Michigan Law Review

Volume 27 | Issue 8

1929

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Recommended Citation
INTERCORPORATE STOCKHOLDING UNDER SECTION 7 OF THE CLAYTON ACT, 27 MICH. L. REV. 931 (1929).
Available at: https://repository.law.umich.edu/mlr/vol27/iss8/7

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INTERCORPORATE STOCKHOLDING UNDER SECTION 7 OF THE CLAYTON ACT.—It is notorious that the Clayton Act was passed in response to misguided popular agitation based upon erroneous notions as to the scope and effect of the Sherman Anti-Trust Law, and in fulfilment of campaign promises voiced not only by Wilson, but embodied in the platforms of all three political parties in 1912. Stevens, "The Federal Trade Commission Act," 4 AMER. ECON. REV. 840; "The Clayton Act," 5 *ibid.* 38; Henderson, THE FEDERAL TRADE COMMISSION, p. 16; Barrett, "The Federal Trade Commission," 81 CENT. L. J., 166-171, 183-189, 201-207; Taft, THE ANTI-TRUST ACT AND THE SUPREME COURT. Even without the perspective of a decade and a half, it must have been apparent that the "trust-busting" measures of 1914 were more politic than efficacious, and that they fell far short of a perfection in economic wisdom and in skilful draftsmanship. Levy, "A Decade of the Federal Trade Commission," 11 VA. L. REV., 21, 111, 196, 278, 372; Henderson, *op. cit., passim.* As usual, the sins of Congress have been visited upon the courts. They have struggled bravely, trying, in spite of the statutes, to reach conclusions free from absurdity. If this has not always been possible, the courts are not entirely to blame.

The regrettable results which the courts have been obliged to reach in deciding cases arising under the Clayton Act are well illustrated in the recent case of *International Shoe Co. v. Federal Trade Commission,* 29 F. (2d) 518, involving sec. 7, which forbids intercorporate stockholding where the effect may be to substantially lessen competition. This was a proceeding to review an order of the Federal Trade Commission directing the International Shoe Co. to divest itself of the stock of the W. H. McElwain Co., found to have been acquired in violation of sec. 7 of the Clayton Act (hereinafter referred to as sec 7), and of the properties of that company taken over through the acquisition of its stock after the Commission had issued its complaint. Since sec. 7 is silent on the acquisition of assets, the International

Shoe Co. obviously acted on the advice of counsel, hoping that the subsequent purchase of assets would validate the illegal stock transfer, and that the case of *Thatcher v. Federal Trade Commission*, 272 U. S. 554, 47 Sup. Ct. 175, 71 L. ed. 405, then pending before the Supreme Court, would be decided favorably to their theory. The court, in the principal case, distinguished *Thatcher v. F. T. C.* on the ground that the transfer of assets in that case was consummated *before* the Commission took any action, and upheld the order of the Commission.

It can not be denied that this deplorable result is consistent with the authorities and flows inevitably from the nature of the legislation. When the purpose of a statute is only vaguely seen, if seen at all, by the legislators, and when the means adopted to achieve that purpose are incomplete, ineffective, and wholly nugatory, it is but natural that the courts should follow the letter of the statute mechanically, going blindly whithersoever the language of the act may lead them. As for the case under discussion, there are a number of facts which do not appear in the opinion, but which throw light upon the absurdities to which sec. 7 has led and may lead. It appears from the report of the Commission, 9 F. T. C. D. 441, that the commissioners divided three to two in their decision. A dissenting opinion by Commissioner Humphrey points out, among other things, that the International Shoe Co. never took the initiative in the transaction, but that it was instigated by the McElwain Co., which at that time was in a failing financial condition, or so the officers thought, and bankruptcy seemed probable; that on the other hand, the International Shoe Co. had a huge number of orders which it was not able to fill, and needed more plants and equipment to increase its capacity; that the assets it acquired were used largely for the purpose of filling these excess orders; that prices were not increased, but were in some cases voluntarily decreased. "The extent of the respondent's sinning," says the dissenting opinion, "in so far as the evidence shows, was that it bought the stock of a competitor at the instance of that competitor, to save such competitor from bankruptcy, and to acquire additional facilities which it badly needed to fill orders that it had already taken."

