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Commerce Requirements of the Clayton Act

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COMMERCE REQUIREMENTS OF THE CLAYTON ACT

The Clayton Act of 1914[1] supplemented the Sherman Anti-Trust Act[2] and made substantive changes in the antitrust law,[3] declaring illegal all price discrimination, exclusive dealing and tying contracts, and mergers, when their effect may be "substantially to lessen competition" or "tend to create a monopoly" in "any line of commerce."[4] Like the Sherman Act, the original Clayton Act was directed primarily to tactics of national trusts;[5] however, changes in American industry and economic institutions after 1914 rendered the Clayton Act ineffective in dealing with many abuses that arose after its passage.[6] In response to these changes, Congress made major revisions of Clayton §§ 2 and 3 in the Robinson-Patman Act of 1936,[7] which was aimed at the predatory practices of the developing large chain stores whose extraordinary leverage over manufacturers threatened the independent merchant and small businessman.[8] The § 7 anti-merger provision of the Clayton Act was extended in 1950 by the Celler-Kefauver Act[9]

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1. Clayton Act §§ 1-26, 15 U.S.C. §§ 12-27 (1971), *formerly* ch. 323, §§ 1-26, 38 Stat. 730 (1914).

2. Sherman Anti-Trust Act §§ 1-8, 15 U.S.C. §§ 1-7 (1971), *formerly* ch. 647, 26 Stat. 209 (1890).

3. D. MARTIN, MERGERS AND THE CLAYTON ACT 31 (1959) [hereinafter cited as MARTIN]; H.R. REP. NO. 627, 74th Cong., 2d Sess. 6-17 (1936) [hereinafter cited as H.R. REP. NO. 627].

4. Clayton Act §§ 2, 3, 7, 15 U.S.C. §§ 13, 14, 18 (1971). See text beginning at note 10, *infra*.

5. "Section 2 [Clayton's price discrimination section] was addressed to an entirely different pricing problem of an earlier era: the predatory tactics of national trusts to slash prices in certain localities for the purpose of eliminating smaller competing sellers." F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 6 (1962) [hereinafter cited as ROWE]. *See* H.R. REP. NO. 627 at 6-13.

6. *See* E. KINTNER, A ROBINSON-PATMAN PRIMER 7 (1970) [hereinafter cited as KINTNER]. *See also* comments of Representative Utterback in H.R. REP. NO. 2287, 74th Cong., 2d Sess. 6-7 (1936) [hereinafter cited as H.R. REP. NO. 2287].

7. 49 Stat. 1528 (1936). For a detailed account of the various bills proposing amendments to the Clayton Act see C. EDWARDS, THE PRICE DISCRIMINATION LAW 21-28 (1959) [hereinafter cited as EDWARDS]; KINTNER at 11-14; ROWE at 11-23.

8. H.R. REP. NO. 2287 at 3. *See* Sen. Doc. No. 4, 74th Cong., 1st Sess. (1935); KINTNER at 7 explains that the FTC was unable to control the purchasing advantages of chain stores under section 2 of the original Clayton Act because the Act authorized unlimited price differentials in the form of quantity discounts.

9. 64 Stat. 1125, 15 U.S.C. § 18 (1950).

to prohibit mergers not only through acquisitions of corporate stock but also through acquisitions of corporate assets.[10]

Sections 2, 3, and 7 of the amended Clayton Act[11] contain differing jurisdictional prerequisites which must be satisfied before a court can consider whether a substantive antitrust violation has occurred.[12] Preliminary to every showing of price discrimination under § 2(a),[13] the plaintiff[14] must demonstrate contemporaneous sales, not merely offers to sell, "in commerce," of commodities of like grade and quality;[15] in suits brought under Clayton §§ 2(d)[16] and 2(e)[17] the plaintiff

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10. MARTIN at 252-53.

11. Clayton Act §§ 2, 3, 7, 15 U.S.C. §§ 13, 14, 18 (1971), formerly ch. 323, §§ 2, 3, 7, 38 Stat. 730 (1914).

12. Jurisdictional requirements in the context of a Clayton Act violation mean more than mere allegations on the complaint that the court has subject matter jurisdiction of the case because the case presents a federal question and the jurisdictional amount is met. The Act names as jurisdictional requirements certain conditions that the plaintiff must demonstrate to the court before the court will consider the lawfulness of the pricing transaction. *See* KINTNER at 35-91.

