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THE "IN COMMERCE" REQUIREMENTS OF CLAYTON § 7

I. Introduction

There is substantial agreement among the Congress, courts, antitrust enforcement authorities, and commentators¹ that mergers pose significant antitrust problems and, therefore, that § 7 of the Clayton Act,² the principal statutory prohibition against anticompetitive mergers, should be vigorously enforced. However, two recent Supreme Court decisions which significantly limited the jurisdictional scope of § 7 have correspondingly reduced the effectiveness of § 7's impact on mergers. Starting with Gulf Oil Corp. v. Copp Paving Co.,³ the Court held that a federal court does not have jurisdiction under § 2(a) of the Robinson-Patman Act⁴ merely because a company's intrastate activities affect interstate commerce. Then in United States v. America Building Maintenance Industries,⁵ the Court extended the jurisdictional standard articulated in Copp Paving to Clayton § 7; a merger is now subject to § 7 scrutiny only when both the acquired and acquiring firm are engaged in interstate commerce.

The Court based both decisions on a literal interpretation of the "in commerce" language of § 2(a) of the Robinson-Patman Act and § 7 of the Clayton Act. However, an examination of the Court's decisions in light of the intended scope of Clayton § 7 indicates that the Court is merely continuing an antitrust policy popular with the Court's "new antitrust majority." This is a policy which is initially tolerant of mergers and subjects the Government's arguments to close scrutiny.

To assess the effect of this new limitation on federal antitrust law, it is necessary to determine whether the Court's interpretation is consistent with the underlying intent of § 7. Moreover, the practical ramification of these decisions must be explored and analyzed in the context of economic considerations.

II. The Purpose of the Clayton Act

Relying on its decision in Copp Paving, the Supreme Court in American Building narrowly construed the "in commerce" language of § 7 of the Clayton Act.⁷ This reasoning is arguably contrary to the underlying purposes of § 7, especially Congress' initial intent in enacting the entire Clayton Act. The Clayton Act was entitled as "an act to supplement existing laws against unlawful restraints and monopolies,"⁸ indicating that Congress apparently intended to remedy the weakness of the Sherman Act. To understand the underlying intent of § 7, then, it is necessary to discuss the failure of the Sherman Act.

⁵ 95 S. Ct. 2150 (1975).
A. The Inadequacy of the Sherman Act

A major inadequacy of the Sherman Act is its restricted substantive reach. The Act applies only to conduct actually anticompetitive in effect; it cannot reach conduct that is potentially anticompetitive.\(^9\) Thus, a proposed merger violates § 2 of the Sherman Act\(^10\) only when the merging parties initially have such a substantial share of the market that indicates an intent to "combine(d) or conspire(d) with any other person or persons to monopolize any part of the trade or commerce among the several states."\(^11\) Section 2 does not reach combinations which merely threaten to increase what may eventually become a dangerous level of market power if wielded by one firm.\(^12\)

An obvious dilemma arises. On the one hand, if a combination is not subject to judicial scrutiny until it has amassed such a large share of the market to be deemed a monopoly under § 2, it may be difficult to fashion an effective remedy at that point. On the other hand, firms which fall short of possessing a monopoly may still pose significant anticompetitive effects. Preventing monopolies does not adequately redress all antitrust problems.\(^13\)

The language of § 7 reveals Congress' attempt to avoid this inherent limitation in the Sherman Act. It is apparent that in enacting the Clayton Act Congress effected a significant expansion of the antitrust law by reaching practices having only a potential anticompetitive effect.

No corporation engaged in commerce shall acquire . . . the whole or any part of the assets of another corporation also engaged 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.\(^14\)

\(^11\) Id.
\(^12\) United States v. Columbia Steel Co., 334 U.S. 495, 505-06 (1948) (Attorney General determined that an increase to 32.7 percent of the national total of ingots and to 39 or 51 percent within the Pacific area would not violate the statute); United States v. International Harvester Co., 274 U.S. 693 (1927) (64 percent held insufficient); United States v. United States Steel Corp., 251 U.S. 417 (1920) (50 percent held insufficient). In United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945), Judge Learned Hand articulated the following standards: (1) a market share in excess of 90 percent would certainly violate § 2; (2) a market share between 60 and 64 percent might violate § 2; and (3) a share of 33 percent would not violate § 2.
\(^13\) The Supreme Court's adoption of a "rule of reason" approach to the Sherman Act further emasculated its effectiveness. Under this approach, although the statute proscribed every contract in restraint of trade, only those practices which the Court deemed unreasonable were condemned. United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911). To a large extent § 7 was enacted in reaction to this judicial approach. This discontent with the rule of reason was expressed in the 1912 National Platform of the Democratic Party: "We regret that the Sherman Anti-Trust Law has received a judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation." Levy, supra note 8, at 415.
\(^14\) 15 U.S.C. § 18 (1970) (emphasis added). The present language derives from the Celler-Kefauver Amendment of 1950. This does not alter the foregoing analysis, however, since although the substantive criteria of § 7 were strengthened in 1950, the original jurisdictional language of § 7 was retained.
The primary goal of § 2 of the Sherman Act, the prevention of monopolization and its reach, is limited to conduct which actually restrains commerce. The approach of the Clayton Act is somewhat different: it seeks to promote competition by reaching incipient threats to competition.

B. The Celler-Kefauver Amendment

Two changes effected by the 1950 amendment of § 7 of Clayton further reflect an intended expansion of coverage. First, the Celler-Kefauver Amendment deleted from the language of § 7 the "acquiring-acquired" test. Under this test, a combination violated § 7 when any competition was foreclosed because of a merger. This construction prohibited only horizontal mergers, because by definition only these mergers eliminate competition between the merging parties. Because the deletion of the "acquiring-acquired" test avoids an automatic result, the amended § 7 reflects a recognition by Congress that not every horizontal merger ought to be proscribed. Thus, this deletion restricted to a certain extent the substantive reach of § 7. However, by deleting the "acquiring-acquired" test, Congress also expanded the scope of the Clayton Act by prohibiting not only horizontal mergers but also conglomerate and vertical mergers. The amended § 7 was thus accorded a clear expansion of scope; it now reaches all types of mergers which effect economically significant consolidations.

