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"Solely for Investment Purposes": Evolution of a Statutory Exemption Under Clayton Section 7

Section 7 of the Clayton Act\(^1\) prohibits a corporation from acquiring another corporation in whole or in part, when the acquisition may substantially lessen competition or create a monopoly. The purpose of the Act is to "cope with monopolistic tendencies in their incipiency."\(^2\) Not every acquisition between competing corporations is illegal,\(^3\) however, and the statute specifically exempts some types of acquisitions from section 7 coverage.\(^4\) One such ex-

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1. 15 U.S.C. § 18 (1976) provides in pertinent part:

   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, wherein any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

   No corporation 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 one or more corporations engaged in commerce, where in any line of 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 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 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.


3. "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree. . . ." International Shoe Co. v. FTC, 280 U.S. 291, 298 (1930); Pennsylvania R. Co. v. ICC, 66 F.2d 37 (3d Cir. 1933), aff'd per curiam by an equally divided court, 291 U.S. 651 (1934). See Swift & Co. v. FTC, 8 F.2d 593, 597 (7th Cir. 1926), rev'd on other grounds, 272 U.S. 554 (1926).

4. "Exemption" has been defined as "a broad concept to signify any statute or judicial doctrine which expressly or impliedly frees certain conduct or persons from usual rules or competition insisted upon for activity in or affecting interstate trade or commerce." Pogue, The Rationale of Exemptions from Antitrust, 19 ABA Antitrust L.J. 313 (1961) [hereinafter].
emtion provides that section 7 does not apply to corporations purchasing stock solely for investment when ownership is not used to bring about, or attempt to bring about, the substantial lessening of competition.\

Antitrust defendants periodically have asserted this "solely for investment purposes" exemption, but usually with little success.\

5. "Investment" has been defined as:

[a word of] broad application, including in its various uses purchases of practically every kind and description and for every purpose. One of those purposes is the purchase of property for the sake of the direct return which can be realized from such property. . . . It ordinarily signifies the use of money to purchase property, personal or real, for any purpose from which income of profit is expected, presently or in the future, speculatively or permanently.


In any antitrust proceeding, the defendant may avoid liability in one of three ways. First, he may rely on the plaintiff's failure to establish all the requisite jurisdictional and substantive elements of the offense charged. Second, he may successfully interpose a statutory or other defense. Third, he may demonstrate that a particular group, industry, or business of which he is a member is exempt. . . .

This distinction is especially significant in the per se area of liability, where, once the basic elements of the offense have been established, no defense is permitted. Even in the area of non per se offenses, it may be easier to establish exempt status than a statutory defense.


7. In the following cases, the defendants failed to qualify for the exemption. United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957); Swift & Co. v. FTC, 8 F.2d
Commentators have suggested that the provision is without practical significance. The exemption was raised and was held to preclude section 7 liability, however, in two recent district court decisions, Anaconda Co. v. Crane Co. and United States v. Tracinda Investment Corp. These decisions suggest that the "solely for investment purposes" exemption may be a viable defense to antitrust actions brought pursuant to section 7.

This article will review investment exemption cases and examine factors which courts have used in determining whether purchases were made solely for investment purposes. The two district court decisions which may suggest a new trend in section 7 analysis will be discussed and analyzed. Finally, this article will explore the implications of the possible resurrection of this exemption as an effective tool in antitrust litigation.

Focus of Investment Exemption Analysis: The Control Factor

The definitive factor in determining whether the investment exemption applies is whether the stock was purchased to gain control


8. "Although this provision is not of great practical significance, its application should be carefully considered when any acquisition is attacked." E. KINTNER, AN ANTITRUST PRIMER 98 (2d ed. 1973). See also Jacobs, Acquisitions, 43 ABA ANTITRUST L.J. 552, 559 (1974).


11. Congress also apparently continues to consider the investment purposes exemption to be important. The Hart-Scott-Rodino Antitrust Improvement Amendment, 15 U.S.C. § 18a(c)(9) (1976), holds exempt from premerger notification requirements "acquisitions, solely for the purpose of investment of voting securities, if as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer." Discussion of the Rodino Amendment is beyond the scope of this article. See generally 16A VON KALINOWSKI, supra note 6 § 11.07A[4]; Note, The Goal of the New Premerger Notification Requirements: Preliminary Relief Against Anticompetitive Mergers, 1979 DUKE L.J. 249; Note, Stop, Look and Listen: Premerger Notification Under The Hart-Scott-Rodino Antitrust Improvements Act, 1979 DUKE L.J. 355.
over the acquired company. Numerical or majority shareholder control is not essential to establish a section 7 violation. Thus, minority share purchases may establish a violation of the Clayton Act if the purchases were made in an effort to control or substantially influence the company whose stock was acquired. Courts have used various criteria to determine whether the purchasing company intends to exercise control.