Thus a transaction which is economically beneficial, and free from any taint of fraud or evil purpose, is set to naught by the courts; the ponderous and costly machinery of a highly organized commission is set in motion to undo a complicated series of business transactions involving millions of dollars—transactions which would have been valid and unassailable if the stock acquired had been exchanged for properties a single day before the Commission filed its complaint. *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619, 47 Sup. Ct. 688, 71 L. ed. 1238. For a shocking example of the lengths to which the courts may go in applying the Clayton Act, see *Aluminum Co. v. F. T. C.*, 284 Fed. 401.

It has been generally assumed by the courts, with notable vagueness of language, that sec. 7, like the rest of the Clayton Act, was intended to nip monopolies in the bud. *Swift & Co. v. Federal Trade Commission*, 8 F. (2d) 595; *Thatcher Mfg. Co. v. F. T. C.*, *supra; Aluminum Co. v. F. T. C.*, 284 Fed. 401. But what has it actually accomplished? Even before the Clayton Act, intercorporate shareholding, when in unlawful restraint of trade, was condemned in several cases under the Sherman Act. *Venner v. N. Y. C. R.*

Co., 164 N. Y. S. 626, 177 App. Div. 296; *Northwestern Consol. Milling Co. v. Callam*, 177 Fed. 786; *United States v. Union Pac. R. Co.*, 226 U. S. 61. Moreover, though the purchase of a controlling interest in a competing corporation would be illegal under the Clayton Act, substantially the same result can be reached lawfully by a purchase of assets. The practical result of the section is therefore no more than to prevent one particular method of corporate consolidation. Henderson, *op. cit.*, p. 39; Harlan and McCandless, THE FEDERAL TRADE COMMISSION, p. 20. Why was this one method singled out? A possible answer might be that it is easier to buy a controlling stock interest than all the properties of a corporation. If so, why is the prohibition in sec. 7 aimed at the acquisition of *the whole* or any part of the stock of another corporation? Is it any easier to buy up all the stock of a corporation than to purchase its assets and business? Are not the two practically equivalent?

Another possible suggestion is that Congress intended to put obstacles in the way of the formation of "bogus independents." If so, sec. 5 of the Federal Trade Commission Act, leveled against unfair methods of competition, would suffice; for "bogus independents" are among the most notorious methods of unfair competition. Stevens, UNFAIR COMPETITION, p. 35, ff. But intercorporate shareholding is not a method of competition at all. Henderson, *op. cit.*, p. 34. The effect, at least as regards horizontal combinations, is to eliminate competition.

As an example of the baffling carelessness with which the act was drawn, it is interesting to observe that an express exception is made in the third paragraph of sec. 7 to permit the formation of subsidiaries or branches and stock ownership in such subsidiaries, "when the effect of such formation is not to substantially lessen competition." The clause quoted renders the exception valueless. For if the effect is *not* to lessen competition, the combination is lawful in any case. Moreover, a corporation that has just been formed can not have been engaged in commerce, and so is outside of sec. 7 anyway. That this paragraph is meaningless is seen clearly in the case of *Swift & Co. v. F. T. C.*, *supra*, where it was evident that the packing company had been considering the formation of branches in the southern states, but had decided to buy up two existing packing concerns instead. The acquisition of stock was held illegal, though the United States Supreme Court reversed the order of divestment of assets acquired on the ground that the Federal Trade Commission was not authorized to order such a divestment of assets and properties acquired through illegal stockholding before complaint filed by the Commission. 272 U. S. 554, 47 Sup. Ct. 175, 71 L. ed. 405.

The moral to be drawn from these cases—at least until the Clayton Act is repealed or amended—seems to be, then, that a large and expanding corporation, desirous of increasing its business, may form subsidiaries in the local territory of small independents and drive them out of business, or that it may absorb them by buying their properties, but that it may not expend as large a sum in buying all their stock unless it uses its stock ownership to effect a transfer of the assets, and does so before the Federal Trade Commission lifts its voice in complaint. M. D.