Cornell Law Review

Volume 52
Issue 4 *Summer 1967*

Article 7

Section of Country as a Subsidiary Issue in Litigation Brought Under Section 7 of Clayton Act

Russell J. Guglielmino

SECTION OF THE COUNTRY AS A SUBSIDIARY ISSUE IN LITIGATION BROUGHT UNDER SECTION 7 OF THE CLAYTON ACT

*United States v. Pabst Brewing Co.**

A careful reading of the Celler-Kefauver Amendment to Section 7 of the Clayton Act indicates the crucial importance of economic market analysis in litigation brought under that section. Section 7 prohibits mergers between two corporations subject to the jurisdiction of the Federal Trade Commission "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."[1]

In actions brought under amended section 7, the Government has been required to prove (*1*) an appropriate line of commerce, (*2*) a relevant section of the country, and (*3*) reasonable probability of a substantial lessening of competition within the line of commerce and section of the country.[2] Line of commerce defines the product market[3] and section of the country defines the geographic market.[4] Together they comprise what is known as the "relevant market,"[5] in which the anticompetitive effects of a merger must be tested.[6] The nature of the proof involved clearly emphasizes the importance of careful market analysis.

The recent case of *United States v. Pabst Brewing Co.*[7] has altered this basic test. Despite the logical necessity of careful market analysis in section 7 actions, *Pabst* has deemphasized its importance in favor of a presumptive-illegality approach. The result is a deviation from legislative intent in enforcing amended section 7, together with an unwarranted extension of governmental power.

---

* 384 U.S. 546 (1966).

1 Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending Act of April 31, 1914, ch. 323, § 19, 38 Stat. 731 (1914).

2 United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181 (S.D.N.Y. 1960); accord, Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 804 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 527 (2d Cir. 1958); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 583 (S.D.N.Y. 1958).

3 United States v. Bethlehem Steel Corp., supra note 2, at 588. The term "product market" means the relevant market in terms of substitutability of products. United States v. Aluminum Co. of America, 377 U.S. 271, 283 (1964) (dissenting opinion). For example, if Corporation *A* manufacturing product *a* merges with Corporation *B*, which makes product *b*, and *a* can be substituted for *b* by the consumer, the product market includes both products. On the other hand, if *a* cannot be substituted for *b*, the products are not in competition with one another, and there is no product market which includes both *a* and *b*. "Product market" and "line of commerce" are interchangeable terms.

4 The "geographic market" defines the relevant market in terms of substitutability of production facilities. United States v. Aluminum Co. of America, supra note 3. If Corporations *A* and *B* manufacture the same product, the issue is whether the facilities of the corporations are in such a geographic relationship with the consumer that he may choose whether to buy from either *A* or *B*. If he has this choice, the production facilities of *A* are said to be substitutable for those of *B*, and the corporations are contained within a single geographic market. If the consumer does not have this choice, the corporations are operating in different geographic markets and are not competing with one another. "Geographic market" and "section of the country" are equivalent.

5 See Crown Zellerbach Corp. v. FTC, supra note 2; American Crystal Sugar Co. v. Cuban-American Sugar Co., supra note 2.

6 E.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963); see Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); Bock, Mergers and Markets 85 (3d ed. 1964).

7 384 U.S. 546 (1966).

In *Pabst* the Government charged that by acquiring Blatz's Brewing Company, Pabst had violated amended section 7. At the trial,[8] the parties agreed that the continental United States was a relevant section of the country. The Government attempted to prove that the state of Wisconsin, and the tri-state area of Michigan, Illinois, and Wisconsin were also relevant sections of the country. At the close of the Government's case, the district court held that the only relevant section of the country, in terms of competition in the beer industry, was the continental United States, and that the Government had failed to prove that competition would suffer in the national market as a result of the acquisition.[9]

On appeal the United States Supreme Court reversed and remanded, holding that:

> [W]hen the Government brings an action under §7 it must . . . prove no more than that there has been a merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce *"in any section of the country."* . . . Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every §7 case which is whether a merger may substantially lesson competition anywhere in the United States.[10]

