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RECENT CASES

Antitrust Law—Clayton Act—Statistics of Market Concentration and Increased Market Share are Insufficient to Show Violation of Section 7 When Other Factors Mandate a Conclusion that Competition will not be Substantially Lessened by the Contested Acquisition

I. FACTS AND HOLDING

The United States brought a civil antitrust action pursuant to section 7 of the Clayton Act[1] challenging the acquisition[2] of a coal mining company by a competing company and its successor, General Dynamics Corporation.[3] The Government contended that aggregate statistics of past production demonstrated that within certain geographic markets[4] the coal industry was becoming increasingly concentrated in a small number of large producers.[5] It further

1. 15 U.S.C. § 18 (1970): "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 suhstantially to lessen competition, or to tend to create a monopoly."

2. The instant acquisition was in the form of a horizontal merger, which is the "acquisition hy one company of all or part of the stock or assets of a competitor which offers the same goods or services in the same market area." E. KINTNER, AN ANTITRUST PRIMER 90 (2d ed. 1973).

3. By 1959, Material Service Corp., a deep shaft coal mining company, acquired a controlling interest in the stock of United Electric Coal Companies, a strip mining company, operating in Illinois and Kentucky. In 1967, Material Service was itself acquired by defendant General Dynamics Corp.

4. The Government's statistics were based on production in the proposed geographic markets of "the State of Illinois and the Eastern Interior Coal Province Sales Area, the latter being one of four major coal distribution areas recognized by the coal industry" and comprised of parts of several midwestern and southern states. 415 U.S. 486, 490 (1974).

5. Evidence of the trend toward concentration offered by the Government included statistics that the top 2 coal producers in Illinois increased their market share from 37.8% to 52.9% from 1957 to 1967; in the Eastern Interior Province the increase of the top 2 was from 29.6% to 48.6% in the same period. For the top 10 firms, the increase in market share was from 84.0% to 98.0% in Illinois and from 65.5% to 91.4% in the Eastern Interior Province. Also indicative of the concentration trend in the same ten-year period was the decrease in the number of coal producing firms in Illinois from 144 to 39, or a drop of 73%. *Id.* at 494-95.

contended that the contested acquisition materially enlarged the market share of the combined company,[6] which contributed toward concentration in the industry and substantially lessened competition in violation of section 7. Defendants asserted that other pertinent factors,[7] including the changing nature of the coal industry, its resultant widespread use of long-term requirements contracts, and the depletion of the acquired company's mineable coal reserves, significantly affected both the coal industry and the defendants' ability to compete and required a conclusion that the contested merger did not adversely affect competition. Finding no substantial lessening of competition resulting from the acquisition, the United States District Court for the Northern District of Illinois rendered judgment for defendants.[8] On appeal[9] to the Supreme Court of the United States, *held*, affirmed. In a civil antitrust action brought pursuant to section 7 of the Clayton Act challenging the acquisition of a coal company by a competing company and its successor, statistical evidence of market concentration and increased market share of the combined company is insufficient to establish a substantial lessening of competition when an analysis of other pertinent

6. The Government's statistics also indicated that the acquisition raised the combined company's market share to as much as 12.4% of the Province market and 23.2% of the Illinois market in 1959. In 1967, these figures were 10.9% and 21.8%. *Id.* at 496.

7. Defendants asserted that changes in the coal industry such as decreases in the demand for coal, the inability of coal to compete with other sources of energy, the increasing dependence of coal producers on large scale sales to utilities, and the increasing use of long-term commitments of coal reserves to meet utilities' coal consumption requirements were all crucially relevant to the Court's assessment of the competitive effects of the instant merger. Additionally, defendants claimed that the acquired company, a strip mining coal producer and the acquiring company, a deep shaft mining company, were essentially complementary rather than competitive producers. Finally, defendants asserted the near complete depletion of the acquired company's mineable reserves was a circumstance demonstrating that anticipated anticompetitive effects as a result of the merger were unrealistic. For a full analysis of these factors, see the district court opinion in *United States v. General Dynamics Corp.*, 341 F. Supp. 534 (N.D. Ill. 1972).

8. *Id.*

9. Appeal was brought under § 2 of the Expediting Act, 15 U.S.C. § 29 (1970). The Government sought to attack the district court holding on several grounds: (1) that the district court committed legal error by giving undue consideration to facts occurring after the effective acquisition in 1959; (2) that defendants' reliance on depleted and committed resources was essentially a "failing company" defense for which defendants failed to satisfy the burden of proof; (3) that the findings of the district court were not supported by the evidence on record and should be overturned under the "clearly erroneous" standard of FED. R. CIV. P. 52(a); (4) that the district court's reliance on evidence of the acquired company's weak position as to uncommitted reserves was improper since the company might either purchase new reserves or develop expertise to recover its then existing deep reserves; and (5) that the district court made improper determinations of the proper product and geographic markets as a precondition to an assessment of the probabilities of a substantial effect on competition within them.

factors affecting the coal industry and defendants' business demonstrated that no lessening of competition had occurred or was likely to occur. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

II. BACKGROUND

Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act of 1950,[10] prohibits any corporate acquisition whose effect is substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country. Congress enacted the amended statute for the express purposes of controlling monopolistic tendencies in their inception[11] and preserving small business as a vital part of economic life.[12] Since, however, Congress provided no definite quantitative or qualitative tests by which enforcement agencies could ascertain whether the effects of a given merger substantially lessened competition or tended toward monopoly, settlement of the section 7 issue became a task of judicial interpretation.[13] To identify the relevant criteria for determining whether competition had been lessened, two tests emerged: first, the per se standard, characterized by the assumption that statistical data describing market structure will determine conclusively the anticompetitive effects of a merger;[14] and secondly, the rule-of-reason standard, employing a case-by-case examination of all relevant economic factors in order to ascertain the probable economic consequences of a merger.[15] The first case in which the Supreme Court set forth a detailed analysis of the scope and purposes of

10. 15 U.S.C. § 18 (1970).

