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Of Plates and Shapes: An Antitrust Vignette

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One of the events that persuaded Congress to toughen section 7,[1] the anti-merger provision of the Clayton Antitrust Act, was the 1948 decision of the United States Supreme Court in *United States v. Columbia Steel Co.*,[2] a case brought by the Antitrust Division of the Justice Department against a subsidiary of United States Steel Corporation. That case might never have been brought but for a strong conflict in personality combined with a philosophical difference over antitrust enforcement policy existing between President Truman's Attorney General and the Assistant Attorney General in charge of the Antitrust Division. This vignette relates the circumstances surrounding the filing of that case, the outcome of which played a significant role in the subsequent enactment of a tougher antimerger amendment.[3]

The need for amendment of the Clayton Act became apparent soon after its adoption in 1914.[4] As originally enacted, section 7 of the Act made unlawful the acquisition by corporations of the capital stock of other corporations when such acquisition would restrain trade.[5] The original statute did not, however, make illegal the corporate control of competitors through acquisition of a corporation's assets rather than its stock.[6] Corpo-

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1. 15 U.S.C. § 18 (1976).
2. 334 U.S. 495 (1948).
3. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.33 (1962).
4. *See* Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1976 & Supp. I 1977)). The Clayton Act was a major plank in President Wilson's "New Freedom" program of political reform. *Cf.* N.Y. Times, Dec. 10, 1912, at 8, col. 3 (announcing the completion of the manuscript of Wilson's book, THE NEW FREEDOM). President Wilson regarded section 8 of the Act, which prohibited certain interlocking directorships, as the most important provision. *See* A. MASON, BRANDEIS: A FREE MAN'S LIFE 401 (1946); Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 YALE L.J. 1266 (1950); Special Address to Congress by President Wilson (Jan. 20, 1914), *reprinted in* 1 THE NEW DEMOCRACY 81 (1926) [hereinafter cited as Wilson Address].
5. *See* note 7 *infra*. *See generally* United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).
6. President Wilson was also concerned about acquisitions by individuals

rate lawyers soon discovered this loophole and proceeded to advise clients to acquire control by simply purchasing the assets instead of the capital stock of competitors and customers.[7]

As deficiencies in the Act became apparent, in part as the result of Supreme Court opinions strictly interpreting section 7,[8] the Federal Trade Commission, and subsequently the Antitrust Division, began to recommend legislation to close the loopholes.[9] These recommendations alone, however, did not persuade Congress to make the suggested amendments. The changes did not occur until 1950, after the decision in *Columbia Steel* and about twenty-five years after the Federal Trade Commission had first requested the changes.

In 1946, United States Steel Corporation sought to purchase from the War Assets Administration a government-owned plant in Geneva, Utah.[10] U.S. Steel's acquisition of the Geneva plant was strongly opposed by Wendell Berge, head of the Antitrust Division who so advised his superior, Tom Clark, the Attorney General of the United States.

By 1946, however, Clark and Berge were not getting along. The bad blood between them began a few years earlier when former Attorney General Biddle switched Berge, who was then the head of the Justice Department's Criminal Division, and Clark, who was the head of Antitrust. In other words, Berge got Antitrust and Clark got the less prestigious Criminal Division. Biddle, who did not respect Clark,[11] had received the

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of controlling stock interests in competing corporations. Congress, however, ignored this issue by limiting section 7 to acquisitions by corporations of capital stock. Wilson Address, *supra* note 4, at 87.

7. Moreover, it was widely assumed, even by the Federal Trade Commission, that the original section 7 applied only to acquisitions of the capital stock of *competitors* and not *customers*. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 313 & n.21 (1962). This assumption derived from the fact that the language of the original section 7 prohibited capital stock acquisition by corporations "engaged in commerce . . . , where the effect . . . may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce." Clayton Act, ch. 323, § 7, 38 Stat. 731-32 (1914) (current version at 15 U.S.C. § 18 (1976)). After section 7 was amended in 1950, *see* note 29 *infra* and accompanying text, the Supreme Court held that the original section *did* apply to the acquisition of a customer's capital stock. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

8. *See* Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 291 U.S. 587 (1934); Federal Trade Commission v. Western Meat Co., 272 U.S. 554 (1926).