Justices Douglas, Harlan (joined by Justice Stewart), White, and Fortas wrote concurring opinions. Mr. Justice Fortas stated that "'unless both the product and the geographical market are carefully defined, neither analysis nor result in antitrust is likely to be of acceptable quality.'"[11] Justice Harlan, feeling that "the Court's opinion . . . appears to emasculate the statutory phrase 'in any section of the country,' "[12] made a thorough analysis of the facts and concluded that both Wisconsin and the tri-state area were relevant sections of the country.[13] Mr. Justice White concurred only "insofar as . . . [the Court] holds the merger of Pabst and Blatz may substantially lessen competition in the beer industry in the Nation as a whole."[14]

While all five concurring Justices agreed with the disposition of the case, four of them (Harlan, Stewart, White, and Fortas) disagreed with the language of the majority which relegated "section of the country" to a subsidiary role. It is this language which creates the problem; it therefore provides a starting point from which to analyze the direction taken by the courts in determining "section of the country" since the 1950 Celler-Kefauver Amendment, and to predict the probable impact of *Pabst* on future antitrust litigation.

Legislative History of "Section of the Country"

As enacted in 1914, section 7 prohibited corporate mergers "where the effect of such acquisition may be to substantially lessen competition between the corporation . . . so acquired, and the corporation making the acquisition, or to

---

8 United States v. Pabst Brewing Co., 233 F. Supp. 475 (E.D. Wis. 1964), rev'd, 384 U.S. 546 (1966).
9 Id. at 488-89.
10 United States v. Pabst Brewing Co., 384 U.S. 546, 549-50 (1966).
11 Id. at 562 (concurring opinion).
12 Id. at 555 (concurring opinion).
13 Ibid.
14 Ibid.

restrain such commerce in any section or community . . . ."[15] Since the competition which exists between the acquired and acquiring companies is necessarily eliminated by a merger, a strict interpretation of the original section might have resulted in the prohibition of all horizontal mergers. Apparently to avoid this result, courts judicially deleted the "acquired-acquiring" test, instead testing horizontal mergers solely in terms of the effect of the merger on the industry as a whole.[16] This "industry-wide-market" test gave way to the more refined "relevant-market" test of the Celler-Kefauver Amendment. Both tests are based upon the same principle, requiring that anticompetitive effects of a merger be measured in a defined market area.

The basic policy aims of the Celler-Kefauver Amendment were the prevention of economic concentration through mergers and the protection of competition. A secondary and sometimes conflicting goal was the protection of the independence of small businessmen.[17] These policy aims were to be effectuated by broad application of the amended section to acquisitions which are economically significant.[18] In order to exclude those mergers which are economically *insignificant*, Congress deleted the words "or community," which had appeared in the original act. This alleviated the fears of some members of Congress that mergers between two minor companies in a small town would fall within the amended section 7.[19] It also illustrated "Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant 'section' of the country."[20]

Suggested Tests for Defining "Section of the Country." Though the underlying policy was carefully elucidated, the congressional reports on the amendment to section 7 properly refrained from establishing inflexible standards for defining "section of the country:"

> What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section . . . .[21]

---

15 Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914) (now Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964)).

16 Note, "Section 7 of the Clayton Act: A Legislative History," 52 Colum. L. Rev. 766, 769 (1952); see, e.g., International Shoe Co. v. FTC, 280 U.S. 291 (1930); V. Vivaudou, Inc. v. FTC, 54 F.2d 273 (2d Cir. 1931); Aluminum Co. of America v. FTC, 284 Fed. 401 (3d Cir. 1922), cert. denied, 261 U.S. 616 (1923).

17 S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950); 96 Cong. Rec. 16506-07 (1950) (remarks of Senator O'Conor); 95 Cong. Rec. 11484-507 (1949). The Celler-Kefauver Amendment also filled a specific loophole in § 7, which had prohibited a "corporation engaged in commerce . . . [from acquiring] directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce . . . ." Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914), by adding: "and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations . . . ." Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

18 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); S. Rep. No. 1775, supra note 17, at 4297; see Handler & Robinson, "A Decade of Administration of the Celler-Kefauver Antimerger Act," 61 Colum. L. Rev. 629, 664 (1961); Comment, 46 Ill. L. Rev. 444, 454-55 (1951).

19 S. Rep. No. 1775, supra note 17, at 4; 96 Cong. Rec. 16456 (1950) (remarks of Senator Kefauver); 95 Cong. Rec. 11488 (1949) (remarks of Congressman Celler); Note, "Section 7 of the Clayton Act: A Legislative History," 52 Colum. L. Rev. 766, 779 (1952).