11. S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950); H.R. REP. No. 1191, 81st Cong., 2d Sess. 11 (1950).

12. *See, e.g.*, 96 CONG. REC. 16444, 16448, 16450 (1950); 95 CONG. REC. 11486, 11489, 11498 (1949).

13. Brown Shoe Co. v. United States, 370 U.S. 294, 321 (1962). For a thorough investigation into the legislative history of the Clayton Act, see 370 U.S. at 311-23. *See also* Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766 (1952).

14. This standard was known as the rule of "quantitative substantiality" in Standard Oil Co. v. United States, 337 U.S. 293, 298, 314 (1949), a case brought under § 3 of the Clayton Act. Essentially, the standard states that when a merger forecloses a quantitatively substantial portion of the relevant market, it is legitimate to infer a significant lessening of competition without considering other economic factors. Comment, 19 VAND. L. REV. 1373, 1374 & n.5 (1966).

15. Pillsbury Mills, Inc., 50 F.T.C. 555, 572 (1953) (Court of Appeals rejected the quantitative substantiality test in considering a § 7 case and adopted a rule-of-reason approach). *See* Comment, *Clayton Section 7: A Critical Appraisal of the Supreme Court's Antitrust—Anti-Bigness Complex in Merger Litigation Since the Brown Shoe Case*, 11 WAYNE L. REV. 739, 754 (1965).

amended section 7 was *Brown Shoe Co. v. United States*,[16] a 1962 decision, in which the Court invalidated a merger between the nation's fourth and twelfth largest shoe manufacturers. Although the Court utilized an elaborate array of economic data to support the merger invalidation, the opinion was generally read to reject the per se standard[17] and to adopt an empirical, rule-of-reason approach for determining the potential anticompetitive effects of mergers. The Court noted that Congress clearly indicated that a merger must be viewed functionally, and judged in the context of the particular industry.[18] One year later, however, in *United States v. Philadelphia National Bank*,[19] the Court emphasized the decisive relevance for section 7 purposes of statistical data evidencing concentration in an industry and market share increase for the two combining firms. The Court averred that congressional concern with the trend towards concentration "warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects."[20] Adhering to the rationale enunciated in *Philadelphia National Bank*, the Court in *United States v. Aluminum Co. of America*[21] essentially ignored defendant's evidence describing general market characteristics[22] and relied instead on the

16. 370 U.S. 294 (1962). Mr. Chief Justice Warren, speaking for the majority, noted that the amendment represented Congressional concern with "what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315.

17. "[T]he Court in *Brown Shoe* has deliberately preserved a great deal of uncertainty, has created a high degree of flexibility, and has consciously established an opportunity for a full inquiry into the economic, competitive circumstances of all but the most obviously bad or obviously good mergers." Rahl, *Current Antitrust Developments in the Merger Field*, 8 ANTITRUST BULL. 493, 508 (1963).

18. 370 U.S. at 321-22. "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Id.* at 322, n.38.

19. 374 U.S. 321 (1963). The Court invalidated a merger between the second and third largest of Philadelphia's 42 commercial banks.

20. 374 U.S. at 363. Statistical data in the case showed that if the merger of the 2 banks were consummated, making the combined bank the largest in the area with 30% of the market, the 2 largest banks would control 59% (up from 44%) of the area's commercial banking business. Despite evidence offered by defendants that there would in fact be no anticompetitive effects resulting from the merger, the Court stated: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." Id. at 364-65.

21. 377 U.S. 271 (1964). The Court invalidated the acquisition by Aluminum Company of America (Alcoa) of the Rome Cable Corporation, because, although the merger increased Alcoa's market share of the aluminum conductor industry by only 1.3%, the acquisition would eliminate "an aggressive competitor" in an industry showing a trend toward concentration. *Id.* at 281.

22. The district court in *Aluminum Co. of America (Alcoa)*, following the directives of

structural aspects of the market to invalidate a merger. Moreover, the Court emphasized the importance of preventing even minimal increases in concentration to preserve the possibility of eventual deconcentration, particularly in an industry in which high concentration already exists.[23] Subsequently, the Court concluded in *United States v. Continental Can Co.*[24] that a merged firm's control of twenty-five percent of the relevant market resulting from the contested acquisition "approache[d] that held presumptively bad in *United States v. Philadelphia National Bank* . . . ."[25] Finally, two 1966 section 7 antimerger decisions, *United States v. Von's Grocery Co.*[26] and *United States v. Pabst Brewing Co.*,[27] further eroded the *Brown Shoe* approach that had called for an appraisal of all relevant economic factors in assessing a merger's anticompetitive effect. These two decisions firmly established that the Government could show a prima facie violation of section 7—even when the district court had found that competition had not been, nor in the future would be lessened[28]—when merger statistics demonstrated both a decline in the number of competitors,[29] and control by the

Brown Shoe, regarded as significant the ease with which competitors could enter the market, the increase in the numher of manufacturers in the preceding 10-year period, testimony from customers and competitors alike that they neither experienced nor anticipated any adverse effects from the merger, and active price cutting taking place in the industry as evidence that statistics alone were insufficient to show anticompetitive effects. United States v. Aluminum Co. of America, 214 F. Supp. 501, 517 (N.D.N.Y. 1963). *See also* United States v. Continental Can Co., 217 F. Supp. 761, 781-82 (S.D.N.Y. 1963).

23. 377 U.S. at 279.

