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DU PONT-GENERAL MOTORS CASE

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On June 3, 1957, the United States Supreme Court, in a four to two decision, held that the du Pont Company's ownership of twenty-three per cent of the voting stock of General Motors had tended to create a monopoly in a line of commerce and thus violated section 7[1] of the Clayton Act.[2] Justice Brennan wrote the majority opinion and Justice Burton, joined by Justice Frankfurter filed a vigorous dissent. Three of the Justices, Clark, Harlan and Whittaker took no part in the consideration or decision of the case. Hence, a possibility remains that the present Court, with all nine Justices participating, might reverse the rules laid down in this decision.

Originally the Government had filed its complaint in 1949 in the Federal District Court of the Northern District of Illinois. As finally amended this complaint named the following defendants:

1. The du Pont Company, which owned twenty-three per cent of the voting stock of General Motors.
2. General Motors Corporation.
3. United States Rubber Company. Directly and indirectly the du Pont family owned eighteen per cent of the voting stock of this defendant.
4. Eight individual members of the du Pont family.
5. Twenty-six additional members of the du Pont family, who were beneficiaries under various trusts owning nine per cent of the voting stock of United States Rubber. This block was part of the eighteen per cent du Pont control mentioned above.
6. Wilmington Trust Company, individually and as trustee under the trusts mentioned above. Directly and indirectly the du Pont family held twenty-four per cent of the stock of this defendant.
7. Christiana Securities Company, a holding company controlled by the du Pont family and owning twenty-seven per cent of the du Pont stock.
8. Delaware Realty and Investment Company, a holding company like Christiana and owning three per cent of the du Pont stock.

In substance the Government alleged in its complaint that these defendants had combined their efforts to secure control over du Pont, General Motors and United States Rubber; that they had created and exploited protected markets for certain products of du Pont and

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1. 38 STAT. 731 (1914), as amended, 15 U.S.C. § 18 (1952).
2. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

United States Rubber to the exclusion of competitive suppliers; and that they had reserved certain areas of production for du Pont to the exclusion of its competitors.

This conduct, the Government charged, constituted a combination and conspiracy to restrain and monopolize interstate trade in violation of sections 1 and 2 of the Sherman Act.[3] Furthermore, the complaint contended, the du Pont acquisition of General Motors stock had tended to create a monopoly in a line of commerce and thus violated section 7 of the Clayton Act.

After a protracted trial the federal district court dismissed the complaint as to all of the defendants.[4] An appeal was then taken by the Government to the Supreme Court but only as to du Pont, General Motors, and the two holding companies, Christiana and Delaware.

In reversing the trial court the majority opinion found there had been a violation of section 7 of the Clayton Act. It declined to rule on the alleged violations of sections 1 and 2 of the Sherman Act, merely stating in a footnote that, "In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act."[5]

Following the reversal, the Court remanded the cause to the district court, "for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute."[6] It may be significant that the majority went on to say that the district courts in framing equitable decrees have "large discretion to model their judgments to fit the exigencies of the particular case."[7]

The *du Pont-General Motors* decision has touched off a wave of criticism and controversy. It has profoundly affected the thinking and the plans of business leaders. Moreover, it has provided new guideposts for lawyers trying to direct their clients through antitrust difficulties. Four principles of law stand out as particularly significant in the majority opinion.

First, the case holds that section 7 of the Clayton Act, even before its 1950 amendment, applied to vertical as well as horizontal stock acquisitions. In support of this proposition the majority opinion states:

> The first paragraph of Section 7, written in the disjunctive, plainly is framed to reach not only the corporate acquisition of stock of a competing corporation where the effect may be substantially to lessen competition between them, but also the corporate acquisition of stock of any corporation, competitor or not, where the effect may be either (1) to restrain

3. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1952).
4. United States v. E. I. du Pont de Nemours & Co., 126 F. Supp. 235 (N.D. Ill. 1954).
5. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 588 (1957).
6. *Id.* at 607.
7. *Id.* at 608.