The second significant change effected by the Celler-Kefauver amendment was the deletion of the word "community" from the original language of the statute. The legislative history indicates a clear intent on the part of the drafters that the amended § 7 reach only economically significant combinations. They feared that if "community" was retained, § 7 might be used to condemn

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16 This expansion was given judicial effect in United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957), where the Court noted that the Clayton Act was designed to reach combinations which might threaten competition. See also Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962).
17 For the legislative history of the Celler-Kefauver Amendment, see Martin, supra note 15, at 221; 1950 U.S. Code Cong. Serv. 4293-300; Note, Section 7 of the Clayton Act: A Legislative History, 52 Colum. L. Rev. 766 (1952).
18 The original § 7 read in pertinent part:
That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition 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 in any section or community, or tend to create a monopoly of any line of commerce.
19 "While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies." 1950 U.S. Code Cong. Serv. at 4296. In effecting this congressional purpose, the courts have on occasion recognized that the merger of two relatively small firms might ultimately promote rather than retard competition if the combination of two relatively ineffective competitors results in the creation of a more viable competitor. Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962).
21 Originally § 7 read: "to create a monopoly of any line of trade in any section or community." See note 18 supra.
a merger between two local and economically insignificant firms.\textsuperscript{22} That the word "community" provoked such debate indicates that Congress had no doubt that § 7 as originally enacted did encompass mergers between essentially local firms if such mergers produced anticompetitive effects.\textsuperscript{23} The deletion of "community" does not evidence an attempt to place local mergers entirely beyond the reach of the amended § 7; if this had been Congress' intent, the "any section of the country" language would not have been retained. Rather, the deletion of "community" indicates that, while Congress wanted to include local mergers within the reach of § 7, the effect of such mergers should nevertheless be gauged to an economically significant "section of the country." This again illustrates an intent to reach conduct which would fall short of a Sherman Act violation. The effect of the expansion is not negated by the insistence that such conduct be economically significant.

The intent of Congress seems clear. The Sherman Act, as drafted, was incapable of remedi?ng significant problems of increasing concentration.\textsuperscript{24} The changes in language, the introduction of a less stringent standard of legality, and the deletion of the term "community" were designed to remedy the shortcomings of the original antitrust law.

C. The Dilemma: Congress' Intent Is Not Reflected in the Language of § 7

While the intent of § 7 may seem clear from the legislative history, the language of § 7 is not equally clear. If Congress designed the Clayton Act to supplement the Sherman Act, in at least one significant respect it did not reflect this intention in the statute. As the Supreme Court stressed in \textit{Copp Paving},\textsuperscript{25} there is a crucial difference in the jurisdictional language of the two statutes. The jurisdictional language of the Sherman Act is very broad; § 1 of the Act prescribes "every contract . . . in restraint of trade."\textsuperscript{26} Indeed, the courts have held that a federal court has jurisdiction to reach the merits in a Sherman Act case if the firm is either actually engaged in commerce or if its activities, though locally

\textsuperscript{22} "The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town." 1950 U.S. CODE CONG. SERV. at 4296.


\textsuperscript{24} Testifying before the congressional committee drafting the amended § 7, Federal Trade Commissioner Robert E. Freer stated:

The facts of record demonstrate that our economy has been evolving in a manner that increasingly contradicts the economic foundations of our institutions and the basic assumptions of our anti-trust laws. This bill affords an appropriate opportunity to [take] the first step toward changing our law to cope with the changing facts and not letting our law against mergers of competing corporations fall further and further behind while concentration of economic power proceeds further . . .

\textit{Quoted in Martin, supra note 15, at 228.}


based, substantially affect interstate commerce.\footnote{27} By contrast, the Clayton Act only prohibits mergers between corporations “engaged in commerce.”\footnote{28}

The language of § 7 is clearly less expansive, but until the American Building\footnote{29} decision there were no cases suggesting that this difference was significant. There is no indication in the legislative history that the draftsmen either in 1914 or in 1950 deliberately selected such language to limit § 7’s proscription to conduct actually occurring in interstate commerce. Indeed, that Congress deleted “community” from the original language of § 7 while retaining “the section of the country” language seems to indicate a clear intent that § 7 reach the conduct of essentially local companies, at least to the extent such regulation is within the constitutional power of Congress.\footnote{30} Furthermore, when § 1 of the Clayton Act defines “commerce,” it uses language substantially similar not only to the language used in the Sherman Act\footnote{31} (“trade or commerce among the several states and with foreign nations. . .”),\footnote{32} indicating that Congress in enacting the Clayton Act intended to exercise its full power under the Constitution. Therefore, when it used the phrase “engaged in commerce” it did not intend to limit the scope of § 7 to preclude the regulation of essentially local activities which substantially affect interstate commerce.\footnote{33}

Any interpretation faithful to this discernible congressional intent, then, should not artificially limit the scope of § 7 as the Supreme Court has apparently done. By scrutinizing American Building and its reliance on Copp Paving more closely, the extent to which the Court has frustrated the underlying purpose of the Clayton Act becomes apparent.

\footnote{27} However, this distinction should be noted: Unless the proscribed conduct falls within one of the per se categories, the court can have jurisdiction only if it is shown that the effect on interstate commerce is substantial. Burke v. Ford, 369 U.S. 320 (1967); United States v. Employing Plasterers Ass’n, 347 U.S. 186 (1954); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Women’s Sportswear Manufacturers Ass’n, 336 U.S. 460 (1949); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945).