24. 378 U.S. 441 (1964). The Court declared Continental Can's (nation's second largest producer of metal containers) acquisition of the Hazel-Atlas Glass Co. (third largest producer of glass containers) invalid because the merger increased Continental Can's share of the combined glass and metal container market from 21.9% to 25% and reduced the number of significant competitors who might challenge its position from 5 to 4. *Id.* at 461.

25. *Id.*; *see* note 20, *supra.*

26. 384 U.S. 270 (1966). The Court ruled that a merger between the third and sixth largest Los Angeles area grocery chains violated § 7.

27. 384 U.S. 546 (1966). The Court reversed a district court's dismissal of the Government's § 7 challenge of the acquisition of Blatz Brewing Co. (nation's 18th largest) by Pabst Brewing Co. (nation's 10th largest).

28. The district court in *Von's Grocery* emphasized the "vigorous competition" of Los Angeles area food retailing: continued entry of new firms, successful expansion of formerly one store supermarkets, efficient single store units, the emergence of wholesale and discount houses, and the availability of from 2 to 10 stores within convenient shopping distance of the average customer. United States v. Von's Grocery Co., 233 F. Supp. 976, 981-83 (S.D. Cal. 1964).

29. In *Von's Grocery*, facts showing a long and continuous trend toward fewer individually owned competitors (from 5,365 to 3,818 in an 11-year period) were "enough to cause us to conclude . . . that the Von's-Shopping Bag merger did violate § 7." 384 U.S. at 274. "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 which is exactly the sort of trend which Congress, with power to do so, declared must be arrested." *Id.* at 278.

merged firm of an undue portion of the relevant market.[30] Thus, five[31] decisions in the 1960's retreated from the broad empirical analysis of *Brown Shoe* in favor of a narrower inquiry based on statistics of market structure. By emphasizing market share and concentration data and avoiding any burdensome economic analysis, the Court formulated a rigid, easily definable rule for determining whether a merger substantially lessens competition.[32] Consequently, the Court created for purposes of section 7 a presumption against corporate growth through merger.

III. The Instant Opinion

The instant court recognized at the outset that in prior decisions[33] involving horizontal mergers[34] it had found prima facie violations of section 7 of the Clayton Act when the Government introduced aggregate statistics showing a trend toward market concentration and an increase in the combined company's market share. Noting that the Government's statistical showing,[35] the accuracy of which was neither discredited by the district court nor contested by defendants, would have sufficed to establish undue concentration under this prima facie approach,[36] the Court characterized the issue in the instant case as whether other pertinent factors affecting the coal industry and defendant's business mandated a conclusion that no substantial lessening of competition had occurred or was threatened by the contested acquisition. Recalling *Brown Shoe*, the Court stated that, although significant, statistics reflecting market share

30. In *Pabst*, the Court found 4.49, 11.32, and 23.95 to be the percentages of the national, tri-state and Wisconsin beer markets absorbed by the merger, and even the 4.49% in the national market was declared "sufficient to show a violation of § 7 ." 384 U.S. at 551-52.

31. For other similar Supreme Court decisions handed down during this period in addition to those covered in text, see United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). For a later decision further illustrating the use of statistical data as the basis for finding § 7 violations see United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970).

32. Rill, *The Trend Toward Social Competition Under Section 7 of the Clayton Act*, 54 Geo. L.J. 891, 898 (1966).

33. The Court cited United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

34. *See* note 2, *supra*.

35. *See* notes 5 & 6, *supra*.

36. The Court noted that the figures presented by the Government relating to the degree and increase of concentration in the coal industry compared favorably to statistics presented in United States v. Pabst Brewing Co., 384 U.S. 546 (1966), and United States v. Von's Grocery Co., 384 U.S. 270 (1966). Additionally, Government figures showing market share increase as a result of the instant merger were analogous to those in *Pabst* and *Continental Can*.

and concentration were not conclusive determinants of a merger's anticompetitive effects.[37] The Court then reviewed the findings of the district court relating to the changes in the patterns of coal distribution[38] and reasoned that, because of the changes in the nature of the coal industry and the consequent reliance of the industry on long-term contracts,[39] the state of available reserves and not past production constituted the most reliable indicator of market power. Pointing out that the acquired company had committed virtually all its mineable coal reserves under such long-term contracts,[40] the Court declared that its ability to compete effectively for subsequent contracts had become severely limited. Thus, the Court concluded that the district court properly analyzed the company's relative weakness as a competitor in light of the factors considered,[41] and this weakness fully substantiated the conclusion that, despite statistical evidence of market share increase and market concentration, the acquisition would not substantially lessen competition.[42]

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37. *See* note 18, *supra*.

38. *See* note 7, *supra*.

39. The Court alluded to the fact that long-term requirements contracts were necessarily mandated by the coal industry's increasing dependence on utilities as consumers of coal. The utilities demand long-term commitments from coal producers as an assurance of a steady supply. Moreover, such contracts generally are necessary from the viewpoint of the coal producers since they provide a security base for the financing of capital investments by producers.

40. The district court found that of the more than 52 million tons of currently mineable reserves held by the acquired company, only 4 million tons had not already been committed under long-term contracts. 341 F. Supp. 534, 538.

41. The Court also found as follows with regard to the Government's attack on the district court's decision on the merits (*see* note 9, *supra*): (1) the district court was justified in relying on post-acquisition evidence relating to changes in the amount of the acquired company's coal reserves, since such evidence necessarily implied that the company was unable to compete effectively for subsequent contracts; (2) it was immaterial that defendants failed to meet the prerequisites of the "failing company" defense, since the evidence of inadequate coal reserves substantiated the conclusion that the company did not have capacity to compete; (3) the findings of the district court were supported by the evidence in the record and thus not "clearly erroneous"; (4) the district court was correct in finding that new strip mining reserves were unavailable, and the fact that the company might someday acquire the expertise to mine deep reserves does not depreciate the validity of the conclusion that the company did not at the time of trial have the capacity to compete effectively for subsequent contracts; and (5) because the district court properly found that the Government's statistical evidence did not establish that a substantial lessening of competition was likely to occur in any market, the issues of the relevant geographic and product markets need not be considered.

