Corporate Joint Ventures and Section 7 of the Clayton Act

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CORPORATE JOINT VENTURES AND SECTION 7 OF THE CLAYTON ACT

I.

APPLICABILITY OF SECTION 7 TO CORPORATE JOINT VENTURES

Section 7 of the Clayton Act in relevant parts states:

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 tend to create a monopoly.1

In the typical corporate joint venture the corporate partners subscribe to stock in a new entity, with their percentage interest in the venture determined by prior agreement. When the corporate partners acquire their interest in the venture corporation, it is not engaged in commerce or in competition with others in the industry it will enter. Therefore, if the venture corporation is not in existence or engaged in commerce at the time the participating partners acquire stock in the venture, can section 7 apply to a joint venture?

This question remained unanswered in the recent case of United States v. Penn-Olin Chem. Co.2 Pennsalt Chemical Corporation and Olin Mathieson Chemical Corporation entered into an agreement whereby Penn-Olin Chemical Company would be formed to produce and sell sodium chlorate in the highly competitive southeastern section of the country. The largest consumers of this chemical were the pulp and paper mills, principally located in the southeast. The Government attacked the creation of this venture alleging that it would substantially lessen competition in violation of section 7. The defendants argued that the “engaged also in commerce” clause of section 7 clearly exempted a corporate joint venture from its provisions because the venture was not in existence at the time the parent companies acquired their stock. The District Court by-passed this argument, holding the joint venture failed to have the anticompetitive effect at which section 7 was aimed, which in turn made it unnecessary to examine the “engaged also in commerce” defense.3 Chairman Dixon of the Federal Trade Commission, speaking before the Economic Club of Detroit in 1962, neatly avoided this issue, stating the basic question was the probable effect the creation of the venture would have upon competition in the industry examined.4

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3. Id. at 115.
4. 5 TRADE REG. REP. ¶ 50133 (1962).
The theory of the *Penn-Olin* defendants was that Penn-Olin Chemical Company was a subsidiary carrying on a lawful extension of their business, and therefore exempt under the third paragraph of section 7. This meant that it was not necessary for the court to decide if the venture was "engaged also in commerce," since the third paragraph exemption applies only when the formation of a subsidiary substantially lessens competition.

Excluding the problem created by the third paragraph of section 7, formation of a new venture corporation would clearly fall outside the section because the corporation is not engaged in commerce at the time of its inception. Before a court can examine the new entity's effect upon competition, it must determine whether or not the joint subsidiary falls within the scope of the statute being applied. The *Penn-Olin* court failed to adopt this approach. Instead, Judge Steel examined the effect the venture would have upon competition, and this approach will probably be the one adopted by other courts confronted with joint ventures attacked under section 7. Thus it is necessary to determine what types of ventures will be deemed suspect. To aid in this determination, merger and acquisition cases have been examined in order to ascertain what factors are considered relevant in assessing a corporate venture's effect upon competition.

II.

**What Is a Corporate Joint Venture?**

The terms joint adventure, joint subsidiary, joint enterprise and joint venture have been used so interchangeably, that any formal distinction between them is unnecessary for purposes of this comment.

Viewing the various relationships between the parent companies and their joint subsidiary, five types of ventures can be created:

"The conglomerate venture" involves a new entity which is neither customer, supplier nor competitor of either participating partner.

"The backward vertical venture," establishes a new entity which acts as a source of supply for the parent corporations.

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5. The third paragraph of § 7 states, "Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

6. Pennsalt and Olin Mathieson contended the third paragraph of § 7 required the showing of an actual lessening of competition because of the use of the word "is," and not just a showing of probable lessening of competition, the weaker standard of proof used in determining a first paragraph violation. (This is the "may be" standard of proof.) United States v. Penn-Olin Chem. Co., 217 F. Supp. 110, 115 n. 2 (D. Del. 1963).

7. See Boyle, *The Joint Subsidiary: An Economic Appraisal*; 5 ANTITRUST BULL. 303, 313 (1960), where the author states, "...many of the adverse results which may be expected through the outright merger of the two or more companies may be obtained through joint combination."

“The forward vertical venture” creates a new entity corporation which will become a customer of the parent corporations, typically buying exclusively from them.

