The Antitrust Procedural Improvements Act of 1980: Jurisdictional Uniformity in Antitrust Merger Law

Beth Beucher

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NOTES

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INTRODUCTION

The Antitrust Procedural Improvements Act of 1980 amends a broad range of antitrust law, including merger jurisdiction provisions of section 7 of the Clayton Act. The Act extends the reach of section 7 to “persons” whose activities are either “in commerce” or “affect commerce,” thereby resolving jurisdictional conflict con-


   (1) by striking out “corporation” each place it appears in the first and second paragraphs and inserting in lieu thereof “person” in each such place;
   (2) by striking out “corporations” in the second paragraph and in the first sentence of the third paragraph and inserting in lieu thereof “persons”; and
   (3) by inserting “or in any activity affecting commerce” after “commerce” each place it appears in the first three paragraphs;
   (4) the amendments made by this section shall apply only with respect to acquisitions made after the date of the enactment of this Act.


The Improvements Act does not alter the substantive standards of section 7 of the Clayton Act. H.R. Rep. No. 871, 96th Cong., 2d Sess. 2 (1980). Hence, the courts will continue to examine whether or not the effect of an acquisition “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18 (1976).

4. Changes in the existing law made by this amendment are shown as follows: existing law deleted by the amendments is enclosed in black brackets, new matter is printed in italic, existing law in which no change is made is shown in roman. Section 7 as amended provides:

That no [corporation] person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the
cerning anticompetitive mergers and section 7. The Act serves to
countermand narrow judicial interpretation of merger jurisdiction,
to conform the jurisdictional requirements of section 7 of the Clay-

stock or other share capital and no [corporation] person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another [corporation] person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting 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.

No [corporation] person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no [corporation] person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more [corporations] persons engaged in commerce, or in any activity affecting commerce where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to [corporations] persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting 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.


5. Under this bill, mergers "affecting commerce" and not merely mergers "in inter-state commerce" can be challenged by the Antitrust Division of the Justice Department or private litigants. Currently, only the Federal Trade Commission has such authority, and there appears to be no reason why the Antitrust Division or private parties should be handicapped in enforcing the antitrust laws.

The [other] provision of this bill extends the reach of section 7 of the Clayton Act beyond its current limitation to mergers between corporations to mergers between noncorporate entities. Again, the Federal Trade Commission has authority to challenge mergers between persons and this provision is intended to grant the Antitrust Division and private litigants the same authority.


Commentators agree that this jurisdictional distinction is "anomalous." See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 233, at 714 (1977); I P. AREEDA & D. TURNER, ANTITRUST LAW § 233a, at 241 (1978). The purpose of the amendments is to remove these illogical distinctions. H.R. REP. No. 871, 96th Cong., 2d Sess. 1 (1980).

6. Congress, by enacting this legislation, altered the statutory language that the Supreme Court relied on in formulating its interpretation of the jurisdictional requirements of § 7 of the Clayton Act. The House Report clearly stated Congress' intent to modify the Clayton Act's language in conformity with that of other antitrust laws. Congress thus demonstrated its dissatisfaction with the Supreme Court's decision in United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975), which narrowly construed section 7 jurisdiction, see notes 34-53 infra, and accompanying text, and stated that the express purpose of this legislation was to "overrule" that case. H.R. REP. No. 871, 96th Cong., 2d Sess. 1 (1980).
ton Act with other antitrust merger law, and to allow proper coordination of investigation and enforcement of antimerger law by the appropriate administrative agencies.

This article will examine the necessity for amending section 7 of the Clayton Act and note the practical effects of the amendments on antitrust merger law in general. The article will then analyze the potential ramifications the amendments will have on judicial interpretation of Clayton Act antitrust merger jurisdiction.

SCOPE OF THE IMPROVEMENTS ACT

The Antitrust Procedural Improvements Act of 1980 (Improvements Act) is a compilation of legislative bills designed to expedite private and public enforcement of the antitrust laws and give the Antitrust Division of the Justice Department and private parties the same jurisdictional authority as that formerly held only by the Federal Trade Commission to challenge anticompetitive mergers. The major provisions of the Improvements Act: (1) authorize the Attorney General and the Assistant Attorney General in charge of the Antitrust Division to issue civil investigative demands (CID's)


