

## CONCLUSIONS

I. The Acquisition of Ballard Violated Section 7  
of the Clayton Act

It is concluded that the acquisition of the Ballard company by Pillsbury in 1951, as hereinbefore described and found, violated Section 7 of the Clayton Act, in that the effect of the acquisition may be to suppress competition in the family flour industry and in the flour-base home mix industry in the principal towns and cities located in that part of the United States generally lying east of the Mississippi River and south of the Ohio and Potomac Rivers, herein referred to as the Southeast, and for the further reason that this acquisition may tend to create a monopoly in Pillsbury in these two industries in that area.

Section 7 of the Clayton Act, as amended December 29, 1950, provides in relevant part:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.<sup>59</sup>

Without giving a detailed summary of the history of Section 7 of the Clayton Act as it was originally enacted in 1914, it might be well to point out that Congress in passing this act intended it to be a preventive to check anticompetitive acts such as the acquisition of competitors in their incipiency before they reached the dimensions of Sherman Act violations. As stated in the Senate Report on the original bill:

Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.<sup>60</sup>

As recognized by the Supreme Court of the United States, in a recent decision,<sup>61</sup> the purpose and objectives of the original Section 7 of the Clayton Act have never been fully realized for the following reasons: (1) the statute applied only to acquisitions of stock and did not apply to acquisitions of assets, even where this stock was used to acquire assets, and (2) it was generally assumed

<sup>59</sup> 64 Stat. 1125, 15 U.S.C. Sec. 18.

<sup>60</sup> Senate Rep. No. 698, 63d Congress, 2d Session 1 (1914).

<sup>61</sup> *U.S. v. E. I. duPont de Nemours & Co.* 353 U.S. 586, 589 (1957).

that the original Section 7 did not apply to vertical mergers. For many years the Federal Trade Commission recommended to Congress that Section 7 be amended because of the Commission's inability to attain the objectives of the original act.

As pointed out in a recent decision of the United States District Court for the Southern District of New York in the case *United States v. Bethlehem Steel Corporation, et al.*,<sup>62</sup> involving the Bethlehem Steel Corporation's acquisition of The Youngstown Sheet and Tube Company, the 1950 amendment to Section 7 expanded its scope as follows:

\* \* \* (1) to prohibit the acquisition of assets as well as stock; (2) to broaden the area in which competition may be adversely affected by eliminating the test of whether the effect of the acquisition may be substantially to lessen competition *between the acquiring corporation and the acquired corporation*; (3) to eliminate the prior tests of whether the acquisition might restrain commerce 'in any community' and instead, to make the test whether 'in any line of commerce in any section of the country' the acquisition may substantially lessen competition, or tend to create a monopoly; and (4) to cover vertical as well as horizontal mergers.

This Court also held that according to Congressional Committee Reports the major objectives of Section 7 as amended are:

\* \* \* (1) to limit future increase in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and (4) to avoid a Sherman Act test in deciding the effects of a merger.

The United States Court of Appeals for the Second Circuit in the *American Sugar Company v. The Cuban-American Sugar Company*,<sup>63</sup> held that Section 7 of the Clayton Act was designed "to halt in their incipiency undue concentrations of economic power or monopoly". The essential issues which the Commission is called upon to determine in this case, and to which the attorneys in support of the complaint have the burden of proof, are (1) the line or lines of commerce, (2) the section or sections of the country in which the effects of the merger may be felt—in other words the relevant market with respect to both products and geographic areas—and (3) whether there is a reasonable probability that the effect of the merger may be substantially to lessen competition or to tend to create a monopoly within the relevant markets by undue concentration of economic power, or the use of methods tending to prevent or lessen competition of smaller units in the industry.

<sup>62</sup> Not reported.

<sup>63</sup> 259 Fed. 2d 524.

*A. Relevant Markets*

1. *Line of Commerce or Product Market.* As set forth in the foregoing findings of fact it has been established in this case that there are four lines of commerce involved: (1) family flour, particularly the premium grades, (2) bakery flour, (3) flour-base home mixes and (4) formula feeds.