“The horizontal venture” is the creation of a new entity by two or more potential competitors; that is, they sell in the same product market, but are geographically non-competitive. The role of the horizontal venture is to exploit a third geographic market, selling or producing the same product sold or produced by the parent corporations.

The fifth type of corporate venture is a combination of the above variations; that is, one parent could be vertically related to the new entity, and the other parent could be conglomerately related.9

Generally, corporate joint ventures are created to facilitate raising capital for exploitation of a particular field or industry. Business risks are apportioned between two or more firms; economies of scale can be derived by vertical integration, and the parent firms can use overlapping technical, research or marketing experience, that is, they can combine their individual experiences in exploring a new field.10

Of course, the ultimate purpose of a joint venture is a profit motive, but other purposes could be the development of new facilities and processes to produce a product needed by the parent companies.11 The need for greater supplies may dictate a venture when independent suppliers are unable to meet the parent companies’ raw material requirements.12

In view of the rationale behind corporate joint ventures, an examination of the effects each type of venture may have upon competition is necessary for section 7 purposes. Each type of venture set forth above will be treated individually, with its possible impact upon competition serving as the focal point of discussion. Factors examined by courts in section 7 cases are the factors deemed important for measuring the venture’s effect upon competition.

III.

PRELIMINARY DETERMINATIONS TO MEASURE “EFFECT” UPON COMPETITION

To measure the effect of a merger upon competition (and it is assumed the joint venture would be measured by the same standards), the relevant markets must be determined.13

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10. For example, one firm may have experience in selling a certain type of product, and the other parent may have experience in producing this type of product.
12. That is, what is the line of commerce (product market) and the section of the country (geographic market).
Recently, in the case of *Brown Shoe Co. v. United States*,¹⁴ the Supreme Court attempted to clarify the meaning of "line of commerce." In this case a merger involving the third and eighth largest sellers of shoes had both horizontal aspects (manufacturing) and vertical aspects (selling). In formulating a test for determining the relevant "line of commerce," the Court instructed that the outer boundaries of the product market should be determined in the light of the reasonable interchangeability of the product itself and its substitutes. Within the outer boundaries submarkets may exist which may also constitute product markets. To determine the boundaries of these submarkets, industry or public recognition of the submarkets, product characteristics, unique production facilities required in producing the product, uses of the product, distinct customers and prices, and other factors were to be used.¹⁵ If there is an economically significant submarket where the merger or acquisition may substantially lessen competition, the merger or acquisition is proscribed under section 7.¹⁶ The District of Columbia Circuit Court of Appeals attempted to apply this standard in *Reynolds Metals Co. v. FTC*¹⁷ where in issue was whether the line of commerce should be decorative foil sold to the florist industry, a submarket of the decorative foil trade. The court decided decorative foil sold to the florist industry was the relevant product market because of distinct pricing, purchaser identity and indisputable industry and consumer recognition of this submarket as a separate economic entity.¹⁸

After determining the product market, the next step in creating the factual background for measuring a venture's effect on competition is ascertaining the section of the country, or the geographic market the venture will enter. In *Brown Shoe*, the Court decided the section of the country should be economically significant and be determined in light of the commercial realities of the industry,¹⁹ which means that "the geographic market in some instances may encompass the entire Nation, in other circumstances, it may be as small as a single metropolitan area."²⁰

In the *Penn-Olin* case, the court dealt with the geographic market question. Citing *United States v. Bethlehem Steel Corp.*,²¹ the court held that the geographic market must be defined in light of the overall objectives of section 7 to determine the reasonable probability that competition will be substantially impaired.²² After examining the evidence, Judge Steel concluded Pennsalt and Olin Mathieson created the venture in order to exploit the southeastern part of the United States, a market in which neither of the parent companies were competitive. Both prior to and after

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¹⁵. *Id.* at 325, 82 S. Ct. at 1524.
¹⁷. 309 F.2d 223 (D.C. Cir. 1962).
¹⁸. *Id.* at 228.
²⁰. *Id.*
the formation of the venture, the sodium chlorate industry in the southeastern market remained competitive. Furthermore, evidence indicated companies competing in this geographic market had been expanding their plant capacities, and two newcomers had entered the field after the formation of Penn-Olin. On this basis, the court determined the applicable section of the country was the southeast.