13. Clayton Act § 2(a), 15 U.S.C. § 13(a): "It shall be unlawful for any person *engaged in commerce, in the course of such commerce,* either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce* . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . ." (emphasis added). Once the plaintiff makes a showing of the jurisdictional prerequisites and price discrimination, a prima facie violation has been established, and § 2(b) of Clayton shifts the burden of rebutting the prima facie case to the person charged with the violation. However, §§ 2(a) and 2(b) of the Clayton Act, 15 U.S.C. §§ 13(a) and 13(b), provide the seller with two defenses.

14. The plaintiff in the action may be either a private party, § 4 of the Clayton Act, 15 U.S.C. § 15, or the United States, Clayton Act § 5, 15 U.S.C. § 16.

15. Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3d Cir. 1939); ROWE at 51-52; KINTNER at 36-40; see text of statute at note 13, *supra.*

16. Clayton Act § 2(d), 15 U.S.C. § 13(d): "It shall be unlawful for any person *engaged in commerce* to pay or contract for the payment of anything of value to or for the benefit of a customer of such person *in the course of such commerce* as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities" (emphasis added).

17. Clayton Act § 2(e), 15 U.S.C. § 13(e): "It shall be unlawful for any

must establish either offers to sell or actual sales "in commerce" of commodities of like grade and quality. Jurisdiction under Clayton Act §§ 2(c),[18] 3,[19] and 7[20] can be exercised whenever the plaintiff proves that any of the conduct prohibited under the provisions occurred "in commerce." The commerce requirements can be classified by their language into two categories: section 2(a) requires that the challenged sales be made during the course of commerce by a person engaged in commerce and that at least one of the sales be in interstate commerce;[21] the language of Clayton Act §§ 2(c),

person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." This section does not contain any commerce requirement, but the courts have cured the "patently inadvertent" omission by reading in the commerce requirement. *E.g.*, Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945); *see* ROWE at 390-94.

18. Clayton Act § 2(c), 15 U.S.C. § 13(c): "It shall be unlawful for any person *engaged in commerce, in the course of such commerce,* to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent . . . or other intermediary" (emphasis added).

19. Clayton Act § 3, 15 U.S.C. § 14: "It shall be unlawful for any person *engaged in commerce, in the course of such commerce,* to lease or make a sale or contract for sale of goods, . . . or other commodities . . . or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" (emphasis added).

20. Clayton Act § 7, 15 U.S.C. § 18: "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 . . ." (emphasis added).

21. Clayton Act § 2(a), 15 U.S.C. § 13(a), see note 13, *supra.* "In order to state a cause of action based on unlawful price discrimination under . . .

2(d), 3, and 7 simply requires that the violation be committed during the course of commerce by someone engaged in commerce.[22]

In *Moore v. Mead's Fine Bread Company*[23] the United States Supreme Court considered the meaning of the complicated commerce requirements of portions of the Clayton and Robinson-Patman Acts. Reversing the intermediate court which dismissed the plaintiff's complaint,[24] the Court affirmed the district court's judgment that the defendant was guilty of selling bread at discriminatory prices in violation of § 2(a) of the Clayton Act.[25] Although the price cutting occurred entirely within New Mexico, the Court found one of the defendant's New Mexico plants was "engaged in commerce" within the meaning of the Acts because the plant made bread deliveries, at the regular price, to purchasers in a neighboring Texas town.[26] The relevant inquiry according to lower federal court decisions had been whether any of the discriminatory purchases under § 2(a) were "in interstate commerce."[27] Yet, Justice Douglas's majority opinion emphasized that the money used to finance the price cutting in New Mexico derived from the bread company's profits from interstate commerce,[28] and stated that an interstate business's use of profits from its interstate sales to finance discriminatory intrastate price cutting satisfied the jurisdictional requirements of § 2(a) of the Clayton Act.[29]

[Clayton Act § 2(a), 15 U.S.C. § 13(a)], it must be alleged that there were two sales made by the same person to two different purchasers at different prices, and that at least one of these sales was in interstate commerce. . . ." Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co., 129 F. Supp. 736, 739 (D.C. Mass. 1955).

22. Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950). See text of statutes at notes 16, 18-20, *supra.*

23. 348 U.S. 115 (1954).

24. 208 F.2d 777 (10th Cir. 1953).

25. 348 U.S. at 120. The Court also concluded that the price cutting violated § 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a).

26. *Id.* at 116.

27. *E.g.*, Atlantic Co. v. Citizens Ice & Cold Storage Co., 178 F.2d 453, 458 (5th Cir. 1949); Danko v. Shell Oil Co., 115 F. Supp. 886, 887 (E.D.N.Y. 1953); Myers v. Shell Oil Co., 96 F. Supp. 670, 675 (S.D. Cal. 1951); Lewis v. Shell Oil Co., 50 F. Supp. 547, 548-49 (N.D. Ill. 1943).