\footnote{30} See text accompanying note 23 supra.


\footnote{32} U.S. Const. art I, § 8.


\footnote{34} Why the drafters chose the phrase “engaged in commerce” is not clear. However, the history behind the adoption of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), is perhaps elucidating. There the phrase “in or affecting commerce” was specifically rejected; it has been suggested that this was done because it was anticipated that if such language was adopted this section would be deemed unconstitutional by the Supreme Court. Although there is no similar rejection of the affecting language in the history of § 7, similar considerations might have persuaded Congress not to change this language in 1950. Salomon, The Robinson-Patman Act “Commerce” Requirement: The Emasculation of Moore v. Mead’s Fine Bread, 8 U.S.F.L. Rev. 497, 503 (1974).
III. The Court's Decisions

A. Gulf Oil Corp. v. Copp Paving Co.

In *Gulf Oil Corp. v. Copp Paving Co.*,\(^{35}\) the operator of a plant which manufactured asphalt concrete used to surface highways sued a liquid producer of asphalt and two of its subsidiaries under the Sherman, Clayton, and Robinson-Patman Acts. The defendant's subsidiaries also produced asphaltic concrete, in direct competition with plaintiff. Plaintiff's manufacturing and retailing activities were confined to California. Because concrete weighs a great deal but has a relatively low value and must be quickly laid, the District Court for the Northern District of California concluded that the market for asphalt was necessarily local.\(^{36}\) The court held that it lacked jurisdiction to reach the merits of the Sherman Act claims, because the plaintiff had neither established that he was "in commerce" nor that his activities substantially affected interstate commerce.\(^{37}\) Whether plaintiff had satisfied the "in commerce" requirements of § 2 (a) of the Robinson-Patman\(^{38}\) and §§ 3 and 7 of the Clayton Act\(^{39}\) was not discussed. The Court of Appeals for the Ninth Circuit reversed, finding that the plaintiff had satisfied the jurisdictional requirements of the Sherman Act. Because asphaltic concrete is used in the construction of interstate highways, the Court of Appeals held that anyone who participated in its production can, as a matter of law, be deemed an instrumentality of interstate commerce, and thus "in commerce."\(^{40}\) The Ninth Circuit further reasoned that since the Clayton Act was designed to supplement the Sherman Act, the "in commerce" requirements of all three acts ought to be uniformly interpreted.\(^{41}\)

The Supreme Court reversed the Ninth Circuit and held that the jurisdictional requirements of § 2 (a) of the Robinson-Patman Act were not satisfied.\(^{42}\) The Court rejected the argument that since interstate highways are instrumentalities of interstate commerce, anyone engaged in the production of materials necessary for their construction is as a matter of law "engaged in commerce" within the meaning of § 2 (a).\(^{43}\) The Court concluded that § 2 (a) applies only where the alleged price discrimination resulted from a sale which actually crossed state lines; the "in commerce" requirement was not satisfied by a mere showing that such discrimination substantially affects interstate commerce.\(^{44}\) The Court did not decide whether jurisdiction would have been available over the Clayton §§ 3 and 7 allegations had the plaintiff demonstrated that its activities substantially affected interstate commerce.\(^{45}\)

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\(^{36}\) In re Western Liquid Asphalt Cases, 1972 Trade Cas. at 92,207.

\(^{37}\) Id. at 92,206.


\(^{40}\) In re Western Liquid Asphalt Cases, 487 F.2d 202, 204 (9th Cir. 1973).

\(^{41}\) Id. at 206.


\(^{43}\) Id. at 198.

\(^{44}\) Id. at 199-200.

\(^{45}\) Id. at 202.
The Supreme Court's approach to § 2 (a) of the Robinson-Patman Act in *Copp* was not entirely without precedent. Courts have held that there is no jurisdiction under § 2 (a) unless at least one of the allegedly discriminatory sales actually crossed state lines. There is also, however, contrary authority. For example, in *Moore v. Mead's Fine Bread Co.*, the Supreme Court reversed the Tenth Circuit's findings that the plaintiff had not satisfied the “in commerce” requirements of § 2 (a). There the plaintiff sold bread locally but the defendant operated bakeries in several states. The Court reversed because the defendant did deliver bread across the New Mexico border into Texas and thus fell within the literal requirement of the statute. However, there is language in Justice Douglas' opinion for the majority which suggests that the Court's decision in *Moore* has a broader rationale: local discrimination will fall within the statute whenever such discrimination has been underwritten with the proceeds from interstate commerce. The majority in *Copp* distinguished *Moore* on the ground that the Court there was essentially concerned with commerce power, and not with jurisdiction. Because the inquiry in *Copp* was essentially jurisdictional, the Court was deciding whether Congress proscribed the conduct in question. By contrast, the concern in *Moore* was whether Congress had the requisite constitutional power under the commerce clause to regulate this activity.

The legislative history of § 2 (a) provides admittedly inconclusive support for the Court’s approach in *Copp*. In deciding to exclude the “affect on commerce” theory as a basis for jurisdiction, the Court noted that Congress specifically rejected language which would have broadened the “in commerce” requirements of § 2(a). The Court was not swayed by the argument that Congress deleted the phrase “whether in commerce or not” more in reaction to the *Schechter* case, which had limited federal power under the commerce clause, than because of a conscious decision to exercise less than its constitutional power and thus limit the scope of § 2(a) to nonlocal instances of price discrimination. Rather, the Court narrowly construed the “in commerce” language of § 2(a) because it considered its legislative history to be at best ambiguous and therefore not sufficient justification for departing from the approach followed by the courts since its enactment.

