FOR RELEASE 12:30 PM, EST
THURSDAY, NOVEMBER 17, 1955

PS
668
.B6

ADDRESS

BY

HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

before the

National Industrial Conference Board

Bellevue Stratford Hotel

PHILADELPHIA, PENNSYLVANIA

THURSDAY, NOVEMBER 17, 1955

I am happy to be with you today and to talk over certain aspects of this Administration's policy toward business mergers. A good beginning point, I suggest, might be some comments on the proposed Bethlehem-Youngstown Merger in a recent magazine editorial. That editorial stated that Bethlehem and Youngstown "have submitted data which they feel indicate that the merger would not result in a lessening of competition. They say, they are willing to put their views to the test of an antitrust suit provided the Government will agree to expedite the case and not conduct such a monumental fishing expedition as in the recent DuPont case." That editorial concludes that "up to now the Department of Justice appears unwilling to give such assurance."

It was more than a year ago that the Justice Department announced its decision to oppose the Bethlehem-Youngstown merger. Despite the passage of more than one year, Bethlehem and Youngstown have not signed any merger agreement. And until they do, or otherwise indicate a definite intent to merge, we cannot take the issue to court. If and when they do go ahead with merger plans, I assure you, as we have often assured them, this Department stands ready to proceed promptly.

Underscoring that, Bethlehem and Youngstown, not the Department of Justice, have thus far thwarted suit. Many months ago, we assured those companies' lawyers that should their clients go ahead with the merger, we would take every step to bring the case to prompt trial. Indeed, we stated that we would try to have the case at trial on the merits within three months after issue was joined in the suit.

Finally the editorial mentions the extra ordinary procedures for speeding up antitrust litigation available to the Attorney General under

the so-called, "Expediting Act." Briefly, the Expediting Act obliges the Chief Judge of any circuit, upon certification by the Attorney General that a civil antitrust case "is of general importance," to immediately assign three judges to hear and decide the matter. Use of such procedure is rare. The last instance was in 1950, where the then Attorney General's request was withdrawn at the suggestion of the Chief Judge of the Circuit Court, on the promise the case would receive prompt hearing. Need for resort to such expediting procedure, of course, depends in large part on the trial calendar of the district in which the suit may be filed. From this it seems clear, we cannot agree with Youngstown and Bethlehem, any more than with any other potential antitrust defendants, to resort to Expenditing Act procedures until after our case has been filed, and the Court's congestion or lack of it become apparent.

Against this background of the Department's willingness to proceed, I can only conclude that Youngstown and Bethlehem have thus far failed to merge, not because of the fear of protracted litigation, but other reasons known only to them. Should they decide to merge, I repeat, this Department is ready and willing to take all reasonable measures to expedite the trial of any action.

The decision of this Department to oppose any Bethlehem-Youngstown Merger is firmly rooted in this Administration's Antitrust policy. Briefly put, this Administration aims at vigorous enforcement of our Antitrust Statutes to preserve the free competitive enterprise system which has done so much to build the United States. Against this background, I shall today talk over with you Antitrust problems mergers may pose. First, what did Congress have in mind when it strengthened Section Seven

of the Clayton Act relating to mergers? Second, how has this Department applied that newly amended provision? Finally, why do we oppose the projected Bethlehem-Youngstown merger while we approved certain mergers in the automobile industry?

First, the Congressional design for amended Section Seven. By its 1950 amendment of Section Seven Congress sought to patch up holes developed in the Act in its previous 36 years of life. Old Section Seven had been held by the Supreme Court not to cover mergers consummated by other than stock acquisition. As a result, many urged that Section Seven fell short of its goal to stop undue concentration of economic power. This background immediately preceding amendment of Section Seven reveals the apparent Congressional objective of fashioning more stringent rules against mergers.