42. A vigorous 4-man dissent led by Mr. Justice Douglas attacked the majority's handling of the issues brought before the Court on appeal by the Government (*see* notes 9 & 41, *supra*). The dissent felt that the Court: (1) wrongfully refused to consider the issues of the relevant geographic and product market; (2) failed to discuss and employ the strict standards of the "failing company" defense, which the dissent felt applicable in the instant case; and

IV. Subsequent Developments

Subsequent to the instant decision, the Supreme Court indicated that the evaluation of relevant economic factors in addition to statistics of market concentration will indeed constitute the standard for evaluating the effects of a merger on competition in section 7 decisions. In *United States v. Marine Bancorporation,*[43] a section 7 decision involving a challenge to a bank merger and based on the doctrine of potential competition,[44] the Court indicated that although strong statistical evidence of concentration in the banking industry established a prima facie case of lessening competition in violation of section 7, the defendant banks could satisfy their burden by showing that the concentration ratios, recognized as possibly unreliable indicators of actual market behavior, did not depict accurately the economic characteristics of the relevant geographic market.[45] Though the banks failed to sustain the burden of rebutting the statistics and the Court decided against the Government on issues other than the standard applied in antimerger cases, the language of the opinion constitutes strong evidence of the Court's new approach to antimerger litigation.

Additionally, the Supreme Court denied certiorari[46] in the case of *Kennecott Copper Corp. v. FTC,*[47] in which the Tenth Circuit, focusing on evidence of concentration, affirmed an FTC divestiture order directed at the acquisition by the nation's largest copper producer of the nation's largest producer of coal. The merger was held invalid by the Tenth Circuit because the financial and other resources of the combined company resulted in a marked potential to accelerate the trend toward concentration in the coal industry and tended to lessen competition within the industry. The Court's refusal to hear the *Kennecott* case may indicate something of the outer limits within which the empirical approach heralded by the instant decision may be employed successfully, demonstrating that,

(3) improperly allowed the defendants to establish defenses on purely post-acquisition evidence, in violation of the limitations that should be placed on such evidence. The dissent further stated that the majority opinion was based on a record "devoid of findings based on correct legal standards" and represented a "deep-seated judicial bias against § 7 of the Clayton Act."

43. 94 S. Ct. 2856 (1974).

44. *See* United States v. Falstaff Brewing Co., 410 U.S. 526 (1973) (the doctrine that a merger may substantially lessen competition by eliminating a firm that, absent the merger, might have entered the market *de novo* and thus would assist in deconcentrating that market over the long run).

45. 94 S. Ct. at 2875.

46. 94 S. Ct. 1617 (1974)(*mem.*).

47. 467 F.2d 67 (10th Cir. 1972).

in the most obvious case of market control as illustrated by statistical data, no evaluation of other factors could be constructed that would rebut such overwhelming evidence of anticompetitive effect.

V. CRITIQUE

The instant opinion portends a basic shift in the Court's attitude toward the method of analysis used to determine the effects of a merger on competition: away from the rigid application of statistical data showing market concentration to establish a prima facie violation of antimerger laws toward the empirical, case-by-case analysis originally used in *Brown Shoe*. With the Court now indicating a willingness to undertake a complete economic analysis of mergers and acquisitions,[48] a Government challenge of these combinations is no longer tantamount to success in establishing a section 7 violation. While the Government can still establish a prima facie violation by statistical showing of substantial or increasing market concentration, defendants can introduce a broader range of evidence including other economic and market considerations to rebut that showing. Having probably lessened the restraining fear of antitrust prosecution by leaving business executives more confident that, in borderline cases, other pertinent factors can rebut a statistical showing of lessened competition, the decision will likely promote a more realistic assessment by courts of anticompetitive effects in section 7 cases and result in a possible increase in mergers.

The Court's apparent willingness to engage in such a broad analysis in section 7 cases seems desirable for several reasons. First, it appears from the legislative history of the Act that Congress envisioned the courts undertaking an evaluation of all relevant economic factors to determine whether anticompetitive effects resulted from a merger.[49] Further a model based largely on statistical data of market concentration is static and tends to preserve the present market structure without a thorough analysis of market realities or probable effects on competition. Strict application of rigid standards ostensibly to preserve competition and protect small business does not necessarily produce a favorable result, either for the small

48. Such a broad analysis is of a type that earlier cases sought to avoid: "[W]e must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation . . . . And so in any case in which it is possible . . . to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

49. *See* S. REP. No. 1775, 81st Cong., 2d Sess. (1950); H.R. REP. No. 1191, 81st Cong., 2d Sess. (1950). *See also* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 122 (1955).

business unit or the economy as a whole.[50] Fear of antitrust prosecution might restrict market transactions for capital assets, which would thereby preserve marginal competitors by preventing their participation in a horizontal combination. Preservation of a large number of marginal competitors does not necessarily result in the optimum level of competition, and size per se is not illegal[51] and should not be equated with anticompetitive effect.[52] Seemingly, the competitive objectives of antimerger law have been infused with a theory characterized by socio-political feelings of hostility towards large, integrated corporations constrasted with friendliness toward small, independent business units.[53] The Court has in the recent past attempted to preserve these social and political values by applying the simplest available criteria in antimerger cases—statistics demonstrating a decreasing number of competitors and an increasing market share in the hands of a few. In the instant opinion, however, the Court has returned its emphasis to a method of analysis characterized by an examination of the relevant economic factors and a consideration of statistical data of market structure, a seemingly desirable result since it represents a realization that only through a wide-ranging economic inquiry can the Court realistically assess and regulate economic and market behavior for the benefit of the public.