In the Conference Report on the Antitrust Procedural Improvements Act of 1980, it was noted that the Senate bill did not include language permitting the Department of Justice and private parties to challenge anticompetitive mergers involving business entities engaged in any activity "affecting" interstate commerce. Ultimately the House and Senate agreed to the House version of the amendment which included the affecting commerce language. H.R. REP. No. 1234, 96th Cong., 2d Sess. 10 (1980).

to obtain discovery materials produced in prior litigation; (2) allow the Justice Department to employ outside agents to examine materials produced pursuant to CID’s; (3) permit judges to award prejudgment interest on actual damages in private, government, and parens patriae antitrust suits; (4) broaden the range of expenses for which an attorney engaging in dilatory tactics may be personally liable; (5) adopt the doctrine of collateral estoppel in antitrust actions, except as to findings made by the Federal Trade Commission; and (6) expand the jurisdictional reach of section 7 of the Clayton Act to include mergers and acquisitions involving “persons” engaged in any activity “affecting commerce.”

The final provision, making the seemingly innocuous change of amending section 7 of the Clayton Act to include “persons” and conduct “affecting commerce,” constitutes a radical expansion of section 7 subject matter jurisdiction. This shift represents a reaction to judicial interpretation of section 7 as well as congressional rethinking of the need for uniformity in the antitrust law. The rationale of this shift can best be explained by examining the pre-Act situation and the changes wrought by the amendments.

NECESSITY FOR AMENDING SECTION 7 OF THE CLAYTON ACT

Persons Subject to Section 7

Prior to the Improvements Act, section 7 of the Clayton Act was limited to corporate acquisitions. No action would lie against a party to an allegedly anticompetitive merger who had not been incorporated. Although section 7 expressly applied only to direct


11. See notes 13-33 infra, and accompanying text.

12. See notes 54-59 infra, and accompanying text.

13. “No corporation . . . shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . [or] the whole or any part of the assets of another corporation . . . where . . . the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.” 15 U.S.C. § 18 (1976).


In G.A.F. Corp. v. Circle Floor Co., a § 7 claim against individuals was dismissed. In dicta, the court stated that even if a corporation indirectly obtained stock through purchases ef-
and indirect corporate acquisitions, the courts began to expand "corporation" to encompass commercial banks and joint ventures. Under certain circumstances, section 7 also could apply to stockholders making an acquisition on behalf of the corporation.

The limitation of the jurisdictional reach of section 7 to corporations affected the ability of the Justice Department to prevent some potentially anticompetitive mergers. Transactions involving partnerships, associations, or other unincorporated entities escaped scrutiny, regardless of their size or potential anticompetitive effect. Noncorporate business entities, however, populate significant areas of the economy, especially the service sector, in which the use of the partnership form is frequent. Many of these noncorporate entities are economically significant. For example, the "Big Eight" accounting partnerships had revenues in 1977 of $350 million to $516 million. A merger between any two such firms might have substantial anticompetitive consequences for the

fected by an individual, no claim would lie against the individual. The court granted summary judgment dismissing the suit against the firm which made the purchases. The court found no specific facts were alleged which would lead to the conclusion that stock purchases by officers of the firm were made on behalf of the firm. G.A.F. Corp. v. Circle Floor Co., 329 F. Supp. 823, 829 (S.D.N.Y. 1971), aff'd, 463 F.2d 752 (2d Cir. 1972), cert. denied, 413 U.S. 901 (1973).

15. Transamerica Corp. v. Bd. of Governors, 206 F.2d 163 (3d Cir. 1953). The Third Circuit stated that the corporate acquisition "language is so clear and unambiguous as to leave no room for construction. Its sweep includes all 'corporations engaged in commerce' without exception." Id. at 165.


For example, the requirement that the operations of both the acquiring and acquired corporation be "in commerce" might in some cases preclude the Justice Department from acting to prevent an acquisition where one of the firms only affects commerce, regardless of the probable anticompetitive effects in the "section of the country" involved. Antitrust Procedural Act of 1979, Hearings on S. 390 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 242 (1979).


20. Id. at 30. It has been estimated that approximately 40 percent of all businesses in the service sector are organized in noncorporate form. Id.

accounting industry. Despite this potential result, the activity could not be challenged in its incipiency because of the narrow jurisdictional scope of section 7 of the Clayton Act. The Justice Department was forced to wait until the activity ripened into a Sherman Act violation before attacking it.22

The Improvements Act amendment brings within the coverage of section 7 acquisitions involving natural persons, partnerships, associations, and other unincorporated entities. The amendment is expected to most significantly affect partnerships, whereas natural persons will rarely be involved in acquisitions having the prohibited anticompetitive effects.23 This amendment to the jurisdictional requirements of section 7 of the Clayton Act from "corporations" to "persons" responds to criticism that the legality of a merger should not be founded upon the legal form chosen by the entities involved, but instead upon its substantive effect on competition.24 The amendment strengthens the primary objective of section 7 of the Clayton Act by clearly indicating that natural persons, and noncorporate and corporate business entities are within the jurisdictional scope of section 7.