It can be seen the court emphasized the Brown Shoe test of defining the section of the country in light of "the commercial realities of the industry." Transportation costs, service, and proximity to supply were considered important competitive factors within the sodium chlorate industry. Because Pennsalt's plant was located in the northwestern part of the United States, it could not compete effectively with suppliers in the southeastern market. However, Penn-Olin leaves open the possibility of using the nation as a whole for the relevant market, when the evidence indicates an imbalance in supply and demand, inducing companies within the industry to cross geographic boundaries.

In Penn-Olin, the following evidentiary factors were deemed relevant when defining the geographic market into which a venture corporation locates. Does imbalance between supply and demand exist within the area? Are there peculiar transportation problems because the buyers consider proximity to the source of supply important? Do buyers demand or need certain services in conjunction with the sale of a product? Are buyers geographically concentrated? Is industry competition typified by geographic competition?

An analysis of Brown Shoe and Penn-Olin indicates the facts of the individual case will determine how the court will define the geographic market for purposes of measuring the venture's effect upon the competitive structure of the industry it will enter.

IV.

THE EFFECT OF A CORPORATE JOINT VENTURE UPON COMPETITION

A. The Conglomerate Joint Venture

The conglomerate joint venture exists when two or more corporations create a new firm to exploit another industry. Diversification and future profit capabilities of the venture corporation are the primary motives for

23. Id. at 121.
24. Ibid.
25. Ibid.
26. Ibid.
27. Id. at 123.
28. Ibid. See United States v. Continental Can Co., 217 F. Supp. 761, 768 (S.D.N.Y. 1963), in which the court followed a similar line of reasoning for a determination of the geographic market; United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 598 (S.D.N.Y. 1958), wherein the court decided the section of the country should be the nation as a whole, because of peculiar imbalances between supply and demand within the industry. The case involved a merger between the second and sixth largest steel corporations in the United States.
its creation. As distinguished from the conglomerate merger, in which there has been a mere substitution of corporations, the conglomerate joint venture injects a new competitor into another industry. Except for this distinction, it appears the conglomerate joint venture and conglomerate merger will have similar effects upon competition.

1. The Problem of “Actual” and “Potential” Competition

At this point, it is important to note the term “competition” has been used to encompass both “actual” and “potential” competition. Hereinafter, the term “actual competition” or “competition” will mean competition in existence at the time the venture is formed, or competition in existence at the time of suit. “Potential competition” will refer to competition not in existence either at the time the venture is created, or at the time of suit, but which might possibly exist some time in the future.29

In United States v. Continental Can Co.,30 the court examined the concept of “actual” and “potential” competition and the standard of proof the Government had to meet under section 7. The Government sought to enjoin the acquisition of a manufacturer making glass containers by a manufacturer who made metal and plate containers. The court decided the case involved the typical conglomerate acquisition in which diversification was the primary motive of Continental Can, the acquiring company. Conceding that “actual competition” had not been lessened, the Government based its case on a substantial lessening of “potential competition.” To establish an alleged injury to “potential competition,” the Government set forth four criteria by which to measure the challenged transaction: elimination in whole or in material part the competitive activity between the acquired and acquiring companies, increase in the relative size of the acquiring company to such a point that its advantage over competitors threatens to be decisive,81 undue reduction in the number of competing enterprises, and establishment of relationships between buyers and sellers which deprive rivals of a fair opportunity to compete.82 Thus, as the court found, the Government’s case was based upon anticompetitive effects which might occur in the future. Section 7 was intended to proscribe those activities which had a reasonable probability of substantially lessening competi-

