this amount of business, the Su-

[23] Ibid. [24] Ibid.
[25] Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948).
[26] Supra note 16. [27] 332 U.S. 392 (1947).

preme Court held that the arrangements violated Section 3, stating:

> Not only is price fixing unreasonable per se . . . but it is also unreasonable, per se, to foreclose competitors from any substantial market. . . . The volume of business affected by these contracts cannot be said to be insignificant or insubstantial. . . .[28]

Tying contracts, *per se*, lessen competition. If through the use of these contracts a not insignificant or insubstantial segment of the market is foreclosed from competition, there may be, *per se*, a *substantial* lessening of competition as a result thereof.

The use of requirements or exclusive dealing contracts is forbidden by Section 3 in the same language as is the use of tying contracts. Basically a requirements contract is one in which the purchaser agrees to buy from a seller, and the seller agrees to sell to the purchaser, all of the buyer's requirements of a given product or line of products over a given period of time. An exclusive dealing contract is one in which the purchaser, who purchases for resale, agrees to handle exclusively the product or brand of products of a single supplier.[29] The most significant judicial construction of the test of illegality of Section 3 as applied to requirements and exclusive dealing contracts appears in Mr. Justice Frankfurter's opinion in *Standard Oil Company of California* v. *United States*[30] (the *Standard Stations* case). Standard Oil of California, the largest distributor of petroleum products in the "Western" market,[31] with 23% of the total volume of business, secured exclusive dealing agreements with operators of 5,937 independent service stations within the area. In 1947, these "dealer" stations accounted for gross sales of $57,696,233, an amount equal to 6.7% of the total market volume. In an action brought by the

[28] Id. at 396.

[29] For example, where an independent service station agrees to sell only petroleum products and accessories furnished by a single distributor, the agreement often accompanied by an agreement on the part of the distributor to paint the physical plant of the purchaser in the colors and insignia of the supplier. The independent station in effect becomes a "dealer" for the distributor. E.G. United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), affd. in per curiam decision, Richfield Oil Corp. v. United States, 343 U.S. 922 (1952).

[30] 337 U.S. 293 (1949).

[31] This "Western area" included the following states: Arizona, California, Idaho, Nevada, Oregon, Utah and Washington. The Supreme Court specifically held that although Standard was the largest distributor in this area, its share of the market was not so large that it would support a conclusion that Standard occupied a dominant position in the market. Id. at 302.

United States under Section 1 of the Sherman Act and Section 3 of the Clayton Act,[32] the District Court enjoined Standard Oil from enforcing or entering into exclusive dealing contracts of this type with independent dealers.[33] The District Court held that the requirement, under Section 3, of showing an actual or potential lessening of competition or a tendency to establish a monopoly was conclusively met by proof that the contracts covered a "substantial number of outlets and a substantial amount of products, whether considered comparatively or not,"[34] and that evidence introduced for the purpose of proving a different probable effect was irrelevant.

In reviewing this decision on *writ of certiorari*, the Supreme Court stated that:

> The issue before us, therefore, is whether the requirement of showing that the effect of the agreements 'may be to substantially lessen competition' may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish.[35]

The Court affirmed the judgment of the District Court, concluding that "the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected,"[36] and holding further that the 6.7% of the market foreclosed by the agreements involved was such a substantial share. This decision was subsequently reaffirmed in a *per curiam* opinion in *Richfield Oil Corp.* v. *United States*.[37] This "quantitative substantiality" doctrine has been applied recently in two cases arising under Section 3. In *Dictograph Products, Inc.* v. *Federal Trade Commission*,[38] the court held that an economic analysis was irrelevant after it had been shown that the party

[32] The Supreme Court decided the case solely on the ground that Section 3 of the Clayton Act had been violated, finding it unnecessary to consider the case in relation to Section 1 of the Sherman Act. Id. at 314.

[33] United States v. Standard Oil Company of California, 78 F. Supp. 850 (S.D. Cal. 1948).

[34] Id. at 875, Standard Oil Company of California v. United States, supra note 30, at 298.

[35] Supra note 30, at 299.

