Volume 18
Issue 3 *Issue 3 - June 1965*

Article 31

6-1965

Determining the "Line of Commerce" Under Section Seven of the Clayton Act

William H. Barr

Determining the "Line of Commerce" Under Section Seven of the Clayton Act

I. Introduction

A provision of the antitrust statutes currently receiving a great deal of publicity is the anti-merger section of the Clayton Act—section 7.[1] The statute prohibits the acquisition by one corporation of 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] It is designed to eliminate the merger as a means to amassing monopoly power by prohibiting at its incipiency the lessening of competition or the creation of monopoly power through merger. A finding of actual anti-competitive effects is not required; only a "reasonable probability" of such effects is necessary.[3]

Two major issues appear in any section 7 litigation: (1) what probable anti-competitive effects satisfy the requirements of substantially lessening competition or tending toward monopoly; and (2) what is the market area within which the effects of the merger are to be analyzed, both the geographic market area and the product or services market, the "line of commerce."[4]

Competition, of course, requires some market in which to occur; the statute, thus, manifestly requires what otherwise is still needed in accurately analyzing the effect of a merger on competition—defining a relevant product or services market. In the analysis of a merger, the product or services market in which competition is affected must be well defined to predict accurately the probable anti-competitive effects which might result. In considering proposed mergers, moreover, business firms must be able to determine the line or lines of commerce which the merger might affect, in order to predict whether such a merger would have the probable anti-competitive effects prohibited by section 7.

One reason why the judicial development of section 7 has been

1. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).
2. Section 7 reads in pertinent part as follows: "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. § 18 (1958).
3. Att'y. Gen. Nat'l Comm. Antitrust Rep. 118 1949).
4 Att'y. Gen. Nat'l Comm. Antitrust Rep. 118 (1955).

so severely criticized[5] is that neither the Federal Trade Commission nor the courts have formulated a definite set of criteria by which to determine what constitutes a line of commerce. It has been said that there can be no certainty as to the legality of a merger, since a businessman may later learn from the Supreme Court that he is in a business of which he has never before heard.[6] Experts ask whether we have reached the "sorry state of affairs in which markets are gerrymandered to magnify the percentages"[7] of a certain market controlled by the merging firms, in order that section 7 violations might be found.

The purpose of this note is to explore the phrase "any line of commerce."[8] It is respectfully submitted than an analysis of the phrase in light of the legislative history of section 7 and the judicial development of the concept of a relevant product or services market, interpreted in the light of certain recent Supreme Court decisions, will give some insight into the phrase "any line of commerce" and its part in section 7 litigation.

II. The Legislative Intent of Section Seven

Section 7 was enacted in 1914 as a part of the original Clayton Act,[9] in response to the public outcry against holding companies which were controlling many industries.[10] At that time, most corporate acquisitions were accomplished by stock acquisitions, since exchanges of stock could be effected without the need of large pools of capital, and the period was characterized by the flotation of enormous amounts of watered stock.[11] Thus, Congress prohibited only stock acquisitions which would substantially lessen competition or tend toward monopoly.[12]

5. See, *e.g.*, Handler & Robinson, *The Supreme Court v. Corporate Mergers*, Fortune, January, 1965, p. 165; Lewyn & Mann, *Some Thoughts on Policy and Enforcement of Section 7 of the Clayton Act*, 50 A.B.A.J. 154 (1964); Oppenheim, *Antitrust Booms and Boomerangs*, 59 Nw. U.L. Rev. 33 (1964).

6. Handler & Robinson, *supra* note 5, at 178.

7. *Id.* at 165.

8. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

9. An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes, 38 Stat. 730 (1914). The congressional reports which accompanied H.R. 15657, 63d Cong., 2d Sess. (1914), which was enacted into the Clayton Act, were: H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914) and S. Rep. No. 698, 63d Cong., 2d Sess. (1914).

10. See United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 581-83 (S.D. N.Y. 1958). See also Martin, Mergers and the Clayton Act 3-20 (1959); H.R. Rep. No. 1775, 81st Cong., 2d Sess. (1950).

11. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 4 (1949).

12. The original § 7 read in pertinent part: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or restrain

The ineffectiveness of the statute appeared soon after it was enacted as the courts began to interpret it very strictly,[13] so that by the beginning of the forties, reports had begun to appear which warned of increasing concentration in the American economy and the dire events which might result.[14] In 1948, a Federal Trade Commission Report[15] warned that

> no great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the government will be impelled to step in and impose some form of direct regulation in the public interest.[16]

Moreover, in 1948, the Supreme Court held that the Sherman Act[17] had a very limited capacity in regulating mergers.[18]

In response, Congress enacted the Celler-Kefauver Amendment[19] to the Clayton Act in 1950, for the express purpose of limiting "future increases in the level of economic concentration resulting from corporate mergers and acquisitions."[20] Two of the reasons for the passage of the bill, as found by the House Committee Report, were that con-

---

such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731-32 (1914).

13. The courts interpreted § 7 so that it did not apply to asset acquisitions. FTC v. Western Meat Co., 272 U.S. 554 (1926); United States v. Celanese Corp. of America, 91 F. Supp. 14 (S.D.N.Y. 1950). The Supreme Court even went so far as to hold that a stock acquisition was beyond the attack of § 7 if converted to an asset acquisition any time before the issuance of the government's divestment order. Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934). See 16 VAND. L. REV. 1217-19 (1963).

14. See, *e.g.*, FTC, THE MERGER MOVEMENT: A SUMMARY REPORT (1948); NATIONAL RESOURCES COMM., THE STRUCTURE OF THE AMERICAN ECONOMY (1939); S. Doc. No. 206, 79th Cong., 2d Sess. (1946); THE STRUCTURE OF INDUSTRY (TNEC Monograph No. 27, 1941).

15. FTC, *supra* note 14.

16. *Id.* at 68. It is interesting to note that the authors of the 1948 FTC report on mergers have subsequently conceded that the mergers of which they spoke have not substantially increased economic concentration. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 232 (1960).

17. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

18. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

19. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). The legislative history of the Celler-Kefauver Amendment in the 81st Congress is as follows: in the Senate: S. 56, 81st Cong., 1st Sess. (1949) (O'Mahoney and Kefauver); *Hearings Before the Senate Judiciary on H.R. 2734*, 81st Cong., 1st and 2d Sess. (1949-50); S. REP. No. 1775, 81st Cong., 2d Sess. (1950); debate: 96 CONG. REC. 16404-05, 16433-37, 16460-61, 16498-508 (1950) passed: 96 CONG. REC. 16508 (1950); in the House: H.R. 988, 81st Cong., 2d Sess. (1949) (Jackson); 1240, 81st Cong., 2d Sess. (1949) (Mansfield); 2006, 81st Cong., 2d Sess. (1949) (Hobbs); 2734, 81st Cong., 2d Sess. (1949) (Celler); *Hearings Before the House Judiciary on H.R. 2734*, 81st Cong., 1st Sess. (1949); H.R. REP. No. 1191, 81st Cong., 1st Sess. (1949); debate: 95 CONG. REC. 11484-507 (1949); passed: 95 CONG. REC. 11507 (1949); House agreed to Senate amendments, 96 CONG. REC. 16573 (1950); approved by President on December 29, 1950, 96 CONG. REC. 17138 (1950).