Defining "in commerce" Under Section 7

Although Congress intended the Clayton Act to supplement the existing laws against restraints of trade and monopolies,25 the jurisdictional reach of the Sherman Act was expressly more expansive than the Clayton Act.26 Until as recently as 1975,27 however, the "in commerce" requirement of section 7 was interpreted as im-

22. See notes 35-40 infra and accompanying text.
25. Section 1 of the Sherman Act prohibits "every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . ." Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . ." 15 U.S.C. §§ 1, 2 (1976). Section 7 of the Clayton Act, prior to the Improvements Act, prohibited mergers between "corporations engaged in commerce." 15 U.S.C. § 18 (1976).
explicitly coextensive with that of sections 1 and 2 of the Sherman Act. The rationale for this conclusion was that the language used to define "commerce" in the Clayton Act substantially resembles that of the Sherman Act and the Commerce Clause. This parallel wording indicated Congressional intent when it enacted the Clayton Act to exercise its full commerce power under the constitution. Thus, regulation by the federal government of essentially local activities which substantially affected interstate commerce could be reached under the Clayton Act as it has under the Sherman Act and the Commerce Clause.

1. Narrowed Judicial Interpretation: The ABMI Case

In 1975, the United States Supreme Court examined the express provisions of section 7 and narrowly construed the jurisdictional scope of section 7 of the Clayton Act in United States v. American Building Maintenance Industries. The government alleged that American Building Maintenance Industries (ABMI) had violated section 7 of the Clayton Act by acquiring the stock of both J. E. Benton Management Corporation and Benton Maintenance, and by merging the latter into one of ABMI's wholly-owned subsidiaries. The district court granted ABMI's motion for summary judgment, holding that there had been no violation of section 7 of the Clayton Act. The Supreme Court affirmed the judgment. The


It is well settled that the "commerce" requirement of §§ 1 and 2 of the Sherman Act is satisfied by activities that are either "in commerce" or "affect commerce." See Burke v. Ford, 389 U.S. 320, 321 (1967); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 232 (1948).


32. "Since the general language of the Sherman Act was designed by Congress 'to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements' the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope." Transamerica Corp. v. Bd. of Governors, 206 F.2d 163, 166 (3d Cir. 1953), quoting United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 558 (1944).


34. 422 U.S. 271 (1975).

35. Id. at 273.

36. Id.
Court found that the acquired companies were not "engaged in commerce" because their activities were wholly intrastate. Section 7 of the Clayton Act, therefore, did not cover the disputed acquisitions and merger.38

Unquestionably, ABMI was actively engaged in interstate commerce. According to the facts of the case, ABMI was one of the largest suppliers of janitorial services in the country and served more than 500 communities in the United States and Canada. It was also the single largest supplier of janitorial services in Southern California.39 Both of the acquired companies also supplied janitorial services in Southern California and together constituted seven percent of the total janitorial sales in the area. Although the acquired companies serviced customers engaged in interstate commerce, the district court concluded that at the time of the challenged acquisition and merger neither of the acquired companies was "engaged in commerce" within the meaning of section 7 of the Clayton Act.40

The Supreme Court agreed, reasoning that the explicit language of section 7 required that the acquiring corporation, as well as the corporations whose stock or assets were acquired, be "engaged in commerce."41 The Court thus framed the issue as whether or not the phrase "engaged in commerce" as used in section 7 of the Clayton Act encompassed corporations engaged in intrastate activities that substantially affect interstate commerce.42 In reaching its determination that the jurisdictional scope of section 7 of the Clayton Act was limited to activities conducted in the flow of interstate commerce, the Court had two bases of support. First, the Court relied upon judicial precedent.43 Second, the Court found persuasive congressional recognition of the distinction between legislation limited to activities "in commerce" and full assertion of Congress' commerce power, covering all activities substantially affecting interstate commerce.44

38. Id. at 285-86.
39. Id. at 274-75.
40. Id. at 275.
42. Id. at 275.
44. See United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 279-82
The Court in *ABMI* relied upon its past interpretation of the jurisdictional scope of section 5 of the Federal Trade Commission Act, before amended, to determine the jurisdiction of section 7 of the Clayton Act. The Court had held that the FTC's section 5 jurisdiction was limited to unfair methods of competition occurring in the flow of interstate commerce. The Court therein had emphatically rejected the contention, identical to the one made in *ABMI*, that "in commerce" should be read as if it meant "affecting interstate commerce."