[36] Id. at 314. This test has become generally known at the "quantitative substantiality" test.

[37] 343 U.S. 922 (1952).

[38] 217 F. 2d 821 (2d Cir. 1954).

using the exclusive dealing contracts accounted for a substantial share of the business in the particular line of commerce through such contracts. The statutory standard was construed in the same manner in *Anchor Serum Co.* v. *Federal Trade Commission.*[39]

The essence of this interpretation of the statutory standard in respect to requirements and exclusive dealing contracts has been best stated by Judge Maris in his opinion in *Transamerica Corporation* v. *Board of Governors:*[40]

> The use of exclusive dealing contracts *per se* lessens competition, however, so that the fact of lessening need not be proven. For one who agrees to purchase all his requirements from a single seller is legally barred from purchasing them from anyone else and is consequently eliminated entirely from the competitive market. In order to establish a substantial lessening of competition in such a case, therefore, it is only necessary in addition to prove that the sales covered by the exclusive dealing contracts amount to a substantial portion of the total involved in the competitive market area. This is precisely what was held in the Standard Oil case.

Thus the same basic determination which governed the application of this qualifying language in price discrimination and tying contract cases governs the application of the same language in requirements and exclusive arrangement cases. Price discriminations, it has been determined by the Supreme Court, *per se* lessen competition, and the qualifying language, as it appears in Section 2, is satisfied by proof that a discrimination has been made and that it is one sufficient to influence the resale price.[41] Tying contracts, *per se,* lessen competition, and the qualifying clause, as it appears in Section 3, is satisfied by proof that a tying contract has been used and that a not "insignificant or insubstantial" volume of business has been affected thereby.[42] Likewise, the use of a requirements or exclusive dealing contracts, *per se,* lessen competition, and once the use of such an arrangement is shown, "the qualifying clause of Section 3 is satisfied by proof that com-

[39] 217 F. 2d 867 (7th Cir. 1954). In following the Standard Stations test, the court stated at 872 that "it is not necessary to show the actual impact which a 'requirements' contract has on competition, but that it is sufficient if it possesses the potentiality to impede a substantial amount of competitive activity."
[40] 206 F. 2d 163, 170 (3rd Cir. 1953) Cert. denied 346 U.S. 901 (1953).
[41] Federal Trade Commission v. Morton Salt Company, supra note 25.
[42] Supra note 27.

petition has been foreclosed in a substantial share of the line of commerce affected."[43] None of these practices is illegal *per se*. The Supreme Court has determined merely that the use of each practice, *per se*, lessens competition. This omits the necessity of proving, through economic factors, the *fact* of a probable lessening of competition, and renders relevant only evidence which bears on the question of the substantiality of this presumed effect.

Application of the qualifying clause in cases arising under the amended Section 7.

Only three cases involving this problem, two by the courts and one by the Federal Trade Commission, have been decided under Section 7 since the amendment. One of these, *Transamerica Corporation* v. *Board of Governors*,[44] was actually decided under the unamended section, the complaint being issued prior to the amendment. Transamerica appealed from an order of the Board of Governors of the Federal Reserve System which had directed the corporation to divest itself of the stock of a number of banks which had been acquired by the corporation. The Court of Appeals for the Third Circuit reversed the order of the Board on ground that the government had not shown that the effect of the stock acquisition was substantially to lessen competition *between the acquired firms*, the prescribed test under old Section 7.[45] The court rejected the contention of the government that the quantitative substantiality test of the *Standard Stations* case should be applied to old Section 7 cases, observing:

> [T]he lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statutes may be invoked. Evidence of mere size and participation in a substantial share of the line of business involved, the 'quantitative substantiality' theory relied on by the Board, is not enough.[46]

[43] Standard Oil Company of California v. United States, supra note 30 at 314.

[44] Supra note 40.

[45] In addition to prohibiting the acquisition by one corporation of the stock of another corporation where the effect might be "to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition", old Section 7 also prohibited the acquisition by one corporation of the stock of "two or more corporations engaged in commerce where the effect of such acquisition . . . may be to substantially lessen competition between such corporations . . . whose stock . . . is so acquired . . ." This is the branch of the section under which the complaint in *Transamerica* was made. 38 Stat. 731 Sec. 7 (1914); 15 U.S.C. Sec. 18 (1946).