20 Brown Shoe Co. v. United States, supra note 18.

21 S. Rep. No. 1775, supra note 17, at 5.

This pragmatic, factual approach to the definition of "section of the country" emphasized that geographic market selection must be made on the basis of commercial realities, and left the issue to be decided by the courts on a case-by-case basis.[22]

Although the Senate Report did not create inflexible standards for defining "section of the country" in an individual case, it did suggest alternative bases which might be used to define a section. On the one hand, a section may be the area in which a significant proportion of trade in a particular line of commerce is carried on. On the other hand, it may be an area which is so isolated from other areas by peculiar economic factors that it is "not affected by the trade in that product in other parts of the country."[23] It is primarily this second alternative standard which has been used by the courts to define "section of the country."[24]

The Second Alternative Standard. Under the second alternative standard suggested by the Senate Report,[25] the geographic market in a section 7 action is an area of such size that a manufacturer or distributor outside the area cannot compete effectively for customers within the area.[26] Under this test, unique economic factors must exist which isolate the relevant section from other geographic markets.[27] "The geographic structure of supplier-customer relations"[28] is of primary importance in determining the section. Elements of this relationship which the courts will find germane are the producer's proximity to other producers, product perishability and freight rates for its transportation,[29] the convenience of doing business with the defendant corporation rather than with one of its competitors,[30] the availability of alternative sources of supply to the customer,[31] and the relative difficulty or ease of entry into the market for new competitors.[32] Where these factors exist so as to economically isolate one

[22] Ibid.; see Brown Shoe Co. v. United States, supra note 18, at 336-37.

[23] S. Rep. No. 1775, supra note 17, at 6.

[24] A few of the more significant cases decided by the use of this standard are United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Erie Sand & Gravel Co. v. FTC, 291 F.2d 279 (3d Cir. 1961); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958); United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965).

[25] S. Rep. No. 1775, supra note 17, at 6.

[26] See, e.g., United States v. Penn-Olin Chemical Co., 217 F. Supp. 110, 120-22 (D. Del. 1963), vacated and remanded, 378 U.S. 158 (1965), complaint dismissed on remand, 246 F. upp. 917 (D. Del. 1966), cert. granted, — Sup. Ct. — (1967).

[27] This separation of geographic markets is necessarily artificial in one sense because of the inability to realistically chart a dividing line between markets. As one travels from the center of the section as defined by this test, where the factors prohibiting entry from without are most prominent, toward the border of the section, the possibilities for entry increase, until at some point it is quite probable that those outside the section will be able to compete effectively with some of those within. This problem was not considered significant for antitrust purposes in United States v. Philadelphia Nat'l Bank, supra note 24, at 359-60 n.37.

[28] Id. at 357.

[29] Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 817 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962); United States v. Penn-Olin Chemical Co., supra note 26, at 121; cf. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 331-33 (1961).

[30] United States v. Philadelphia Nat'l Bank, supra note 27, at 358; Crown Zellerbach Corp. v. FTC, supra note 29.

[31] United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 916 (S.D.N.Y. 1965).

[32] For an analysis of the effect of this factor on choice of section, see United States v. Manufacturers Hanover Trust Co., supra note 31, at 916-17.

geographic area from all others, that area is a section of the country, or an area of effective competition,[33] according to the second alternative standard. After passage of the Celler-Kefauver Amendment, it remained for the courts to determine what part this concept was to play as a practical matter in the trial of an antitrust action.

Judicial History of "Section of the Country"

In *United States v. E.I. du Pont de Nemours & Co.*,[34] a case in which the line of commerce was at issue, the Court held that determination of a "relevant market" is a *necessary predicate* to the finding of a violation of section 7.[35] Although *du Pont* was decided under the old section 7 and dealt specifically with the determination of a relevant product market, this proposition was adopted as a valid standard in later cases decided under the amended section,[36] and was extended to encompass the necessity of finding a relevant geographic market.[37]