It seems clear that Congress' object in Section Seven's 1950 amendment was to strike down mergers beyond the reach of the Sherman Act. Thus the Senate Report explains that the "bill is not intended to revert to the Sherman Act test. The intent here * * * is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." The Report further states that the Act's intent is to have "broad application to acquisitions that are economically significant. * * * [The] various additions and deletions--some strengthening and others weakening the bill--are not conflicting in purpose or effect. They are merely different steps toward the same objective, namely, that of framing a bill which although dropping portions of the so-called Clayton Act test that have no economic significance, reaches far beyond the Sherman Act."

In life fashion, the House Committee Report states that the tests prescribed, "are intended to be similar to those which the courts have applied in interpreting the same language as used in other Sections of the Clayton Act. Thus, it would be unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered to be unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to 'destroy or exclude competitors or fix prices.'" Moreover, the Act is "intended to permit intervention in * * * a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition," even though this effect may not be so far reaching as to amount to a violation of the Sherman Act. From this it follows that Section Seven, unlike the Sherman Act, requires findings and conclusions, not of actual anticompetitive effects, but merely of a reasonable probability of a substantial lessening of competition or tendency toward monopoly.

The essential standards for Section Seven discussed, I now turn to the Department's program for that provision's enforcement. This program has two facets: our procedure for pre-merger clearances, and cases the Department has filed attacking mergers already or about to be consummated.

Since 1953 the pre-merger clearance program has become increasingly important. Thus, in 1953, there were seven mergers submitted for pre-merger clearance. Of these, five were cleared, one denied, and one withdrawn. In 1954, of the 12 mergers considered, seven were cleared, four abandoned, and one denied. So far in 1955, of the 14 mergers considered, seven were cleared, three abandoned, three denied, and one is still pending.

Here some explanation of terms may be useful. By "cleared" the Department means that upon the information presently available, we do not currently intend to institute proceedings if the transaction is consummated. Thus, at the outset, clearance is based upon the accuracy and completeness of facts submitted. Should later investigation reveal the facts supplied were either inaccurate or incomplete, clearance is of course withdrawn. Further, should the industry or relative market situation change after clearance, the Department reserves the right to proceed. Finally, even absent factual inaccuracy or market change, it should be kept in mind that strictly from a legal standpoint, a clearance granted by one attorney general has no binding effect on his successor.

Beyond this clearance program, the Division investigates mergers not submitted for advance approval. At the outset, briefly reviewed are mergers and acquisitions reported, for example, by trade journals, financial newspapers, and manuals of investment, such as Standard Corporation Records and Moody's Industrials. Such initial investigation aims to gauge the economic effect of acquisitions, proposed or consummated. This preliminary survey is referred to within the Division as "Blue Sheet Procedure." From January 1953 to date, the staff has reviewed some 1800 reports of mergers and acquisitions.

Should this limited review indicate an acquisition may have adverse effects on competition, a more comprehensive analysis is conducted. For this purpose, the merger is assigned to a particular attorney who conducts a more exhaustive review of the companies and industry involved. On the basis of this analysis, the attorney recommends either additional investigation, referral of the matter to another section of the Antitrust Division for information or action, or closing the matter.

If the Division believes the merger may have those anti-competitive effects Section Seven proscribes, we seek from the then parties involved detailed information concerning the merging companies and any affected industry. In addition, the Department makes use of data secured from other companies, Government agencies, and trade associations. Typical of the information sought is:

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

2. Structure and size of the industry in terms of production and capacity.

3. Relative position in the industry of the two companies, individually and combined.

4. Number of companies reported active, their respective size and relative standing in sales and total assets.

5. Sales, relative standing, etc., of the two companies and their competitors in definable market areas, if relevant.

6. Annual reports, profit and loss statements and balance sheets for both companies for recent years.

7. Patents of importance that may be involved in the merger.

8. Contract terms and reasons of both parties for the merger or acquisition and a statement as to the mechanics of the merger. Copy of the merger contract.

9. Copies of the minutes of the meetings of the Board of Directors of both companies concerning the merger.

Since January 1953 the Legislation and Clearance Section has set up special merger files in more than 100 instances which merited detailed inquiry. Some involved mergers which already have resulted in the institution of proceedings, some mergers are still under inquiry, and in other instances mergers investigated were never consummated.