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48 *Id.* at 119.
49 419 U.S. at 200 n.17.
51 419 U.S. at 200.
52 *Id.* at 199-201.
54 The Conference Committee, however, deleted this “effects on commerce” provision, leaving only the “in commerce” language of 2(a). Whether Congress took this action because it wanted to reach only price discrimination or because of its then understanding of the reach of the commerce power, its action strongly militates against a judgment that Congress intended a result it expressly declined to enact.
419 U.S. at 200.
55 419 U.S. at 200.
B. United States v. American Building Maintenance Industries

In *Copp Paving*, the Supreme Court did not decide whether the jurisdictional requirements of Clayton § 7 were satisfied by a showing that the conduct in question had a substantial effect on interstate commerce. *United States v. American Building Maintenance Industries* provided the Court an opportunity to resolve this question.

The Government there brought a civil antitrust action against ABMI, one of the largest suppliers of janitorial services in the country, charging that an acquisition of a competing janitorial service violated § 7 of the Clayton Act. At the time of suit ABMI had 56 branches throughout the country serving over 500 communities in the United States and Canada. In southern California, ABMI held approximately 10 percent of the market for janitorial services. The challenged action was the acquisition of the Benton Companies, two janitorial service firms operating exclusively in southern California which together occupied seven percent of that market. Although the Benton Companies operated only in California, many of their customers were engaged in interstate commerce. Indeed, contracts with such companies as Mobil Oil, Rockwell International, and Teledyne accounted for more than 80 percent of their revenues. The Benton Companies purchased none of their equipment or supplies outside California, but they obtained some of their supplies through a wholesaler who had purchased them in interstate commerce.

In a 6-3 decision, the Supreme Court held that the “in commerce” language of Clayton § 7 did not reach all activities subject to federal commerce power, and that there would be no jurisdiction to consider the merits of a § 7 merger question unless both the acquiring and acquired firms were actually engaged in commerce. The fact that a combination affected interstate commerce was held insufficient to give the court jurisdiction. The Court’s decision thus renders the scope of the Clayton Act less expansive than that of the Sherman Act.

The Government argued that even if *Copp Paving*’s interpretation of “commerce” applied to Clayton § 7, the Court nevertheless had jurisdiction to reach the merits because the acquiring and acquired firms were “engaged in commerce.” ABMI was clearly engaged in interstate commerce, since it operated service offices throughout the country. The more crucial question, however, was whether the activities of the Benton Companies were sufficient to place them in interstate commerce. The Court held that since they did not sell or purchase

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56 95 S. Ct. 2150 (1975).
57 Id. at 2153.
58 Id.
59 Id. at 2158 n. 9.
60 Id. at 2157-58.
61 Id. at 2154.
62 Id.
63 Id. at 2155.
65 The contention of plaintiffs in both *American Building* and *Copp Paving* that they “engaged in commerce” is not entirely unsupported. Cases decided under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1970), have held that maintenance men, window
goods or services directly in interstate commerce, the "engaged in commerce" requirement of § 7 had not been satisfied. That the acquired firms purchased supplies from and provided janitorial services to firms clearly engaged in interstate commerce was held insufficient to meet the "in commerce" requirements of the statute.

In holding that the § 7 "in commerce" requirements are not satisfied by showing that the combination affects commerce, the Court confined itself to examining the language of § 7 in the context of its legislative history. The Court contrasted Clayton § 7 with Sherman § 1 and thought it significant that the latter proscribed "every contract" while the former only applied to corporate acquisitions. The Court felt that this difference in language mandated a stricter construction of the "in commerce" language because it indicated that the scope of § 7 was less expansive than that of the Sherman Act. In the Court's view, this difference in language was more persuasive than the argument that Congress did not intend to limit the jurisdictional scope of a statute designed to bolster existing antitrust legislation. In characterizing the "in commerce" language of the Clayton Act as distinct, the Court concluded that nothing justified its expansion.

Although the Court's opinion in American Building turns almost exclusively on statutory construction, the Court did not directly address the policy implications of its decision. The Court intimated that it perceived no policy considerations which favor a different interpretation of the literal language of § 7. Thus, the Court did not intend to require any change in the Justice Department's enforcement policies. The Court noted that it has never been the policy of the Justice Department to attack intrastate mergers and that its decision is thus con-

washers, and workmen repairing interstate highways were "engaged in commerce or in the production of goods for commerce." Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953); Martin v. Michigan Window Cleaning Co., 327 U.S. 173 (1946); Borden Co. v. Borella, 325 U.S. 679 (1944); Overstreet v. North Shore Corp., 318 U.S. 125 (1943); Kirschbaum v. Walling, 316 U.S. 517 (1942). Admittedly this language differs from the "in commerce" language of the Clayton Act. However, these cases should still be persuasive in that they create almost a per se classification, anyone who is "engaged in commerce or in the production of goods for commerce" is covered by the Act. Such is clearly not the case with Clayton § 7 where the Government must subsequently prove that the acquisition "may substantially lessen competition or tend to create a monopoly." Justice Douglas, dissenting in Copp Paving and American Building, was persuaded that these cases were grounds for holding that these plaintiffs "engaged in commerce." United States v. American Bldg. Maintenance Indus., 95 S. Ct. 2150, 2159 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 208 (1974).

66 95 S. Ct. 2150, 2158 (1975).
67 Id. at 2155.
68 Id. at 2154.
69 Although this was the first case to define the "in commerce" language of Clayton § 7, the Court found support for its position in cases interpreting analogously constructed antitrust provisions, particularly FTC v. Bunte Bros. Inc., 321 U.S. 549 (1941). There the Court held that there was jurisdiction to hear a claim brought under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), only if the alleged violation occurred in interstate commerce. The Court thought that if jurisdiction was extended to conduct which affected interstate commerce, this would encroach upon areas of local concern and as such greatly expand the meaning of § 5. The Court was unwilling to take this step without more explicit instructions from Congress. The "in commerce" language of § 5 has recently been amended to read "in or affecting commerce" to transcend the jurisdictional limits imposed by Bunte Bros. See Magnunon-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-537, § 201, 88 Stat. 2193.
70 95 S. Ct. at 2157 n. 8.
sistent with the remedial aims of § 7. The Court concluded, then, that although the language of § 7 cannot be construed to afford the Court jurisdiction by a showing of substantial affect on interstate commerce, this construction does not render the statute incapable of effecting its initial objective.