The Brown Shoe Decision. Not until 1962, in the leading case of *Brown Shoe Co. v. United States*,[38] did the Supreme Court have occasion to elaborate thoroughly upon the meaning of amended section 7. Brown Shoe, the third-largest seller of shoes in the United States by dollar volume, and in control of 1230 retail outlets, acquired the G. R. Kinney Shoe Company, the eighth largest shoe manufacturer and owner of 350 retail outlets. The Court found the relevant geographic market for testing the horizontal aspect of the merger to be "cities with a population exceeding 10,000 and their environs in which both Brown and Kinney retailed shoes through their own outlets."[39]

Having found this section of the country, the Court adopted the findings of fact of the district court, which had made a detailed analysis of competition in shoe retailing in St. Louis, a city in which Kinney did not operate. These findings were interpolated, together with testimony concerning shoe retailing in forty other cities where Kinney and Brown stores had been in competition with one another, and the Court concluded that the merger would have severe anti-competitive effects in retail shoe sales.[40] It also found that, using the nation

[33] The Senate Report on the Celler-Kefauver Amendment also specifically endorsed the definition of geographic market given in a then recent Supreme Court decision. S. Rep. No. 1775, supra note 17, at 6, citing Standard Oil Co. v. United States, 337 U.S. 293 (1949). In that case, decided under § 7 prior to the amendment, the Court defined the geographic market as an area of effective competition. Standard Oil Co. v. United States, supra at 299-300 n.5. Thus, an area of effective competition is equivalent to a section of the country.

[34] 353 U.S. 586 (1957).

[35] Id. at 593.

[36] Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 804 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 527 (2d Cir. 1958); United States v. Columbia Pictures Corp., 189 F. Supp. 153, 162 (S.D.N.Y. 1960); Bock, Mergers and Markets 85 (3d ed. 1964); Kaysen & Turner, Antitrust Policy 134 (1959); Note, 14 Syracuse L. Rev. 97, 100 (1962).

[37] Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

[38] 370 U.S. 294 (1962).

[39] Id. at 339.

[40] Id. at 340-41. It has been argued that the district court in Brown Shoe, by adopting the cities as sections of the country, and then analyzing the possible effects of the merger in a city which was not a relevant geographic market as defined, totally ignored the geographic market in its analysis. Handler & Robinson, supra note 18. But it appears that the district court did not use St. Louis to analyze anticompetitive effect, but only to determine the pattern of competition in shoe retailing in cities and their surrounding areas. United States v. Brown Shoe Co., 179 F. Supp. 721, 734 (E.D. Mo. 1959).

as a whole as the relevant geographic market, the vertical aspect of the merger would have severe anticompetitive effects.[41]

In terms of defining "section of the country," the *Brown Shoe* opinion contributed significantly to antitrust law in several respects. *First*, the Court emphasized that a geographic market can be as small as a single metropolitan area or as large as the entire nation.[42] *Second*, the Court said that, within a geographic market, there may be submarkets[43] which can be considered appropriate sections of the country.[44] *Third*, the Court went to great lengths to show that each case arising under amended section 7 must be approached pragmatically. "The geographic market selected must . . . 'correspond to the commercial realities' of the industry and be economically significant."[45] *Fourth*, the Court suggested that amended section 7 is broad enough to prohibit a merger even though the merging parties compete only in a small area of the country which is likely to be affected by the merger.[46] *Fifth*, and most significant for the purposes of the present analysis, the Court followed the teaching of *du Pont*[47] in holding that determination of a relevant market is a *necessary predicate* to finding a violation of amended section 7.[48]

Developments After Brown Shoe. The significance of the proposition that determination of a relevant market is necessary to finding a violation of amended section 7 can be appreciated in the context of the fact situation in *United States v. Philadelphia Nat'l Bank*.[49] In that case the decision hinged upon the section of the country found to be relevant. The merger involved was one between the second and third largest of the banks having main offices in the Philadelphia metropolitan area. Statistics presented at trial by the Government established that a sizeable proportion of the business of the two banks was in the metropolitan area.[50] Despite these statistics, the district court held that the entire

---

41 Brown Shoe Co. v. United States, supra note 37, at 334.

42 Id. at 337; accord, United States v. Columbia Pictures Corp., 189 F. Supp. 153, 193-94 (S.D.N.Y. 1960); United States v. Maryland & Va. Milk Producers Ass'n, 167 F. Supp. 779 (D.D.C. 1958), aff'd, 362 U.S. 458 (1960).