The *ABMI* Court found this interpretation of FTC Act jurisdiction particularly relevant to its construction of the "in commerce" language of section 7 of the Clayton Act. Section 5 of the Federal Trade Commission Act and section 7 of the Clayton Act were both amended during the same congressional session and were designed to deal with closely related aspects of the same problem—ensuring free and fair competition nationwide. The Court in *ABMI* rejected the argument that the "in commerce" language of section 7 should be construed as coextensive with the Sherman Act, and therefore more expansively than the Court's interpretation of the FTC Act.

The second foundation for the Court's decision in *ABMI* was congressional recognition of the distinction between legislation limited to activities "in commerce" and legislation encompassing all activities substantially "affecting commerce." Although the Clayton Act was designed to supplement the Sherman Act, Congress failed to reflect its intention to give the Clayton Act similarly expansive jurisdiction. The contrast between the explicit statutory

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47. The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. *FTC v. Bunte Bros.*, 312 U.S. 349, 354-55 (1941).
language of section 1 of the Sherman Act and sections 2(a) and 7 of the Clayton Act indicated that the jurisdiction of the Clayton Act was limited by its explicit language and had to be construed narrowly.\(^\text{60}\) The Court seized upon the fact that the statutory language concerning jurisdiction was different in the two acts.\(^\text{61}\) Because the Sherman Act had a broader reach than the Clayton Act, the Court found that jurisdiction of the acts was not coextensive. Furthermore, in amending and reenacting section 7 of the Clayton Act in 1950, Congress retained the narrow “in commerce” language, rather than adopting the broad “affecting commerce” jurisdictional formulation.\(^\text{62}\) The preservation of the requirement that both the acquiring and acquired companies be “engaged in commerce” demonstrated congressional intent, at the time of amendment, not to extend the drastic prohibitions of section 7 of the Clayton Act to the full reach of the commerce power.\(^\text{63}\)

2. Impact of ABMI and Statutory Amendment

The result of ABMI was that a national firm, engaged in interstate commerce, could acquire any number of local firms and create a monopoly notwithstanding that each acquisition violated the

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51. Id. In Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 194-95 (1975), relied upon in ABMI, the Court held:

[This] “in commerce” language . . . of § 1 of the Sherman Act . . . includes within its scope all prohibited conduct “in restraint of trade or commerce among the several States, or with foreign nations . . . .” The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods.

In contrast to § 1, the distinct “in commerce” language of the Clayton and Robinson-Patman Act provisions . . . appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce.

Despite the finding that the facially narrow “in commerce” language limited the Clayton Act provisions, the Copp Paving Court recognized the validity of an argument that the history and practical purposes of the Clayton Act required a more expansive jurisdictional scope. Id. at 201. Whether or not such an argument would justify radically expanding the jurisdiction expressed by the statutory language by judicial decision rather than by amendatory legislation was deemed doubtful. Id. at 202.

52. Id. at 280. A serious challenge to this conclusion is raised by the writer in Note, Antitrust—United States v. American Building Maintenance Industries: A Narrow Construction of Section 7 of the Clayton Act, 54 N.C. L. Rev. 189, 191 (1976).
53. 422 U.S. at 281.
A merger would not fall within the prohibitions of section 7 of the Clayton Act if the acquired firm was not directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce, even though the acquired firm’s activity could significantly affect interstate commerce.55

Congressional discontent with judicial interpretation requiring that both the acquiring and acquired firms be “in commerce” was the major impetus for amending this aspect of section 7. The Improvements Act amends section 7 of the Clayton Act to reach activities of business entities that “engage in commerce or in any activity affecting commerce.”56 The amendment of section 7 provides the necessary explicit congressional mandate that the jurisdiction of section 7 is to be coextensive with the Sherman Act and extend to the full reach of Congress’ authority under the Commerce Clause.57 Thus, the narrow judicial interpretation imposed on section 7 by ABMI is effectively “overruled” by enactment of the Improvements Act.58