> commerce in any section or community, or (2) tend to create a monopoly of any line of commerce. The amended complaint does not allege that the effect of du Pont's acquisition may be to restrain commerce in any section or community but alleges that the effect was ". . . to tend to create a monopoly in particular lines of commerce."[8]

It must be remembered that this was a question of first impression before the Supreme Court and the Government had never invoked section 7 against vertical acquisition prior to this action. Moreover, the Federal Trade Commission had said that the section did not apply to vertical acquisitions.[9]

But this set of precedents did not restrain the majority which held:

> This Court has the duty to reconcile administrative interpretations with the broad anti-trust policies laid down by Congress. Cf. Automatic Canteen Co. v. Federal Trade Commission 346 U.S. 61, 74. The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act.[10]

This ruling excited shrill voices of fear and criticism but it will probably register less impact on business than most critics now anticipate. Remember that it applies only to vertical acquisitions effectuated prior to the 1950 amendment of section 7. There had been practically universal agreement that section 7 as amended in 1950 clearly applies to vertical as well as horizontal acquisitions. As the practical difficulties for the Antitrust Division, with its present staff and work load, in probing back before 1950 are considerable, and there are more than enough current cases for investigation, any serious delving into section 7 violations before 1950 seems unlikely.

Also, unamended section 7 applied solely to stock acquisitions and did not cover asset acquisitions before 1950. Of course since 1950 it has been applicable to both kinds of acquisitions.

Further limiting the enforcement of section 7 is the practical difficulty of unscrambling assets when they have been physically scrambled for a period of time. Here the problem of divesting the acquiring corporation of the stock of the acquired corporation becomes almost insuperable. In the *du Pont-General Motors* case the two corporations maintained their separate identities and no physical asset merging occurred. This makes the stock divestiture a much simpler task than it would have been if the two corporations had undergone a physical merger when the General Motors stock was acquired by du Pont.

Even as to stock and asset acquisitions after 1950, the Antitrust

8. *Id.* at 590-91.
9. *Id.* at 590.
10. *Ibid.*

Division must move in the courts with reasonable promptness when assets of the corporations involved become scrambled. Otherwise, the Government finds itself unable to sue effectively because of the difficulties in obtaining divestiture or other adequate remedies.[11] For this reason bills have been introduced in Congress to require advance notice to the Antitrust Division when corporations contemplate mergers and to give the Government power to halt such mergers found to be in violation of our antitrust laws. So far Congress has not enacted such a bill.

A second important rule laid down in this case provides that the situation at the time of suit rather than the situation at the time of the stock acquisition determines whether a violation of section 7 of the Clayton Act has occurred. Counsel for du Pont had contended that section 7 must be construed as applying only to the acquisition of the stock and not to its subsequent holding or use. Moreover, the du Pont argument continued, the passage of thirty years between the acquisition of General Motors stock and the filing of the complaint in 1949 should operate as implied approbation by the Government.

Rejecting this reasoning, the Supreme Court held that it

> misconceives the objective toward which Section 7 is directed. The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending on the circumstances of the particular case.[12]

Of course it only amounts to dictum, but the Court did consider the situation in which the acquisition was made solely for investment (which is expressly exempted from the prohibition contained in section 7) but the acquiring corporation later began to engage in activities prohibited by section 7. In such a setting, the Court stated that "the plain language of Section 7 contemplates an action any time the stock is used to bring about, or in attempting to bring about, the substantial lessening of competition."[13]

This second rule like the first has generated unnecessary fears as to the danger of its backward sweep because there are definite limits on the scope of this rule. It can only apply to stock acquisitions and not to asset acquisitions prior to 1950. Furthermore, in cases involving a scrambling of the physical assets of the merging corporations,

11. Address by Robert A. Bicks, First Assistant, Antitrust Division, Department of Justice, before the Antitrust Section of The American Bar Ass'n, July 13, 1957.
12. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957).
13. *Id.* at 597-98.

whether before or after 1950, a failure of the Government to move promptly may prevent it from securing an adequate remedy.