43 Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962); accord, Erie Sand & Gravel Co. v. FTC, 291 F.2d 279, 283 (3d Cir. 1961); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 603 (S.D.N.Y. 1958).

44 Pabst is an excellent example of the submarket concept. If it is assumed that the geographic market for beer sales is a regional one, and the area of Wisconsin, Illinois, and Michigan comprises the geographic market, then the state of Wisconsin is a submarket for § 7 purposes, if it corresponds "to the commercial realities of the industry and . . . [is] economically significant." Brown Shoe Co. v. United States, supra note 43, at 336-37. [Citations omitted.]

45 Ibid.

46 Id. at 337 n.65. In two cases since Brown, variations of this situation have arisen. A.G. Spalding & Bros. v. FTC, 301 F.2d 585 (3d Cir. 1962); United States v. Bethlehem Steel Corp., supra note 43. The Senate Report on the Celler-Kefauver Amendment goes even further by indicating that a merger might be prohibited if its effect is substantial in a section where neither of the merging firms is present:

> It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well.

S. Rep. No. 1775, supra note 17, at 6.

47 United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).

48 Brown Shoe Co. v. United States, supra note 43, at 324.

49 374 U.S. 321 (1963).

50 In the words of the district court:

> As of September, 1960, combining the figures for the two banks, commercial and industrial loans outstanding in the four-county area amounted to 57% of the total dollar

northeastern United States, rather than the four-county Philadelphia metropolitan area, was the relevant section of the country.[51]

On appeal, the Supreme Court reversed.[52] It found that the distance a customer will travel to obtain alternative banking service is a function of the size of his banking business. Large borrowers and large depositors bank in a regional or national geographic market while small borrowers and depositors are restricted to their immediate neighborhoods. Thus, drawing the geographic market too broadly would have diluted the effect of the merger on competition for local customers, while drawing it too narrowly would have placed the merging banks in different sections of the country, minimizing the effect of the merger on competition outside the City of Philadelphia. Faced with these two extremes, the Court found that the Philadelphia metropolitan area was a geographic market.[53] This compromise was in line with state law and the findings of three federal banking agencies which had treated the four-county area as a geographic market for their regulatory purposes.[54]

Clearly, the Court's choice of a section was a compromise based upon the predominantly local nature of the business of small and intermediate sized bank customers.[55] It is also clear that the section of the country found to be relevant was only a rough approximation of the actual geographic market in which the two banks operated.[56] While the facts did not fit neatly within either of the suggested standards of the Senate Report,[57] the Court's approach in seeking some rational basis for making a finding of "section of the country" closely follows the spirit of the Report.[58] This approach contrasts strikingly with the Court's language in *Pabst*, holding that "section of the country" is a subsidiary issue.[59]

The Court's treatment of the problem of finding the geographic market in *Philadelphia Nat'l Bank* indicates that no reasonable conclusion can be reached regarding the effect of a merger without a preliminary finding of a relevant section of the country, based upon analysis of the geographic market structure in the industry involved. In order for this analysis to be valid, it must be made with great care. In a recent bank-merger case, the District Court for

amount; loans to individuals . . . 72% . . . ; lines of credit outstanding . . . 49% . . . ; personal trusts . . . 83.1% . . . ; and, demand deposits . . . 75.4% of the total dollar amount.
United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348, 363 (E.D. Pa. 1962).

51 Id. at 363-64.

52 United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

53 Id. at 361-62.

54 Id. at 360-61. Congress did not disapprove this type of market analysis as applicable to bank mergers when it amended the Bank Merger Act. 80 Stat. 7 (1966), amending 12 U.S.C. § 1828(c) (1964); see H.R. Rep. No. 1221, 89th Cong., 2d Sess. (1966). But the amended act does establish new procedures for Government suits to enjoin bank mergers. United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965), and two other bank merger cases pending on the date Philadelphia Nat'l Bank was decided were exempted from the provisions of the new act, with the result that the mergers were authorized, despite adverse judicial findings. The exemption was the basis for two of the dissenting reports on the bill. See H.R. Rep. No. 1221, supra at 27, 31. See also supplemental views of Congressman Ottinger, id. at 39.