[46] Supra note 40 at 170.

Thus the court rejected the contention of the government that mergers, *per se*, lessen competition, and held that the *fact* of a probability of a lessening of competition as a result of a particular merger must appear from the circumstances of the case.

The only litigation reaching the courts under amended Section 7 involved a suit by the Hamilton Watch Co. to enjoin the Benrus Watch Co. from voting a sizable block of Hamilton stock which the latter had acquired, on ground that the acquisition violated the section. The District Court granted a preliminary injunction,[47] which was sustained on appeal.[48] Neither the opinion of the District Court or the opinion of the Court of Appeals for the Second Circuit attempts to make an analysis of the qualifying language of Section 7, the opinion of the appellate court containing this caveat:

> Although we now indulge in no ultimate conclusion, we believe the amendment of Section 7 in 1950 casts doubt on decisions . . . interpreting that section as it stood previously. The Senate Committee Report stated that the intent of the amendment was 'to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.' Interference at an early stage, if possible, seems the paramount aim.[49]

In *Matter of Pillsbury Mills, Inc.*,[50] the Federal Trade Commission examined the qualifying language of Section 7 extensively, and rendered a rather elaborate opinion setting forth the Commission's views as to how this language should be interpreted. Pillsbury, the second largest flour milling company in the United States, acquired in 1951 and 1952 the assets of two leading competitors, Ballard and Ballard Company and Duff's Baking Mix Division of the American Home Products Corporation. In reversing the trial examiner's dismissal of the complaint charging Pillsbury with a violation of amended Section 7, the Commission rejected the *Standard Stations'* quantitative substantiality test as being applicable to Section 7 cases, holding that "it would not be sufficient to show that an acquiring and an acquired company to-

[47] Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn. 1953).
[48] Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738 (2d Cir. 1953).
[49] Id. at 741.
[50] Federal Trade Commission Docket No. 6000 (1953).

gether control a substantial amount of sales, or that a substantial portion of commerce is affected"[51] and that there "must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences"[52] of each merger attacked as a violation of the statute. The *Pillsbury* case, it would seem, follows precisely the reasoning of the court in the *Transamerica* case, each rejecting the notion that all mergers, *per se*, lessen competition, and each requiring a showing, by economic factors, of a probability of lessening of competition as a result of the particular merger involved.

The common denominator in the application of this qualifying clause in the cases arising under Sections 2 and 3 of the Clayton Act is a judicial determination that some lessening of competition is implicit in each use of one of the specific trade practices forbidden by those sections. If the judiciary is to follow the legislative intent as expressed by the House Committee that the tests of illegality of Section 7, as amended, "be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act,"[53] this basic determination must be made in respect to mergers. If mergers, like tying, requirements and exclusive dealing contracts, *per se*, lessen competition, then and only then can the qualifying clause of Section 7 be applied in a manner similar to that in which this same language has been applied in cases arising under Sections 2 and 3, so that the only evidence relevant in determining whether the effect of a particular merger "may be substantially to lessen competition" will be evidence as to the magnitude of the merging companies.

But is a probable lessening of competition implicit in every merger? The answer to this question logically depends upon the type of merger involved, whether horizontal, vertical or conglomerate. As previously stated, prior to the 1950 amendment, because of the requirement of showing a probability of a substantial lessening of competition between the acquiring and acquired corporations, the section prohibited only horizontal acquisitions having the proscribed effect on competition. As amended, the section makes unlawful mergers which may have the pro-

51 Id. at 8.
52 Id. at 9.
53 H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

scribed effect "in any line of commerce in any section of the country." In discussing this phase of the proposed amendment, the House Report states:

> [I]n the proposed bill, as has been pointed out above, the test of the effect on competition between the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. But there is a second reason, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition. . . .
>
> If, for example, one or a number of raw-material producers purchases firms in a fabricating field (*i.e.*, 'forward vertical' acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms.
>
> The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers.[54]