IV. The Significance of American Building

A. The Framework

American Building interpreted, as did Copp Paving, the meaning of the phrase “engaged in commerce.” The Court resolved this issue by literally interpreting the statutory language of § 7. In interpreting statutes, it is the Court’s duty to look to the literal language of the statute and, if its interpretation of the language frustrates the law’s original design, it is the Legislature’s duty to remedy the situation. After characterizing the initial design of the Clayton Act and examining the Court’s analysis in Copp Paving and American Building, a crucial question remains unanswered: To what extent has the Court frustrated the initial design of the Clayton Act § 7?

B. The Practical Impact of American Building

In analyzing the practical impact of the Court’s approach, it is crucial to determine what type of mergers are likely to be immune from § 7 scrutiny after American Building. There is some authority in the Court’s opinion for the proposition that the jurisdictional requirements of § 7 will be satisfied if any transaction of the company has actually occurred in interstate commerce. Thus, in a footnote the Court indicated that it would not consider the merger condemned in Von’s Grocery to be exempt from the operation of Clayton § 7. There, the Court found that a merger between two Los Angeles grocery store chains violated § 7. The suggestion that a merger between two local grocery chains would afford the court jurisdiction clearly indicates that only those concerns which have never engaged in interstate commerce would be exempt from the operation of § 7.

71 Id. at 2157. “In sum, neither the legislative history nor the remedial purpose of § 7 of the Clayton Act, as amended and re-enacted in 1950, supports an expansion of § 7 beyond that defined by its express language.” Id.


73 As necessary background to the discussion below, both Copp Paving and American Building were discussed. However, of the two cases, American Building effects the more significant legal development because it is the first case to delineate the jurisdictional language of § 7. Until American Building, only one case had attempted to define the “in commerce” language of § 7; in Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.), cert. denied, 346 U.S. 901 (1953), the court defined § 7 “commerce” to include banking. But even apart from this, American Building is more significant than Copp Paving because, although there is little local sanction against either mergers or price discrimination, the latter is clearly more susceptible to local regulation. Price discrimination clearly injures competition at the local level, whereas the anticompetitive effects of even an essentially intrastate merger will usually be experienced nationwide.

74 95 S. Ct. at 2157 n.8.

1. Exemption of Service Industries from § 7

As a practical matter, the American Building rule may be limited to those entrepreneurial pursuits which require neither complicated equipment nor massive supplies. Logically, the more components necessary to construct the marketable product, the greater the likelihood that the producer will be forced to go outside the state to obtain them. Thus, a prime candidate for exemption from the operation of § 7 would seem to be service industries, which are generally locally oriented and do not have to look outside the state for either product components or distributional services.

If the impact of American Building is limited to the service industry, it would nevertheless be significant. The Government attacked the American Building merger both because of the rapid growth which the service industry is currently experiencing and the appearance of an increasing trend towards concentration within that industry. In its brief, American Building argued that the Government's attack on its merger was unwarranted because of the low barriers to entry in the building maintenance industry, and because an increase in the concentration of that industry did not pose significant antitrust problems. Even if this analysis is accurate, it does not dispose of the issue. The fact that this particular industry poses none of the problems which the Clayton Act was initially designed to cure does not guarantee that difficulties will not exist in other similarly exempted service industries. Thus, American Building allows mergers to go substantially unchecked in a growing sector of the economy and will facilitate the creation of a highly concentrated sector, causing the significant antitrust problems which § 7 was designed to remedy.

2. A Percentage Test as a Viable Alternative

It is not unequivocally clear that the impact of American Building will in fact be limited to service industries. The reference in the Court's opinion to Von's Grocery is somewhat ambiguous. The Court appears to have distinguished Von's Grocery on the ground that the "District Court . . . expressly found that

76 Apart from service industries and other pursuits requiring few inputs, industries particularly favored by local conditions are, as a practical matter, likely to fall outside the scope of § 7.

77 It is true that previous Section 7 cases have involved both acquiring and acquired firms engaged in the flow of commerce. But that past enforcement pattern simply reflects the fact that the government has devoted its limited enforcement resources to areas where the need was most pressing. The rapid growth of the service sector of the national economy is of relatively recent origin and this case is a response to what the record shows is an increasing trend toward concentration in that sector. Brief for Appellant at 36, United States v. American Bldg. Maintenance Indus., 95 S. Ct. 2150 (1975), reprinted in 8 LAW REPRINTS: TRADE REG. SER. 112 (No. 7, 1974-75 Term).

78 Id. at 41-52, reprinted in 8 LAW REPRINTS: TRADE REG. SER., at 169.

79 That a firm is locally oriented and requires few components does not preclude the emergence of barriers to entry. It is true that a locally based service industry is unlikely to enjoy economies of scale, as such pursuits are often by definition labor-intensive, rather than capital- or equipment-intensive. However, some barriers to entry may arise in a locally oriented firm. For example, the local firm may reap the benefits of advertising to the extent a loyal following of customers is established; and it may enjoy cost advantages by virtue of the fact that it was there first. Such advantages deter entry as effectively as do economies of scale.
both of the merging grocery chains directly participated in the flow of interstate commerce because each purchased more than 51% of its supplies outside of California. A question is raised whether this reference indicates that meeting the jurisdictional requirements of § 7 will become a matter of percentages, whereby a federal court will have jurisdiction only if a certain percentage of the company's transactions actually occurred in the course of interstate commerce. The Supreme Court has previously applied such criteria in deciding whether a merger violated § 7.