55 United States v. Philadelphia Nat'l Bank, supra note 52, at 359 n.36.

56 Id. at 360.

57 See S. Rep. No. 1775, supra note 17, at 6.

58 Ibid.

59 United States v. Pabst Brewing Co., 384 U.S. 546, 549-50 (1966).

the Southern District of New York emphatically asserted the necessity for careful analysis of the relevant market:

> If the product and geographic markets are scrambled, . . . or selected services homogenized and analyzed while others are ignored, . . . probable anti-competitive effects in one market might be offset by pro-competitive consequences in the other, leading us to a false conclusion that on balance the merger may, or may not, restrain trade, substantially lessen competition, or tend to monopoly in either market. Such an approach to the problem is fundamentally unsound . . . .[60]

The Impact of Pabst on Future Litigation

The Pabst Decision. The legislative and judicial history of "section of the country" demonstrates that the purpose of the concept is to provide a geographic market framework within which the anticompetitive effects of a merger can be tested. Set against this background, *Pabst* is illustrative of a trend in recent Supreme Court decisions toward interpreting section 7 more liberally in favor of the Government.

At the trial of *Pabst*[61] the only contested issue was whether Wisconsin and the tri-state area of Wisconsin, Michigan, and Illinois were relevant sections of the country. The facts pointed toward a decision on this issue in favor of the Government. Both Pabst Brewing Company and Blatz Brewing Company were significant competitors in the two contested areas.[62] The percentage of the market occupied by a small number of the largest sellers indicated that the market for beer sales in Wisconsin and the tri-state area was oligopolistic.[63] Sales statistics showed that in the two areas a small number of large firms effectively controlled beer sales.[64] This, in turn, made entry into either of the markets exceedingly difficult for new competitors, leading one to conclude that the two areas were relevant sections, according to the second alternative standard of the Senate Report.

Given the sufficiency of evidence which could have been used to justify a finding that the two contested areas were relevant sections of the country, the question arises as to what the Court meant when it called the determination of "section of the country" a subsidiary issue.

---

[60] United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 918-19 (S.D.N.Y. 1965).

[61] United States v. Pabst Brewing Co., 233 F. Supp. 475 (E. D. Wis. 1964).

[62] United States v. Pabst Brewing Co., supra note 59, at 558 (concurring opinion). In Wisconsin in 1957, the year before the merger, Blatz was the largest seller of beer with 12.81% of all beer sold. Pabst was fourth with 11.14% of the market. The merger made the corporation first in sales in Wisconsin, with 23.95% of the market in 1958 and 27.41% in 1961. In 1957 Pabst made 13% and Blatz made 31% of its total national sales in the state. In the tri-state area, Blatz was the sixth largest seller of beer in 1957, with 5.84% of sales. Pabst was the seventh largest seller, with 5.48% of all sales. Id. at 550-51.

[63] In Wisconsin, the four largest sellers controlled 47.74% of the market in 1957, and 58.62% in 1961. In the tri-state area, the eight largest sellers controlled 58.93% of the market in 1957, and 67.65% in 1961, and the number of competitors selling beer fell from 104 in 1957 to 86 in 1961. United States v. Pabst Brewing Co., supra note 59, at 551.

[64] United States v. Pabst Brewing Co., 384 U.S. 546, 558 (1966) (Harlan, J., concurring). Mr. Justice Harlan points out a number of other factors which bolster the conclusion that the two contested areas were relevant sections of the country. These include marketing techniques used by the beer industry, the high cost of promotion before a new brewer can enter a market, the pattern of regional, statewide, and local distributing networks, and the differences in state beer regulations. Id. at 559-60.

"Section of the Country" After Pabst. In one sense *Pabst* is in line with the trend since *Brown Shoe*. That trend has been based upon increasing emphasis on the ultimate objective of the Celler-Kefauver Amendment—prevention of economic concentration in its incipiency.[65] This emphasis has been accompanied by a corresponding de-emphasis of the standard of proof required of the Government. In turn, this de-emphasis seems to have resulted, in *Pabst* at least, in the complete erosion of the relevant market concept.