Express Intent to Control

When the purchaser expressly states an intent to control, the determination is a fairly simple one. For example, in Briggs Manu-

12. The courts ostensibly base their decisions on objective factors. See notes 59-65 infra and accompanying text.

One court which considered a § 7 violation in conjunction with a Securities Exchange Act of 1934 claim seemed to adopt the Rule 12b-2 definition of control for the antitrust context as well. Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951, 965 (S.D.N.Y. 1978). “The term 'control' . . . means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership or voting securities, by contract or otherwise.” 17 C.F.R. § 240.12b-2(f) (1980).

The decisions which address the exemption issue generally do not attempt to define control. The courts themselves seem unclear on what they mean by control. The courts seem to be concerned about the possibility of manipulating management in the day-to-day decision making process. When one considers the role of shareholders, the only significant method of controlling or influencing management decisions would be by establishing on the board a director whom the shareholder could manipulate. Otherwise, the shareholders' opportunity to directly affect the course of the company would be limited to voting on items that require direct shareholder approval, such as an extraordinary change in the corporate organization.


14. Express intent becomes important in other contexts. For example, the Williams Act, section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1976), requires that any person, after acquiring ownership of more than five percent of any stock subject to the Act must make a report to the issuer of the stock. Section 13(d)(C) (1976) requires the purchaser to file a statement with the S.E.C. and send a statement to the issuer:

if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure.

Id. While a discussion of the Williams Act is beyond the scope of this article, the issue is raised because of the § 7 allegations which are often made in the context of a tender offer or takeover bid. See, e.g., Gulf & W. Indus. Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973); Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951 (S.D.N.Y. 1978).
facturing Co. v. Crane Co., the court denied the exemption because the Crane chairman had admitted that Crane's intention had never been to purchase Briggs stock as an investment. Additional factors which supported denial of the exemption included: 1) Crane had proposed to purchase Briggs' assets rather than build its own plants in the midwest market; 2) the financial press, including the Wall Street Journal, gave a great deal of publicity to Crane's intentions; 3) Crane's purchase of Briggs stock at above market prices further evidenced Crane's systematic approach to gaining control, and 4) Crane nominated seven individuals to the board of directors. Furthermore, because of Michigan's cumulative voting statute, Crane could elect one and possibly two directors to Briggs' board. The court had no reason to suspect the integrity of the nominees, but it expected them to be sympathetic to Crane's interests. Because of Crane's expressed intent to gain control rather than to procure an investment opportunity, the court granted a preliminary injunction against Crane, even though Crane held only a 22% minority interest in Briggs. The court concluded that the effect of Crane's acquisition may have been to substantially lessen competition in the plumbing fixtures and sup-


In describing the use of a § 7 allegation to thwart a takeover attempt, Judge Friendly stated:

Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown.


For examples of express intent to control, see United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 602 (1957) (annual reports and other documents revealed duPont's intent to establish itself as G.M.'s primary supplier of fabrics and finishes); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 693 (D. Del. 1962) (chairman to Susquehanna's board stated that his company could, and expected to, acquire as much as 51% of Vanadium stock if necessary in order to take Vanadium over); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 392 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958) (chairman stated that his "ultimate objective" was to create a joint venture through merger or common control).

16. Id. at 180.
17. Id. at 181.
18. Id.
plies industry.\textsuperscript{19}

In contrast to an expressed intent to obtain control, which obviously negates an investment purpose, an expressed intent to the contrary, \textit{i.e.}, a commitment to maintain a “hands-off” posture, may not be sufficient to bring a merger within the exemption. This situation was presented in \textit{United States v. Wilson Sporting Goods Co.},\textsuperscript{20} where Wilson sought to acquire Nissen Corp., the leading manufacturer and seller of gymnastic equipment. Wilson claimed that it viewed Nissen as “simply an attractive investment.”\textsuperscript{21} Furthermore, Wilson intended to keep George Nissen, president and majority shareholder, at the head of the business. A proxy statement sent to both companies’ shareholders pledged that although Nissen Corp. would become a wholly owned subsidiary of Wilson, management of Nissen would remain essentially intact. Wilson also pledged not to intermingle any facilities, sales operation, or company functions.\textsuperscript{22}