9. For a review of these recommendations, see Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962).

10. *See* United States v. Columbia Steel Co., 334 U.S. 495, 503-06 (1948).

11. *See* F. BIDDLE, IN BRIEF AUTHORITY 365-66 (1962).

blessing for this game of musical chairs by contacting Senator Tom Connally of Texas, the all-powerful Chairman of the Judiciary Committee. Connally had quickly given his approval, without understanding that the result was a demotion for his protégé, Clark.[12]

It is against this background that the sale of the Geneva plant must be considered. While consideration of the sale was being debated within the Truman Administration in early 1946, a strike was called by the United Steel Workers.[13] Truman desperately wanted the strike settled and it was rumored that U.S. Steel's price was permission to acquire the Geneva plant. This could only be achieved if the Attorney General gave an opinion that the acquisition would not be contrary to antitrust law and policy.[14] Over Berge's strong objections, Clark furnished the requested opinion on June 17, 1946.[15]

About eight months later, U.S. Steel announced its intention to acquire, through its subsidiary, Columbia Steel Company, the assets of Consolidated Steel Company,[16] a West Coast manufacturer that fabricated steel plates and shapes into bridges, tanks, welded pipe, and other products. The announcement came at a time when the Antitrust Division felt frustrated over its seeming inability to take any action to prevent or slow the post-war merger boom, which was then gathering momentum. This frustration resulted largely from the loophole in section 7 of the Clayton Act, a loophole that did not prevent control by acquisition of a corporation's assets. Because of this deficiency in section 7, the author suggested to Berge that the Division might use the Sherman Act in an attempt to block the merger. Berge dispatched a telegram to U.S. Steel suggesting a meeting and stating that the proposed Consolidated Steel acquisition raised serious antitrust questions.

U.S. Steel was very likely aware of the conflict between Clark and Berge. Accordingly, company officials responded directly to Clark and a meeting was arranged in the Attorney General's office. Representing U.S. Steel were Irving Olds,

12. Formal consent of the Senate was not required because the Senate had previously confirmed the appointments of both Berge and Clark as Assistant Attorneys General.

13. *See* 1 H. TRUMAN, MEMOIRS 498-500 (1955).

14. *See* Surplus Property Act of 1944, ch. 479, § 20, 58 Stat. 765, 775 (repealed 1949).

15. *See* United States v. Columbia Steel Co., 334 U.S. 495, 505 (1948).

16. N.Y. Times, Feb. 4, 1947, at 35, col. 6.

Chairman of the Board of Directors; Ben Fairless, President; and Nathan Miller, a former Governor of New York and the Corporation's General Counsel. The Antitrust Division was represented by Berge; Holmes Baldridge, Chief of the General Litigation Section; Harold Wein, an economist; and the author.[17] The meeting was held in the Attorney General's outer office, a huge, handsomely furnished room.[18]

The three representatives from U.S. Steel formed a semicircle in front of Attorney General Clark, who was seated behind the only desk in the room. Governor Miller did most of the talking. In fact, he spoke for nearly an hour without notes. The Governor reminded the Attorney General that the Government had permitted U.S. Steel to acquire the Geneva plant and argued that the Corporation had to be assured an outlet for the basic unfinished steel produced there.[19] Acquisition of Consolidated Steel would give U.S. Steel the assurance of such an outlet. The Governor's argument was as bold as it was candid. Purporting to conclude that the prior acquisition of the Geneva plant *supported* the acquisition of Consolidated Steel, he actually articulated the classic reason for opposing such downward vertical mergers: they may lessen competition by hindering the ability of the acquiring company's competitors to sell their products to the acquired company.[20]

Following Governor Miller's presentation, President Fairless offered reasons for permitting the acquisition that, while impressive in the clarity of their expression, contributed little to the Governor's argument. Toward the end of the meeting, Attorney General Clark promised to notify U.S. Steel promptly of the Justice Department's decision regarding whether or not to file suit to prevent the merger. When the meeting adjourned, Clark retired behind a curtain that separated the outer office from his private office and summoned Berge to follow.