29. See Rahl, Applicability of the Clayton Act to Potential Competition, in ABA, ADMINISTERED PRICES — POTENTIAL COMPETITION 128 (1958). This essay treats the various elements and legal meanings of the term “potential competition.”
31. In The Procter & Gamble Co., 3 TRADE REG. REP. (27-22 Trade Cas.) ¶ 15773 (FTC Order 1962), the Federal Trade Commission found a violation of § 7, when the acquiring company, a leading producer of soap and detergent products, acquired Clorox, a dominant seller of liquid bleach. Because the acquiring company had large economic and financial strength, and possessed greater advertising and promotional experience than had the competitors of the acquired company, the F.T.C. enjoined the acquisition. “The test of conglomerate power is whether a corporation is able to concentrate its competitive efforts at one point by shifting its financial resources and competitive strength from one industry or market to another.” Id. at 20583.
tion, and not those activities which might occur at a later date.\textsuperscript{33} It required either a showing that competition had been actually diminished to a significant degree, or that there was a reasonable probability anticompetitive effects would result from the acquisition.\textsuperscript{34} The use of "mere possibilities,"\textsuperscript{35} "speculations,"\textsuperscript{36} and "conjectures"\textsuperscript{37} to prove a lessening of competition was not encompassed within section 7.

The Government countered that the history of prior acquisitions impelled a finding that section 7 had been violated. The court recognized that the section could be violated in the light of a cumulative process of acquisitions, but such a violation would occur only when the effect significantly reduces the vigor of competition in any line of commerce. This result cannot be assumed.\textsuperscript{38} The Government had to introduce evidence showing the anticompetitive effects the prior acquisitions might have had, cumulative or otherwise. Although an acquiring firm has had a history of prior acquisitions, it does not necessarily compel a finding that the present acquisition will have anticompetitive effects in any of the industries or product markets to which they were related.\textsuperscript{39} An acquisition may have competitive advantages, but Congress did not intend section 7 to be used as a means to discourage businessmen from taking steps to compete more effectively. Rather, the intended effect of the Clayton Act was to keep competition vigorous and effective.\textsuperscript{40}

2. \textit{Factors Examined To Measure "Effect"}

Examining the government's contentions in \textit{Continental Can}, that is, that potential competition had been impaired, it is manifest that the main objection to the acquisition was the size and market shares held by the acquired and acquiring firms in their respective industries. The question of size was viewed in the light of the acquiring firm's past history of acquisitions. However, size alone was rejected as being conclusive in deciding whether or not an acquisition had a section 7 anticompetitive effect.\textsuperscript{41} Apparently, the Government viewed the acquisition as an extension of the acquiring firm's size and power into another product market, with the size factor alone having an \textit{in terrorem} effect upon competitors of the acquired company. Size theoretically yielded greater financial ability

\begin{itemize}
\item \textsuperscript{33} Id. at 783-84.
\item \textsuperscript{34} Id. at 783.
\item \textsuperscript{35} Id. at 784.
\item \textsuperscript{36} Ibid.
\item \textsuperscript{37} Ibid.
\item \textsuperscript{38} Id. at 784.
\item \textsuperscript{39} Ibid.
\item \textsuperscript{40} Id. at 786.
\item \textsuperscript{41} "... size and market shares are factors to be taken into account in determining anti-competitive effects and tendency to monopolize. But mere size or concentration alone are not decisive... Such tests are particularly inapposite where a conglomerate merger is under scrutiny." \textit{Ibid.}
\end{itemize}
to subdue smaller competitors, who economically could be more efficient, but who lacked financial reserves to withstand any price wars initiated by the new and larger competitor.42

It should be noted, however, that even though the court rejected both the size argument and the history of prior acquisitions argument, it limited its decision to the peculiar facts of this case, namely, the two different product markets in which the acquiring and acquired firm competed were not closely tied together.43 Also, there had been no increase in industry or product market concentration by the mere substitution of the acquiring firm for the acquired firm, and their respective industries had remained essentially the same in their competitive structures.44

3. Does a Conglomerate Venture "Substantially Lessen Competition?"

In light of the merger and acquisition cases, can it be said that the conglomerate joint venture will have anticompetitive effects? Chairman Dixon has stated that the Federal Trade Commission and the Justice Department are interested in those joint ventures involving parent firms with a sizeable share of the market for a commodity. When smaller corporations are forced to pit their resources against a "two-headed or three-headed giant decked out in the garb of a joint venture,"46 the Chairman remarked, the joint venture will dampen the fires of competition. An examination of the following hypothetical venture combinations will assist in formulating an answer to the question first posed and may be helpful in determining what courses the Government will chart in pursuing the multi-headed giant.