Although the district court recognized that Wilson would probably abide by its representation under the proxy statement to maintain separate corporate identities, the court remained uneasy about possible unforeseen factors which might occur after the merger. Specifically, the court hypothesized that should Mr. Nissen leave the company for any reason, Wilson would have less incentive to maintain segregated operations.\textsuperscript{23} Wilson also would be likely to affect Nissen’s sales, should Nissen’s share of the market continue to decline. Given the “well-known tendencies of human conduct,”\textsuperscript{24} the court did not believe that Wilson would permit Nissen to function as independently as before and not exert any control over Nissen. Looking as the probable, rather than actual, effects of the merger, the court reasoned that it was likely that Wilson’s eco-

\textsuperscript{19} For other examples of cases in which an expressed intent to control was held to negate an investment purpose, see Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 693 (D. Del. 1962) (board chairman stated that his company could and expected to acquire the necessary stock to take plaintiff over); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 392 (S.D.N.Y. 1957), aff’d, 259 F.2d 524 (2d Cir. 1958) (board chairman stated that his “ultimate objective” was to create a joint venture through common control or merger). \textit{Cf.} Apolo Bus. Mach. Inc. v. Compucorp, 1976-2 Trade Cas. 1 61,015 at 69,476-77 (N.D. Ala. 1976) (Company’s acquisition of 24\% voting stock did not violate \S 7 because the company had no voting control, did not elect a director on acquired company’s board, and there was no showing of any lessening of competition).

\textsuperscript{20} 288 F. Supp. 543 (N.D. Ill. 1968).
\textsuperscript{21} \textit{Id.} at 547.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 556.
nomic strength would benefit Nissen's sales at the expense of competitors and that Nissen would keep its current market share rather than face further decline. While noting that Wilson would be obligated under the proxy statement to segregate the businesses, the court declined to accept this as objective evidence of Wilson's investment intent.

**Implied Intent to Control**

An expressed intent to acquire stock in order to gain control of a company clearly negates an investment purpose. Similarly, courts have had little trouble inferring an implied intent to control from acquiring companies' actions. For example, courts have inferred an intent to control the management and policies of the acquired company from an attempt by the shareholder company to elect a director to the board of the acquired company.

The decision in *Hamilton Watch Co. v. Benrus Watch Co.* exemplifies the rationale of implied intent. Benrus, a direct competitor of Hamilton, acquired a 23% interest in Hamilton Watch Co. Benrus could not acquire a controlling interest because of a ten-year voting trust established by Hamilton shareholders in response to Benrus' program of acquisition. Benrus intended to vote its shares cumulatively to elect a director for a three year term.

The trial court found that Benrus had no power to control Hamilton

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25. 288 F. Supp. at 556. The court seems to bootstrap an argument that "the merger cannot be defended as a mere 'investment' once it appears that the acquiring company intends to vote its stock and exercise control." *Id.* The court bases its argument on mere speculation, however, as to what would happen if Mr. Nissen left the company or if Nissen's market share should decline. *But see* United States v. Tracinda Inv. Corp., 477 F. Supp. 1093, 1100-01 (C.D. Cal. 1979) in which the court refused to speculate about future events.


28. 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953). At least one commentator has attached particular importance to this decision. 16A *Von Kalinowski*, *supra* note 6 § 11.07[3][a].

while the voting trust remained in effect, but if Benrus obtained representation on the board, it could possibly bring about collaboration which would probably lessen competition.30 Such representation would allow the Benrus board member access to confidential information which could harm Hamilton by weakening Hamilton’s competitive position. A Benrus director would also have conflicting loyalties in making management decisions.31

Other factors considered in determining that Benrus’ stock purchases were not made solely for investment included: 1) Benrus borrowed most of the $1,300,000 which it spent for Hamilton stock; 2) Benrus continued to purchase Hamilton stock in a rising market over a six month period whereas under a pure investment strategy, Benrus would have been more patient, especially since the market returned to normal after Benrus stopped buying Hamilton stock; 3) Benrus could not show that the Hamilton stock was merely an item in a diversified investment portfolio, and 4) Benrus showed a clear hostility to the voting trust and stopped buying when the voting trust consolidated control.32 Under these circumstances, the court concluded that a finding that Benrus purchased Hamilton stock for investment purposes would be “naive.”33 The fact that Benrus did not achieve the control it sought did not insulate the company from possible antitrust liability. The court concluded that acquisition of a non-controlling interest in a company could still constitute a violation of section 7 if the acquisition were made in an attempt to gain control which could reasonably be achieved at the time the acquisition was made and which would substan-

30. The presence of such a director on the Hamilton board would create a situation in which Benrus would have power to discourage the vigor of competition by Hamilton and so to embarrass and impede Hamilton’s management that it might well be driven to unwanted collaboration or to merger as the least of two evils. Such a situation would constitute irreparable harm to Hamilton.