In *Philadelphia Nat'l Bank*[66] the Court held that after having proven the relevant market, the Government can prevail by showing that (*1*) the market share occupied by the merged firm approximates thirty per cent of the relevant market, and (*2*) there has been a trend toward concentration in that market, regardless of its cause.[67] Despite *Pabst's* consistency with the general trend, a literal interpretation of the "subsidiary-issue" language of the Court's opinion is curiously inconsistent with the holding in *Philadelphia Nat'l Bank*. In the brewery case, section of the country was subsidiary to the issue of probable anticompetitive effect. In the bank case, on the other hand, analysis of the relevant market, of which a section of the country is one element, provided the only rational basis for a measurement of market share, and market share, in turn, provided presumptive evidence that anticompetitive effects of the merger would be severe. Thus, the *Pabst* Court is apparently destroying the most important analytical concept upon which the *Philadelphia Nat'l Bank* decision is based.

This raises a very serious question as to the meaning of the term "subsidiary."[68] It is possible that Mr. Justice Black, in speaking for the majority, was restating the law as it has been. In one sense, "section of the country" has always been a subsidiary issue. The real issue in any section 7 action is whether the anticompetitive effects of the merger are, or may be, substantial. While, chronologically, determination of the geographic market comes first in order to provide a conceptual geographic framework for testing anticompetitive effect, substantively, the geographic market is merely a vehicle which focuses attention on the major issue. In this sense, it is in fact a subsidiary issue.

This interpretation arguably reconciles *Pabst* and *Philadelphia Nat'l Bank*, but it neglects two significant facts. *First*, three of the concurring opinions in *Pabst* (representing four Justices) express the view that the majority has made a drastic change in the law. *Second*, as pointed out previously,[69] the evidence was sufficient to warrant reversal on traditional grounds, and it was unnecessary for the Court to use the "subsidiary-issue" language. These facts suggest that the majority in *Pabst* meant the opinion to be read literally. Mr. Justice Harlan presents this view in persuasively arguing that the majority opinion "appears to emasculate the statutory phrase 'in any section of the country.' "[70] According to this view, the Court in *Pabst* rejected the proposition that determination of the geographic market is a necessary predicate to consideration of the probability

[65] United States v. Pabst Brewing Co., supra note 64, at 552; Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962).
[66] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
[67] Id. at 363-64.
[68] United States v. Pabst Brewing Co., supra note 64, at 550.
[69] See notes 62-64 supra and accompanying text.
[70] United States v. Pabst Brewing Co., 384 U.S. 546, 555 (1966) (Harlan, J., concurring).

that competition will be lessened, and its decision thereby flies in the face of virtually every case decided under amended section 7.[71]

Further analysis provides additional support for this view. While it is undoubtedly true that "Congress . . . [was] not . . . troubled about the exact spot . . . [where] competition might be lessened,"[72] it does not necessarily follow that Congress intended that the spot need not be carefully defined as a part of the Government's case. As a practical matter, the market-share approach adopted in *Philadelphia Nat'l Bank*[73] necessitates careful market analysis. There is no reasonable alternative to careful market analysis short of presumptive illegality in *all* section 7 cases. The anticompetitive effects of a merger can hardly be measured in the abstract.

The conclusion that the Supreme Court is headed in the direction of presumptive illegality in all section 7 cases by diluting the relevant market concept is fortified by its treatment of "line of commerce" in recent cases.[74] In each of three recent antitrust cases in which the line of commerce was at issue, the Court "has demonstrated a susceptibility for making a finding of a . . . [line of commerce] antagonistic to the challenged merger."[75] By fitting the defendant's

---

[71] See United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 (1964); United States v. Philadelphia Nat'l Bank, supra note 66, at 362; Brown Shoe Co. v. United States, 370 U.S. 294, 335 (1962); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1954); Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 804 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 527 (2d Cir. 1958); United States v. Columbia Pictures Corp., 189 F. Supp. 153, 162 (S.D.N.Y. 1960).

A third possible interpretation of the "subsidiary-issue" language is that the Court wanted to retain the concept of "section of the country" whenever relevant to a showing of anticompetitive effect, but to discard it as a separate element of the Government's case. This is not so much an interpretation supported by the wording of Pabst, however, as it is a possible position to be taken in later cases.

[72] United States v. Pabst Brewing Co., supra note 70, at 549.

[73] See note 67 supra and accompanying text.

[74] United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); cf. United States v. Grinnell Corp., 384 U.S. 563 (1966) (alleging violations of §§ 1 and 2 of the Sherman Act). It is to be recalled that fine of commerce defines the relevant market in terms of close substitutability of products while section of the country defines the relevant market in terms of the close substitutability of production facilities. United States v. Aluminum Co. of America, supra at 283 (Stewart, J., dissenting); see notes 3-4 supra and accompanying text.

