FOR RELEASE AT 12:30 PM, EST
THURSDAY, SEPTEMBER 30, 1954

THE ANTITRUST ASPECTS OF MERGERS

AN ADDRESS

BY

THE HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

Before

The New York Chapter

of

The Public Relations Society of America

New York City

Thursday, September 30, 1954

On vacation this summer I was thumbing through Harpers Weekly of some forty years ago. The value of various products in the automobile world, such as the Empire, the King, and the Winton Six, were proclaimed in advertisements. Brinkley, the all-time drop-kick hero of Harvard, had defeated Princeton 3-0. Mrs. Pankhurst was in her glory. A cartoon described the Turkey Trot. Crystal Herne was starring in the Countess Mitzi. Ford-Robertson was making his annual farewell tour in "Hamlet," "The Light that Failed," and "The Passing of the Third Floor Back." Madero was rebelling against Heurta in Mexico.

But a surprising amount of space was being devoted to the "trust" problem -- the evils arising when power over the nation's business is concentrated in the hands of a few corporations.

Most articles dealt especially with the problems of intercorporate relations and the "unscrambling" of mergers previously consummated.

The February 7, 1914, issue of Harpers went so far as to predict confidentially that the "disintegration of the Money Trust" would be in sight once Congress strengthened and supplemented the Sherman Act as recommended by the President.

Congress did take action in a matter of months with the enactment of the Clayton Act on October 15, 1914. It was Section 7 of this Act which dealt with mergers as live a subject today as it was then.

Now, merger activity has long been recognized as having a major impact on the competitive structure of American economy. The high degree of industrial concentration which has characterized and still characterizes certain segments of our economy stems largely from waves of merger activity.

The first major wave of mergers came at the turn of the century. A second in the late 1920's resulted in a further increase in concentration. The third came just before World War II and continued under the impact of wartime economy and post-war economic developments. In the fields of mining and manufacturing alone during the years 1940 through 1947, listings of 2,000 formerly independent companies disappeared from financial manuals.

The first of the big merger cases was the Northern Securities case, instituted in 1902. It attacked creation of a holding company to acquire stock in two parallel, competing transcontinental railroads -- the Northern Pacific and the Great Northern.

Both of these roads were in active competition with other transcontinental lines, but the Supreme Court upheld the Government's view that the holding company violated Section 1 of the Sherman Act. This landmark decision condemning a merger which restricted freedom of commerce has retained its vitality over the years. Little wonder that this victory was regarded by President Theodore Roosevelt as an outstanding achievement of his administration.

Other cases in the railroad field followed. The decision led also to cases against industrial trusts such as Standard Oil and American Tobacco. Successful in these cases in 1911, the Government then filed suit against the United States Steel Corporation. Formation of this billion-dollar concern was the greatest consolidation in history for it brought together in one fell swoop some 174 formerly independent concerns.

World War I delayed progress of the case so it was not until 1920 that the Supreme Court ruled. It decided that United States Steel, despite its size and the series of acquisitions and consolidations which had created it, was not in violation of the Sherman Act at the time of the suit.

The Government victories in the Standard Oil and American Tobacco cases had been received with mixed feelings. For instance, in the Standard Oil case, the Court adopted the so-called rule of reason for testing conduct against the prohibitions of the Sherman Act. Some felt that the Sherman Act, by this rule, had been rendered so vague as to seriously lessen its usefulness. Others desired to have Congress be more specific as to what constituted illegal practices, and to empower the Government to halt in their earliest stages those trends and factors which would be apt in time to blossom forth into monopolistic conditions. After long public and Congressional discussion of these problems, the Clayton Act was passed.

That Act of 1914 specifically prohibited certain types of corporate mergers and acquisitions. It prohibited acquisition by one corporation of the stock of another when the effect "may be to substantially lessen competition" between them, or to "restrain such commerce in any section or community or tend to create a monopoly in any line of commerce."

Congress thus sought to discourage the merger process by curbing two of the easiest methods by which companies could combine -- stock acquisitions and corporate holding company control of competing corporations.

This was interpreted by the Supreme Court as having the same general purpose and legislative intent as reflected in the Sherman Act and the courts soon were applying tests of substantial lessening of competition -- or virtually the same tests applied under the Sherman Act.

Further lessening of the effectiveness of the Clayton Act came with the Supreme Court decisions holding that the Federal Trade Commission lost its jurisdiction to interfere with a merger if the acquiring company exchanged the acquired stock for assets of the company being acquired before the FTC could issue a cease-and-desist order. As a result, companies were able to evade Congressional disapproval of mergers quire effectively and quite easily since the terms of the statute were limited to stock acquisitions and never did forbid acquisition of assets. This situation plus later interpretations made Section 7 of little avail in combating the merger movement.

This, coupled with the great increase in mergers following World War II, prompted Congress in 1950 to amend Section 7. The change fundamentally prohibited acquisition of assets as well as stock of a corporation where such acquisition may result in a substantial lessening of competition or tend to create a monopoly. And it does not require that the merging corporations be competitors in order for the prohibition to apply.

Moreover, the Congressional Committees' reports made it clear that the amendments was more than a re-enactment of Sherman Act prohibitions.

They show that one purpose was to permit intervention by the Government in the merger process where the effect may be a significant loss in the amount of competition -- even though this effect may not be so far reaching as to amount to a combination in restraint of trade, a monopoly, or an attempt to monopolize.