Hopefully, the Court will take the next logical step and attempt to verbalize the criteria against which the judiciary should measure the facts of a merger or acquisition in order to determine whether the merger may lessen competition. Changes in demand or in efficiency, ease of market entry, motives for the merger, existing and potential competition, and any other economic effects of a merger should be considered in addition to Government statistical data to ascertain whether statistics characterize the true nature of the market and create valid assumptions about the effects on competition.

50. Phillips, *Some Implications of the Supreme Court's Antimerger Decisions*, 21 S.W. L.J. 429, 443-50 (1967).

51. "The law, however, does not make the mere size of a corporation, however impressive, . . . an offense, when unaccompanied by unlawful conduct . . . ." United States v. International Harvester Co., 274 U.S. 693, 708 (1926); *see* C. KAYSEN & D. TURNER, ANTITRUST POLICY 106 (1959). *But see* United States v. Continental Can Co., 378 U.S. 441, 458 (1964): "Where a merger is of such size as to be inherently suspect, elaborate proof of market structure . . . may be dispensed with in view of Section 7's design to prevent undue concentration."

52. *See* Comment, *Clayton Section 7: A Critical Appraisal of the Supreme Court's Antitrust—Anti-Bigness Complex in Merger Litigation since the Brown Shoe Case*, 11 WAYNE L. REV. 739, 786 (1965).

53. *See* Rill, *supra* note 32, at 895.

Setting forth the proper antitrust guidelines for business and Government would better define and effectuate the goals of antimerger laws and would help to make these laws more responsive to economic reality.

MICHAEL D. KELLY

Criminal Procedure—Federal Habeas Corpus—A Writ of Habeas Corpus May Be Issued in Advance of Trial to Prevent Double Jeopardy When a Juvenile Has Been Previously Adjudicated a Delinquent

I. FACTS AND HOLDING

Petitioner was adjudicated a delinquent and committed to a juvenile institution by a state juvenile court after his arrest on a charge of rape and subsequently was indicted by a grand jury for the same offense.[1] The state criminal court dismissed the indictment on the ground that it subjected petitioner to double jeopardy, but the appellate level reversed, holding that the juvenile court judge should have waived jurisdiction and certified the case to criminal court pursuant to state statutes.[2] The State Supreme Court affirmed the appellate decision and ordered the indictment reinstated.[3] Alleging that his prosecution under the indictment would violate the double jeopardy clause of the fifth amendment[4] and transgress fundamental fairness concepts of the fourteenth amend-

1. Petitioner Roger Fain was age 16 when he was arrested in Volusia County, Florida and charged with rape. Five days after his arrest juvenile court counsel filed a petition alleging Fain a delinquent by reason of the criminal charge. The juvenile court judge adjudicated Fain a delinquent after hearing arguments on the State Attorney's request that the judge waive jurisdiction and certify the case to state criminal court. The indictment was handed down nine days later.

2. FLA. STAT. ANN. § 39.02(6)(a) (1967), *as amended*, Fla. Laws 1973, ch. 231, § 3 (permitting discretionary waiver of juvenile court jurisdiction over youths charged with certain felonies); FLA. STAT. ANN. § 39.02(6)(c) (1967) (mandatory waiver of juvenile court jurisdiction after an indictment alleging a crime punishable by death or life imprisonment is returned). The juvenile court judge declined to relinquish jurisdiction or stay execution of the commitment of Fain to the Youth Services Division.

3. R.E.F. v. State, 265 So. 2d 701 (Fla. 1972) (*per curiam*), *aff'g* State v. R.E.F., 251 So. 2d 672 (Fla. App. 1971).

4. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

ment,[5] petitioner sought a writ of habeas corpus to terminate his physical custody, which had been prolonged because of the indictment.[6] Rejecting the State's arguments that petitioner had not exhausted state remedies[7] and that jeopardy did not attach in juvenile adjudications,[8] the United States District Court for the Middle District of Florida declared further prosecution unconstitutional and granted a writ of habeas corpus compelling petitioner's release.[9] On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, affirmed. The prolongation of a juvenile delinquent's physical custody because of attempted prosecution under an indictment alleging the same offense for which the juvenile was previously adjudicated a delinquent and that has been fully challenged in the state courts justifies federal habeas corpus relief in advance of the criminal trial because the trial would violate the double jeopardy provisions of the fifth amendment and fundamental fairness concepts of the fourteenth amendment. *Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3667 (U.S. May 25, 1974) (No. 73-1768).

II. BACKGROUND

The writ of habeas corpus traditionally was used to review the legality of a prisoner's detention and to compel his release if the grounds for the detention were found to be legally inadequate.[10] Early habeas corpus hearings rarely were concerned with the validity of judicial decisions, but looked only to the competency of the sentencing court.[11] While the availability of habeas corpus relief was

5. The due process clause of the fourteenth amendment has been held in a variety of cases to require that a state act in accordance with concepts of fundamental fairness in prosecutions of individuals. *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947) (California procedure permitting comment on a defendant's failure to testify in his own behalf not unfair).

6. The Director of Youtb Services testified that Fain had been sufficiently rehabilitated to be released from the correctional facility and readied for placement, but he had not been released for fear of immediate arrest and trial on the outstanding indictment.

7. *See* 28 U.S.C. § 2254(b) (1970), wbich provides: "An application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ."

8. The State Attorney contended that since a juvenile delinquency adjudication was not a "conviction," *see* [FLA. STAT. ANN. § 39.10(3) (1967), no jeopardy attached to the adjudication. Alternatively, he argued that the double jeopardy clause did not apply to juvenile proceedings in any case. *See* note 43 *infra*.