20. S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950).

centration through merger had invaded the "traditionally 'small business' industries;"[21] and that the merger movement occurring at that time did not include smaller firms combining together to compete on a more equal footing with larger firms, but was characterized by the larger corporations buying out the smaller companies.[22] The amendment was designed primarily to plug the "loophole," to prohibit asset acquisitions as well as stock acquisitions and to make the statute applicable to vertical as well as horizontal mergers.[23]

There have been many detailed analyses of the legislative history of section 7,[24] but the only definite conclusion one may derive is that the purpose of Congress, in enacting the Celler-Kefauver Amendment, was to stop the economic concentration which was developing, and which it considered detrimental to our "system of free enterprise."[25] Section 7, as amended, was intended to prevent the concentration of economic power by way of merger from reaching the enormity required to find a Sherman Act violation:[26] "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[27]

If the effect of a merger "may be substantially to lessen competition, or to tend to create a monopoly,"[28] the merger is prohibited, and the acquiring company can be made to disgorge itself of the stock or assets of the acquired corporation. Phrasing the statutory language in this way burdened the courts with the duty of predicting the future consequences of a merger on competition. Such a prediction is so difficult that few economists feel confident that they can achieve consistent accuracy.[29] Thus, it would appear that Congress was not so interested in the manner in which to determine what acquisitions would be prohibited as it was in the ultimate goal of stopping economic concentration at its incipiency.[30]

It is not essential to this discussion to consider directly the tests of illegality which have been used by the courts in determining whether

21. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 3 (1949).
23. S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950).
24. See, *e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1960); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 581-83 (S.D.N.Y. 1958); Bok, *supra* note 16, at 233-38; Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Anti-Merger Act*, 61 Colum. L. Rev. 629, 652-74 (1961); *Note*, 52 Colum. L. Rev. 766 (1952). For a complete analysis of the development of § seven, See Martin, Mergers and the Clayton Act (1959).
25. See Bok, *supra* note 16, at 238.
26. See United States v. Columbia Steel Co., *supra* note 18.
27. S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950).
23. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).
29. See Bok, *supra* note 16, at 244-47.
30. *Id.* at 233-38.

the effects of a merger are anti-competitive. Some of the primary factors which have been applied in determining such effects are: (1) an undue percentage share of the market,[31] (2) undue concentration in the market,[32] (3) market dominance,[33] and (4) the elimination of a significant independent company in the market.[34] Such tests, of course, must always be applied within the context of a product or services market, and the delineation of the market will determine the amount of concentration which has taken place. Probably the most famous example of the relevance of market delineation is the *DuPont-Cellophane* case.[35] In an action brought under the Sherman Act,[36] the government charged that DuPont was monopolizing the cellophane industry since its share of the cellophane market amounted to seventy-five per cent.[37] DuPont successfully defended, however, by arguing that the market had been ill-defined by the government. DuPont contended that cellophane was not a market in itself, but only part of the flexible packaging market of which DuPont's cellophane production accounted for less than twenty per cent.[38] If the market had been held to be just cellophane, DuPont would surely have a monopoly, while if it were defined as all flexible packaging material, DuPont's share of the market would not reach monopoly proportions.

31. See United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), 16 VAND. L. REV. 1217 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

32. See United States v. Philadelphia Nat'l Bank, *supra* note 31; A. G. Spalding & Co. v. FTG, 301 F.2d 585 (2d Cir. 1962); American Crystal Sugar Co. v. American Cuban Sugar Co., 259 F.2d 524 (2d Cir. 1958); United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958); Pillsbury Mills, Inc., 57 F.T.C. 1274 (1960).

33. See Brown Shoe Co. v. United States, *supra* note 31; Crown Zellerbach Corp. v. FTC, 296 F.2d 800 (9th Cir. 1961); Proctor & Gamble Distributing Co., TRADE REG. REP. ¶ 70674, at ¶ 78085 (S.D. Calif. Feb. 13, 1963).

34. See United States v. Philadelphia Nat'l Bank, *supra* note 31; Brown Shoe Co. v. United States, *supra* note 31; A. G. Spalding & Co. v. FTG, *supra* note 32; Crown Zellerbach Corp. v. FTC, *supra* note 33; United States v. Bethlehem Steel Corp., *supra* note 32; Proctor & Gamble Distributing Co., *supra* note 33; Pillsbury Mills, Inc., *supra* note 32. The House Report accompanying the Celler-Kefauver Amendment expressed these factors in other terms: "Such an [anticompetitive] effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete." H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949). For a detailed analysis of these and other factors used by the courts in determining the illegality of a merger, see BOCK, MERGERS AND MARKETS 153-230 (3d ed. 1964).

35. United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1956).

36. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

37. United States v. E. I. DuPont de Nemours & Co., *supra* note 35, at 379.

38. *Ibid.*

III. LEGISLATIVE HISTORY OF "ANY LINE OF COMMERCE"

There is no indication that the phrase "any line of commerce" in the original Clayton Act[39] expressed any concept more definite than a vague notion of a line of trade or a product market.[40]

The phrase originally only modified the words, "tend to create a monopoly," but in the Celler-Kefauver Amendment, it was reworded so that the relevant product or services market must be delineated in applying both tests of illegality, the lessening of competition and the tendency to create a monopoly.[41] A congressional report on the Celler-Kefauver bill[42] stated:

> It is intended that acquisitions which substantially lessen competition, as well as those which tend to create monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.[43]

"Line of commerce," suggested the report, is defined in terms of the relevant area of effective competition,[44] the determination of which can only be made through an economic analysis of the factual situation in which the merger occurs.[45] In amending section 7, therefore, Congress indicated that the Federal Trade Commission and the courts in the future would have to base their investigations on a market, in the economic sense, and that the effects on competition would have to be measured within a relevant product or services market.[46] Beyond that, however, Congress gave no indication as to the manner in which the relevant product or services market, the line of commerce, was to be determined.

---

39. "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes," 38 Stat. 730 (1914). The phrase "in any line of commerce" is found in §§ 2, 3, & 7.

40. The phrase "or tend to create a monopoly in any line of commerce" was added to § 7 in conference without any mention of "any line of commerce," but because it was feared that an acquisition might not lessen competition, yet it might tend to create a monopoly or a restraint of trade. Remarks of Senator Chilton, 51 CONG. REC. 16002 (1914). See United States v. E. I. DuPont de Nemours and Co., 353 U.S. 586, 591-92 (1957).

41. See MARTIN, *op. cit. supra* note 24, at 259, 264.

42. H.R. 2734, 81st Cong., 1st Sess. (1949).

43. S. REP. No. 1775, 81st Cong., 2d Sess. 4 (1950).

44. S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950).

45. See Markham, *The Federal Trade Commission's Use of Economics*, 64 COLUM. L. REV. 405, 408 (1964).

46. See MARTIN, *op. cit. supra* note 24, at 265.

IV. Judicial Development of Concept of Relevant Product or Services Market or Line of Commerce

The judicial notion of a line of commerce or a product or services market was slow in developing. In the earliest section 7 cases, no consideration whatsoever was given to such a definition.[47] Not until 1929, in the *Van Camp* case,[48] an action brought under section 2 of the Clayton Act,[49] was there any reference made to the concept. The Court did not enunciate any factors to be considered in defining a relevant product or services market, but it did give some indication as to the breadth of the phrase; "the phrase is comprehensive and means that if the forbidden effect or tendency is produced in one out of all of the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied."[50] As a result of this case, it was soon accepted that the product or services market as defined for purposes of the Clayton Act, and specifically section 7, need not be the main line or lines of commerce in which merging firms are engaged, but that it may be "any" line of business affected by the merger.[51]

International Shoe Co. v. Federal Trade Commission[52] was one of the few Commission decisions under the original section 7 which was reviewed by the Supreme Court. In that case, International Shoe had acquired the stock of the McElwain Company, another shoe manufacturer. The Court held that the two shoe companies were not competing within the same line of commerce. International Shoe sold primarily a work shoe while McElwain marketed a dress shoe. The Court, in delineating two separate "lines of commerce," emphasized the distinct customers to which the shoes of the two different companies appealed as a result of the difference in quality and price:

> It is plain . . . that the product of the two companies here in question, because of the difference in appearance and workmanship, appealed to the tastes of entirely different classes of consumers; that while a portion of the product of both companies went into the same states, in the main the product of each was sold to a different class of dealers and found its way into distinctly separate markets.[53]

In 1948, the Supreme Court handed down the *Columbia Steel Co.*

---

47. See Aluminum Co. of America v. FTC, 284 Fed. 401 (3d Cir. 1922), *cert. denied,* 261 U.S. 616 (1923); FTC v. Thatcher Mfg. Co., 6 F.T.C. 213 (1923). For a discussion of these cases, see Martin, *op. cit. supra* note 24, at 58-73. *But cf.* Standard Oil Co. v. United States, 221 U.S. 1 (1910).
48. George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929).
49. 38 Stat. 730 (1914), 15 U.S.C. § 13 (1958).
50. 278 U.S. at 254.
51. See note 43 *supra* and accompanying text.
52. 280 U.S. 291 (1930).
53. *Id.* at 296-97.

decision,[54] in which it explored the concept of a relevant product or services market, this time under the Sherman Act.[55] The Court was faced with the problem of whether "plates and shapes," certain unfinished steel products made from ingots by means of rolling mills,[56] constituted a market distinct from other rolled steel products.[57] In holding that all rolled steel products are part of the same market, the Court applied a test of interchangeability of production: "If rolled steel producers can make other products as easily as plates and shapes, then the removal of Consolidated's demand for plates and shapes must be measured not against the market for plates and shapes alone, but for all comparable rolled products."[58]

Therefore, as of the time of the passage of the Celler-Kefauver Amendment, the Supreme Court had suggested two tests that could be applied in determining a relevant product or services market: a distinct customers test, determined by such factors as quality and price;[59] and an interchangeability of production test which delineated a market to include all products which could be produced interchangeably.[60]

By 1954 the rising importance of delineating the relevant product market in antitrust suits was evidenced by the opinion of Judge Wyzanski in *United States v. United Shoe Machinery Corp.*,[61] an action under the Sherman Act,[62] asserting that United had a monopoly in the shoe machinery industry. The court looked to the factual situation, analyzing it with the manifest intention of defining the market which actually existed in the shoe machinery business. In a section of his opinion,[63] Judge Wyzanski held that the relevant market was composed of all shoe machinery except dry thread machinery.[64] "[R]egardless of the relationship of a particular machine type to another type or to a particular process, they are in the same market, because all processes are in competition with one another."[65]

54. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

55. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

56. 334 U.S. at 499.

57. For an explanation of the distinction between "plates and shapes" and other rolled steel products, see 334 U.S. at 499-500.

58. *Id.* at 510.

59. International Shoe Co. v. FTC, 280 U.S. 291 (1930).

60. United States v. Columbia Steel Co., *supra* note 18.

61. 110 F. Supp. 295 (D.C. Mass. 1953).

62. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

63. 110 F. Supp. at 302-03.

64. United did not manufacture sewing and stitching machinery. The evidence showed that other manufacturers of shoe machinery did not make sewing machinery and that manufacturers of sewing machinery did not manufacture other shoe machinery. "Sewing machinery, unlike other shoe machinery, is nsed in many industries other than shoe manufacture, and its manufacture does not require detailed knowledge of the whole art of shoe making." *Id.* at 303.

65. *Id.* at 302.

Each shoe manufacturer, he said, is aiming at the consumer dollar spent on shoes; thus, the processes and machines of one manufacturer are competing with those of every other manufacturer. By offering all machine types except dry thread sewing machines, United, the most important producer in the field, aids in defining the shoe machinery market, since "defining a market turns on discovering patterns of trade which are followed in practice."[66]

In 1962, the Celler-Kefauver Amendment was first judicially interpreted by the Supreme Court in *Brown Shoe Co. v. United States.*[67] The two most important cases in developing the pre-*Brown Shoe* concept of a relevant product or services market were the *DuPont* cases.[68] In the first case,[69] a civil action under section 2 of the Sherman Act,[70] the government charged that DuPont had monopolized interstate commerce in cellophane, since DuPont produced almost seventy-five per cent of the cellophane sold in the United States.[71] The relevant product market in which to judge DuPont's activity emerged as the determinative issue, for cellophane constituted less than twenty per cent of a broader market encompassing all flexible packaging material sales.[72] The Court said that if alternative products exist that buyers may use for the same purpose, control of the product allegedly monopolized will not be an illegal monopoly.[73] In holding that the market consisted of all flexible packaging material,[74] the Court then applied a test of reasonable interchangeability. "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another."[75] The Court equated this test with the economic concept of cross-elasticity of demand[76] between products, which is the responsiveness of the sales

66. *Id.* at 303.

67. Brown Shoe Co. v. United States, *supra* note 31, was the first Supreme Court case to interpret the Celler-Kefauver Amendment and, therefore, is one of the most important precedents in this area of the law.

68. United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586 (1957) (hereinafter cited as DuPont-General Motors; United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1956) (hereinafter cited as Dupont-Cellophane).

69. DuPont-Cellophane, *supra* note 68.

70. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1958).

71. 351 U.S. at 379.

72. *Ibid.*

73. *Id.* at 394.

74. *Id.* at 404.

75. *Id.* at 383.

76. One noted antitrust economist has defined the concept as follows: "Cross-elasticity reflects the extent to which price changes in one product affect the amount of another product that buyers will buy. Where the cross-elasticity of demand for rival products is great, a decline in the price of one decreases the sale of the other and may lead to a decline in its price." STOCKING, WORKABLE COMPETITION AND ANTITRUST POLICY 123 (1961).

of one product to the price changes of another.[77] "Thus, if a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market."[78]

It was suggested by one commentator shortly after the cellophane decision that section 7 of the Clayton Act would require a test other than reasonable interchangeability in defining a relevant product market, since the Clayton Act requires less of a showing of probable harm than does the Sherman Act.[79] However, the courts have applied the interchangeability of use test in many later section 7 cases, and it stands at the present time as the primary test used to determine a product market under section 7.[80]

The second *DuPont* case[81] was an old section 7 case seeking to divest DuPont of the twenty-three per cent of General Motors stock which it had owned for more than thirty years.[82] In this case, the Court held for the first time that

> determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected.[83]

The controversy centered on whether DuPont's stock ownership was the cause of General Motors' purchasing a large part of its supply of automotive finishes and fabrics from DuPont, thereby substantially lessening competition in that market. In holding that automotive finishes and fabrics were a relevant market apart from all finishes and fabrics, the Court applied a test of "sufficiently peculiar characteristics and use."

77. 351 U.S. at 400. For a criticism of this test, see Mann & Lewyn, *The Relevant Market under Section 7 of the Clayton Aet: Two New Cases—Two Different Views,* 47 VA. L. REV. 1014 (1961).

78. 351 U.S. at 400.

79. Turner, *Antitrust Policy and the Cellophane Case,* 70 HARV. L. REV. 281, 315 (1956).

80. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

81. DuPont-General Motors, *supra* note 65.

82. Between 1917 and 1919, DuPont purchased 23% of the outstanding stock of General Motors for a total outlay of $49 million. Since this action was not brought by the Justice Department until 1949, the Supreme Court decision handed down in 1957, acted retroactively to void a stock acquisition which had occurred almost forty years before. The question, therefore, arises as to whether the substantial lessening of competition was the result, not of the stock acquisition, but of the internal growth of both corporations subsequent to the acquisition. If the latter was true, then § 7 was not a proper statute under which to order divestiture.

83. 353 U.S. at 593.