Id. at 314.

31. A director on Hamilton’s board elected by Benrus would be in a position to obtain confidential information of value to Benrus as a competitor, the disclosure of which would be harmful to Hamilton and would materially impair its competitive position. In participating in the management, such a director would be subjected to frequent conflicts of loyalties involving decisions dependent upon the exercise of his judgment faculties many of which would be of such a nature that it would be impossible to demonstrate the presence or extent of the Benrus influence if that had been a factor.

Id. at 314. See also Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 694 (D. Del. 1962).


33. Id.
ially lessen competition.34

Just as voting shares to elect a director has been held to manifest an intent to control the acquired company, a corporation’s “track record”35 also may be considered to indicate a purpose other than investment. In Gulf and Western Industries, Inc. v. Great Atlantic and Pacific Tea Co.,36 Gulf’s “well-established practice”37 of acquiring companies by first purchasing a minority interest sufficient to allow Gulf to “insinuate”38 itself onto the board convinced the court that Gulf did not wish merely to invest in A & P.39 Rather, the court determined that Gulf intended to obtain control of A & P, or in the alternative, to strongly influence A & P’s management.40

More subtle actions which affect relationships between companies by substantially influencing management also may be found to indicate an attempt to control the acquired firm. The United States Supreme Court, in United States v. E.I. duPont de Nemours & Co.,41 considered duPont’s claim that it purchased a 23% interest in General Motors solely for investment. The Court found, after examining duPont’s annual reports, that duPont actually acquired the G.M. stock in order to expand and insure duPont’s market for automotive fabrics and finishes.42 Furthermore, a former duPont vice president had become G.M.’s vice president in charge of the operations committee. This vice president kept duPont informed of G.M.’s business affairs and intended to promote the use of duPont materials by General Motors.43 The Court reasoned that “[i]t is not pure imagination to suppose that such surveillance from that source made an impressive impact upon

34. Id.
42. Id. at 602.
43. Id. at 602-03.
Thus, the Supreme Court "left open the door to the future viability of the 'solely for investment' statutory exemption." However, a corporation making an investment may not use its shareholder position to influence purchasing relationships, even though the original stock purchase had been made many years before.

DuPont appeared before the Supreme Court a second time in United States v. E.I. duPont de Nemours & Co., to seek approval of duPont's plan to conform to the Court's earlier order of divestiture. While the government demanded complete divestiture of duPont's 23% interest in G.M., duPont suggested an alternative plan, i.e. that the voting rights appurtenant to the G.M. shares would not be exercised by duPont, but would "pass through" to duPont shareholders in proportion to the shareholder's interest in duPont. The corporation would divest itself of voting rights while retaining other attributes of ownership such as the right to receive dividends.

The Supreme Court rejected this proposal. Since the duPont shareholders would vote the G.M. stock, dissolution of the corporation's "community of interest" would be unlikely. This decision flowed from the conclusion that duPont voters would find it in their best interest to induce General Motors to favor duPont. The Court would not assume "contrary to all human experience" that the duPont stockholders would not vote in their own self interest.

Since an improper purpose to affect the relationship of the two

44. Id. at 603. The duPont decision appears to be the only time the Supreme Court has addressed the investment exemption issue, albeit tangentially. This fact was acknowledged by the district court in Anaconda Co. v. Crane Co., 411 F.Supp. 1210, 1219 (S.D.N.Y. 1975):

The Court in duPont left open the door to the future viability of the 'solely for investment' statutory exemption but cautioned against use of the investor status to lessen competition: "when the purchase is solely for investment, the plain language of § 7 contemplates an action at any time the stock is used to bring about, or attempting to bring about, the substantial lessening of competition. 353 U.S. at 597-598."


49. Id. at 331.

50. Id. at 332.
corporations had been found, duPont was not allowed to maintain any control over the shares. Apparently, forgoing the attributes and privileges of ownership is insufficient to render an acquisition exempt under the statute.