28. 348 U.S. at 119.

29. *Id.* Justice Douglas explained, "The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. . . . If this method of competition were approved, the pattern for growth of monopoly

Moore, however, did not signify the beginning of a more expansive interpretation of § 2(a) of the Clayton Act. The lower federal courts continued to adhere to their pre-*Moore* reasoning, and most have held that to establish actionable price discrimination a plaintiff must prove that at least one of the discriminatory sales crossed state lines.[30] Though the *Moore* decision has not been ignored totally,[31] the circuit courts of appeals generally agree that Justice Douglas utilized unnecessarily broad language in *Moore*, and that the real key to the decision was the interstate character of the sales from New Mexico to Texas.[32] Thirteen years after *Moore*, the Tenth Circuit in *Food Basket, Inc. v. Albertson's, Inc.*[33] suggested that the Supreme Court had sanctioned implicitly the lower courts' restrictive reading of the *Moore* decision by repeatedly denying certiorari in cases subsequent to *Moore*.[34]

While the lower federal courts were adhering to a strict interpretation of the commerce requirements of Clayton Act § 2(a),[35] cases involving §§ 2(c), 2(d), 3, and 7 of the amended Clayton Act[36] suggested that because the commerce language of these sections is less specific than in § 2(a), these sections

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would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants." *Id.*

30. Belliston v. Texaco, Inc., 455 F.2d 175, 178 (10th Cir. 1972); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 208-10 (5th Cir. 1969); The Borden Co. v. F.T.C., 339 F.2d 953, 955 (7th Cir. 1964); Willard Dairy Corp. v. Nat'l Dairy Prod. Corp., 309 F.2d 943, 946 (6th Cir. 1962).

31. Littlejohn v. Shell Oil Co., 456 F.2d 225, 226 (5th Cir. 1972), *rev'd*, 483 F.2d 1140 (5th Cir. 1973), held that "a complaint under the Robinson-Patman Act need not allege that one of the sales involved was interstate in character as long as it charges that interstate sales were used to underwrite allegedly intrastate price cutting."

32. Stough v. May & Co., 484 F.2d 22, 24 (5th Cir. 1973); Food Basket, Inc. v. Albertson, Inc., 383 F.2d 785, 787 (10th Cir. 1967); Willard Dairy Corp. v. Nat'l Dairy Prod. Corp., 309 F.2d 943, 946 (6th Cir. 1962); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265, 267 (7th Cir. 1961).

33. 383 F.2d 785, 787 (10th Cir. 1967).

34. *Id. See, e.g.*, Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 393 U.S. 1042 (1970); Cream Crest-Blending Dairies, Inc. v. National Dairy Prod., 370 F.2d 332 (6th Cir. 1967), *cert. denied*, 387 U.S. 930 (1967).

35. See cases cited at note 30, *supra*.

36. 15 U.S.C. §§ 13(c), (d), (f), 14, 18; see text of these provisions at notes 16, 18-20, *supra*.

are susceptible of a broader interpretation.[37] Hence, violations occurring in connection with intrastate sales usually are sufficient to invoke the court's jurisdiction under these sections if committed by a business engaged in interstate commerce.[38]

In determining whether the commerce requirements of Clayton §§ 2(c), 2(d), 3, and 7 have been met, the courts have implicitly borrowed the jurisdictional analysis used in alleged Sherman Act violations.[39] The Sherman Act declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states. . . ."[40] By judicial interpretation, the commerce requirement of the Sherman Act can be met by the plaintiff's showing that the challenged conduct substantially affects interstate commerce, though the conduct itself might be wholly intrastate.[41] On the other hand, when interpreting the anti-price discrimination provisions of Clayton Act § 2(a), courts uniformly reject the Sherman Act test on the basis of § 2(a)'s narrower language and consistently require that at least one of the discriminatory sales involves interstate purchasing of commodities.[42]

In 1974, the Supreme Court granted certiorari in *Gulf Oil Corp. v. Copp Paving Co.*[43] and for the first time since the 1954 *Moore* decision, considered the commerce requirements of the Clayton Act.[44] Copp Paving Company filed suit against three

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37. Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148 (D. Minn. 1967), 395 F.2d 388 (8th Cir. 1968); Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404 (5th Cir. 1963), J.H. Filbert, Inc., 54 F.T.C. 359 (1957).

38. *Id.*

39. Corn Prods. Refining Co. v. FTC, 324 U.S. 726, 744-45 (1945); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 861 (9th Cir. 1965); McCormack v. Theo. Hamm Brewing Co., 284 F. Supp. 158, 163 (D. Minn. 1968).