> The record shows that automotive finishes and fabrics have sufficiently peculiar characteristics and use to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act.[84]

Since General Motors was the largest automobile manufacturer in the United States and, therefore, the largest purchaser of automotive finishes and fabrics, and since General Motors purchased more than half of its requirements from DuPont subsequent to the stock acquisition, the Court found a substantial lessening of competition violative of section 7 in the line of commerce of automotive finishes and fabrics.

Until the *Brown Shoe* decision[85] was handed down in 1962, the lower courts based their determination of a relevant product and services market under the Celler-Kefauver Amendment on these Sherman Act cases or on the cases brought under the old section 7. Only after twelve years of interpretation by the district courts and the Federal Trade Commission did the Supreme Court in *Brown Shoe* set any guidelines for the delineation of a "line of commerce" under the Celler-Kefauver Amendment.[86]

V. Development of "Any Line of Commerce" Under the Celler-Kefauver Amendment

Although the phrase "any line of commerce" was included in the original Clayton Act,[87] the importance of delineating a relevant market has increased since the passage of the Celler-Kefauver Amendment.[88] In analyzing a transaction so complex as a merger in order to demarcate a relevant market in which the merger might have anti-competitive effect, great use has been made of economic concepts and theory.[89] Although these concepts are useful in identifying the product dimensions of a market, the determination of a line of commerce is not the result of an abstract economic analysis alone. The economic concepts and theories become legal concepts and theories as defined by the courts and must be analyzed in their legal sense, even though they

84. *Id.* at 593-94.
85. Brown Shoe Co. v. United States, *supra* note 80.
86. See note 117 *infra* and accompanying text.
87. An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes, 38 Stat. 730 (1914).
88. See Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act,* 61 COLUM. L. REV. 629, 642 (1961). See also note 83 *supra.*
89. "Section 7 of the Clayton Act is stated in such terms that adjudication of merger cases is virtually impossible until a reasonable amount of economic analysis is in the record. As historians, lawyers, and economists have frequently pointed out, in enacting section § 7 Congress was unable, because of the market complexities of the business world, to specify in precise and measurable terms which mergers were permitted and which were prohibited." Markham, *The Federal Trade Commission's Use of Economics,* 64 COLUM. L. REV. 405, 408 (1964).

originated in the field of economics.[90] Consequently, a conclusion based on the most accurate economic analysis may well be contrary to a legal conclusion concerning the same facts. In section 7 litigation, the congressional intent to thwart the concentration of economic power at its incipiency pervades the entire analysis, including the determination of the "line of commerce" and is paramount to contrary economic conclusions.

The consequence of this blending of economics and law is uncertainty.[91] No general formula or rule has been enunciated which will delineate in all cases the relevant product or services market. A factor determinative in one case may not be present in another, or if it is, will not be of the same significance. Only by a complete economic analysis of the factual situation in the light of the purpose of section 7 can the boundaries of a market be defined. This does not mean, however, that there is no way to predict the legality of a proposed merger. The general principles and specific tests which have been enunciated by the courts afford business fairly reasonable guidelines to use in predicting the general line of commerce, if any, in which it could be held that there is a reasonable probability that a proposed merger might have the effect of substantially lessening competition or tending toward monopoly.[92] Uncertainty could be reduced by the enunciation of per se tests of illegality as has been done for certain practices under other antitrust statutes; but accuracy of decision would surely be sacrificed, for mergers have not yet been sufficiently explored for the courts or the Commission to have a full understanding of the prospective economic manifestations.[93]

An analysis of the judicial interpretation of "any line of commerce" since passage of the Celler-Kefauver Amendment will show: (1) the "lego-economic method"[94] used by the courts in demarcating the line of commerce in which to analyze the effects on competition; (2) the factors deemed by the courts to be important or determinative in defining a line of commerce in a particular case; and (3) the general

90. See Bock, Mergers and Markets (3d ed. 1964).

91. *Id.* at 83; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226 (1960).

92. See Bock, *op. cit. supra* note 90, at 4.

93. In *White Motor Co. v. United States*, the Court held that it would not determine vertical territorial limitations to be illegal per se for the following reason: "Horizontal territorial limitations, like '[g]roup boycotts, or concerted refusals by traders to deal with other traders,' . . . are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain." 372 U.S. 253, 263 (1963).

94. By the use of the term "lego-economic method," the author intends to imply a blending of economics and law in which economic concepts and theories are utilized, but in which the courts are not bound to any definitional rigidity of the economic discipline.

principles and guidelines expressed by the courts for defining a line of commerce.

Although the cases decided under the Celler-Kefauver Amendment prior to *Brown Shoe*[95] were confusing and conflicting, they did establish certain patterns in section 7 litigation. These decisions so fortified the proposition that the relevant product or services market must be delineated in a section 7 case[96] that in *DuPont-General Motors*,[97] the Supreme Court could easily hold that such a delineation is a prerequisite to measuring the anti-competitive effects of a merger.[98] Moreover, the reasoning of the *Van Camp* case,[99] that "any line of commerce" was sufficiently comprehensive to mean any one of several lines of commerce possibly affected,[100] has persisted and become stronger: "*Any* line of commerce does not mean the same as the entire line of commerce, or all lines of commerce engaged in or touched upon by the acquired concern. The line of commerce need not even be a large part of the business of any of the corporations involved."[101]

Since the two *DuPont* cases,[102] the tests laid down by the Supreme Court in those cases—interchangeability of use or cross-elasticity of demand[103] and sufficiently peculiar characteristics and use[104]—have been applied as the general tests by which to determine the relevant product market in a section 7 case.[105]

On the other hand, the courts and the Commission also have developed more specific tests before a section 7 action was argued before the Supreme Court. One of the primary tests developed was a "market recognition" test. If the particular product area alleged to be a proper line of commerce is recognized as a distinct industry or product market, by either the industry itself, exemplified by trade associations for example, or by the public, then it may be said that such a market has sufficiently peculiar characteristics and use under

95. Brown Shoe Co. v. United States, *supra* note 80.
96. See text accompanying note 68-86 *supra*.
97. *Supra* note 68.
98. DuPont-General Motors, *supra* note 68, at 593.
99. George Van Camp & Sons Co. v. Ameriean Can Co., 278 U.S. 245 (1929).
100. *Id.* at 253.
101. Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 812 (9th Cir. 1961).
102. DuPont-General Motors, *supra* note 68; DuPont-Cellophane, *supra* note 68.
103. DuPont-Cellophane, *supra* note 68, at 395.
104. DuPont-General Motors, *supra* note 63, at 593-94.
105. For cases applying the peculiar characteristics and uses standard, see, *e.g.*, A. G. Spalding & Co. v. FTC, 301 F.2d 585, 602 (3d Cir. 1962); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958); Union Carbide Corp., 59 F.T.C. 614, 627 (1961). For cases applying the interchangeability of use standard, see, *e.g.*, Ameriean Crystal Sugar Co. v. American Cuban Sugar Co., 259 F.2d 524 (2d Cir. 1958).

the *Dupont-General Motors* test[106] to be a separate line of commerce.[107] In *Bethlehem Steel*,[108] the court concluded that the iron and steel industry had sufficiently peculiar characteristics and use to be considered a line of commerce:

> The products of the iron and steel industry are generally distinct one from the other and as a group distinct from the products of other industries. They are sold in a recognized market with its own competitive standards. The iron and steel industry is commonly recognized by its members as well as the community at large as a separate industry. It has its own trade association, treating thc industry as separate and distinct. In light of these facts the conclusion is warranted that the sum of all the products of the iron and steel industry constitute a line of commcrce.[109]

Another test developed is the "distinct customers" test. If an alleged product market has an identifiable set of buyers for its product or service, distinct customers which either use or resell the product or service, then it is more likely that the alleged product market will be a proper line of commerce.[110] For example, in the *Spalding* case,[111] the court found two distinct lines of commerce within the more general line of commerce of sporting goods: sporting goods to be used in competitive sport, and sporting goods which were toys.[112] These products were of different quality and for different purposes and thus sold to distinct customers. The better goods were sold to professional and amateur athletic teams while the toys were sold to or for use by children.