An additional effect of amending the jurisdictional language of section 7 is that it provides for simplification and efficiency of enforcement of section 7 cases. Testimony at the congressional hearings on the amendment indicated that judicial resources were often consumed over the question of whether the acquired or acquiring corporation was “in commerce” or “affects commerce.”59 The

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55. The following is an example of the type of activity which is encouraged by ABMI: Assume A is a firm located in Kansas City, Kansas, and has a substantial portion of the building maintenance business in that market, but does no business outside the State. Further assume that B is a national business maintenance business corporation based in Kansas City, Missouri. Company B makes what would be an unlawful acquisition of Company A under the substantive standard of § 7. While Company A engages in commercial activities which substantially “affect” interstate commerce, it is not “in” interstate commerce. [Applying the result of the decision in ABMI] the Justice Department or a private party (including the illegally acquired business) cannot challenge B’s acquisition of A under § 7 of the Clayton Act, even though the effect of the acquisition may be substantially to lessen competition in the Kansas City, Kansas market.
58. Id. at 1.
59. Hearings on H.R. 4049, supra note 18, at 169. David L. Foster, a member of the American Bar Association Antitrust Section Counsel, observed: “[S]ome Section 7 actions have been impeded by the necessity of taking evidence on the volume of incidental interstate purchases or telephone calls in order to determine whether a company was engaged in
amendment simplifies section 7 litigation by substantially reducing
the likelihood of a need for a determination on the issue of
whether each party is engaged "in commerce."

PRACTICAL EFFECTS OF AMENDMENT OF SECTION 7: CORRECTION OF
JURISDICTION ANOMALIES

Sections 1 and 2 of the Sherman Act

The Sherman Act proscribes the illegal conduct of "persons" and
encompasses "trade or commerce among the several states and
with foreign nations." The term "persons" includes natural per-
sons, corporations, unincorporated associations, partnerships, and
other unincorporated business entities. When the Sherman Act
was enacted in 1890, Congress took a very narrow view of its power
under the Commerce Clause. The Supreme Court has since per-
mitted the reach of the Sherman Act to expand along with the ex-
panding notions of Congress' commerce power. Presently, the Su-
preme Court broadly construes the Sherman Act to proscribe
"every contract, combination or conspiracy in restraint of trade or
commerce among the several States . . . , whether entered into by a
natural person, partnership, corporation or other form of business
organization."

Section 7 of the Clayton Act was intended to supplement the
Sherman Act by reaching incipient monopolies and restraints of
trade. The Improvements Act removes the anomaly that a statute
intended to prohibit incipient monopolies had less jurisdictional
breadth than the statute designed to prohibit unlawful use of mon-


   States v. E.C. Knight Co., 156 U.S. 1 (1895) with Mandeville Island Farms, Inc. v. American
   Crystal Sugar Co., 334 U.S. 219 (1948) and United States v. Employing Plasterers Ass'n.,
64. United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 279 (1975) (em-
   phasis in original). See also Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743
   Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977); FTC v. Procter &
opoly power. In addition, the term “person” is given the meaning accorded to it under section 1 of the Sherman Act. Because the jurisdictional scope of section 7 is now clearly coextensive with the Sherman Act, jurisdictional standards and precedent applicable to Sherman Act cases may be useful in determining the jurisdictional requirements of a section 7 Clayton Act case.

Section 5 of the Federal Trade Commission Act

Section 7 of the Clayton Act authorizes the FTC, the Department of Justice, and private parties to challenge mergers. The FTC in addition has authority to challenge mergers under section 5 of the Federal Trade Commission Act. Section 5 prohibits “unfair methods of competition in or affecting commerce.” The FTC, pursuant to section 5, has the authority to challenge alleged anticompetitive acquisitions or other similar transactions involving noncorporate and corporate entities. Although the ability to challenge such activity under section 7 was restrained by the ABMI decision, the FTC could still pursue activity which substantially violated section 7 under section 5 of the FTC Act. Thus, the FTC apparently had greater authority to challenge merger activity than the Department of Justice or private parties.

67. Id. at 7.
68. 15 U.S.C. § 18 (1976). Although § 7 of the Clayton Act is most commonly employed to challenge a merger, action may be taken under three other statutory provisions. An acquisition of a noncorporate entity, previously not subject to challenge under § 7, may be attacked under § 5 of the FTC Act as an unfair method of competition. Section 1 of the Sherman Act also provides an alternative to challenge the acquisition of a noncorporate enterprise. Finally, a merger violates § 2 of the Sherman Act, if the merger creates a potential monopoly or is an attempt to monopolize within the market.