Thus, under the amended section, if as a result of a merger a probability of a substantial lessening of competition occurs in any line of commerce[55] affected thereby, the acquisition is unlawful. In the case of a purely horizontal merger only one line of commerce, that in which the companies involved competed prior to the merger, is affected. But vertical acquisitions affect more than one line of commerce, and an adverse effect on competition can be produced by such an acquisition either in the line of commerce in which the acquiring corporation was engaged prior to the acquisition, or in the line of commerce in which the acquired corporation was engaged.[56] *This, it would seem, is the key factor*

[54] Id. at 11.

[55] "Line of commerce" has been defined in the abstract as "the manufacture or distribution of a product or service distinct from all other products or services." For further practical elaboration of this definition see Note, 52 Colum. L.R. 766, 778 (1952).

[56] It has been effectively urged that the test of illegality has no practical application in cases involving conglomerate acquisitions. Adelman, "Acquire the Whole or Any Part of the Stock or Assets of Another Corporation," Proceedings of the Annual Meeting of the Section of Antitrust Law of the American Bar Association, p. 111 (1953). In the light of this argument, there has been no attempt herein to interpret Section 7's applicability in conglomerate merger cases.

in the application of the qualifying clause to cases arising under the amended Section 7.

Both the court in *Transamerica* and the Federal Trade Commission in *Pillsbury* decided that mergers do not, *per se,* lessen competition. In the former, the court held that "the lessening of competition . . . must appear from the circumstances of the particular case,"[57] and in the latter, the Commission stated that there "must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences."[58] In both of these cases, the tribunal was considering the probable effect on competition of a merger of corporations which had previously been in *direct competition.* In reaching the conclusion that no probability of a lessening of competition was implicit in the merger involved in the *Pillsbury* case, the Commission stated:

> The impact of a tying contract or a requirements contract is different from that of an acquisition. The force of the former falls principally upon buyers or upon competitors of the company which imposes the contract, the effect of such contracts is thus to cut off these competitors from what would otherwise be part of their natural market. In contrast, an acquisition seldom has such an immediate impact upon competitors. The reason that acquisitions are, under certain circumstances, to be regarded as illegal is not because of their effect on buying and selling practices but because of their probable effect on competition.[59]

Basically a *horizontal* acquisition involves only a change in ownership of one company competing in the line of commerce affected. There is no "foreclosure of competition" such as is present in the use of tying or requirements contracts. The result is simply that one enlarged corporation takes the place of two smaller corporations in competing for the business available, and this fact, in and of itself, cannot support a valid inference that competition probably will be lessened thereby. As put by the Report of the Attorney General's National Committee to Study the Antitrust Laws:

> [M]ergers are a common form of growth; they may lessen, increase, or have no effect upon competition.

[57] Supra note 40 at 170.
[58] Supra note 51 at 9.
[59] Supra note 51 at 7-8.

> A merger as such involves no necessary connotations of coercion, dominance, or lack of effective competitive pressures. In addition, mergers may ease from the market companies which have failed in the competitive struggle and thus prevent potential bankruptcies. Finally, they may spur operating economies by spreading overhead costs or enabling improved technology or management.[60]

Insofar as horizontal movements by acquisition of stock or assets are concerned, the *fact* of a probable lessening of competition must be proven.[61] In this respect the opinions in *Transamerica* and *Pillsbury* are sound, and most authorities writing on the subject adopt this position.[62]

These same considerations, however, *should not be controlling when the acquisition involved is a vertical one.* Simply stated, a vertical integration is a combination under one management of the business functions which could be performed at different levels in the process of obtaining the raw materials, converting them into finished goods and distributing the finished goods to the ultimate consumer.[63] Thus acquisitions by a manufacturer of a company producing the needed raw materials, or by a wholesaler or distributor of a retail outlet, are vertical acquisitions. *Two lines of commerce* are affected by vertical movements of this type-and if competition in *either* of the lines of commerce affected may be substantially lessened thereby, the acquisition is unlawful even if competition in the other line of commerce affected be actually increased. Vertical acquisitions, like those trade practices which are forbidden by Sections 2 and 3 and unlike horizontal acquisitions, have an effect, at some level, on the marketing and distributing phases of commerce.