Another test applied to establish sufficiently peculiar characteristics between the two proposed lines of commerce was the "distinct prices" of each.[113] The lower quality goods produced to be used as toys were much lower priced than were the goods manufactured to be used in competitive contests.

The courts, therefore, developed three new tests to be used in determining the presence of sufficiently peculiar characteristics and use and interchangeability of use: public or industry recognition, distinct customers, and distinct prices.

One of the most important determinations of the lower courts and the Commission was the realistic delineation of a relevant product or services market; it must conform to the actual competitive situation

106. DuPont-General Motors, *supra* note 68, at 593-94.
107. See, *e.g.*, A. G. Spalding & Co. v. FTC, *supra* note 105, at 602.
108. United States v. Bethlehem Steel Corp., *supra* note 105.
109. *Id.* at 594.
110. See, *e.g.*, Crown Zellerbach Corp. v. FTC, *supra* note 101; United States v. Bethlehem Steel Corp., *supra* note 105.
111. A. G. Spalding & Co. v. FTC, *supra* note 105.
112. *Id.* at 601.
113. *Id.* at 602. See also In the Matter of Union Carbide Corp., 59 F.T.C. 614 (1961).

involved in the particular case. In the *Crown Zellerbach* decision,[114] a case involving review of a Federal Trade Commission ruling, the Ninth Circuit held that what was important in determining the line of commerce were the "facts concerning competition in the market."[115] "All that the Commission was required to do was to ascertain and find a product line which was sufficiently inclusive to be meaningful in terms of *trade realities*."[116] These trade realities, however, must be considered in light of the purpose of section 7: to stop concentration of economic power at its incipiency.

The Supreme Court considered the Celler-Kefauver Amendment for the first time in 1962, in the now famous *Brown Shoe* decision.[117] This opinion introduced the concept of "submarkets" as distinguished from "markets." The Court said that since section 7 of the Clayton Act prohibits a merger which has anti-competitive effects in "*any* line of commerce," the effects of the merger must be examined in every "economically significant submarket" to determine whether it might have anti-competitive effects in that market.[118]

In asserting the importance of "economically significant submarkets,"[119] the Court adopted the requirement of *Crown Zellerbach*[120] that any market which qualifies as a line of commerce must be "meaningful in terms of trade realities."[121] However, the Court expanded the concept of the relevant product or services market by saying that there can be markets within markets which are economically significant.[122]

In defining the outer boundaries of a product market, the Court applied the *DuPont Cellophane*[123] test of "reasonable interchangeability of use" which it equated with "cross-elasticity of demand between the product itself and substitutes for it."[124] The Court thus applied the same test used to delineate a market under the Sherman Act.[125]

The Court went on, however, to say that within this broader market there can be well defined submarkets which, for the purpose

114. Crown Zellerbach Corp. v. FTC, *supra* note 101.
115. *Id.* at 807.
116. *Id.* at 811. (Emphasis added.)
117. Brown Shoe Co. v. United States, *supra* note 80.
118. *Id.* at 325.
119. *Ibid.*
120. Crown Zellerbach Corp. v. FTC, *supra* note 101.
121. *Id.* at 811.
122. Brown Shoe Co. v. United States, *supra* note 80, at 325. See A. G. Spalding & Co. v. FTC, *supra* note 105.
123. 351 U.S. 377 (1956).
124. Brown Shoe Co. v. United States, *supra* note 80, at 325.
125. In a footnote, the Court suggested that interchangeability of production facilities, the test applied in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), may also be used to delineate a broad product market under § 7. Brown Shoe Co. v. United States, *supra* note 80, at 325 n.42.

of section 7, qualify as lines of commerce. The Court listed "practical indicia" which it said could be used in determining a submarket:

> industry or public recognition of the submarket as a separate economio entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[126]

These indicia were an enumeration of the different factors and tests used by the lower courts and the Commission in determination of a "line of commerce."[127] The Court did not state that these six were the indicia to be applied, but it said only that indicia such as these might be applied to make it easier to analyze the actual market situation, to determine what markets are "economically significant."[128]

These indicia were subsequently used in the analysis of the market in *Reynolds Metals Co. v. Federal Trade Commission*,[129] in which converting aluminum foil for use by the florist trade was held to be a line of commerce.[130] It was said:

> It is now clear that the mere potential interchangeability or cross-elasticity may be insufficient to mark the legally pertinent limits of a "relevant line of commerce." The "outer limits" of a general market may be thus determined, but sharply distinct submarkets can exist within these outer limits which may hence forth be the focal point of administrative and judicial inquiry under section 7.[131]

The court held that the Commission had properly defined the "relevant line of commerce" by the use of three of the indicia enumerated in *Brown Shoe*: public and industrial recognition of the market as a separate economic entity, its distinct customers, and its distinct prices.[132]

In the *Philadelphia National Bank* case,[133] the Court again stressed the importance of determining a line of commerce in accord with "trade realities."[134] The Court found commercial banking to be a line of commerce. Certain products or services of a bank have little or no competition; other services enjoy a cost advantage over any competition, and finally some services enjoy a settled consumer preference

126. *Ibid.*
127. The Court, in enumerating these indicia, cited BOCK, MERGERS AND MARKETS, AN ECONOMIC ANALYSIS OF CASE LAW 25-35 (1960). *Id.* at 325 n.43. In Miss Bock's book, the same enumeration will be found as the list of factors, with analysis, which lower courts had emphasized in prior § 7 cases.
128. *Ibid.*
129. 309 F.2d 223 (D.C. Cir. 1962).
130. *Id.* at 228.
131. *Id.* at 226.
132. *Id.* at 227.
133. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
134. *Id.* at 357.

over any competitors.[135] For these reasons the Court found a low cross-elasticity of demand between commercial banking and competitors such as savings and loan associations; and the Court, therefore, held commercial banking to be a line of commerce for purposes of section 7.

VI. Recent Cases

Two 1964 Supreme Court cases interpreting section seven and the phrase "any line of commerce" gave answers to some of the problems which had arisen as to how to delineate a relevant product market.[136]

A. *Continental Can*

In *United States v. Continental Can Co.*,[137] the Justice Department brought an action under section 7 for a divestiture order. Continental, engaged principally in the manufacture and sale of metal cans and other metal containers, had acquired all of the assets and assumed all of the liabilities of Hazel-Atlas Glass Company, a company engaged in the business of manufacturing and selling glass containers.

In addition to metal containers, Continental also manufactured can closing machinery, flexible packaging, plastic containers and other plastic products, paper containers and other paper products, certain can, bottle and jar tops and caps, and a miscellany of other products.[138] Hazel-Atlas produced glass containers of various types for industrial consumers and glass jars for home canning, both largely of the wide-mouth variety.[139] It also manufactured certain glass containers for the home, some specially designed glass articles for industrial use, and screw-type metal lids for glass jars. At the time of the merger, the two merging companies manufactured no identical products.[140]

In 1955, the year before the merger, Continental was the second largest company in the metal container field, manufacturing approximately thirty-three per cent of the metal containers sold in the United States. Continental and American Can, the largest producer, shipped seventy-one per cent of all the metal containers, with the number three company shipping only about five per cent.[141] In 1955, Hazel-Atlas was third in glass container shipments with a little less

135. *Id.* at 356-57.
136. United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964).
137. *Supra* note 136.
138. United States v. Continental Can Co., 217 F. Supp. 761, 769 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441 (1964).
139. *Id.* at 770.
140. *Ibid.*
141. 378 U.S. at 445.

than ten per cent, while the first two glass container manufacturers accounted for about forty-six per cent of the glass container shipments.[142] Therefore, these two product markets, metal containers and glass containers, the only two agreed upon by the parties as relevant product markets for the purpose of section 7, were both highly concentrated. Concentration has always been a primary factor in determining the illegality of an acquisition under section 7.[143]

At the trial, the government sought to prove ten lines of commerce,[144] including the two above. It then endeavored to prove that the merger caused a reasonable probability of anti-competitive effects in each market delineated. At the close of the government's case, the defendant moved for dismissal,[145] on the ground that upon the law and the facts no right of relief had been shown by the government.