9. Fain v. Duff, 364 F. Supp. 1192 (M.D. Fla. 1973).

10. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-45 (1970).

11. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

guaranteed in the Constitution,[12] the trauma of Reconstruction prompted Congress to enact a statute that expressly authorized federal habeas corpus relief, subject to certain requirements of custody and exhaustion of state remedies.[13] The availability of this relief increased over the years as the courts expanded the substantive scope of habeas corpus review, relaxed the degree and nature of restraint necessary to meet the jurisdictional custody requirement, and interpreted more restrictively the statutory exhaustion provision. The substantive expansion of federal habeas corpus review of state court decisions resulted largely from the continuing incorporation of various constitutional liberties within the fourteenth amendment due process clause.[14] For example, the double jeopardy clause of the fifth amendment has been expressly incorporated[15] making custody in violation of that clause a ground for federal habeas corpus relief.[16] The concept of jeopardy is still developing, and recently has been extended in mistrial,[17] parole,[18] and juvenile proceeding cases.[19]

12. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

13. 28 U.S.C. § 2241 (1970). The Act provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . ." 28 U.S.C. § 2241(a) (1970). The Act further states that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3) (1970). The exhaustion requirement is set forth in note 7 *supra*. *See Developments in the Law—Federal Habeas Corpus, supra* note 10, at 1048.

14. Fay v. Noia, 372 U.S. 391, 413-14 (1963); *Developments in the Law—Federal Habeas Corpus, supra* note 10, at 1041.

15. Benton v. Maryland, 395 U.S. 784 (1969).

16. United States *ex rel* Russo v. Superior Ct., 483 F.2d 7 (3d Cir. 1973) (granting habeas corpus relief to petitioner, free on bail after a mistrial, on grounds of double jeopardy).

17. *E.g.*, Thomas v. Beasley, 491 F.2d 507 (6th Cir. 1974) (jeopardy attached to a trial stopped after partial testimony of the prosecutrix). *But see* Illinois v. Sommerville, 410 U.S. 458 (1973) (holding that the double jeopardy clause did not bar retrial after a mistrial if "manifest necessity" and the "ends of public justice" required the retrial).

18. *E.g.*, United States *ex rel* Marrero v. Warden, Lewisburg Pen., 483 F.2d 656 (3d Cir. 1973), *rev'd*, 94 S. Ct. 2532 (1974) (concerning denial of parole eligibility in a narcotics statute).

19. *E.g.*, Jones v. Breed, 497 F.2d 1160 (9th Cir. 1974) (granting habeas corpus on the ground that the double jeopardy clause prohibited petitioner's conviction as an adult following his adjudication as a delinquent on the same charge). Certain due process safeguards have been extended to juvenile hearings. *In re* Gault, 387 U.S. 1 (1967), extended due process rights in the areas of notice, counsel, confrontation, and self-incrimination to juvenile proceedings, and enunciated the standard of "fundamental fairness" to be applied in considering constitutional guarantees to be provided in juvenile hearings. *In re* Winship, 397 U.S. 358 (1970), mandated that the standard of guilt beyond reasonable doubt be applied in juvenile proceedings. The Court declined to require a jury trial in juvenile actions, however, stating that not all rights assured an adult are to be imposed on the juvenile process and noting that a jury is

Since the federal habeas corpus statute provides no specific guidelines in its provisions requiring custody and exhaustion of state remedies, those requirements have been subject to extensive judicial relaxation. In *Fay v. Noia*[20] the Supreme Court held that a peititioner need exhaust only those state remedies available to him at the time of his petition and that adherence to state procedural rules is not a prerequisite to federal habeas corpus review. In *Jones v. Cunningham*[21] the Court held that a paroled prisoner was sufficiently restrained of his liberty to meet the custody provision of the writ.[22] The Court in *Walker v. Wainwright*[23] determined that relief other than immediate release from custody could properly be granted through the writ.[24] The Court continued this trend of relaxation in *Peyton v. Rowe*[25] by abandoning the doctrine of prematurity,[26] which held that a prisoner's challenge of a sentence in advance of his incarceration under that sentence was premature, allowing a prisoner serving two consecutive sentences to challenge the second while still confined under the first. The Court reasoned that a prisoner should not be required to serve a prolonged sentence before he is permitted to challenge the cause of its longevity.[27] The Burger Court followed the trend in *Hensley v. Municipal Court,*[28] in which it found that a person released under his own recognizance was sufficiently restrained of his liberty to satisfy the custody requirement. Furthermore, in *Braden v. 30th Judicial Circuit Court,*[29] the Court held that an interstate detainer issued by Kentucky authori-

not a prerequisite to accurate fact-finding. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). As a result of the increased application of constitutional standards in juvenile court proceedings a judicial trend recognizing jeopardy in delinquency adjudications has developed. For a detailed study of this trend see Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 WM. & MARY L. REV. 266 (1972).

20. 372 U.S. 391 (1963).

21. 371 U.S. 236 (1963).

22. The Court noted the historical evolution of the writ: "[Habeas Corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to meet its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.* at 243.

23. 390 U.S. 335 (1963).

24. The Court noted that the habeas statute does not deny federal courts the power to fashion appropriate relief other than immediate release from physical confinement and that courts may dictate such relief as law and justice require. *Id.* at 337. *See* Carafas v. La Vallee, 391 U.S. 234 (1968) (granting a writ of habeas corpus although petitioner had been unconditionally released during the habeas proceedings).

25. 391 U.S. 54 (1968).

26. The prematurity doctrine was established in McNally v. Hill, 293 U.S. 131 (1934).

27. "Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time." *Id.* at 64.

28. 411 U.S. 345 (1973).