If this approach is followed, American Building will certainly exempt a large number of mergers from the operation of § 7. Under this numerical standard, a nationally based firm could acquire firms in a number of states so long as each of the acquired firms purchased only 49 percent of its supplies in the course of interstate commerce. Whether a national firm would be permitted to gain control of these local markets would ultimately depend upon the portion of supplies which each acquired firm purchased in interstate commerce. This result is without a rational basis. Whether a national firm can acquire a local firm ought to depend upon the effect that the acquisition or series of acquisitions has on competition within that particular industry; it should not depend upon something as tenuously related to the legislative objective of the antitrust laws as the percentage of goods actually purchased in interstate commerce. Since these acquisitions, while not resulting in a monopoly, may enhance the control which one firm exercises over the market the Court has indirectly sanctioned what Congress intended to prohibit by the Clayton Act.

Finally, there is the distinct possibility that the rule announced in American Building will encourage the creation of its own class of exemptions. It seems likely that immunizing intrastate firms will reward, if not promote, vertical integration. A merger with a firm that does not purchase its supplies or sell its products in interstate commerce is apparently immune from the operation of Clayton § 7 after American Building.

V. Alternatives to Clayton § 7

American Building severely restricts the jurisdictional scope of § 7. Those mergers now exempt from § 7 scrutiny may pose significant antitrust problems

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80 95 S. Ct. at 2157 n.8.
82 In this context, Representative Heinz made the following comment:
As the law stands now, there is nothing to prevent a national company from merging with 50 separate companies that are involved only in intrastate commerce. This could create a situation whereby one large business firm controls the market for its product in every state of the Union.
83 The practical significance of American Building is even more notable if it is remembered that both of the merging parties must satisfy the jurisdictional requirements of Clayton § 7. In this context, the Court noted:
Under the explicit reach of § 7, therefore, not only must the acquiring corporation be "engaged in commerce," but this corporation or corporations whose stock or assets are acquired must be "also engaged in commerce."
95 S. Ct. at 2154. Thus, as was the case in American Building, even if one of the merging parties is among the largest in the industry, as long as the other is not actually engaged in interstate commerce the Court has no power under § 7 to prevent a merger between them.
which the Clayton Act was initially designed to remedy. To effectively limit those mergers, alternatives to § 7 must be considered. Two alternatives arguably reach mergers outside the scope of § 7: § 2 of the Sherman Act, which forbids monopolization and attempts to monopolize, and § 5 of the Federal Trade Commission Act, which proscribes “unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.”

A. § 2 of the Sherman Act

There are several problems in attacking a merger under § 2 of the Sherman Act. As noted above, § 2 is limited to the proscription of actual monopolization or attempted monopolization. Thus, a corporation must possess a large share of the market before it is subject to attack under § 2. By definition, a merger involving locally oriented firms is unlikely to amass a market share sufficiently large to come within the substantive reach of § 2. Even where a national firm gains control of various local markets through a series of acquisitions, a successful § 2 attack would be unlikely unless the control exercised by that firm was fairly pervasive nationwide. To come within § 2, that national firm would have to control the local market either in a majority of states or in one well-defined region of the country. Similarly, a merger between the largest firms within one state would be virtually free from § 2 scrutiny, except to the extent that such a merger effected a consolidation with such a significant share of the market that it posed a nationally significant antitrust problem.

Since a § 2 violation can be established only if the merging parties have amassed a substantial share of the market, § 2 cannot serve as a viable means of reaching the majority of mergers which American Building has placed outside the scope of § 7 of the Clayton Act. A few mergers involving intrastate corporations may amass sufficient market power to come with the substantive reach of § 2. However, even in these cases there are additional difficulties. To prove that one has monopolized or has attempted to monopolize, it is crucial that “monopoly” be precisely defined. Such conceptual precision is not essential where it need only be demonstrated that the effect of a merger tends to create a monopoly. Additionally, it must be proved that the violation has in fact occurred. Monopoly is an economic rather than legal concept. Proof of monopolization is often very costly and because a § 2 case turns substantially on factual determinations, a decision is characteristically considered applicable only to those parties directly involved in the litigation. Therefore, if the Government resorts to § 2 to deal with those mergers it cannot reach under § 7, it must attack every merger that

86 See note 12 supra.
87 It is no longer entirely clear what constitutes a “monopoly.” Oligopoly and “shared monopoly” theories complicate the concept, and render enforcement under Sherman § 2 more difficult. See Baker, Section 2 Enforcement—The View from the Trench, 41 ABA ANTITRUST L.J. 613 (1972); Ward, A Current Perspective on Enforcement of Laws Against Monopolization, 41 ABA ANTITRUST L.J. 601 (1972).
89 Baker, supra note 87, at 613-14.
poses an antitrust question since, given the complexity of proving a § 2 violation, a successful decree in one case is unlikely to deter similarly situated corporations. The Justice Department lacks the manpower to effectively enforce the law under these conditions. Moreover, because it is so difficult to prove a § 2 violation, only the most blatant are likely to be attacked under that section. It is very unlikely, then, that many of the mergers exempted from the operation of § 7 by American Building can be, or will be, attacked under § 2.

B. § 5 of the Federal Trade Commission Act

If those mergers exempted from the operation of § 7 after American Building cannot be reached under § 2 of the Sherman Act, § 5 of the Federal Trade Commission Act is the remaining alternative. In American Building, the Supreme Court alluded to without exploring the possibility that the American Building-Benton Companies merger might come within the operation of § 5. That section prohibits unfair methods of competition and deceptive practices. As the Court noted, § 5 has recently been amended to read "in or affecting commerce." Thus, under § 5 a federal court would have jurisdiction over intrastate commerce if its activities therefrom substantially affect interstate commerce.