In the first situation, the two or more parent firms are of equal size and maintain a dominant position in their own product markets. In the second combination, the parent firms are of unequal size—one of them an industry leader within its own product market and the other parent neither a large nor small competitor within its own industry. The third type of conglomerate venture combines parent companies with neither dominant nor leader status within their respective product markets.

In the first hypothetical situation, extension of power from one product market into another would be the objectionable factor. However, even if such power does exist, it is meaningful to note that the creation of a conglomerate venture injects new competition into the industry being entered by the joint subsidiary; neither actual nor potential competition would be impaired. However, in Penn-Olin the court left open the possibility of "large" parent firms creating a joint venture suspect under section 7.

42. This would be on the theory that the acquiring company could start selling the acquired firm's product at cost or below cost, using the profits derived from other product markets to absorb temporary losses that might be sustained in the acquired company's product market.
44. Ibid.
45. 5 Trade Reg. Rep., supra note 4.
The court observed:

... whatever advantage Penn-Olin might be able to obtain through reciprocal arrangements because of the combined size of the defendants scarcely warrants the conclusion that as a matter of reasonable probability Penn-Olin will ultimately dominate the sodium chlorate market.\footnote{United States v. Penn-Olin Chem. Co., 217 F. Supp. 110, 126 (D. Del. 1963).}

Thus, it would appear a court could find a conglomerate joint venture would have anticompetitive effects if: it were shown the parent companies have the ability to exert their power into the venture corporation’s product market; the additional financial resources available to the venture corporation yield competitive advantages sufficient to subdue competitors; finally, in the light of the industry background, there exists a reasonable probability competition would be substantially lessened.

Under hypothetical cases two and three, there appears to be no question concerning the validity of the venture because the parent firm’s financial resources would not be as great as those in hypothetical one. But, again it might be argued that in a particular industry, at a particular point in time, the venture corporation will have access to capital sufficient to stifle weaker competitors.\footnote{See generally Adelman, Acquire the Whole or Any Part of the Stock or Assets of Another Corporation, in ABA, Section of Antitrust Law — An Antitrust Handbook 195 (1958); Bergman, supra note 9; Boyle, supra note 7; Connelly, Emerging Theories of Mergers, in CCH, 1960 Antitrust Law Symposium 111; Hale, supra note 12; Rowe, Merger and the Law: New Direction for the Sixties, 47 A.B.A.J. 1074 (1961).}

Before concluding this discussion one other conglomerate venture should be examined. Consider the two parent firms who are competitors, that is, they compete in the same product market, and a joint venture is created to compete in a different product market. In such a case, it has been argued this relationship could serve as a springboard for collaboration between the parent firms thereby precipitating price fixing, territorial allocation, and production allocation within their own product and geographic market. Is such an inference sufficient to prohibit the venture?\footnote{One writer posed this hypothetical as being the key problem for determining whether or not a joint venture would violate the Sherman Act. "The important issue, and one apparent at first glance, is that the joint venture allows a common meeting place in which the supposedly competitive firms may legally meet. It will probably, regardless of the purpose of the venture, result in a close association and collaboration between the parties. ... This is the important problem, not whether the joint subsidiary is in the same or another industry." Boyle, supra note 7, at 308.}


"The probability of competition being substantially lessened by conduct specified in the antitrust statutes need not be established by direct evidence. Inferences that competitive restrictions will probably result are judicially acceptable if supported by adequate evidence. Here the proof shows only an opportunity for illegal activities. That is not enough. To equate opportunity for wrongdoing with likelihood of its occurrence reflects a cynicism toward business behavior which is without warrant. Presumption of probable wrongdoing cannot be a substitute for its proof."}
In conclusion, it would appear the conglomerate joint venture, launched
either by competing or non-competing firms, cannot be enjoined as being
violative of section 7. However, it should be noted that such economic
factors as size of the parent companies, and industry composition of pro-
ducers, sellers and buyers might lead a court to find in a particular case
that it is reasonably probable that competition would be substantially
lessened if creation of the venture is not enjoined. But, such a holding
would appear contrary to antitrust policy, since the venture corporation
will strengthen, rather than weaken, the competitive picture in a given
product market.