**Summary of Factors**

From this litigation history, it is possible to distill factors relevant to whether the "solely for investment purposes" exemption will be recognized in a section 7 case. The acquisition must have been solely for investment. A company's exercise of control over another company through the purchase of stock precludes the possibility of coming within the investment exemption provision. Evidence of expressed intent to gain control of another corporation, as well as evidence of more subtle behavior which implies an intent to establish control, may disqualify the acquisition from the exemption's protection. In addition, the acquiring company cannot purchase stock with a view toward affecting a relationship between themselves and the target company. Nor can the acquiring company attempt to gain representation on the Board of Directors of the acquired corporation. The courts have recognized that such representation would give access to business plans and confidential information which would harm competition between companies. A corporation's history of acquisition also may evidence an intent extending beyond a mere investment. Furthermore, the price

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52. See note 14, *supra*.
53. The acquiring company may not attempt to influence the purchasing requirements or habits of the company in which it owns shares. United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 602 (1957). (G.M. purchased virtually all its requirements for auto finishes and fabrics from duPont, a 23% shareholder); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 693 (D. Del. 1962) (stock purchased to create a closer relationship); United States v. Jerrold Electronics Co., 187 F. Supp. 545, 565 (E.D. Pa. 1960), aff'd *per curiam*, 365 U.S. 567 (1961) (community antenna systems requirements for parts and services were purchased from the company owning the system); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 394 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958) (chairman of the board admitted that the purpose of the stock purchase was to develop a "closer connection" between companies). 
54. See note 27 *supra*.
55. See note 27 *supra*.
paid for the stock may be significant, particularly if the stock is bought at a higher than normal rate. Finally, a pledge in a proxy statement and merger agreement to keep the wholly owned subsidiary separate is not sufficient to qualify the acquisition for exemption, even though the corporation would be required to abide by the proxy statement.

The courts have ostensibly based their decisions on objective behavior, but the decisions contain a subjective element as well. For example, the United States Supreme Court based its judgment on "human experience" to infer that the shareholders were likely to vote stock in their own self interest, thereby influencing purchasing relationships. One district court balanced a proxy statement pledge not to interfere with the subsidiary's management against the "known tendencies of human conduct." Another district court refused to recognize an exemption, concluding that a finding of a mere investment purpose under the circumstances would be "naive." An essential element in these cases was credibility of the expressed motivation for the acquisition. Determining the control factor, therefore, is as much a qualitative analysis as it is a


59. ANTITRUST ADVISOR, supra note 6, at 156. See also United States v. First Nat'l Bank, 310 F. Supp. 157, 161 (D. Md. 1970); Golden Grain Macaroni, 78 F.T.C. 63 (1971) "Whether an acquisition is or is not for investment must be determined by objective, not subjective standards. The investment exception otherwise could be employed to make Section 7 a nullity." Id. at 172.


61. See note 53 supra.


64. ANTITRUST ADVISOR 1978, supra note 51, at 158. Cf. Anaconda Co. v. Crane Co., 411 F. Supp. 1210, 1218 (S.D.N.Y. 1975) (court was persuaded by the testimony of Crane's chief executive officer, by the Stipulation Agreement between the parties, and by representations of counsel that Crane intended to hold Anaconda stock solely for investment).
quantitative one.65

Anaconda Co. v. Crane Co. AND United States v. Tracinda Investment Corp.: RESURRECTION OF THE INVESTMENT EXEMPTION?

Prior to 1975, courts which specifically addressed claims that stock acquisitions were exempt from antitrust claims because they were solely an investment most frequently found that acquiring companies were not merely making investments.66 Two recent decisions, Anaconda Co. v. Crane Co.67 and United States v. Tracinda Investment Corp.,68 may mark the beginning of a trend reversing this almost uniform rejection of the investment purposes exemption.

65. Antitrust Advisor 1978, supra note 51, at 158:
In general, almost any corporate purchase of stock for investment may be challenged under Section 7 of the Clayton Act if the corporation acquiring the minority stock interest is likely to exert some influence on the corporation in whose stock it has invested. The investment exemption will probably be available, if at all, for relatively insubstantial stock investments when the acquiring firm seeks solely passive financial participation, and there appears to be no danger whatever that management of the acquired firm will be influenced as a result of the investment or that the firm making the investment will gain access to any confidential information.


66. See note 7, supra. But see Pennsylvania R. Co. v. ICC, 66 F.2d 37 (3d Cir. 1933), aff'd per curiam by an equally divided court, 291 U.S. 651 (1934). The court found that the Pennsylvania Railroad Co. had purchased the stock of Lehigh Valley Railroad Co. and Wabash Rail Co. solely for investment purposes. The court further found that competition was not lessened by the stock acquisition. Rather, competition between the rail companies increased. The court insisted that it was “not primarily concerned with the economic result of our interpretation of the statute...but to force all this stock suddenly upon the market might have such a disastrous effect in these troubled times that it has caused us to consider most carefully the questions in this case.” Id. at 40. See also Dennison Mines Ltd. v. Michigan Chem. Corp., 469 F.2d 1301, 1309 n.15 (7th Cir. 1972); Texassulf Inc. v. Canada Dev. Corp., 366 F. Supp. 374, 407 (S.D. Tex. 1973). The decision turned on a finding of no competition. The court observed that:

Section 7 specifically excludes from coverage stock purchases made solely for investment until the voting powers attendant to the stock are exercised to bring about a lessening of competition. There was evidence at the hearing that while CDC spoke in terms of "effective control" in its tender offer, it was mainly concerned with making a solid investment, and made no decision on changes it would make by exerting control. Indeed some testimony indicated that even if they attained 35% of the stock, there was still a strong likelihood of them not getting control since management would still control the proxy machinery. Thus, should this in fact turn out to be an investment, Section 7 would be inapplicable.

Id. at 407 n.49.


Anaconda Co. v. Crane Co.: The Initial Shift

In Anaconda Co. v. Crane Co.,69 Crane offered to exchange five million shares of subordinated debentures, to be issued by Crane, for Anaconda common stock. This would have given Crane 22.6% ownership of Anaconda, and a dominant shareholder position. Anaconda claimed that the exchange offer would violate section 7 because Crane directly competed with an Anaconda subsidiary.70 Anaconda therefore sought a preliminary injunction to prevent Crane from expanding its ownership of Anaconda stock.71

Responding to Anaconda's antitrust claim, Crane asserted that it had no intention of obtaining control of Anaconda, and that the acquisition of Anaconda stock was protected by the investment exemption. In support of this position, Crane submitted to the court a "Stipulation" (which the court identified as a Consent Order) whereby Crane pledged not to acquire more than the five million shares of Anaconda Common stock pursuant to the Exchange Offer. This would limit Crane's control of shares to 22.6% of Anaconda stock. Crane pledged not to seek representation on Anaconda's Board of Directors so long as Crane owned any shares of Anaconda. Crane further pledged to comply with section 7 and accepted a prohibition from voting its holdings to bring about or attempt to bring about a substantial lessening of competition.72 The Consent Order-Stipulation was broadly worded so as to insure compliance by all Crane subsidiaries.

The District Court for the Southern District of New York accepted Crane's position and denied the preliminary injunction. The Stipulation persuaded the court of Crane's sincerity to hold Anaconda stock as an investment, and not to use the stock to lessen competition. The court was "particularly persuaded"73 by the testimony of Crane's Chief Executive Officer, who ratified and adopted the Stipulation in open court. The Stipulation also prohibited Crane from taking any action in its own business operations that would lessen competition with Anaconda. Furthermore, any violation of this Stipulation "would be punishable as contempt."74

70. Id. at 1217.
71. Id. at 1219.
72. Id. at 1217.
73. Id. at 1217.
74. Id.
Although Crane had acquired a dominant shareholder position, the court accepted the Stipulation as proof of a proper investment purpose, notwithstanding that Crane competed directly with an Anaconda subsidiary. In analyzing the application of the statutory provision, the district court reasoned that once the defendant validly raised the "solely for investment" exemption, the plaintiff must show that the defendant was presently using the stock to substantially lessen competition. The absence of such evidence justified denial of injunctive relief. The court recognized, however, the possibility that noninvestment motives might be uncovered at trial.78

This case reflects a combination of objective and subjective factors.78 The objective action of entering the Stipulation in conjunction with the subjective assessment of the Chief Executive Officer's testimony persuaded the court that Crane had validly raised the exemption. Therefore, the burden of proof should shift to Anaconda to show an improper motive.

United States v. Tracinda Investment Corp.: The Two-Pronged Test

The 1979 decision of United States v. Tracinda Investment Corp.,77 extended the Anaconda analysis. The District Court for the Central District of California developed what it termed a "two-pronged test"78 to determine whether the investment exemption provision applied. This test consisted of "(1) a factual determination of whether the acquisition was made solely for investment; and (2) a factual determination of whether the stock is being used by voting or otherwise to bring about or attempt to bring about a substantial lessening of competition."79

Tracinda Investment Corp., owner of 42% of MGM Common

75. In cases where the "solely for investment" exemption does not apply a plaintiff need only show a reasonable probability of a lessening of competition . . . . Thus the anti-competitive effects may be attacked in their incipiency. The statutory exemption, however conspicuously omits this language. Once it is established to the satisfaction of the Court that the acquisition is "solely for investment," the statute requires a showing that the defendant is "using the (stock) by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

76. See notes 59-65 supra and accompanying text.
78. Id. at 1099.
79. Id.
stock, made a tender offer for 19% of Columbia Pictures' outstanding stock. Since Tracinda's sole shareholder, Kerkorian, also personally owned six per cent of Columbia, this acquisition gave Kerkorian effective control of 25% of Columbia. At the time the tender offer was made, Kerkorian, Tracinda and Columbia entered into a Stockholders' Agreement which was to remain in effect for a three year period. The contract expressly stated that the stock was purchased for investment purposes only and not to gain control over Columbia. Kerkorian agreed to vote his stock in favor of directors nominated by Columbia management, and to limit his Columbia stock ownership and control to 25.5%. The court concluded that this agreement, on its face, raised the exemption issue, irrespective of whether the defendant alleged the exemption as an affirmative defense.