[60] Report of the Attorney General's National Committee to Study the Antitrust Laws, Chapter III, Mergers, 124-125 (1955).

[61] For an excellent discussion of the economic factors generally relevant in determining the probable effect on competition of such a merger see, Report of the Attorney General's Committee to Study the Antitrust Laws, supra, note 60 at 125-128, and Barnes, "Economic Issues in the Regulation of Acquisitions and Mergers," 14 Ohio State L.J. 279, 288-306 (1953).

[62] Adelman, "Acquire the Whole or Any Part of the Stock or Assets of Another Corporation," supra note 56; McAllister, "Where the Effect May Be To Substantially Lessen Competition Or Tend To Create A Monopoly," Proceedings of the Annual Meeting of the Section of Antitrust Law of the American Bar Association, 124 (1953); Report of the Attorney General's National Committee to Study the Antitrust Laws, supra note 60, among others.

[63] See generally Adelman, "Integration and Antitrust Policy," 63 Harv. L. Rev. 27 (1949).

In the *Pillsbury* case, the Federal Trade Commission went to some length to distinguish between the impact of tying and requirements contracts and the impact of acquisitions. The crux of the distinction seems to be that the contracts forbidden by Section 3 "cut off from these competitors what would otherwise be part of their natural market," while mergers seldom have "such an immediate impact on competitors."[64] Actually, this distinction is valid *only in respect to horizontal acquisitions,* the subject matter of the litigation then before the Commission. A vertical acquisition, *like an exclusive dealing contract,* cuts off from competitors a part of what would otherwise be their natural market. Unlike horizontal acquisitions, vertical integrations of this sort do involve a foreclosure of competition in one of the lines of commerce affected. The only appreciable difference in the effect on competition produced by vertical acquisitions and the effect produced by requirements and exclusive dealing contracts is that the former affect competition permanently while the latter affect it only for the term specified by the contracts. The court in the *Transamerica* case agreed that the use of exclusive dealing contracts *per se* lessens competition because "one who agrees to purchase all his requirements from a single seller is legally barred from purchasing them from anyone else and is consequently eliminated entirely from the competitive market."[65] Obviously the same effect on competition is produced when the single seller referred to merely purchases the retail outlet instead of securing an exclusive dealing contract. Vertical acquisitions, under this reasoning of the court, must *per se* lessen competition.

It has been argued that mergers carry no necessary connotations of coercion which often accompany the use of tying or requirements contracts. The investment of capital involved in an acquisition has been said to be a factor calling for a different test in the case of mergers than has been applied to cases involving contracts the use of which is forbidden by Section 3. The legality of a particular acquisition, however, is to be determined solely by its probable effect on competition, and the motives behind the acquisition are wholly irrelevant.[66] As vertical acquisitions do

[64] Supra note 51 at 7. [65] Supra note 40.

[66] McElroy, "Section 7 of the Clayton Act and the Oil Industry," 5 Baylor L. Rev. 121, 137-139 (1953).

foreclose competition in one of the two lines of commerce affected thereby, the quantitative substantiality test of Section 3 is fully applicable. Foreclosure of a segment of the market from competition, under the reasoning of the Supreme Court in the *Standard Stations* case, diminishes the competitive opportunity in that market by an amount equal to the volume of business so affected. It is from this decrease in the total competitive opportunity that the conclusive presumption of a probable lessening of competition is drawn. There being such a foreclosure of competition in vertical acquisitions, the qualifying language of Section 7, as amended, can be applied in cases involving these acquisitions in a manner similar to that in which the same language has been applied in cases arising under Sections 2 and 3. Proof that a vertical acquisition has been made can be tantamount to proof that competition probably will be lessened. The only evidence which then will be relevant in determining whether the effect of the particular acquisition may be substantially to lessen competition will be evidence as to the market shares of the corporations involved.