A third rule enunciated in the majority opinion provides that the Government need not prove an intention to restrain or monopolize to establish a violation of section 7 of the Clayton Act but merely a reasonable probability that the stock acquisition will result in the condemned restraints. As the Court plainly states:

> Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of violation of Section 7 to show that restraint or monopoly was intended.[14]

And then a few lines further the Court states:

> We repeat, that the test of a violation of Section 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The conclusion upon this record is inescapable that such likelihood was proved as to this acquisition.[15]

This rule clearly warns prospective corporate purchasers of the dangers involved in purchasing the stock of another corporation where any of the prohibited activities are likely to result from this acquisition. Unless such purchasers can bring themselves within the exemption of section 7 by showing that the purchase is solely for investment purposes, they must proceed with great caution.

Moreover, there is an evident policy to use this rule vigorously where applicable in antitrust prosecutions. On the strength of this rule the Government has recently filed a supplemental brief in its suit to halt the merger of Bethlehem Steel Corporation and Youngstown Sheet and Tube Company, the second and fifth ranking producers respectively in the steel industry. The original petition was filed in 1956 in the Federal District Court for the Southern District of New York under section 7 of the Clayton Act. In its supplemental brief the Government cites this rule laid down in the *du Pont-General Motors* decision and argues that the proposed consolidation would be illegal even if only a reasonable probability exists that it will result in substantially lessened competition or tend toward monopoly.[16]

A fourth important rule laid down in the *du Pont-General Motors* case provides that a line of commerce may be merely a certain product or products with sufficiently peculiar characteristics and uses to distinguish them from all others of the same class.

14. *Id.* at 607.
15. *Ibid.*
16. Wall Street Journal, Sept. 23, 1957.

In its argument before the Court, du Pont had contended that the line of commerce involved in this case was the total market for all finishes and fabrics. On this basis du Pont could show that in 1947 its sales of finishes to General Motors amounted to a mere 3.5 per cent of the total market and that its fabric sales to the same customer were only 1.6 per cent of all fabrics sold in that year.[17]

But the Supreme Court rejected such a broad relevant market for the purposes of this case, holding that the record showed that: "[A]utomobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them a 'line of commerce' within the meaning of the Clayton Act."[18] The record made by du Pont has considerable evidence of the financial investment and research effort needed to develop the du Pont finishes and fabrics so that they would be distinctly suitable for automotive use, as opposed to the ordinary nonautomotive uses.[19] Such evidence came into the record to convince the Court that du Pont's primacy as a supplier to General Motors arose out of the superior merit of their products but it seems to have affected the thinking of the Court in a quite different fashion.

With this more restricted concept of the relevant market adopted by the Court, the dominant position of du Pont becomes much more striking. As the majority opinion pointed out, du Pont supplied sixty-seven per cent and sixty-eight per cent of the General Motors requirements for auto finishes in 1946 and 1947. In the same years du Pont sold General Motors fifty-two per cent and thirty-eight per cent of its auto fabric purchases. Furthermore, since the corporation normally produces about half the cars sold, the Court went on to say that

> its requirements for automotive finishes and fabrics must represent approximately one-half of the relevant market for these materials. Because the record clearly shows that quantitatively and percentage-wise du Pont supplies the largest part of General Motors' requirements, we must conclude that du Pont has a substantial share of the relevant market.[20]

This definition of a line of commerce under section 7 should be compared with the rule laid down in the famous *Cellophane* case, also involving du Pont.[21] In the *Cellophane* case the Government charged du Pont with violating section 2 of the Sherman Act by monopolizing interstate commerce in this product. During the period involved du Pont produced seventy-five per cent of all the cellophane sold in the United States but cellophane itself constituted less than twenty per cent of the entire production of flexible packaging mate-

17. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).
18. *Id.* at 593-94.
19. *Id.* at 594 n. 12.
20. *Id.* at 596.
21. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

rials. Here the Supreme Court found for du Pont and against the Government because cellophane's interchangeability with other flexible packaging materials sufficed to make it part of the flexible packaging material market.[22] And the Court laid down this rule "that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal."[23]