B. The Backward Vertical Venture and Its Effects Upon Competition

In a backward vertical venture, the parent companies create a new
entity related to their product market in a supply capacity. Typically, the
parent companies will be competitors, but being in need of a constant
source of supplies, for example, raw materials, they agree to set up a
corporation which will satisfy their supply requirements. The business
risks involved in creating the new enterprise could have induced the par-
ticipating firms to enter into this type of agreement. Also, initial expenses
to create the venture may be greater than one firm could afford.

To measure the effect of the backward vertical venture, the line of
commerce and section of country involved must again be determined. In
this type of venture, a first line effect may exist, that is, competitors of the
parent companies will suffer a competitive disadvantage by being sub-
jected to possible shortages of supply. A second line effect may be ex-
perienced by the competitors of the new entity who are foreclosed from a
segment of their product market, that is, supplying the parent companies.

The effect of the backward vertical venture may be demonstrated
by viewing two competing oil companies who combine to form a
pipeline company. The pipeline company's function is to supply the two
parent corporations with crude oil for their refineries. Costs involved in
transporting crude oil probably induce the establishment of the corporate
venture. Another consideration is the profit motive, that is, competitors of
the parent companies will use the excess transportation capacity. The
additional income received from competitors would help defray the costs
incurred in constructing the pipeline.

Is there a reasonable probability competition would be lessened, either
in the first line or second line in such a backward vertical venture? Again,
should be noted that under this type of venture, competition within the
industry supplying the needs of the corporate partners, has been increased.
But it can be questioned whether this creates a vigorous competitor, for
more than likely the new venture corporation will deal exclusively with its
parent firms, thereby eliminating competition between the new entity and
its competitors for the parent companies' business. However, this "captive
buyer" theory was rejected by the Court in Penn-Olin which held that
there was not a reasonable probability that Olin Mathieson would buy exclusively from Penn-Olin. Even though Olin Mathieson's fifty per cent ownership in Penn-Olin might induce them to buy from the venture corporation, freight and service disadvantages might outweigh their interest as a stockholder in the joint venture. Thus, the court re-emphasized that any section 7 violation must be proven by sufficient facts to show a reasonable probability of injury to competition. Even though competitors of the venture might ultimately be foreclosed from the corporate partners' business, this does not necessarily dictate the conclusion that competition will be substantially lessened in the particular product and geographic market examined. The evidence must show that the parent firms' position in the particular product and geographic market was substantial.

The Brown Shoe case stressed the concept of the size of the acquiring company in relation to its competitors as a means of determining the impact of a merger or acquisition. Admittedly, the case dealt with the question of a forward vertical relationship, but size would be important in any case involving a vertical relationship, whether it be labelled backward or forward. The Court stated the wording of section 7 required a determination of the future effect of a merger, and whether or not there would be a potential market foreclosure must be proved by evidence showing the reasonable probability of the prohibited effect.

Therefore, when examining the effects of a backward vertical venture upon competition, it appears the courts will place importance upon the size of the corporate partners, the competitive structure within the parent firms' industry, the competitive structure into which the new entity will emerge, and the extent to which the parent companies comprise the market for the venture's competitors prior to its formation.

C. The Forward Vertical Venture and Its Effects Upon Competition

The forward vertical venture establishes the new entity as a customer for the corporate partners' products. The relationship between the parent companies could be competitive or non-competitive when viewed at the horizontal level of competition. In either case formation of the new entity will aid in the dissemination of the parents' products.

Factually, it is possible for competing corporate partners to meet as participating members of a venture to discuss policy for conducting the new

50. Id. at 125-26.
52. Id. at 331-32, 82 S. Ct. at 1527; In Reynolds Metals Co. v. FTC, 309 F.2d 223, 229 (D.C. Cir. 1962), the court concluded acquisition of a customer by the acquiring firm — the acquired firm accounting for approximately 33% of the decorative foil sales to the florist trade — would have the foreseeable result of foreclosing the acquiring company's competitors from a substantial share of the relevant market. However, the court did state this was a minor anticompetitive effect, outweighed by the second line effect of the acquisition, that is, competitors of the acquired firm were placed at a disadvantage because of the 'power of the 'deep pocket' or 'rich parent' for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small....'
entity's business. Also, they may be insulating themselves from market price-fluctuations by selling exclusively to the joint subsidiary.53 If the corporate partners are vigorous and powerful competitors, there may be an extension of economic power, that is, use of aggregate financial resources to develop and exploit another market. This result would be even more pronounced if the venture entered a new industry still in its formative stage.54