40. Sherman Act § 1, 15 U.S.C. § 1 (1971).

41. Burke v. Ford, 389 U.S. 320, 321 (1967); United States v. Women's Sportswear Mfr's. Ass'n, 336 U.S. 460 (1949); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

42. See cases cited at note 30, *supra*. In the context of assessing an alleged Sherman Act violation, the Fifth Circuit in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), recognized the difference between the commerce requirements of Clayton Act § 2(a) and Sherman Act § 1, saying that the commerce language of § 2(a) was "far narrower in scope than the 'effect on commerce' test applicable under the Sherman Anti-Trust Act." *Id.* at 37.

43. 419 U.S. 186 (1974), *cert. granted*, 415 U.S. 988 (1974).

44. The Ninth Circuit had found for the plaintiff on the basis of the

oil companies, suppliers of liquid asphalt in interstate commerce, and two other firms, competing producers and sellers of asphaltic concrete in the Los Angeles area. The Ninth Circuit exercised jurisdiction over the alleged violations of §§ 1 and 2 of the Sherman Act and §§ 2(a), 3, and 7 of the Clayton Act because the asphaltic concrete was produced by firms that sold more than a *de minimis* share of their concrete for use in the construction of local segments of the interstate highway system.[45] Rejecting this "nexus to commerce" theory,[46] the Supreme Court reversed the Ninth Circuit decision.[47]

The Court went beyond a mere declaration that the "nexus to commerce" theory was insufficient to sustain jurisdiction under the facts presented; it considered whether § 2(a) of the Clayton Act should be interpreted according to the Sherman Act's "effect on commerce" test.[48] In rejecting any application of the Sherman Act analysis to § 2(a), the Supreme Court relied on the legislative history of the Robinson-Patman bill.[49] The bill as originally proposed contained specific language making price discrimination unlawful "whether in commerce or not."[50] Congress deleted this language and replaced it with the requirement that "either or any of the purchases involved" must be in interstate commerce.[51] The Court thought this change was significant, though not controlling, and found further support for its position in four decades of circuit court interpretation consis-

defendant's violation of the Sherman Act, Clayton Act, and the Robinson-Patman Act. *In re* Western Liquid Asphalt Cases, 487 F.2d 202 (9th Cir. 1973). The Supreme Court, however, granted certiorari specifically limited "to the questions arising under the Clayton and Robinson-Patman Acts." 419 U.S. at 193.

45. *In re* Western Liquid Asphalt Cases, 487 F.2d 202 (9th Cir. 1973).

46. The "nexus to commerce" theory seems to be an application of the Court's reasoning in cases interpreting the "engaged in commerce" provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1971). *See* Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953); Overstreet v. North Shore Corp., 318 U.S. 125 (1943).

47. 419 U.S. at 199. The Ninth Circuit decision was reversed only as to the Clayton Act and the Robinson-Patman Act issues since the Sherman Act violation was not considered by the court.

48. *Id.* at 202.

49. *Id.* at 200.

50. W. PATMAN, THE ROBINSON-PATMAN ACT 323 (1938); H.R. REP. NO. 8442, 74th Cong., 2d Sess. (1936).

51. H.R. CONF. REP. NO. 2951, 74th Cong., 2d Sess. 6 (1936).

tently rejecting the "effect on commerce" approach and requiring that at least one of the discriminatory purchases cross state lines.[52] *Moore v. Mead's Fine Bread Co.* was reconciled with the later jurisprudence, the Court treating Justice Douglas's broad language as merely indicative of the extent of Congress's commerce power,[53] which the Court concluded had not been exercised to its limits when Congress enacted the jurisdictional requirements of Clayton Act § 2(a).

The Court also considered the jurisdictional requirements of §§ 3 and 7 of the Clayton Act, and in dictum concluded that their legislative history did not support the argument that the broad Sherman test should be used to interpret their commerce requirements.[54] However, the Court avoided a definitive ruling on the jurisdictional requirements of §§ 3 and 7 of the Clayton Act by concluding that regardless of the interpretation placed upon the commerce requirements, the complaint would have to be dismissed because no evidence of an interstate transaction or any effect on commerce had been presented.[55]

Less than a year later, in *United States v. American Building Maintenance Industries*,[56] the Supreme Court took up the jurisdictional question left open in *Copp Paving*, whether the commerce language of § 7 of Clayton could be interpreted according to the "effect on commerce" test of the Sherman Act. The Government sued American Building Maintenance Industries, one of the nation's largest suppliers of janitorial services, claiming the company's acquisition of two janitorial service firms supplying intrastate services violated § 7. The Supreme Court affirmed the trial court's granting of defendant's motion for summary judgment, finding that the complaint did not allege the jurisdictional requirements necessary for a § 7 violation because at the time of the acquisition neither of the two acquired firms was "engaged in commerce" within the meaning of § 7.[57]

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52. 419 U.S. at 200.