A more substantial question is whether the substantive scope of § 5 is broad enough to encompass mergers. Although its language is very broad, § 5 contains no express prohibition of mergers. In FTC v. Sperry & Hutchinson Co., the Supreme Court held that the substantive reach of § 5 is not confined by the literal language of the antitrust laws and that practices not proscribed by these laws may nevertheless be reached under § 5. Presumably this means that a merger which

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90 "This is genuine case-by-case enforcement. It has a very low pay-off beyond the four corners of each case." Id. at 614.
91 Panel Discussion: Monopolization and Attempts to Monopolize: Whatever Happened to Section 2? 41 ABA ANTITRUST L.J. 645 (1972). Baker made following remarks:
I think that section 2 enforcement is an enormously difficult area. It really differs from merger enforcement in practical effect. When we bring a merger case . . . we are not earning our return in that product market; we are earning a return across the board—in the credibility of the enforcement process . . .

Id. at 649.
92 [W]e really have to be able to justify the enforcement costs of a Section 2 structure case out of the gains in that industry alone: this can be done in a giant growing industry like computers, but it is not likely in a highly localized monopoly situation. . . . It makes sense to try a local merger case and carry it to the Supreme Court—because the rule we thus established can be applied to anticompetitive mergers in a thousand other Phillipsburgs across the country. This is the vital pay-off on our efforts. No such pay-off would occur from a monopolization case in the same market. Similarly situated defendants elsewhere will just sit tight and hope that lightning won't strike twice.

Baker, supra note 87, at 614.
94 95 S. Ct. at 2156 n.7.
96 405 U.S. 233 (1972).
97 Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not allocate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Id. at 244.
for some reason cannot be reached under § 7 might be subject to attack under § 5. However, this poses a conceptual problem: Since the Clayton Act was originally designed to reach incipient Sherman Act violations, allowing § 5 to encompass situations which fall short of Clayton Act violations is tantamount to proscribing incipient incipiencies. There are some obvious objections to such an approach. Principally, it allows the FTC to assume a legislative function, thus rendering the law in this area largely unpredictable. The greater danger is that, the substantive language of § 5 being so broad, a court will be able to decide a case without giving proper consideration to all of the economic ramifications of the situation. Antitrust law applicable to mergers may deteriorate into a set of overly simplistic rules, devoid of economic reality. To some extent this has already happened in many merger cases brought under § 7. The use of § 5 in such a context can only hasten this trend of disposing of merger questions without considering whether they conflict with antitrust policy.

It has been suggested that these difficulties can be avoided in jurisdictionally deficient cases brought under § 5 if the substantive standards of the Clayton Act are implemented. Thus, mergers after American Building which fall outside the scope of § 7 solely because the court lacks jurisdiction might be attacked under § 5, but the merger could be condemned only if the effect of the merger was substantially to lessen competition or tend to create a monopoly. In such a case, it is clear that the Commission would have to make the same factual and analytical determinations that a court would have made if the same merger had been attacked under § 7.

Even if employing the substantive tests of § 7 in a jurisdictionally deficient case brought under § 5 solves these problems, it is not clear that those mergers immune from § 7 scrutiny after American Building can be brought within the reach of § 5. Although there is some indication that a merger with an intrastate firm or between two intrastate firms might be condemned under § 5, the courts have never decided such a case. There is the further problem that the newly amended § 5 might be subject to constitutional attack: If the "in or

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98 Howrey, Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law, 5 ANTITRUST BULL. 161, 173 (1960); Rahl, Does Section 5 of the Federal Trade Commission Extend the Clayton Act?, 5 ANTITRUST BULL. 533, 541 (1960).
100 Note, for example, the approach taken by the Court in United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). There, whether a merger violated § 7 turned solely on the size of the market share amassed; the competitive effects of the merger were not assessed. Only if the firm has a large share of the market is such an approach warranted.
102 95 S. Ct. at 2156 n.7.
103 It should be remembered that in American Building and Copp Paving the Court was faced with only the jurisdictional issue; its only concern was whether in enacting § 2(a) of the Robinson-Patman Act and § 7 of the Clayton Act Congress intended to reach the activities of intrastate firms. Whether Congress can constitutionally regulate such activities is a completely different question. The Sherman Act was enacted pursuant to the commerce clause, and only reaches activities which affect interstate commerce. As the Court has insisted, the
affecting commerce" language is struck down as beyond Congress' constitutional power under the commerce clause, the jurisdictional scope of § 5 will be no broader than that of § 7.

If the resort to either § 2 of the Sherman Act or § 5 of the Federal Trade Commission Act proves impossible, the restricted jurisdictional scope articulated in American Building may produce additional problems in merger enforcement even as to those cases which can still be brought under § 7. In order for the Government to obtain a favorable decree in a merger case, it must necessarily argue for a narrow definition of the relevant product and geographic markets. Unless the relevant market is narrowly defined, the Government will be unable to prove that the merger substantially lessens competition or tends to create a monopoly in that market. After American Building, the Government may have to broadly define the relevant market in order to claim that a defendant is actually "engaged in commerce" and thus establish jurisdiction. But once the market is so defined, the Government's chance of prevailing on the merits will be substantially diminished.

VI. A Proposal

In deciding American Building the Court did more than determine that the particular Benton Companies-American Building merger did not violate § 7 of the Clayton Act. As a practical matter, this decision means that certain types of mergers will be exempted from the operation of § 7; those mergers which are exempted may pose significant antitrust problems. For the most part, those mergers exempted from § 7 scrutiny after American Building will not fall within the reach of § 2 of the Sherman Act. Although § 5 of the Federal Trade Commission Act may provide an effective means of reaching these mergers, there are a number of unresolved problems with applying it to any merger. Mergers which fall outside the scope of § 7 after American Building, then, are largely immune from the operation of any existing antitrust law. Legislative alternatives appear to be the only recourse.