29. 410 U.S. 484 (1973).

ties had a substantial, adverse impact on the confinement conditions of a prisoner serving a sentence in Alabama, and therefore the prisoner was deemed to be in the custody of Kentucky authorities and a writ of habeas corpus could be properly directed to those authorities. In *Braden* the writ was issued before the prisoner had been tried in Kentucky courts, and it compelled the state to attempt extradition of the prisoner for prompt trial. The Court emphasized the affirmative nature of the relief sought in the pretrial writ and cautioned that the decision was not to be interpreted as permitting "the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court."[30] That caveat parallels the Burger Court's strong assertion of the abstention doctrine in cases directly challenging state criminal statutes and procedures in federal courts. In *Younger v. Harris*[31] the Court applied this doctrine when it expressly limited the availability of federal injunctive relief, holding that pending state criminal proceedings should not be enjoined except in unusual circumstances when intervention is necessary to prevent immediate, irreparable harm.[32] The abstention doctrine is based on interests of comity, federalism, and respect for the integrity of proceedings in state courts.[33] These same considerations have tempered the wide application of federal habeas corpus relief in the past[34] and have recently prompted a proposed amendment to the Federal Habeas Corpus Act.[35] Referring to those interests in his concurring opinion in *Schneckloth v. Bustamonte*,[36] Justice Powell argued that petitions for habeas corpus founded on fourth amendment claims should be limited to those claims that impugn the integrity of the fact-finding process or bear directly on the innocence of the accused. Fifth amendment grounds for habeas corpus relief may not be susceptible to those proposed limitations, however, since the Court recently

30. 410 U.S. at 493.

31. 401 U.S. 37 (1971).

32. *Accord*, Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971) (extending the doctrine to declaratory relief). The Court in *Younger* held that "[t]he threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense to a single criminal prosecution." 401 U.S. at 46; *see* O'Sbea v. Littleton, 414 U.S. 488, 499 (1974). *See also* Steffel v. Thompson, 415 U.S. 452, 460-61. (1974).

33. 401 U.S. 37, 44 (1971).

34. *See Ex parte* Royall, 117 U.S. 241, 251 (1886).

35. S. 567, 93d Cong., 1st Sess. (1973). For critical commentary on the proposed amendment see Wulf, *Limiting Prisoner Access to Habeas Corpus—Assault on the Great Writ*, 40 BROOKLYN L. REV. 253 (1973); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221 (1973).

36. 412 U.S. 218, 250 (1973).

held in a case concerning the retroactivity of a Supreme Court decision that procedural and nonprocedural constitutional rights are not necessarily subject to the same analysis and limitations.[37] Thus, recent cases evidence two conflicting trends: The extension of federal habeas corpus relief through relaxed custody and exhaustion requirements and expanded substantive scope, and the reaffirmation of federal court abstention with its threatened impact on federal habeas corpus.

III. The Instant Decision

Recognizing that a grant of pretrial habeas corpus relief required strong justification, the court in the instant case considered the traditional uses of the writ and examined recent cases relaxing custody and exhaustion prerequisites. Relying on *Peyton v. Rowe*[38] the court found that the custody requirement was satisfied because the outstanding indictment had a substantial, adverse effect on the conditions of petitioner's confinement.[39] The court next considered the statutory exhaustion requirement and the reluctance of federal courts to litigate prematurely constitutional defenses to state actions and found that the state supreme court's definitive ruling on the instant constitutional claim exhausted available state remedies.[40] The court further reasoned that in the instant case, as in *Braden v. 30th Judicial Circuit Court*,[41] petitioner had not asserted merely a federal defense to a criminal prosecution, but sought to enforce a constitutional right that could and should be vindicated without awaiting state trial.[42] Having determined that custody and exhaustion requirements were satisfied, the court considered the merits of petitioner's constitutional claim and found that since petitioner had been adjudicated a delinquent and committed to a

37. *See* Robinson v. Neil, 409 U.S. 505 (1973) (holding that the double jeopardy prohibition of Waller v. Florida, 397 U.S. 387 (1970), should be applied retroactively).

38. *See* notes 26-27 *supra* and accompanying text.

39. The court said that it would look beyond labels to substance in finding that petitioner was confined. It then held that any proceeding that may result in incarceration places a person, either adult or juvenile, in jeopardy.

40. The court rejected the state's contention that the defense could be raised again at the criminal trial and on appeal, noting that the chances of the state courts' changing their position and acquitting petitioner on those grounds were extremely remote.

41. *See* notes 29-30 *supra* and accompanying text.

42. The instant court recognized the distinction made by the Court in *Braden* between an affirmative obligation and a prohibition mandated by a writ of habeas corpus, but found that distinction not applicable to these facts. In his dissent to the denial of a rehearing *en banc* in the instant case, Judge Clark argued that the majority opinion cut across the express caveat in *Braden* disclaiming the intention to allow pretrial litigation of constitutional claims. 488 F.2d at 228; *see* text accompanying note 30 *supra*.

correctional institution by a judge having the power to restrain significantly a juvenile's freedom, and since the adjudication was founded on a violation of state criminal law, jeopardy attached to the proceedings.[43] Reasoning that the state's subjection of petitioner to its powers by indicting him as an adult required that he be accorded all the constitutional rights available to an adult, the court held that the fifth amendment protection against double jeopardy must be accorded him. The court held also that concepts of fundamental fairness precluded the state's prosecution of petitioner as an adult after a prior delinquency adjudication based on the same offense.[44] Since petitioner had fully litigated these contentions to no avail in the state courts, the instant court affirmed the district court's grant of habeas corpus relief in advance of the criminal trial.