While these provisions enable various methods to challenge an anticompetitive merger or acquisition, there are shortcomings. For example, § 7 only requires proof that the merger may substantially lessen competition or tend to create a monopoly. On the other hand, § 1 of the Sherman Act requires a showing of an actual substantial lessening of competition. Given this additional burden, an attack under § 7 of the Clayton Act is clearly preferable.

72. An antitrust scholar has noted that “acts or practices which are for technical reasons beyond the scope of [the Clayton Act] . . . may be reached by the Commission under Section 5 if they have or are likely to have a substantial anticompetitive effect.” Kritzer, supra note 8, at 23.
Coextensive authority for enforcing merger law was needed for several reasons. The Justice Department and the FTC work together to coordinate their enforcement activities and to avoid duplication of effort. One agency, possessing a certain expertise, might be more effective in challenging particular mergers than the other. The Justice Department might have more knowledge and experience regarding specific industries and firms, thus making it the more appropriate investigatory agency. Further, a merger

74. In the field of enforcement of merger law, where investigations and enforcement decisions must be completed very quickly, proposed mergers must be assigned to one agency or the other in the very early stages of investigation. At this stage, it is difficult, if not impossible, to determine whether the firms involved are "engaged in" interstate commerce, or merely "affect" interstate commerce. If, following a decision for [Department of Justice] Antitrust Division investigation, the Division determined after further investigation that a firm merely "affected" commerce, and that only the FTC could prevent the merger, reassignment of that transaction to the FTC would be a waste of time and effort not only for the government enforcement agencies, but also for the affected private parties as well. Hearings on H.R. 4049, supra note 18, at 45.

75. Hearings on H.R. 4049, supra note 18, at 45. The two agencies have established a systematic, mutual exchange of information regarding investigations. When one agency begins an investigation, the other agency is promptly notified. If any objections arise as to the action proposed by either agency, the question of which agency should proceed is submitted to a joint conference. Aside from this procedure, an enforcement program has emerged from case-by-case action, in which "the two agencies have attempted, with limited, but ever increasing, success to cooperate in their dual administration of the antitrust law." ATTORNEY GENERAL'S NATIONAL COMMISSION TO STUDY THE ANTITRUST LAWS, REPORT, at 376 (1976). See also Kitner, supra note 8, at 148-49.

76. Congress has recognized that the decision to challenge acquisitions in a particular industry should be based on the expertise of the separate agencies, "rather than on accidental jurisdictional differences." Hearings on H.R. 4049, supra note 18, at 169.

77. Federal Trade Commission litigation emphasizes activities which result in "unfair methods of competition" and "unfair or deceptive acts or practices" with an ultimate view toward competition and consumer protection. S. Kanwit, FEDERAL TRADE COMMISSION: REGULATORY MANUAL SERIES 1-2 (1979). The Justice Department considers that "the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition. The merger guidelines [a statement of policy of the Justice Department with regard to enforcement of section 7 of the Clayton Act] focus primarily on the structure of the market, and are intended to identify those mergers that alter market structure in ways likely now or eventually to encourage or permit noncompetitive conduct." 1 B. Fox & E. Fox, CORPORATE ACQUISITIONS AND Mergers, § 22.02 (1976).

78. Hearings on H.R. 4049, supra note 18, at 45.

Traditionally the Justice Department has investigated the following industries: aluminum; automobile industry monopolization and dealer relations; aviation; banking and securities; communications; computers; international agreements; newspaper acquisitions; and tire manufacturing.

The FTC has investigated: autoparts monopolization and acquisition; batteries and accessories distribution; cement; brewing monopolization and price discrimination; copiers and business machines; dairy industry acquisitions; department store acquisitions; food and food distribution; franchising; health care; petroleum monopolization; shopping center trade re-
might be related to ongoing investigations, litigation, or enforcement activities being conducted by a particular agency.79

Congress determined that denying equal jurisdictional authority to the Justice Department might lead to less effective, and possibly inconsistent, antitrust enforcement.80 The Improvements Act removes jurisdictional inconsistencies in merger law and mandates that section 7 of the Clayton Act is to be coextensive with section 5 of the FTC Act. The jurisdictional standards applicable to section 5 of the FTC Act now also apply to section 7 of the Clayton Act, thus placing the Justice Department’s and private parties’ merger-challenging ability on an equal basis with that of the FTC.81

Section 7A of the Clayton Act

To facilitate the investigation of imminent mergers by the Antitrust Division of the Justice Department and the FTC, Congress added section 7A to the Clayton Act by enactment of the Hart-Scott-Rodino-Antitrust Improvements Act of 1976.82 This legislation established pre-merger notification and waiting requirements for persons planning to consummate very large mergers and acquisitions.83 The advance notice given the FTC and the Justice De-

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81. Id. at 2.
83. "[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons . . . file notification . . . [and] if . . . the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce." 15 U.S.C. § 18A(a) (1976).