The lower court found that only three of the proposed product markets qualified as constituting a line of commerce for the purpose of section 7: metal containers and glass containers, the two product markets stipulated, and containers for the beer industry.[146] In these three lines of commerce, the court found no showing of a reasonable probability of anti-competitive effects; therefore, it dismissed the action.[147]

In analyzing the market situation, the trial court classified the products which Continental and Hazel-Atlas manufactured into three separate industries: metal containers, plastic containers, and glass containers;[148] and the court analyzed the difference between each of these in terms of some of the "practical indicia" laid down in *Brown Shoe*: the distinct physical characteristics, the trade associations in each industry recognizing it as an industry, and the different machinery required for the manufacture of each product line.[149] The court did, however, recognize "substantial and vigorous inter-industry competition between these three industries,"[150] and that "Hazel-Atlas and Continental were part of this overall industrial pattern, each in a recognized separate industry producing distinct products engaged in inter-industry competition for the favor of various end users of

142. *Id.* at 446.

143. United States v. Philadelphia Nat'l Bank, *supra* note 133, at 362-70.

144. "The ten lines of commerce are as follows: 1. The packaging industry. 2. The can industry. 3. The glass container industry. 4. Metal closures. 5. Containers for the beer industry. 6. Containers for the soft drink industry. 7. Containers for the canning industry. 8. Containers for the toiletries and cosmetic industry. 9. Containers for the medicine and health industry. 10. Containers for the household and chemical industry." 217 F. Supp. at 778-79.

145. FED. R. CIV. P. 41(b).

146. 217 F. Supp. at 806.

147. *Id.* at 806-07.

148. *Id.* at 770-71.

149. *Id.* at 771-76.

150. *Id.* at 780.

their products."[151] The court held that these three industries, metal containers, glass containers, and plastic containers, could not be included in a single product market because they produced a wide variety of products and there was no showing of a reasonable interchangeability of use or a cross-elasticity of demand between these products.[152]

On direct appeal to the Supreme Court,[153] the government advocated a line of commerce which it had not suggested on the trial level: "the production and sale of containers for all end uses for which metal and glass containers compete."[154] The government argued that section 7 was enacted not only to prohibit concentration within an industry, but also to prohibit inter-industry concentration when the industries vigorously compete as do the metal container and the glass container industries. A merger between dominant firms in two competing industries, eliminating substantial inter-industry competition, "can be a significant step toward increasing concentration by maintaining and extending oligopoly structure"[155] and should be proscribed by section 7.[156]

Continental accepted the contention that inter-industry competition could be proscribed by section 7 in the proper factual situation, but it contended that the facts in this case did not show a proper line of commerce encompassing both metal and glass containers.[157] It argued that the evidence did not show reasonable interchangeability of use or cross-elasticity of demand.[158] In addition, Continental contended that application of the "practical indicia" enumerated in *Brown Shoe* does not support a line of commerce composed of metal and glass containers. First, the can industry and the glass container industry are separate and well defined, each having its own trade association and being recognized by the business world as a separate industry and market. Secondly, cans and glass containers are made of different material and have different physical characteristics. Moreover, can and glass container manufacturing equipment is not interchangeable. In addition, there was no evidence to show that purchasers of metal cans or glass containers, or both, fall into any categories of distinct classes of customers. Glass containers and cans are priced separately, the price of the latter being determined primarily

151. *Id.* at 781.
152. *Ibid.*
153. 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958).
154. Brief for Appellant, p. 14, United States v. Continental Can Co., *supra* note 136.
155. *Id.* at 21.
156. *Ibid.*
157. Brief for Appellee, p. 11, United States v. Continental Can Co., *supra* note 136.
158. *Id.* at 12-16.

by that of tinplate and the price of the former by that of labor. Also, the prices of one type of container are not changed by price movements of the other type. There are no specialized vendors; the manufacturers sell their respective products.[159] Finally, in addition to the tests enumerated in *Brown Shoe,* Continental argued that, even according to the government's own evidence, there is little actual competition between glass and metal containers; on the contrary, either one type of container or the other is used for the packaging of specific goods and there is little interchangeability.[160]

The Supreme Court reversed, holding that "the inter-industry competition between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete."[161] The Court said that there is no precise formula with which to determine the relevant product market, but that such a judgment must be based on consideration of the entire record to recognize meaningful competition when it in fact exists.[162] It recognized the differences between glass and metal containers and their use but said these factors should not "obscure the competitive relationships which this record so compellingly reveals."[163] After analyzing some of the areas in which glass and metal containers compete, the Court found that the competition between the two industries was "insistent, continuous, effective and quantitywise very substantial."[164] A narrow construction of "competition" and of "reasonable interchangeability of use and cross-elasticity of demand" cannot be "used to obscure competition but to 'recognize competition where, in fact, competition exists.' "[165] Even though the interchangeability of use or cross-elasticity of demand is not immediate, the long run competition between glass and metal containers, caused, for example, by innovation, brings the competition within the proscriptions of section 7.[166]

> Since the purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects of a given acquisition, its contours must, as nearly as possible, conform to competitive reality. Where the area of effective competition cuts across industry lines, so must the relevant line of commerce, otherwise an adequate determination of the merger's true impact cannot be made.[167]

---

159. *Id.* at 17-19.
160. *Id.* at 21-31.
161. 378 U.S. at 457.
162. *Id.* at 453.
163. *Id.* at 450.
164. *Id.* at 453.
165. *Id.* at 452-53, quoting Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962).
166. 378 U.S. at 455.
167. *Id.* at 457.

In analyzing the effects of the merger in this line of commerce, the Court found a probable lessening of competition as a result of the merger. The Court applied the "principle that where there has been a 'history of tendency toward concentration in the industry,' tendencies toward further concentration 'are to be curbed in their incipiency.' "[168] Although Continental and Hazel-Atlas were not actually competing for the same market, they had the potential to do so. Therefore, since this potential to compete existed, and since the container industry had been heading toward heavy concentration, such a merger was struck down as a violation of section 7.[169]

The Court in *Continental Can* re-emphasized the importance of the purpose of the Celler-Kefauver Amendment to section 7 litigation. Both the glass container industry and the metal container industry are highly concentrated; since section 7 seeks to impede economic concentration at its incipiency,[170] the purpose of the statute is properly fulfilled by prohibiting such a merger. With this purpose in mind, the Court delineated a line of commerce which must be questioned as to its economic significance.[171]

Of some import is the fact that the Court did not consider use of the "practical indicia" of *Brown Shoe* to be mandatory. As a result of this decision, it is apparent that such indicia will be used to divide a line of commerce into smaller lines of commerce only when it is necessary to do so in order to more readily find the requisite anti-competitive effect. If the proscribed effect can be found in a larger line of commerce, however, as it was in this case, the Court need not analyze any submarkets. Such an approach is in accord with the holding in the *Van Camp* case[172] that if the requisite illegal effect is found in *any* line of commerce, it is a violation of the Clayton Act.