IV. CRITIQUE

Although the instant court's decision to issue a writ of habeas corpus in advance of trial was a departure from the customary exercise of that remedy, the facts of the instant case, together with the Supreme Court's recent decisions relaxing custody and exhaustion requirements, justified the court's action. The conditions of petitioner's custody more than met the standard required in *Hensley v. Municipal Court*,[45] and the prolongation of petitioner's detention justified the application of the adverse effect rationale of *Braden v. 30th Judicial Circuit Court* and *Peyton v. Rowe*.[46] Further, the instant court correctly held that petitioner's challenge of the state's indictment at all levels of the state courts rendered further litigation of his constitutional claims in the state system futile and that his petition for habeas corpus was therefore appropriate to prevent prolonged unconstitutional deprivation of petitioner's liberty.[47] In both *Braden* and the instant case state remedies had been exhausted, but the *Braden* decision was expressly limited by the Court's caveat

43. The court rejected the state's contention that under the *McKeiver* rationale, petitioner had no constitutional right not to be put twice in jeopardy. *See* note 19 *supra*.

44. The court followed its decision in Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968), in which it held unconstitutional the prosecution of a juvenile previously adjudicated a delinquent. Since *Benton v. Maryland* had not yet been decided, the court in *Hultin* relied on the fundamental fairness argument instead of the double jeopardy clause. *See* note 15 *supra* and accompanying text. In the instant case the court found that the juvenile court judge had acted within his power and discretion in declining to waive jurisdiction. For a detailed discussion of Florida juvenile court procedures and the question of jeopardy therein see Commentary, *Juvenile Court: Due Process, Double Jeopardy, and the Florida Waiver Procedures*, 26 U. FLA. L. REV. 300 (1974).

45. *See* note 28 *supra* and accompanying text.

46. *See* notes 26 & 29 *supra* and accompanying text.

47. *See* Peyton v. Rowe, 391 U.S. 54 (1968); notes 26-27 *supra* and accompanying text.

disclaiming authorization of premature litigation of constitutional defenses.[48] The instant Court properly was undeterred by that caveat, but failed to explain its position adequately. The court also failed to confront the mandate of abstention expressed by the Burger Court in *Younger v. Harris* and other cases.[49] While the instant case involved litigation of a constitutional claim in advance of trial, that claim had already been litigated by petitioner in state courts before the federal hearing, a circumstance that removes the instant case from the scope of the *Braden* caveat and distinguishes it from *Younger*. Moreover, since petitioner had been subjected once to the state's punitive power, the instant case could have been characterized under the *Younger* reasoning as an unusual situation in which federal injunctive or declaratory relief was arguably appropriate to prevent repeated prosecution.[50] To have allowed the proposed trial to occur would have prevented complete vindication of petitioner's constitutional rights because the double jeopardy clause prohibits a second prosecution, not only a second punishment.[51] Since this constitutional mandate is nonprocedural in nature, the reasoning of Justice Powell's opinion in *Schneckloth v. Bustamonte* proposing limitations on federal habeas corpus in the interests of comity is inapposite.[52]

As the Court found in *Fay v. Noia*,[53] the initial consideration of a federal court that considers a habeas corpus petition should be whether the petitioner's constitutional claim had been considered adequately at the state level, not whether the petitioner had resorted to every conceivable state remedy. The practical limitation that the Supreme Court placed on the exhaustion requirement in that case should include the prevention of a state trial when the trial will provide no practical opportunity for fruitful consideration of the constitutional claim and will result only in the petitioner's prolonged unconstitutional confinement. While granting federal habeas corpus relief before state trial may conflict with the concept of federal abstention, when the merits of a petition warrant the issuance of the writ, state procedural devices and interests of comity should not be permitted to interfere with the prompt vindication of the petitioner's constitutional rights.[54] The unusual circumstances of

48. *See* text accompanying note 30 *supra*.
49. *See* notes 32-33 *supra* and accompanying text.
50. *Id. Cf.* notes 8, 19, 43 *supra* and accompanying text.
51. United States *ex rel.* Russo v. Superior Ct., 483 F.2d 7, 12 (3d Cir. 1973).
52. *See* note 36 *supra* and accompanying text.
53. *See* note 20 *supra* and accompanying text.
54. *See* text accompanying notes 31-36 *supra*.

the instant case probably limit its impact since occasions in which a constitutional claim has been litigated by a petitioner in advance of state trial and therefore justify pretrial federal habeas corpus consideration will be rare. Similar circumstances may arise, however, in cases of mistrial,[55] interstate detainers,[56] or prosecution for one offense by more than one court of the same sovereign.[57] In each of these cases, the opportunity exists for an accused to challenge the second prosecution in advance of the state trial. Unless the accused is successful in his challenge at the trial court level, however, he faces the possibility that the appellate court may treat his claim as an interlocutory matter, not appealable at that stage. After such a ruling, federal habeas corpus would not be timely since the claim would not have been litigated fully in the state courts. But in circumstances such as those of the instant case, a federal court can properly hear a habeas corpus petition. Therefore, in the appropriate situation the instant case stands as a well-reasoned precedent for pretrial habeas corpus review of state court actions resulting in unconstitutional confinement.[58]

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55. *See* Thomas v. Beasley, 491 F.2d 507 (6th Cir. 1974); note 17 *supra*.

56. *See* Braden v. 30th Jud. Cir. Ct., 410 U.S. 484 (1973).

57. *See* Waller v. Florida, 397 U.S. 387 (1970); note 37 *supra*.

58. Several cases have expressly followed the instant decision. *See, e.g.*, Jones v. Breed, 497 F.2d 1160, 1165 (9th Cir. 1974) (granting habeas corpus to a juvenile confined as a result of a criminal conviction subsequent to a delinquency adjudication); State *ex rel.* Kelley v. Rawlins, 289 So. 2d 444 (Fla. App. 1974) (granting a writ of prohibition barring the trial of a juvenile on an indictment returned after a delinquency adjudication, although that adjudication had been dismissed because of a procedural infirmity).