The required waiting period shall:

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the "Assistant Attorney General") of—

(i) the completed notification required under subsection (a), or
(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).


Section 7A only applies to activity that meets, or is above, the base monetary require-
partment to investigate substantial mergers and acquisitions strengthens the enforcement of section 7 of the Clayton Act.

Prior to the passage of the Improvements Act, however, enhanced enforcement of section 7 through the use of section 7A was impeded. Under section 7A, prior notification to the government is required of significant acquisitions by or from any “person” if either party is “engaged in commerce or any activity affecting commerce.” The Justice Department, however, could not challenge such acquisitions unless the “in commerce” test of section 7 was met. To require that the Justice Department be given notice to evaluate merger information, but not allow it to challenge the activity underlying such information, was illogical. The Improvements Act empowers both the Justice Department and the FTC to oppose pre-merger transactions that will affect commerce. Section

ments of § 7A. 15 U.S.C. § 18(a)(2)-(3) (1976). Private parties are not entitled to this advance notice. Any information or documentary material filed with the Justice Department or the FTC pursuant to section 7A “shall be exempt from disclosure . . . and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.” 15 U.S.C. § 18a(h) (1976).

Both the Antitrust Division of the Justice Department and the FTC have the authority to halt impending mergers before consummation by seeking temporary restraining orders and preliminary injunctions from the federal courts.


The government carries the burden of proof in pre-merger injunction proceedings and must demonstrate a reasonable probability that it will prevail on the merits of the merger challenge. United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969); United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963), aff'd, 320 F.2d 509 (3d Cir. 1963). Crucial to a pre-merger challenge is advance notice of an imminent merger, data relevant to its legality, and at least several weeks to prepare a case. Without this information and preparation, the government would have no chance to sustain its burden of proof and obtain a preliminary injunction against a merger that appeared to violate section 7 of the Clayton Act. H.R. REP. No. 1373, 94th Cong., 2d Sess. 8, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2637, 2640.

Section 7A also shifts the emphasis away from the traditional post-acquisition litigation in the merger area. S. KANWIT, FEDERAL TRADE COMMISSION: REGULATORY MANUAL SERIES 17-45 (1979).

The FTC should also have been limited by the “in commerce” requirement, but was able to circumvent this limitation by employing section 5 of the FTC Act. See supra note 72, and accompanying text.

H.R. REP. No. 871, 96th Cong., 2d Sess. 6 (1980).
7A may now be used in conjunction with section 7 to effectively challenge mergers and acquisitions in the pre-merger stage. 88

**Ramifications of Legislative Action**

The enactment of the Improvements Act is not so much a congressional innovation in antitrust law, as merely a continuing expansion of the jurisdictional reach of the antitrust laws. The passage of the 1980 Improvements Act mirrors the legislative actions and purposes present in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. 90 The Magnuson-Moss Act formally expanded FTC jurisdiction, pursuant to section 5 of the FTC Act, to include activities “in or affecting commerce.” 91 An object of the FTC Improvement Act was to expand the FTC’s ability...
to police the market effectively, by enabling it to regulate conduct which, although local in character, affected interstate commerce.92 Similarly, the Improvements Act provides the "clear mandate"93 to support expansion of the jurisdictional scope of section 7 of the Clayton Act.

Conceivably, the Improvements Act could be subject to constitutional attack, on the ground that, by extending the statute's scope, Congress has improperly attempted to regulate local activities.94 Given the general acceptance of legislative activity in expanding the jurisdictional requirements of the antitrust laws, however, the success of a constitutional challenge to the Act seems remote. The Supreme Court in ABMI95 did not suggest that Congress lacked the requisite constitutional power to regulate local mergers and acquisitions that affect interstate commerce. Rather, the opinion stated that the language of section 7 indicated that Congress did not exercise its full constitutional power in enacting the statute.96

The Court's determination in ABMI of the jurisdictional scope of section 7 of the Clayton Act was founded upon statutory construction, not upon any constitutional limitations. Confining itself to an examination of the supposed "plain meaning" of the words of section 7 in the context of its legislative history,97 the Court did not address constitutional arguments.98 Moreover, the Court recognized that the jurisdictional scope of the Sherman Act, in which Congress exercised its full constitutional power under the Commerce Clause, may constitutionally reach local conduct which af-

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The Magnuson-Moss Act granted the FTC authority to regulate "transactions which neither cross state lines nor constitute a part of a pattern of interstate commerce conducted by the business concern itself or its local agents." Id.