The other Antitrust Division lawyers left the room fearing

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17. Others, including George Haddock, Assistant Chief of the General Litigation Section of the Antitrust Division, may also have been present.

18. While waiting for the Attorney General to enter from his inner sanctum—a more modest-sized corner room adjoining the main office—the author found himself seated on a sofa next to Mr. Olds. Olds was a precisely dressed, highly polished gentleman, more reminiscent of an ambassador than a businessman. The author recalls nervously using the time until the Attorney General arrived to discuss with Mr. Olds the quality and beauty of the office's vast rug, which appeared to approximate the size of a football field.

19. The argument was repeated by President Fairless during the ensuing litigation. *See* United States v. Columbia Steel Co., 334 U.S. 495, 506 (1948).

20. *See generally* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 69-70, 85-88 (1971).

that the Attorney General would decide not to file the suit. From the beginning of his term as Attorney General, Clark had not given the staff reason to believe that he would support vigorous antitrust enforcement.[21] For example, early in his term he ordered that all Antitrust Division investigations would be conducted by the FBI. This was somewhat of a coup for FBI Director J. Edgar Hoover, who had sought control over antitrust investigative work for some time. FBI agents, however, were notoriously unexcited by the comparatively dull work involved in investigating antitrust violations. Moreover, the agents were not trained in the subtleties of antitrust law, and, as might be expected, did not do a particularly imaginative job in conducting the investigations. Accordingly, many of the Antitrust Division staff lawyers regarded the Clark order as a disaster that would seriously impede effective enforcement of the antitrust laws.

Given this background, the Antitrust Division staff was understandably surprised when, just a few minutes after the meeting with the U.S. Steel representatives had ended, Berge told the staff about the Attorney General's decision. In essence, Clark had ordered Berge to file suit immediately and suggested that he put his best man on it. Clark appeared to be furious at U.S. Steel, and with good reason. The dire predictions that Berge had made prior to U.S. Steel's acquisition of the Geneva plant had materialized. Clark had approved an acquisition that led to the very anticompetitive consequences against which Berge—Clark's former rival—had warned.

Attorney General Clark, in authorizing the suit, approved a complaint that went far beyond any previous action. Essentially, the Justice Department's suit constituted an effort to extend the Sherman Act beyond its existing boundaries to embrace mergers that, in spite of the anticompetitive effects, did not even approach monopolization.[22] In retrospect, it appears that Clark was motivated by a desire to demonstrate to

21. After he was elevated to the Supreme Court, most of Justice Clark's opinions and votes favored the plaintiff's position in antitrust cases. For examples of his antitrust opinions, see United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964); White Motor Co. v. United States, 372 U.S. 253, 275 (1963) (dissenting opinion); United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963); International Boxing Club v. United States, 358 U.S. 242 (1959); and Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951). *But see* Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953).

22. The suit had a few precedents involving railroads, but these cases were

his critics that he was as vigorous a trustbuster as was Assistant Attorney General Berge.

Berge's "best man" turned out to be Robert Llewelyn Wright, the son of the famous architect. Earlier in his career as a senior attorney in the Antitrust Division, Wright had shepherded through the district courts complex and difficult antitrust suits against motion picture distributors and producers.[23] Wright promptly instituted the suit against the U.S. Steel subsidiary, lost the case after trial,[24] and filed a direct appeal to the Supreme Court. The Government's argument was presented by Solicitor General Perlman and the Corporation's argument was made by Governor Miller.