It must be emphasized that the rule laid down in the *Cellophane* case applied to section 2 of the Sherman Act while the rule developed in *du Pont-General Motors* applied to section 7 of the Clayton Act. Perhaps it is significant that the Court in *du Pont-General Motors* did not see fit to compare the two different rules. For the present at least, it would seem prudent to assume that these rules must be restricted to the respective sections of the Clayton Act and the Sherman Act for which they were developed by the Court. Some commentators hint that the more restricted rule for section 7 may now be applied to contract the relevant market rule laid down for section 2 of the Sherman Act but there is nothing in the *du Pont-General Motors* opinion to support this view.

Of equal import with the four rules laid down in the *du Pont-General Motors* case is the realistic analysis of intercorporate relationships, which pervades the majority opinion. It contrasts markedly with the attitude revealed in the district court opinion, which carefully develops very comprehensive findings of fact on the du Pont-General Motors alliance but refuses to find that one motive in buying General Motors stock was to control a major market for du Pont products.

Here is what the district court says on the subject of motive:

> Raskob's report, the testimony of Pierre S. and Irenee du Pont and all the circumstances leading up to du Pont's acquisition of this substantial interest in General Motors, as shown by the record, establish that the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business.[24]

But the Supreme Court, accepting the findings of fact of the district court, comes to the opposite conclusion:

> The background of the acquisition, particularly the plain implications of the contemporaneous documents, destroys any basis for a conclusion that the purchase was made "solely for investment." Moreover, immediately

22. *Id.* at 400.
23. *Id.* at 395.
24. United States v. E. I. du Pont de Nemours & Co., 126 F. Supp. 235, 242 (N.D. Ill. 1954).

> after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes.[25]

Throughout the opinion the four justices making up the majority indicate a striking awareness of the actualities of corporate practice. This would imply that in future cases of such a character they will examine the factual backgrounds of the corporations involved and draw informed conclusions as to what really happened. They probably will not insist on strict documentary proof of agreements in violation of the antitrust laws when the surrounding circumstances and the conduct of the parties clearly suggest that such agreements exist.

Still unsolved is the problem of designing a proper remedy to eliminate the violation of section 7 found to exist in this case. Acting under the terms of the Supreme Court mandate, the federal district court has already initiated proceedings to determine the necessary and appropriate equitable relief. Upon request of the Court, attorneys for the Government and du Pont appeared before Judge La Buy in Chicago on September 25, 1957.

As attorney for the Government, Mr. George D. Reycraft, told the court that du Pont's counsel had submitted a plan to the Government, which called for lifting of the voting rights from the General Motors stock held by du Pont and restricting the du Pont representation on the General Motors Board of Directors. However, the proposal would permit the voting of this stock on important matters with approval of the Court.

The Government rejected this suggestion as inadequate because it did not call for complete divestiture of the General Motors stock. Attorneys appearing for du Pont requested the Government to submit its proposals for compliance so that du Pont could then offer counter proposals.

As a result the court ordered the Government to file a plan for implementing the Supreme Court decision within thirty days. The court went on to rule further that du Pont should then have sixty days to present its objections and the Government should have another thirty days to reply to the du Pont presentation.

Recognizing the financial and tax implications of this matter, the court appointed two "friends of the court," one to represent the interests of the du Pont stockholders and the other to perform the same function for the General Motors shareholders.[26]

Acting under this order, the Government submitted its proposal on October 25, 1957, in the form of a suggested final judgment.[27] In

25. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 602 (1957).
26. New York Times, Sept. 26, 1957.
27. New York Times, Oct. 26, 1957. The proposed final judgment is set forth in full.

substance it called for du Pont to transfer all of its 63,000,000 shares of General Motors stock to a trustee or trustees to be appointed by the Court. Then, over a ten-year period the trustee would distribute sixty per cent of this huge block of stock in equal annual allocations on a pro rata basis to du Pont stockholders other than Christiana, Delaware and the stockholders of Delaware. While sixty per cent of the du Pont stock is widely distributed among some 153,000 stockholders, the remaining forty per cent is held as follows: twenty-seven per cent by Christiana, three per cent by Delaware and ten per cent by the stockholders of Delaware.