In addition to these more than 100 special merger files set up within the Division, some acquisitions meriting inquiry have been referred to the Federal Trade Commission. The Antitrust Division and the Commission together aim to husband scarce enforcement resources by avoiding duplication of effort in areas where both have concurrent jurisdiction. Toward this end, both have instituted a systematic information exchange. Pursuant to this plan, since 1948 there have been daily contacts whereby each agency is fully informed of the other's activities. Within this general liaison program is the work of the Division and Commission in the field of mergers.

Before either agency investigates a merger or a clearance request, it notifies the other by telephone and by file index card. On the card is written the name of the merging companies, the products or activities involved and a brief description of the transaction. Upon

receipt of a file card, the liaison officer determines whether or not the proposed inquiry in any way duplicates an investigation, pending or proposed, by his own agency. Overlap absent, the initiating agency is informed its inquiry may begin. Should a projected inquiry duplicate an investigation by the other agency, such conflict is resolved on the basis of which agency's proceeding, in the light of each one's particular resources and past industry experience, would most likely produce effective enforcement results.

Apart from the above programs, we actually filed four complaints alleging violation of Section Seven. These cases, all filed in 1955, reflect different aspects of the merger problem. They present to the courts different questions raised by the new anti-merger statute.

The first case was against Schenley Industries, Inc. This case presents a factual situation of creeping concentration culminating in Schenley's acquisition of Park & Tilford. Since 1933, Schenley has acquired more than 50 companies engaged in the production, distribution or sale of alcoholic beverages, thus becoming one of the "Big Four" leaders in the whiskey industry.

The second case filed involved the General Shoe Corporation. That case illustrates the cumulative effect of a series of small acquisitions. The complaint charges that the acquisition of Delman, Inc., was the eighteenth since June 1950 in a series of acquisitions by General Shoe, one of the five leading manufacturers of all kinds of shoes in the United States. Even if no single one of these acquisitions was individually of such importance as to justify invoking

the "anti-merger" statute, the Government felt it was clear that the "cumulative" effect of this series of acquisitions produced the type of result Congress intended to outlaw by the Clayton Act. This proceeding effectuates the Congressional purpose, again in the language of the House Report, "to permit intervention in * * * a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition."

The third case was against the Hilton Hotels Corporation. This action attacks Hilton's acquisition of the Hotel Statler Corp., applies the "anti-merger" statute to the hotel industry, with particular emphasis on the convention business. Hilton is the largest hotel chain in the world, and Statler was one of the largest hotel chains in the United States, and competed with Hilton throughout the nation for the business of national and regional conventions. This case probes the precise meaning of Section Seven's language "in any line of commerce * * * in any section of the country."

Each of these cases presents distinctive factual differences. The decisions of the courts should do much to clarify the scope of the statute and point out how successful Congress has been in its attempt to strengthen Section Seven.

The Schenley, General Shoe, and Hilton cases are now pending before district courts. As a result, thus far no decisions have been rendered which have any significance with regard to the merger program. However, you may be interested in one instance of the successful

application of our prefiling consent decree procedure in the merger field. In September we filed a complaint alleging a violation of Section Seven against the Minute Maid Corporation, and at the same time a consent decree, the result of extensive negotiations with the prospective defendant, was entered. That complaint alleged that Minute Maid, by its acquisition of the Snow Crop Division of Clinton Foods, had lessened competition in the frozen fruit juice concentrate industry. The consent decree required Minute Maid to divest itself of certain concentrate plants and provided other injunctive relief. These cases, I believe, mark out a pattern, of realistic Antitrust enforcement, flexible enforcement that accounts for the infinite variations in American Business Life.

Illustrating this flexible realistic approach enforcement are the reasons why the Department of Justice turned down the Bethlehem-Youngstown Merger, while at almost the same time we approved certain mergers by some of the auto manufacturers. Consider, if you will, the pattern of automobile production in early 1954, the time the Division considered the proposed mergers of Hudson-Nash, Packard-Studebaker. There were then three major, and several smaller concerns. The majors in 1949 produced more than 85 percent of new cars -- leaving the smaller firms with a meager 14-1/2 percent market share. By the first four months of 1954, however, the majors had jumped to almost 95 1/2 percent -- while smaller producers' share had shrunk to a bit over four percent. In 1954 some of the smaller firms actually operated at

a loss. The picture confronting us, then, revealed the smaller companies falling fast behind and the larger producers surging rapidly ahead.