The Court appears to approach the definition of a line of commerce in *Continental Can* with so great a degree of emphasis on the purpose of finding a market in which the anti-competitive effects are substantial that the usefulness of the concept of a line of commerce is lost. When Congress suggested that a line of commerce should be economically significant,[173] it would seem that the intent was to demarcate any actual area of competition in which the competitive effects of the acquisition might be accurately analyzed so that the Court could reach a realistic decision as to the effect of the acquisition on competi-

168. *Id.* at 461.
169. *Ibid.*
170. S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950).
171. See Comment, *1964 Developments in the Application of Section 7 of the Clayton Act to Horizontal Acquisitions*, 33 Fordham L. Rev. 274, 287-95 (1964); *The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 143, 269-75 (1964).
172. George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929).
173. S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950).

tion. In *Continental Can,* however, it appears that the Court determined that a merger between leading firms in related industries which are highly concentrated is per se illegal; and then the Court delineated a line of commerce in which to identify the illegal effects, as required by the statute.[174]

Moreover, the Court, although it recognized that plastic is in vigorous competition with glass and metal containers, does not include plastic containers in the line of commerce delineated. Plastic surely competes for many of the same end uses as glass and metal containers and may well gain a competitive advantage in the near future as a result of the technological advancements which are being made in that industry. Therefore, it would appear that the Court, in properly considering the purposes of section 7, has so overemphasized the importance of that purpose that it "reads the 'line of commerce' element out of section 7, and destroys its usefulness as an aid to analysis."[175]

B. *Alcoa*

In the second recent case, *United States v. Aluminum Company of America,*[176] the United States brought an action charging violation of section 7 against Alcoa, seeking divestiture of the assets of the Rome Cable Corporation, which Alcoa had acquired through merger.

Alcoa is a completely integrated producer of aluminum and aluminum products. Until World War II, it maintained a monopoly in the American aluminum market.[177] However, as a result of post-war governmental policies fostering competition, other firms entered the integrated aluminum industry.[178] As of 1960, nevertheless, Alcoa was still the largest producer of primary aluminum.[179] Among the wide variety of aluminum products which Alcoa produces are aluminum conductor wire and cable and insulated or covered aluminum wire and cable. These products are designed to be used commercially in the transmission of electricity. Copper wire and cable is the only other product used commercially for such purposes.[180] Bare aluminum conductor is now used for most overhead transmission lines, while

174. See 378 U.S. at 476-77 (Harlan, J., dissenting).
175. *Id.* at 468.
176. 377 U.S. 271 (1964).
177. See United States v. Aluminum Co. of America, 148 F.2d 416, 422-24, 438 (2d Cir. 1945).
178. Brief for Appellant, pp. 4-5, United States v. Aluminum Co. of America, *supra* note 177; Brief for Apellee, pp. 4-5, *id.*
179. Primary aluminum is the plain aluminum ingot after being refined from the bauxite, as opposed to finished products made from aluminum, *e.g.,* aluminum conductor. In 1960, Alcoa produced 38% of the primary aluminum in the United States. Brief for Appellant, p. 4, United States v. Aluminum Co. of America, *supra* note 177.
180. 377 U.S. at 273.

both bare and insulated conductor, aluminum and copper, are used in distribution lines. Insulated copper conductor, however, is the only conductor used in underground lines. In 1958, the last year prior to the merger, Alcoa produced no copper conductor, but produced 32.3% of the bare aluminum conductor, 11.6% of the insulated aluminum conductor, and 27.8% of the broader aluminum line.[181] Alcoa was the leading producer of the broad aluminum conductor line and of the bare aluminum conductor and ranked third in the production of the insulated aluminum conductor.[182]

Rome Cable Corporation was a fabricator of copper and aluminum wire and cable products. Rome's primary production was in copper wire and cable; but, in addition, in 1958, the year prior to the merger, it produced 0.3% of the bare aluminum conductor produced in the United States, 4.7% of the insulated aluminum conductor and 1.3% of the broader aluminum line.[183] As a result, the government sought to prove anti-competitive effects in the broader aluminum conductor line.

At the trial level, three lines of commerce were stipulated: the broad conductor wire and cable market, eneompassing both copper and aluminum, the insulated wire and cable market, both copper and aluminum, and the bare aluminum cable line.[184] The primary issue concerned whether aluminum conductor line, both bare and insulated, and insnlated aluminum conductor line constitute lines of commerce for the purposes of section 7.

In rejecting insulated aluminum conductor as a line of commerce, the district court applied the indicia enumerated by the Supreme Court in *Brown Shoe.* The court found that insulated aluminum conductor was not recognized in the industry as a separate economic entity; that it was functionally interchangeable with copper; that production facilities for both aluminum and copper were interchangeable; that the insulated aluminum conductor had no customers distinct from insulated copper conductor purchasers; and that there were no specialized vendors.[185] The court did recognize, however, that there were price distinctions between the aluminum and the copper cable and that there was no price sensitivity between the two products.[186]

Since insnlated aluminum conductor did not constitute a line of

181. *Id.* at 274.
182. *Id.* at 278.
183. *Id.* at 273-74.
184. A fourth line of commerce, not important for this discussion, was stipulated: conduit (aluminum and steel). United States v. Aluminum Co. of America, 214 F. Supp. 501, 509 (N.D.N.Y. 1963), *rev'd*, 377 U.S. 271 (1964).
185. *Ibid.*
186. *Ibid.*

commerce, the broader aluminum conductor line could not be considered a line of commerce, the court said. For a line of commerce cannot consist of two parts, one of which is a line of commerce and one of which is not. "To constitute a proper line of commerce, same must include the substitutes therefor which are reasonably interchangeable in use and for which there is a cross-elasticity of demand."[187] The court then went on to hold that in the lines of commerce proved, there was no showing of a reasonable probability of a substantial lessening of competition or a tendency toward monopoly.[188]

On direct appeal to the United States Supreme Court,[189] the government argued that the district court erred in its findings as to the relevant lines of commerce and that the proper product markets in which to measure the effect of the merger were the insulated aluminum conductor line and the broader aluminum conductor line. The government admitted the competition between insulated aluminum conductor and insulated copper conductor, but contended that this competition was rapidly disappearing because the price differential was so substantial, the price of insulated aluminum conductor being only fifty to sixty-five per cent of that of an equal copper product.[190] Since copper and aluminum are equally efficient functionally, the choice is based on economic factors. Consequently, aluminum, being cheaper, is rapidly dominating the market for insulated conductor for overhead distribution lines. Even though insulated conductor, both copper and aluminum, may be a line of commerce, the substantial price differential warrants recognition of a submarket of insulated aluminum conductor.[191] In addition, the government argued, regardless of whether insulated aluminum conductor is a line of commerce, the broader aluminum conductor line so qualifies because of its peculiar characteristics as to price and physical makeup in relation to copper conductor.[192]

Alcoa, in response, contended that determining insulated aluminum conductor to be a line of commerce would be inconsistent with the *Brown Shoe* decision. *Brown Shoe*, of course, set out the "practical indicia" to which one might look to determine whether a particular market qualifies as a line of commerce.[193] The use of only one factor in determining a line of commerce, so argued Alcoa, is inconsistent

187. *Id.* at 510.
188. *Id.* at 519.
189. 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958).
190. Brief for Appellant, p. 41, United States v. Aluminum Co. of America, *supra* note 184.
191. *Id.* at 38-46.
192. *Id.* at 47-48.
193. Brown Shoe Co. v. United States, *supra* note 165, at 325.