53. *Id.* at 200-01 n.17.

54. *Id.* at 201.

55. *Id.* at 202. Citing *United States v. Yellow Cab Co.*, 332 U.S. at 230-34, the Court held: "The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions." *Id.*

56. 422 U.S. 271 (1975).

57. *Id.* at 284-86. The Government appealed directly to the Supreme

Before applying the anti-merger prohibition of Clayton Act § 7, federal courts consistently have required that both the acquired firm and the acquiring firm be "engaged in commerce."[58] Since American Building was so engaged, the issue was whether the jurisdictional prerequisites were met by the acquired janitorial companies' intrastate servicing of businesses engaged in interstate commerce, or by a showing that their acquisition by American Building adversely affected interstate commerce. The Supreme Court held that Clayton § 7 is not coextensive with congressional power under the commerce clause and that the § 7 jurisdictional requirements cannot be equated with those of the Sherman Act.[59] The Court defined "engaged in commerce" as "engaged in the flow of interstate commerce," and "to be engaged 'in commerce' within the meaning of section 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce."[60]

The Court gave three reasons for its narrow interpretation. First, both § 5 of the Federal Trade Commission Act[61] and § 7 of the Clayton Act were enacted during the 63rd session of Congress and were directed toward maintaining free competition;[62] thus, the Court concluded that their commerce language reasonably could be given similar constructions. In 1941, the Supreme Court in *FTC v. Bunte Brothers*[63] had rejected the theory that § 5 of the Federal Trade Commission Act could be used against intrastate firms whose activities merely affected interstate commerce.[64] The Court also cited the legislative history of the 1950 amendments to

Court from the United States district court pursuant to § 2 of the Expediting Act, 15 U.S.C. § 29 (1971). *Id.* at 273 n.1.

58. *E.g.*, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968). See text of Clayton Act § 7 at note 20, *supra*.

59. 422 U.S. at 283.

60. *Id.*

61. 15 U.S.C. § 45 (1971): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." Congress recently replaced the § 5 "in commerce" language with "in or affecting commerce." *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, PUB. L. NO. 93-637 § 201(a), 88 Stat. 2193, 15 U.S.C. § 45 (1975 Supp.).

62. H.R. REP. NO. 2287 at 6-7.

63. 312 U.S. 349 (1941).

64. *Id.* at 351.

Clayton Act § 7 in the Celler-Kefauver Act.[65] By 1950, the lower federal courts had distinguished between "in commerce" and "affecting commerce"[66] and had limited application of Clayton § 7 to situations involving the former.[67] While trying to close the loopholes of § 7 in 1950, Congress left untouched the narrowly interpreted commerce requirement, leaving the impression that Congress did not intend to extend § 7 to the constitutional limits of its power.[68] Finally, the Court was guided by precedent, which uniformly restricted enforcement of the prohibitions of § 7 to mergers in which both the acquired and the acquiring firms were directly doing business in interstate commerce.[69]

Undoubtedly, the rationale of the decision in *American Building* will not be limited to § 7 but will be expanded by analogy to give content to the commerce requirements of §§ 2(c), 2(d), and 3 of the Clayton Act. If so, the difference in the commerce requirements between § 2(a) and §§ 2(c), 2(d), 3, and 7 will have been rendered nugatory. Taken together, *Copp Paving* and *American Building* provide a consistently narrow construction of the jurisdictional commerce requirements of the Clayton Act. They have probably eliminated the possibility of a wider application of the Clayton Act that would result from use of an "effect on commerce" test or by reliance on the broad language of *Moore*, and perhaps have encouraged, in intrastate transactions, predatory practices which Congress made illegal in the interstate sphere.

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65. 422 U.S. 280-81. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1970).

66. A distinction between direct and indirect effects on commerce (i.e. "in commerce" versus "affecting commerce") was made as early as 1935 in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546-48 (1935). *E.g.*, United States v. Wrightwood Dairy Co., 315 U.S. 110, 120-26 (1942). The courts think that Congress has also recognized this difference. In *Bunte Brothers*, 312 U.S. 349, 351 (1941), the Court states that when Congress has regulated local activities through the use of the commerce power it has conveyed its intent explicitly as in 29 U.S.C. §§ 152(7), 159(c), 160(a) (1971), 45 U.S.C. § 51 (1971).

67. 422 U.S. 280.

68. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 13-16 (1949).

69. 422 U.S. at 282. See case cited at note 58, *supra*.