In reaction to the Copp Paving and American Building decisions, a number of bills have been proposed in Congress. On March 21, 1975, Senators Hart and Scott introduced a bill "to improve and facilitate the effective enforcement of the antitrust laws. . . ." The proposed bill envisioned the insertion of the phrase "in or affecting commerce" into the language of §§ 2(a), 3, and 7 of the Clayton Act. This language clearly responds to Copp Paving. The Hart-Scott Antitrust Improvements Act of 1975, as the bill was named, was

language of the Clayton Act is different. However, it has not intimated that expanding the jurisdictional scope of the Clayton Act would render it unconstitutional. Indeed, § 5 might be more susceptible to constitutional attack because its substantive standard is less precise than that of § 7.

106 Id., § 701.
107 Id., § 101.
completely redrafted and was reintroduced in July.\textsuperscript{108} The amended bill provides for an expansion of the jurisdictional scope of § 7. If this bill is adopted, § 7 will encompass those situations excluded by \textit{American Building}: the "in commerce" language would read: "where the activities of either corporation are in or affect commerce."\textsuperscript{109} A comparable bill was introduced in the House by the Republican Task Force on Antitrust and Regulatory Reform.\textsuperscript{110} One of the cosponsors of this bill commented on the need for legislative reform:

These two court decisions make it imperative that Congress clarify for the courts that mergers between corporations and companies that do business in only one state should fall subject to the antitrust laws.\textsuperscript{111}

All of these bills envision an expansion of the jurisdictional scope of § 7. It is clear that the substantive target of § 7 does not pose insurmountable obstacles to this expansion. Although the Clayton Act clearly effects a less precise standard of illegality than the Sherman Act, since it prohibits practices which may substantially lessen competition or tend to create a monopoly, it was not argued in either \textit{Copp Paving} or \textit{American Building} that because the substantive reach of §§ 2(a) and 7 is less precise than that of the Sherman Act, the jurisdictional scope of these statutes ought to be limited accordingly.\textsuperscript{112} Such a limitation would be unnecessary, for it was not argued that § 7 was or should have been (or that any comparable provision should be) designed to outlaw all mergers. Although Congress sought to reach mergers which did not amass sufficient market power to fall within the proscriptions of § 2 of the Sherman Act, it intended to forbid only those mergers likely to produce anticompetitive effects. Thus, the substantive criteria of § 7—that a merger substantially "lessen competition or tend to create a monopoly"—would seem to sufficiently limit the scope of the statute. In redefining the jurisdictional boundaries of the Clayton Act, or in redrafting merger legislation which seeks to prohibit conduct short of a monopoly, its broad substantive reach ought not concern Congress.

In redefining the jurisdictional scope of § 7 to reach local mergers, the only concern should be that an extension of the statute's scope not be judicially deemed unconstitutional on the grounds that Congress lacks the authority to regulate local mergers. Neither \textit{Copp Paving} nor \textit{American Building} suggests that Congress lacks the requisite constitutional power to regulate such conduct. Rather, the opinions state that, whatever Congress' initial intent, the language

\textsuperscript{108} July 28, 1975. The Supreme Court handed down its decision in \textit{American Building} on June 24, 1975.

\textsuperscript{109} S. 1284, § 701(b), 94th Cong., 1st Sess., (1975) (emphasis added). Section 701(a) of the same bill proposes that the "in commerce" language of § 3 of the Clayton Act and § 2(a) of the Robinson-Patman Act be amended to read "in or affecting commerce."

\textsuperscript{110} H.R. 9329, \textit{cited in} BNA \textit{ANTITRUST \& TRADE REG. REP.} A-14 (Sept. 9, 1975) (No. 729).

\textsuperscript{111} \textit{Id.} at A-15.

\textsuperscript{112} Such an argument was made in \textit{Heater v. FTC}, 503 F.2d 321, 322-24 (9th Cir. 1974), where the Ninth Circuit refused to permit the FTC to order restitutionary relief where there was a violation of § 5, since such broad remedial powers would be inconsistent with the overall purpose of the Federal Trade Commission Act.
of §§ 2(a) and 7 clearly indicates that Congress did not exercise its full constitutional power in enacting these statutes. Moreover, both opinions contrast the language of §§ 2(a) and 7 with that of the Sherman Act. This suggests that the jurisdictional scope of the Sherman Act, whereby local conduct which affects interstate commerce is reached, is not constitutionally invalid.

Thus, it is clear that if Congress desires to expand the jurisdictional scope of the Clayton Act it can do so by enacting one of the proposed bills.

However, it is not clear that the proposed amendments to the jurisdictional language of the Clayton Act will remedy the problems created by the Court’s approach in American Building. These problems will be eliminated by the proposed legislation only to the extent that this decision merely articulates a drafting weakness of § 7. These decisions, however, may point to a problem more significant than a drafting weakness. Recently, a new antitrust majority has emerged on the Court; it generally subjects the Government’s arguments in merger cases to harsher scrutiny. If these decisions portend something more than a drafting weakness in § 7, it is clear that a rewording of the “in commerce” language of § 7 will not completely eliminate the problems produced by these two decisions. The phrase “in or affect commerce” is broad enough that it offers the Court a certain amount of flexibility: in applying this language to particular situations the Court may construe such language so narrowly that the conduct of local firms is rarely deemed sufficient to “affect” commerce. Thus, even if the Hart-Scott Bill is adopted, a merger involving a local firm may be effectively exempted from the federal antitrust laws.

If this approach is taken by the Court, a more extensive approach to the anticompetitive conduct of local firms will be required of the Legislature. Such an approach may require a change in both the substantive and jurisdictional language of the Clayton Act.

S. Lee Martin

113 See note 65 supra.
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