with an analysis of the entire economic situation as called for in *Brown Shoe*. Therefore, the price differential alone is not sufficient to justify denominating insulated aluminum conductor as a line of commerce.[194] Alcoa argued, further, that the two aluminum conductor lines could not be combined to form one line of commerce, since insulated aluminum conductor by itself is not a line of commerce, as the district court had held. Also, the bare and insulated aluminum conductor lines do not compete and are not recognized as a separate economic entity so as to qualify as a submarket within the conductor market.[195]

The Supreme Court reversed, holding that insulated aluminum conductor and aluminum conductor generally constituted lines of commerce for purposes of section 7.[196] The Court said that there was sufficient competition between insulated copper and aluminum conductor to find a single product market, but the competition did not preclude dividing the copper and aluminum into submarkets.[197] The vital factors in a choice between copper or aluminum insulated conductor are economic considerations, since aluminum is fifty to sixty-five per cent more expensive than copper.[198] Such a differential in price warrants separating insulated aluminum conductor into a separate submarket: "[W]here insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business."[199]

Since the insulated aluminum conductor is a line of commerce, said the Court, the broader aluminum conductor line likewise qualifies as a distinct line of commerce, because it is distinct from copper conductor in characteristics such as price and use. The Court, therefore, held that both insulated aluminum conductor and aluminum conductor generally constituted proper lines of commerce for the purpose of section 7.[200]

The Court found, moreover, the requisite anti-competitive effects to make the merger a violation of section 7. A basic premise of section 7, the Court said, was that competition will be most vital where there are many sellers, none of which have any significant share of the market. Therefore, where concentration is great, as it is in this case, the importance of preventing even slight increases in concentration

194. Brief for Appellee, pp. 30-38, United States v. Aluminum Co. of America, *supra* note 184.
195. *Id.* at 28-29.
196. 377 U.S. at 277.
197. *Id.* at 275.
198. *Id.* at 276.
199. *Ibid.*
200. *Id.* at 277.

and preserving the possibility of eventual deconcentration is so great as to be violative of section 7. Oligopolistic markets create a likelihood of collusion which can be lessened or eliminated by small but significant competitors.[201]

It is understandable that the Court would be very suspicious of any acquisitions made by Alcoa in view of the monopolistic history of the aluminum industry. The industry was still highly concentrated and even the acquisition of a small competitor could have a substantial effect on competition, especially when that small competitor has technological skills needed by the larger acquirer.

Of note in *Alcoa,* as it was in *Continental Can,* is the Court's use of the "practical indicia" of *Brown Shoe.* The Court showed that these indicia were not to be used numerically, that is, that the proposed line of commerce defined by the greatest number of indicia is not necessarily the proper line of commerce in which to analyze the effect of an acquisition. While the line of commerce composed of insulated conductor was valid, the distinct prices of copper and aluminum were, by themselves, "sufficiently significant economically" to justify delineation of insulated aluminum conductor as a separate line of commerce. Upon consideration, this reasoning seems entirely proper, in spite of the fact that insulated copper conductor still retains approximately twenty per cent of the market, for it appears very likely that many utility companies who origiually installed copper are reluctant to change to aluminum because of the cost of complete changeover.[202]

On the other hand, the combining of insulated aluminum conductor and bare aluminum conductor into a general aluminum conductor line has been said to be improper since bare aluminum conductor and insulated aluminum conductor are not reasonably interchangeable in use.[203] It would seem, nevertheless, that both types of aluminum conductors have sufficiently peculiar characteristics as to be considered a single line of commerce under the *DuPont-General Motors* test.[204]

It has also been argued that the Court did not need to analyze the effects of the merger in the broader aluminum conductor line, for a probability of substantial lessening of competition could be found in the insulated aluminum conductor line.[205] A showing of the high degree of concentration and a showing that Rome's superior insulating

201. *Id.* at 280-81.
202. Brief for Appellant, pp. 13-14, United States v. Aluminum Co. of America, *supra* note 184.
203. *The Supreme Court, 1963 Term, supra* note 171, at 273 (1964).
204. 353 U.S. 586 (1957).
205. *The Supreme Court, 1963 Term, supra* note 171, at 274.

techniques could substantially increase Alcoa's share of the market might have been sufficient to render the acquisition unlawful.[206]

VII. CONCLUSION

In section 7 litigation, the government will, of course, advocate a line or lines of commerce in which it can present the strongest case for a substantial lessening of competition or a tendency toward monopoly. Therefore, the government will, in fact, be trying to "gerrymander" the relevant product or services market.[207]

Such action is permissible under the statute. It is not necessary that the proposed market be a primary area of the merging firms' business, as long as it is legally sufficient to constitute a line of commerce. "Acquisitions . . . will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition."[208]

As a consequence, a concern cannot defend itself by advocating another line of commerce as better adapted to measure the effect of the merger. It must prove that the lines of commerce which the government advocates are not valid delineations of a relevant product or services market as it has been interpreted by the courts. In *Continental Can*, for example, the defendant moved to dismiss, not even introducing any evidence, and he argued that the market areas which the government advocated did not have legal sufficiency.[209]

The real problem, of course, is what makes a line of commerce legally sufficient. Throughout the judicial development of the concept, the one idea which has always persisted is that a relevant product or services market must be in accord with "trade realities."[210] This concept is elusive as well, but it does indicate complete analysis of the factual situation. In the two recent cases analyzed, however, the Court seems to have subordinated this policy to one of finding a line of commerce where substantial anti-competitive effects exist.

The keys to the concept of "trade realities" appear to be the various tests which have been used by the courts in demarcating a line of commerce. The purpose of the statute, however, must always be considered. If the case, as presented, is not clear-cut in favor

206. *Ibid.*

207. See Handler & Robinson, *The Supreme Court vs. Corporate Mergers*, FORTUNE, January 1965, p. 165.

208. S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950).

209. United States v. Continental Can Co., 217 F. Supp. 761, 766 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441 (1964).

210. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 257 (1963); Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 811 (9th Cir. 1961).

of either the government or the defendant, the legislative intent of prohibiting concentration at its incipiency will weigh heavily in favor of the government's position.

Of the tests used, the interchangeability of use or cross-elasticity of demand appears to be the most important. It is a measure of the competition between certain products or services.

As for the "practical indicia" enumerated in *Brown Shoe*,[211] it is of importance to realize that the lower courts' analyses in the two recent cases discussed above, in which the courts emphasized these practical indicia, were overturned by the Supreme Court. In *Continental Can*, the Court said that inter-industry competition alone was sufficient to determine a line of commerce,[212] while in *Alcoa*, the Court held that the price differential between insulated copper conductor and insulated aluminum conductor was alone sufficient to demarcate the relevant market.[213] Therefore, it appears that an analysis applying all of these indicia to a fact situation is not always a legally sufficient basis on which to determine a line of commerce, but that the actual competitive situation must be analyzed in each case, sometimes with the aid of any of the indicia which might be found to be present or dominant in that particular case. It must be kept in mind, however, that these factors were originally used by the lower courts at different times as dominant factors,[214] and that dominance by one in a particular factual situation, even though others may be present, will probably be determinative.

As a result, a "line of commerce," for purposes of section 7, will be an area of effective competition as determined by a complete analysis of the factual situation of each case, but if substantial anti-competitive effects appear inevitable as a result of the acquisition, it seems that the Court will delineate the line of commerce so as to forestall such effects and will hold the acquisition in violation of section 7.

WILLIAM HUME BARR

211. Brown Shoe Co. v. United States, *supra* note 165.
212. United States v. Continental Can Co., 378 U.S. 441, 456 (1964).
213. United States v. Aluminum Co. of America, 377 U.S. 271, 276 (1964).
214. See note 128 *supra* and accompanying text.