The Tracinda court relied on the statutory exemption to preclude liability under section 7. The contract and Kerkorian's testimony at trial supported the conclusion that the stock was purchased solely as an investment, thus satisfying the first prong of the test. The court specifically noted the similarity between the contract and the Anaconda-Crane Consent Order. Tracinda's consent to the contract terms prior to any court action further supported the court's finding of an investment purpose. The limited duration of the contract did not pose a problem, nor would the court speculate as to what would happen at the close of the three year period. The court reasoned that the length of the contract did not reflect the parties' intent at the time of the agreement. In fact, the brevity of the term was deemed consistent with an investment purpose because it indicated a desire for flexible planning.

In addition, the court found sufficient justification for a provi-
sion requiring Columbia management to consult with Kerkorian regarding major financial decisions. It seemed only reasonable that a major investor would wish to be kept informed of crucial management decisions. Based on its own assessment of the calibre and stature of Columbia top management, the court flatly rejected any argument that Kerkorian could unduly influence Columbia personnel. Moreover, Kerkorian's individually-owned shares in Columbia would give him the same access to management information and an opportunity to affect decision-making. By entering the Stockholders' Agreement, Kerkorian voluntarily limited his personal rights of stock ownership. The result of Tracinda may therefore be attributable to the unique situation of Kerkorian as an existing shareholder in Columbia, and Tracinda, Kerkorian's alter ego, acting as the acquiring company.

The government's failure to provide any evidence in support of the second prong of the test led the court to summarily conclude that no lessening of competition existed. Although the decision could have rested on the investment exemption, the court examined the evidence of possible anticompetitive effects and concluded that, under traditional tests, there were none.

**Emergence of a New Analysis**

The Tracinda and Anaconda decisions seem to represent a departure from the earlier decisions dealing with the investment purposes exemption issue. The impact of the decisions remains uncertain. Narrowly interpreted, the cases could be considered aberrations from settled law. While the Anaconda court advanced

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89. Id.
90. Id. The court characterized as "absurd" or "inconceivable" the government's arguments that the contract period and the consultation provision evidenced anything more than an investment purpose.
91. When one considers that even if divestiture were granted with respect to the Tracinda stock, Kerkorian would still be a substantial stockholder with 5% and as such would have access to the management in order to voice his opinion, the Government's position that the additional 19% of Columbia stock gives Kerkorian a greater voice is absurd in view of the stature of the people in the management of Columbia. Indeed, the acquisition by Tracinda actually undermines Kerkorian's position since the Stockholders' Agreement restricts the use of Kerkorian's stock, as well as Tracinda's, while prior to that Agreement there were no restrictions on Kerkorian's personal holdings.

Id. at 1101 n.9.
92. Id. at 1101.
93. Id. at 1102.
94. Id. at 1111.
a well-reasoned analysis of the statutory provision, the court used the exemption only to deny a preliminary injunction, while expressly leaving open the possibility that a noninvestment purpose would be uncovered at trial. Tracinda was decided on the merits, but the exemption issue in that case could easily be limited to its peculiar set of facts and the relationship of the parties.

These decisions could, however, be broadly interpreted as creatively considering and using the factors enumerated in earlier decisions in order to find that a particular acquisition qualifies for the exemption. Tracinda and Anaconda seem to recognize and take into account behavior that the courts have found inconsistent with an investment purpose in order to analyze and objectively conclude that investment motivation has been demonstrated. The key factor in these two decisions seems to be the objective, written promise not to exert control in order to inhibit competition, where the breach of that promise had measurable consequences. The promise not to exert control over the acquired company is important because it is clear that any attempt at control removes the acquisition from the solely for investment exemption. The written documents remove the necessity for the court to make a subjective determination of the acquiring company’s intent based on behavior and implied intent.