Congress made it plain that it was furnishing a legal tool to cope with monopolistic tendencies in their incipiency, or long before they have resulted in conditions justifying a Sherman Act proceeding.

The first significant case to reach an appellate court under the amended Section 7 of the Clayton Act was Hamilton Watch Co. v. Benrus Watch Co. The complaint charged that Benrus violated the amended section in purchasing a large block of voting stock in Hamilton; that should Benrus achieve control over Hamilton, it would control such a significant portion of the watch industry as to lessen substantially competition in that line of commerce.

Hamilton and Benrus were the fourth and fifth largest concerns and their combined sales amounted to about 20 percent of the industry. Actually, two other jeweled watch companies who led the industry in 1951 and 1952 each sold more watches than Hamilton and Benrus combined.

The District Judge entered an order enjoining Benrus from voting the Hamilton stock and Benrus appealed. The Second Circuit Court of Appeals affirmed the lower court. In its opinion, the Appeals Court also took occasion to say:

"Although we now indulge in no ultimate conclusion, we believe the amendment of Section 7 in 1950 certainly casts doubt on decisions - - - interpreting that section as it stood previously. The Senate Committee

Report stated that the intent of the amendment was 'to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.' Interference at an early stage, if possible, seems the paramount aim."

Now, mergers have been important in the past in the steel industry. They continue to be important today.

I mentioned earlier the importance of mergers and acquisitions in the formation of the United States Steel Corporation. I also want to point out that the FTC reports that two-thirds of the long-term growth of Republic Steel during the period 1915 to 1945 resulted from mergers and acquisitions. The same sources say that mergers and acquisitions accounted for one-third of the long-term growth of Bethlehem Steel, while a recently published economic study indicates that through 1948 about one-half of the growth of Bethlehem's assets was due to acquisitions.

Now you all know that Bethlehem Steel Corporation has announced its intention of merging with Youngstown Sheet and Tube Company. According to information furnished by the companies, the total assets of Bethlehem at the end of 1953 were nearly one-billion-seven-hundered-and-eighty-three-million dollars, and those of Youngstown, nearly five-hundred-and-fourteen-million dollars. During 1953, Bethlehem's sales were two-billion-82-million dollars, and Youngstown's five-hundred-and-forty-eight-million dollars.

The Department, in its efforts to cooperate with business, has offered to study such plans and provide guidance to business concerns. Bethlehem and Youngstown did ask the Department to advise them whether the merger, in the form proposed and under present conditions, would or would not be in conformance with the antitrust laws.

We made a careful study of the Bethlehem-Youngstown proposal. After considering all factors, we concluded that the merger proposed by them would be in violation of the antitrust laws. We so advised them.

The decision is in keeping with the Administration's policy so well enunciated by President Eisenhower who said:

> "I am opposed to all unnecessary governmental restriction and regulation of private enterprise. I favor with equal vigor the maintenance and effective enforcement of the necessary basic safeguards to free American enterprise. These are provided in our antitrust laws and in those laws supporting fair competitive pricing practices."

In this connection, it should be remembered that each industry, and in fact each proposed merger within an industry, presents a unique problem. For example, in the automotive business there have recently been several mergers of leading companies. These presented economic and competitive problems peculiar to the industry and substantially different from those encountered in the steel industry.

As a result of a thorough study of the problems presented, both legal and economic, based upon voluntary disclosures of all pertinent information requested by the Government prior to the proposed mergers, the Antitrust Division of the Department of Justice advised the companies it would not institute proceedings because of the merger of Hudson and Nash into American Motors, and of Packard and Studebaker.

There is wide interest, I know, in how we reach a decision on whether or not a merger would be in violation of law.

In attempting to decide whether we should take action to oppose a merger, there are certain considerations which must be kept before us.

I would like to mention briefly the types of things which, depending on the various circumstances presented, we feel must be considered and weighed before reaching any conclusion as to whether a proposed merger or acquisition runs afoul of the Sherman or Clayton Acts. These factors include:

1. The location, physical and financial size, past acquisitions, products, and activities of the merging companies, individually and in combination.

2. The structure and size of the industry in terms of production and capacity.

3. The relative position in the industry of the two companies individually and combined.

4. The ease by which new competitors may enter the industry.

5. The number of companies active in the industry, their respective size and relative standing in sales and total assets.

6. Sales, relative standing and like factors of the two companies and their competitors in definable market areas, if relevant.

7. The nature of the industry -- that is, whether infant, dynamic or declining.

8. The effect the proposed merger may have on sources of raw materials and methods and patterns of distribution.

9. Whether the acquisition may result in a significant reduction in competition.

10. Whether the acquisition may increase the relative size of the purchasing company in such a fashion as to give it a substantial advantage over its competitors.

11. Whether the relationships between the purchaser and other companies that may be brought about by the merger might result in a lessening of competition.

If we conclude, after reviewing various relevant factors, that the merger would be contrary to the Sherman or the Clayton Act, it is then our duty to take appropriate steps as provided by these laws. We either seek an injunction to prevent any such merger about to be consummated or bring action to dissolve one of that nature which already has been completed.

Congress sharpened the tools to be used by the Department of Justice in meeting the antitrust problems of today. We intend to use these tools to carry out the policy determined by Congress. To do less would be to fail in our duty.