Against this background, our feeling was the proposed mergers of Packard and Studebaker, Nash and Hudson, might revitalize these lagging smaller concerns. They would then have broader asset basis, might economize by eliminating duplicating facilities, secure better dealer representation and sell more complete lines of cars. It should be emphasized that these companies merging were the smallest in the business. Thus their consolidation spelled no competitive disadvantage over smaller concerns. Vital to our determination of legality was, I emphasize, consideration as to any merger's probable effect, not only on the merging companies' ability to compete with their giant rivals, but also on any remaining smaller companies. In this case, not only were there no smaller concerns to be at a disadvantage, but the merger, by increasing the smallest firms' strength, created far more competition than it eliminated.

Absent competitive disadvantage to smaller rivals, Congress beyond doubt intended us to consider mergers' effect on small companies ability to compete with dominant firms. Thus The Report of the House Committee considering Section Seven asks, for example: "Would the Bill prohibit small corporations from merging in order to afford greater competition to larger companies." The Report then refers to the "objection that the suggested amendment would prohibit small companies from merging." Rejecting this possibility the Report concludes

"there is no real basis for this objection." For, "obviously those mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition, but rather, intensify it." Applying this legislative guide, I concluded the auto mergers submitted constituted no substantial lessening of competition nor tended toward monopoly.

We reached, as I have indicated, contrary conclusions regarding the proposed Bethlehem-Youngstown merger. Since litigation may well be in the offing, my comments are perforce cursory. In steel, the three majors have 30, 15, and 8 percent of the capacity. The remaining seven of the first ten producers range from 5 percent to 1.7 percent of capacity. Of the proposed merging companies Bethlehem is the second of the big three and Youngstown the sixth of the first ten. Moreover, much of both Youngstown's and Bethlehem's capacity stems from past mergers and acquisitions.

Unlike the automobile, however, there were and are, of course, many companies - - integrated and non-integrated - - much smaller than Youngstown. Further, there was no need for Bethlehem and Youngstown to combine in order to compete with the 80 smaller steel companies, most of which are not even integrated. Thus, not only would this proposed merger eliminate competition between Bethlehem and Youngstown but equally important, it would increase concentration in the hands of two companies already industry leaders, and thus widen the competitive spread between the merged companies and their smaller rivals.

Arguing to the contrary, Bethlehem and Youngstown urge that by combining they may better compete with the largest steel giant - - U. S. Steel, suffice it to say, in the language of the Federal Trade Commission in the Pillsbury Case, the result of the proposed merger would be a market "dominated by a few large * * * companies * * *. This, of course, has been the trend in other industries. In some of them under the policy of the Sherman Act, competition between the big companies continues to protect the consumer interest. But, as we understand it, it was this sort of trend that Congress condemned and desired to halt when it adopted the New Clayton Act anti-merger provisions."

The facts of steel concentration underscore the necessity of applying that reasoning to halt the Youngstown-Bethlehem merger.

Were we not to take a position against the proposed Bethlehem-Youngstown merger, I pose the question, where would we begin to stop mergers in the steel industry? If the Bethlehem-Youngstown merger was approved, could we fail to approve any other proposed merger that resulted in less than U. S. Steel's 34 percent? Could we permit Republic, National and all 23 of the fully integrated companies smaller than the first ten to unite? Or should we permit the smaller 23 to merge with Kaiser and Colorado Fuel & Iron and Interlake and Armco and Inland and Jones & Laughlin? Neither of such mergers would create a company larger than U. S. steel. Yet could such mergers conceivably be outside the Congressional intended ban? In short, stopping steel mergers now seems the best chance to avoid the troublesome problem - of undue concentration which the Clayton Act seeks to prevent.