Perlman, although a fine man and a popular Solicitor General, made a very poor argument. He appeared to be unprepared, even having difficulty placing the Geneva plant in the correct state. Not long after he began his remarks, the Solicitor General stated that, at the time of the acquisition of the Geneva plant, U.S. Steel had made a "solemn agreement" not to acquire any other steel companies. Chief Justice Vinson reached for his copy of the record and asked the Solicitor General what page of the record contained the agreement. Perlman responded, "Oh, Mr. Chief Justice, the agreement was not in writing, but it was a solemn promise," or words to that effect. The Chief Justice put his copy of the record down and, by his facial expression and posture, indicated a lack of any further interest in what the Solicitor General might have to say by way of argument. In contrast to the poor presentation by the Solicitor General, Governor Miller made a brilliant argument which held the full attention of the Court.

In a five-to-four vote, the Supreme Court decided against the United States. The majority opinion was written by Justice Stanley Reed, widely known as a "swing" Justice. Justice Reed's opinion first considered the acquisition's vertical effects: the alleged elimination of competition between U.S. Steel and its competitors in supplying steel to Consolidated for further fabrication. The opinion concluded that "vertical integration, as

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brushed aside by the Court's opinion in the *Columbia Steel* case. *See* United States v. Columbia Steel Co., 334 U.S. 495, 531 (1948).

23. *See* United States v. Paramount Pictures, Inc., 66 F. Supp. 323, *modified per curiam*, 70 F. Supp. 53 (S.D.N.Y. 1946); United States v. Schine Chain Theatres, Inc., 63 F. Supp. 229 (W.D.N.Y. 1945); United States v. Crescent Amusement Co., 31 F. Supp. 730 (M.D. Tenn. 1943), *aff'd in part, rev'd in part*, 323 U.S. 173 (1944).

24. *See* United States v. Columbia Steel Co., 74 F. Supp. 671 (D. Del. 1947), *aff'd*, 334 U.S. 495 (1948).

such without more, cannot be held violative of the Sherman Act."[25] The opinion then proceeded to outline the factors on which the reasonableness of a vertical acquisition should be judged, and found that the Consolidated Steel acquisition complied with the tests. It was not unreasonable, primarily because the acquisition did not restrain enough trade.[26] Finally, Justice Reed addressed the horizontal effects of the alleged elimination of competition between U.S. Steel and Consolidated Steel in the manufacture of pipe and certain fabricated steel products. Again the opinion concluded that the acquisition would not eliminate enough competition to constitute an unreasonable restraint of trade.[27]

The Antitrust Division fully expected the Supreme Court decision in *United States v. Columbia Steel Co.* to be a serious blow to its hopes of slowing the merger movement. In fact, the decision had the opposite effect. It gave a powerful argument for a new statute to those members of Congress who had been trying to amend section 7 of the Clayton Act in order to tighten its strictures against mergers.[28] They argued that, in light of the Supreme Court's strict interpretation, there was need for an amended statute expressly prohibiting a merger or acquisition that would probably result in a substantial lessening of competition in any line of commerce. Such a merger or acquisition should be prohibited, the congressmen argued, whether it was vertical or horizontal, whether it would have national or only sectional anticompetitive effects, and whether the merger was achieved through the acquisition of capital stock, the acquisition of assets, or otherwise.

The proposed amendments to section 7 were enacted in 1950.[29] By 1962, the Supreme Court was interpreting the new law so as to render the government's attack on horizontal mergers "*the* major success of antitrust enforcement policy since 1950."[30] The interplay of personality and will between two able

25. United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948).
26. *Id.* at 526-27.
27. *Id.* at 529-30.
28. *See* 96 CONG. REC. 16502 (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949).
29. *See* Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125 (current version at 15 U.S.C. §§ 18, 21 (1976)).
30. Address by Federal Trade Commissioner Pitofsky, 12th New England Antitrust Conference, in Boston (Dec. 1978), *reported in* [1978] ANTITRUST & TRADE REG. REP. (BNA), No. 892, at A-24.

and ambitious government lawyers—Tom Clark, the Attorney General, and Wendell Berge, the Assistant Attorney General in charge of the Antitrust Division—had indirectly played a part in persuading Congress to amend section 7 of the Clayton Act in a way that was to have a profound effect on the future market structure in America.