93. In ABMI, the Court recognized that Congress had acted to remedy the narrow jurisdictional interpretation of § 5 of the FTC Act rendered by Bunte Bros. "Congress recently acted to provide such a 'clearer mandate' amending the FTC Act by replacing the phrase 'in commerce' with 'in or affecting commerce' in §§ 5, 6 and 12 of the Act." United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 277 n.6 (1975).

94. "The justification for an expansive interpretation of the 'in commerce' language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of local character, harmful to the national marketplace." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 198-99 (1974) (emphasis added).


96. Id. at 284 n.10.

97. In the legislative hearings, Eleanor Fox, a leading authority on antitrust law, emphasized that the Court's reasoning in ABMI was founded on a "technical exercise in statutory construction." Hearings on H.R. 4049, supra note 18, at 112.

98. 422 U.S. at 279-81.
fects interstate commerce.\textsuperscript{99}

In clarifying the language of section 7 to remedy the strict statutory construction applied by the Court in \textit{ABMI}, Congress examined the policy considerations of expanding the jurisdiction of the Clayton Act. Congress determined that section 7 should reach firms affecting commerce and should apply to natural persons and unincorporated entities. Acquisitions by persons and entities affecting, although not engaged in commerce, may be anticompetitive,\textsuperscript{100} and thus should be subject to section 7's prohibitions, even though such activities might be local in character. Thus, in view of the judicial experience with the Sherman Act, expansion of the jurisdictional scope of section 7 of the Clayton Act to allow it to reach local activity which affects interstate commerce will probably withstand constitutional challenge.

\textsuperscript{99} \textit{Id.} at 278. In a recent decision, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980), the Court recognized the breadth of Sherman Act prohibitions, but took a more restrictive approach toward satisfaction of the jurisdictional requirements before the statute could be invoked. In \textit{McLain}, a private antitrust action was brought against real estate firms and trade associations and a class of real estate brokers who had transacted business in New Orleans. It was alleged that defendants had engaged in a price-fixing conspiracy in violation of the Sherman Act. While readily accepting that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory, the Court required a more stringent standard for establishment of the effect on interstate commerce. The Court stated:

\begin{quote}
[J]urisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.
\end{quote}


Earlier the Court, in Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974), likewise expressed the restrictive viewpoint that is demonstrated in \textit{McLain}.

This justification, [for an expansive interpretation of the "in commerce" language] however, would require the courts to look to the \textit{practical consequences}, not to the \textit{apparent and nominal connections} between commerce and activities that may have no significant economic effect on interstate markets. (emphasis added).

\textit{Id.} at 198-99.

\textsuperscript{100} \textit{See} the discussion of "person" \textit{supra} notes 13-23, and accompanying text, and \textit{see} the discussion of "affecting commerce" \textit{supra} notes 25-33, and accompanying text.
CONCLUSION

The Antitrust Procedural Improvements Act of 1980 broadly amends federal antitrust law. With respect to antitrust merger jurisdiction, the Improvements Act amends section 7 to include all "persons" who are engaged "in commerce" or "affect commerce." The amendments clarify the statutory language of section 7, remove jurisdictional anomalies in federal merger law, and provide the courts with a definitive statement of congressional intent concerning the applicability of section 7 to anticompetitive mergers and acquisitions. The practical effect of the amendments is to remove arbitrary restrictions on section 7 antimerger jurisdiction in relationship to related provisions of the Sherman Act, Clayton Act, and FTC Act. Further, the amendments enable both the Justice Department and the FTC to enforce with equal power the substantive provisions of section 7 of the Clayton Act. Finally, by extending section 7 to non-corporate entities and broadening the scope of activities subject to merger law, Congress has ensured that conduct in violation of the substantive provisions of section 7 of the Clayton Act, and not mere jurisdictional defects or technicalities, will be the focus of investigatory and enforcement efforts in federal merger law.

Beth Beucher