Under the plan Christiana, Delaware and the stockholders of Delaware would not receive their proportionate forty per cent of the General Motors stock held by the trustee. Instead, the trustee would offer this block to the other du Pont stockholders under an option arrangement. Each year the trustee would issue them on a pro rata basis options to purchase one-tenth of this stock and these options would run for one year. All stock, on which the options were unexercised, would be sold by the trustee either at private or public sale. With approval of the Court, the trustee could postpone such sales whenever in his judgment market conditions prove unreasonable.

Christiana and Delaware would also have to convey to the trustee all General Motors stock directly owned by these two corporations. Apparently Christiana does not own any stock at present but Delaware has about 500,000 shares. All of this stock would be handled by the trustee under the same option procedure previously described. Of course the trustee would be obliged to pay over the net proceeds of all stock sold under this option plan to Christiana, Delaware and the stockholders of Delaware according to their beneficial interests.

Furthermore, the Government proposal involves a permanent injunction against du Pont, Christiana and Delaware acquiring or holding directly or indirectly any General Motors stock or exercising or attempting to exercise any influence over General Motors. It would also bar any interlocking directorates or sharing of officers by General Motors on the one hand and du Pont, Christiana and Delaware on the other.

Moreover, the plan would forbid any contract, agreement or understanding between General Motors and du Pont providing for any of the following:

(1) General Motors to purchase any specific percentage of its requirements of any product from du Pont.

(2) Granting of exclusive patent rights by either company to the other.

(3) du Pont to have either first or preferential right to manufacture or sell any chemical discovery made by General Motors.

(4) Joint ownership or operation of any commercial or manufacturing enterprise.

During the ten-year trusteeship dividends paid by General Motors on the stock still held by the trustee would be paid over to du Pont, Christiana and Delaware in proportion to the amounts of stock originally transferred by them to the trustee. And stockholders of du Pont, other than Christiana, Delaware and stockholders of Delaware, would receive proxies from the trustee authorizing them to vote General Motors stock still held by the trustee. Apparently, each stockholder would be entitled to vote the number of shares that he would eventually receive at the end of ten years if he exercised all of his options.

Analysis of the Government's plan reveals one dominant objective—to eliminate every vestige of du Pont control over General Motors. However, it does temper considerably the financial and tax consequences, which would have resulted if the court had forced du Pont to sell all of its General Motors stock at once. At closing prices for January 2, 1958, the 63,000,000 shares amounted to $2,165,000,000, probably an indigestible amount even under the most favorable conditions.

Originally, the court had ordered du Pont to submit counter proposals by December 24, 1957, or sixty days after the Government filed its plan. However, a motion by the du Pont stockholders requesting that the plan be submitted to the Internal Revenue Service for a ruling as to the tax consequences received court approval on November 21, 1957.[28] Then on December 17th the court granted du Pont a delay in filing its answer until after the Internal Revenue Service issues the requested ruling.[29]

Even under the most favorable tax ruling du Pont may still oppose the Government's plan as too drastic a remedy. Giving up all of its General Motors stock means surrendering about one-half of the total assets of du Pont, which normally account for a substantial share of the corporation's revenue. In 1956, for example, du Pont earned $8.20 per share on its stock and the dividends from General Motors stock amounted to $2.55 per share.

If the Government and du Pont can agree on a solution, the Court will probably approve it. But if they fail to agree and the Court imposes a remedy fundamentally distasteful to either party, an appeal will probably follow. Perhaps the Supreme Court may still have to formulate the appropriate equitable relief, which it requested of the federal district court in Chicago.

28. *Id.*, Nov. 22, 1957.
29. *Id.*, Dec. 18, 1957.