[75] Note, 41 St. John's L. Rev. 263, 265 (1966). In the Continental Can case, the Court held that the line of commerce included both aluminum and metal containers, which were manufactured by the merging corporations, but did not include any other type containers. United States v. Continental Can Co., supra note 74, at 457. In the Alcoa case, "although aluminum and copper were virtually interchangeable as conductors and there was competition between them, the Court held that the two products were in separate lines of commerce because there was a price difference between the two materials." Note, 41 St. John's L. Rev. 263, 265 (1966). This allowed the Court to strike down the merger. United States v. Aluminum Co. of America, supra note 74, at 277. In Grinnell, the Court saw "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." United States v. Grinnell Corp., supra note 74, at 573. Compare Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending Act of April 31, 1914, ch. 323, § 19, 38 Stat. 731 (1914) with Sherman Act § 2, as amended, 26 Stat. 209 (1890), 15 U.S.C. § 2 (1964); see United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 667-68 (1964). The Court held that "the entire accredited central station service business . . . [was] a single market . . . ." This business was almost exclusively the defendants'—87% of the "market" as defined. United States v. Grinnell Corp., supra note 74, at 571.

business "neatly into the product . . . market so defined,"[76] the Court obtained large market shares for the defendauts. These market shares justified a finding of presumptive illegality under *Philadelphia Nat'l Bank*.[77] By thus defining the product market, the Court found violations of the antitrust laws which are at least questionable under traditional standards.[78]

The conclusion appears inescapable that the trend is toward "laying down a '*per se*' rule that mergers between two large companies in related industries are presumptively unlawful under §7."[79] This rule of presumptive illegality violates congressional intent when based upon questionable market analysis, since Congress explicitly stated that the Celler-Kefauver Amendment was not intended to prohibit all mergers, but only those which are economically significant. Such significance can only be determined by reference to some specific, carefully defined market.

Conclusion

It is at least arguable that the law under section 7 is clarified by the *Pabst* decision. A corporate defendant in a merger case must be well aware that its chances for victory are slim indeed. Its attorney may feel, as a result of this case, that he need not spend his client's time and money in gathering elaborate statistical evidence of the geographic markets, since the Court is likely to find a section of the country antagonistic to the merger. He might better employ his efforts concentrating on the issue of probable anticompetitive effect. As a result, the trial of section 7 actions will be less lengthy,[80] and the opposing parties will marshall their evidence on the crucial issue.

On the other hand, this apparent clarity in the law has a serious shortcoming. The Court has offered no alternative to careful analysis of market structure except presumptive illegality. From the standpoint of the corporate defendant, this is no alternative at all. If the corporation is a large one, the probability of the merger's being upset will, in effect, be left to the discretion of the Justice Department or the Federal Trade Commission.[81]

*Russell J. Guglielmino**

---

[76] Id. at 587 (Fortas, J., dissenting).

[77] See United States v. Continental Can Co., supra note 74, at 467 (Harlan, J., dissenting); United States v. Aluminum Co. of America, supra note 74, at 281 (Stewart, J., dissenting); United States v. Grinnell Corp., supra note 74, at 585 (Fortas, J., dissenting).

[78] Ibid.; see Cook, "Merger Law and Big Business: A Look Ahead," 40 N.Y.U.L. Rev. 710, 712 (1965); Notes, 41 St. John's L. Rev. 263, 265 (1966), 10 Vill. L. Rev. 734, 804 (1965).

[79] United States v. Continental Can Co., supra note 74, at 476 (Harlan, J., dissenting).

[80] Pabst is illustrative of the calendar problems caused by antitrust litigation. The trial was scheduled so that two months could be allotted on the court calendar. United States v. Pabst Brewing Co., 233 F. Supp. 475, 478 (E.D. Wis. 1964), rev'd, 384 U.S. 546 (1966).

[81] Under Clayton Act § 11, 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964) and Clayton Act § 15, 38 Stat. 736 (1914), 15 U.S.C. § 25 (1964), the FTC and the Attorney General have coordinate responsibility to enforce the antitrust laws.

* Editorial Supervisor, Bruce A. Coggeshall.