The courts' approach to a venture created by competing partners will probably proceed on a case to case basis. The reasonableness of the venture in light of the size and power of the partners will be considered,55 rather than adopting a per se rule of illegality, particularly since the latter rationale fails to account for economic justifications which may outweigh the size and power of the corporate partners.

On the other hand, when competitors are the joint partners, one may argue the venture affords a common meeting ground for collaboration on non-venture business. The feared collaboration may result in territorial and customer allocations, price fixing and other activities prohibited by the Sherman and Clayton Acts.56 In Penn-Olin the Government suggested that competitor partners should not be permitted to form a joint subsidiary on the theory that the economy is better served by the formation of wholly-owned subsidiaries, thus minimizing the deterrent effect the joint venture might have upon entrance into the market.57 Judge Steel rejected this theory because at trial no evidence had been adduced which indicated that future entrants would be discouraged from entering the sodium chlorate market in the southeast. Although Pennsalt and Olin Mathieson could have established a wholly-owned subsidiary profitably in the sodium chlorate market, the profit motive and the desirability of sharing the risks attendant the opening of a new outlet persuaded them to create the jointly owned plant.58

Where the corporate partners are non-competitive, application of section 7 would seem remote because the risks of horizontal collusion are eliminated. It is true the venture corporation will have greater financial reserves to draw upon than its competitors, but this factor should not be con-

53. See Bergman, supra note 9.
54. See generally Bergman, supra note 9; Boyle, supra note 7, at 311; Rowe, supra note 47.
55. See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S. Ct. 872 (1957). In this case, du Pont acquired approximately 23% of General Motors' stock. The Court decided du Pont did not acquire the stock for investment purposes. Rather, the acquisition was for the purpose of obtaining a commanding position as a supplier for General Motors' fabric and finish supply requirements. Since the relevant market was automobile finishes and fabrics, and General Motors was the "colossus" of the automobile industry, du Pont's stock acquisition acted as a foreclosure of a substantial share of the relevant market. Thus, the forward vertical integration by stock acquisition was unreasonable, in light of General Motors' position in the automobile industry.
56. This point is discussed, infra, in the section dealing with horizontal ventures.
58. Id. at 129-30.
clusive in such a case. Other considerations, such as the desirability of minimizing problems in the distribution of products, should outweigh the financial resources argument.

The case of United States v. Aluminum Co. of America aids in ascertaining what factors a court will examine when a forward vertical venture is under scrutiny. In this case, the acquiring firm supplied approximately three-tenths of one per cent of their total aluminum production to the acquired firm. Both physically and financially, the acquiring firm, Alcoa, was large, and its corporate activities varied and extensive. The court rejected the size of the acquiring firm as being the key criteria for finding a violation of section 7. Abuse of the power which accompanies size must be shown. The court held that since the acquired firm purchased such minimal amounts of the acquiring firm’s total production, the competitive effect would be insignificant because the acquiring firm did not obtain a “captive market.” This conclusion rested on the theory that the acquiring firm was not insuring the retention of the business of a large buyer. However, in this case the result might have been different if the acquired firm purchased greater amounts of the acquiring firm’s total production, and if the acquiring firm had a greater or dominant position in the product market in which it produced.

It appears that the same factors involved in measuring the effect of a backward vertical venture would be used when a forward vertical venture is questioned. However, when non-competitors are the corporate partners, the reasonableness of the venture would seem greater than when the corporate partners are competing with each other. Also, the theoretical possibility of collaboration between the partners in violation of the antitrust laws is absent when the parent firms are non-competitive.