These cases also depart from the traditional approach of examining “human tendencies.” The earlier decisions presumed that a corporation which purchased any amount of stock in a competing corporation did so with a view toward asserting control, and not with a view toward investment. In each case, the court looked beyond the form of the purchase to the substance of the transaction. The opinions consistently have stated that a showing of numerical control is unnecessary because minority shareholders can be expected to use the means available to them, such as cumulative voting, to attempt to elect directors or otherwise influence

96. See notes 80-82 supra and accompanying text.
97. Cf. United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 556 (N.D. Ill. 1968) (A pledge to shareholders in a proxy statement which the court recognized as an enforceable obligation was not sufficient evidence of investment purpose. This situation involved a purchase of the entire company, however, as a wholly owned subsidiary).
98. In Anaconda, the court noted that breach of the consent order would be contempt. Presumably, breach of Tracinda’s pledge would give rise to a breach of contract as well as antitrust action.
99. See notes 51-65 supra and accompanying text.
100. See notes 27-31 supra and accompanying text.
management.101 Conversely, in Anaconda and Tracinda the courts refused to look beyond the form of the agreements in each case. The Anaconda Stipulation and the Tracinda Shareholders' Agreement were sufficient on their faces to establish that the purchases were made solely for investment.102 The cases suggest a new presumption that, absent any showing to the contrary, the acquiring corporation will abide by its investment purpose.

Both opinions also emphasized that the defendants had voluntarily limited their holdings of stock. The emphasis seems misplaced in light of cases which stated that the numbers of shares held is not a deciding factor in finding an attempt to control or otherwise influence management.103 Anaconda and Tracinda seem to say, however, that since the written agreements presumptively showed an investment purpose, holdings as large as 25.5% can be held to be an investment. How large an acquisition can be made consistent with an investment purpose remains an open question.104

A broad interpretation of Anaconda and Tracinda also raises procedural questions. First, if the statutory provision is an exemption, as the Tracinda court insists,105 then a plaintiff's suit could be vulnerable to a motion to dismiss or a motion for summary judgment.106 If the provision is an affirmative defense, as has been suggested,107 then the defendant will be required to plead the defense, thereby raising a question of fact which would necessitate a full trial on the merits. The defendant would be required to plead the affirmative defense or would waive the right to raise the issue at trial.108 Second, if the defendant raised the issue of investment purpose, either through pleadings or evidence, the burden of proof would shift to the plaintiff to show that the exemption does not apply.109

In the earlier decisions, the plaintiffs carried the burden of proof only on the issue of showing a probable lessening of competition resulting from the acquisitions in each situation in order to estab-

101. See note 13 supra and accompanying text.
103. See note 13 supra and accompanying text.
105. See note 6 supra.
106. JAMES AND HAZARD, supra note 6, at 149-50.
107. See note 6 supra.
108. JAMES AND HAZARD, supra note 6, at 218-225.
lish a section 7 violation. Under *Anaconda* and *Tracinda*, once the defendant successfully demonstrates that the acquisition was made solely for investment purposes, the plaintiff would have to rebut that evidence as well as satisfy the second prong of the two step analysis, *i.e.*, whether the defendant was using the stock by voting or otherwise to bring about or attempt to bring about the substantial lessening of competition.

Finally, it should be remembered that the solely for investment provision is stated in the present tense, exempting corporations "purchasing" stock and "not using" it to bring about the substantial lessening of competition. This language indicates that the acquiring corporation must abide by its investment agreement. It would seem that any later action inconsistent with an investment purpose would remove the acquiring corporation from the exemption's protection. The acquiring company would no longer be sheltered from antitrust liability.

At this stage, several questions regarding the strength and scope of the exemption remain unanswered. Until these questions are answered through case law development, corporations should be aware of the provision's existence and consider it when starting a program of acquisition or as a tool in defending a potential Section 7 challenge to an acquisition.

**CONCLUSION**

Historically, the courts have been extremely reluctant to accept defendants' allegations that acquisitions of stock in competing corporations have been solely for investment. The courts have based their decisions on assessment of defendants' objective behavior and upon inferences drawn from perceived subjective motivation as well. The cases establish a two-prong test: 1) a determination of whether the acquisition was made solely for investment; and 2) a determination of whether the stock is being used substantially to lessen competition.

Corporations may be able, however, to protect themselves successfully from antitrust attack by placing voluntary, objective, visible restrictions upon their behavior in order to convince the court of an investment motive. The limitation itself need not be extremely burdensome, nor of long duration. A writing alone may be sufficient. What other kinds of restrictions or objective evidence will be acceptable to the courts to show investment motive in any given situation remains an open question. The continued development of these principles may establish the investment exemption
as a viable and effective concept in antitrust litigation.

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