D. The Horizontal Venture and Its Effects Upon Competition

Case law in this area is more fruitful in determining whether or not a joint venture would be suspect under section 7. In a horizontal venture, the parent firms are product but not geographic competitors. By uniting, a jointly owned subsidiary is created to exploit a geographic market where neither of the parent companies compete. All the reasons and purposes for a joint venture are present: the desire to obtain more profit, sharing risks inherent in starting a new business, and the problems of initial costs in establishing another territory.

The possible ramifications of the horizontal venture would be viewed under the framework formulated by the Court in Brown Shoe. In this case,

60. Id. at 516.
61. It should also be noted that in this case, the court found the acquiring-acquired firm integration had no adverse effects upon competition. After the integration, the integrated firm suffered a drop in sales within the lines of commerce investigated. Id. at 517.
62. Conceivably, some overlapping might occur, with the venture corporation and the parent firms crossing the theoretical geographic boundaries.
the Court stated section 7 would apply in situations where the competing companies have competed in but a "fraction of the geographic markets in which either has operated. . ."68

Factors such as the relative size and number of parties involved, whether or not market shares have been allocated among the parties, whether or not price fixing is involved, and whether or not competition has been absorbed or insulated64 will be especially relevant in assessing the effect a horizontal venture would have upon competition.65

In the Penn-Olin case, the Government alleged the joint venture of Pennsalt and Olin Mathieson had horizontal effects. The Government contended that by creating Penn-Olin, Pennsalt and Olin Mathieson would not enter the sodium chlorate market in the southeastern section of the country, and this made the arrangement invalid under section 7. The Court was not persuaded by this argument since such an interpretation would emasculate section 7 which requires a substantial lessening of competition.

To ascertain whether or not competition has been substantially lessened, the challenged transaction must be compared with the competitive situation which would have existed otherwise.66

Examining the geographic market in which the venture was to engage, Judge Steel explained that when the typical horizontal merger is involved, the competitive potential of the combining competitors can be determined on the basis of their prior records.67 But in the venture situation, neither of the parent firms have previously engaged in exploiting the geographic market examined, thus making it impossible to measure the competitive impact Pennsalt or Olin Mathieson would have had if they had owned their own plants in this section of the country.68 In light of the combined skills and experiences of the corporate partners, the venture corporation should be a more vigorous competitor than either of the parent firms entering the designated market area on an individual basis.69

When product competitors create a horizontal venture, territory, price, product and customer allocation arrangements may be discussed. Of course,
such agreements are now treated as per se violations of section 1 of the Sherman Act.\textsuperscript{70} Because such a venture may afford opportunity for illegal activities, some proof must be introduced to show such agreements had been reached or attempted.\textsuperscript{71}

Of all the various types of corporate joint ventures, the horizontal venture is probably the most suspect, even though the venture itself does not raise the inference of collaboration between the corporate partners. A per se rule should not be applied in this area because here too valid economic reasons may support the enterprise. As the Supreme Court stated, "A most important . . . factor to examine is the very nature and purpose of the arrangement."\textsuperscript{72}

V.

CONCLUSION

There is a myriad of relationships that can be formed in a corporate joint venture. The venture can be vertical, conglomerate, horizontal, or a combination of the above, depending upon the relationship between the corporate partners and the venture entity. A careful reading of section 7 appears to place such ventures outside its provisions because it is not "another corporation engaged in commerce" at the time of its creation. However, even if this statutory language is ignored, factors such as the industry structure in which the venture will compete, size and position of the corporate partners within their own industry, relationship of the parent companies' product to the joint venture's product market, and the relationship between the parent firms and their joint subsidiary will all be weighed in assessing the validity of the venture. Because valid and reasonable economic considerations may underlie the formation of a joint venture, neither a per se nor a quantitative substantiality test should be applied. Emphasis should be placed upon the nature and purpose of any venture agreement, whether the participating partners be competitors or non-competitors.

\textit{Thomas J. Bradley

\textsuperscript{70} See White Motor Co. v. United States, 373 U.S. 253, 83 S. Ct. 696 (1963); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971 (1951). In both of these cases, the Court examined horizontal type of arrangements among competitors, holding them violative of § 1 of the Sherman Act.


\textsuperscript{72} Brown Shoe Co. v. United States, 370 U.S. 294, 329, 82 S. Ct. 1502, 1526 (1962).