2. *The Section of the Country—the Geographic Market.* The evidence in the record also indicates that as to the Ballard acquisition, the section of the country, or the geographic market, is the Southeast insofar as family flour, bakery flour, flour-base home mixes and formula feeds are concerned, all four products being involved in the Ballard acquisition. However, the evidence also indicates that although Pillsbury and Ballard both sold family flour and all of the other products involved in the acquisition in that geographic section of the country, there were certain subdivisions thereof, such as metropolitan areas, where competition between Pillsbury and Ballard in family flour and mixes was more pronounced, and as a result, the competitive effect of the acquisition was more pronounced.

*B. The Effect of the Acquisition*

In determining the effect of the acquisition of Ballard in the family flour and mix markets in the Southeast, it is important to consider the opinion of the House Committee at the time it reported out this amended Section 7 when it stated the purpose of the amendment as follows:

[Section 7] is intended [to apply] when the effect of an acquisition may be a significant reduction in the vigor of competition, even though its effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.<sup>64</sup>

The United States District Court in the Bethlehem Steel case, *supra*, in interpreting the amended Section 7 in this respect stated:

A horizontal merger can affect competition in at least two ways. It can have an impact not only on the competitors of the merged companies but also on the buyers who must rely upon the merged companies and their competitors as sources of supply. The purpose of section 7 is to guard against either or both effects of a merger—if the likely consequence is substantially to lessen competition or to tend to create a monopoly. The section 7 market must therefore be considered with reference to the two groups: (1) the competitors of the merged companies and (2) the buyers who would be dependent upon the merged companies and their competitors as sources of supply.

The Court then referred to the House Committee Report as follows:

<sup>64</sup> H.R. Rep. No. 1191, p. 8.

[The proscribed] effect may arise in various ways: [1] such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, [2] increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, [3] undue reduction in the number of competing enterprises, or [4] establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.<sup>65</sup>

In the present case, to determine the full effect of the acquisition the relevant markets involved are subdivided as follows:

(a) The family flour market, particularly premium grades, in the Southeast into two areas, (1) urban metropolitan trading areas and (2) country or rural trading areas and

(b) The flour-base home mix market (1) throughout the United States insofar as it applies to the Duff acquisition and (2) in the Southeast insofar as it applies to the Ballard acquisition.

1. *Family Flour in Urban Markets.*

(a) Removal of a substantial competitor. Taking up first the impact of the acquisition upon the family flour market in the urban trading areas, the facts in the record indicate that by the acquisition of Ballard, the third largest distributor of family flour in the Southeast, Pillsbury removed one of its principal competitors having a popular brand of soft wheat flour with excellent consumer acceptance, and that chain stores and supermarkets in these urban market areas, and the consuming public buying through them, were deprived of the benefit of the preexisting competition. The two companies followed the same general methods in advertising and promoting their respective brands of flour, both of which were premium grade, aiming their sales efforts at the housewife who was willing to pay a high price for premium quality and who shopped in chains and supermarkets in the urban centers. Ballard and General Mills were the only sellers of family flour that were directly competitive with Pillsbury in the sale of premium grades *throughout* the Southeast. Ballard's Obelisk was probably the most popular single brand in the Southeast with the possible exception of Gold Medal and was at the time of the acquisition more popular than Pillsbury's Best. In eliminating Ballard from the family flour market in the Southeast, a very substantial competitor was removed from that market.

(b) Increased Pillsbury share of market. Not only did the acquisition result in the removal of a substantial competitor, but it also enabled Pillsbury immediately to double its competitive volume of family flour sales in the Southeast and has been a major factor in Pillsbury's advance from fifth position to first position in

<sup>65</sup> H.R. Rep. No. 1191, p. 8.

the volume of sales of family flour in that area. By virtue of the competitive advantage resulting from the acquisition of the flour mill in Louisville, Kentucky, at a strategic location to take advantage of milling-in-transit rates, and the popularity of the Obelisk brand, coupled with its financial ability to advertise and promote these two brands of flour, Pillsbury has been enabled to increase its share of the market in family flour in that area from the time of the acquisition until 1956, when the last testimony was taken. In the more than five years that has expired since the acquisition in a declining flour market, no other competitor in the Southeast, either local or regional, has been able to replace the Ballard company in the chain and supermarket stores in the urban areas.

At the time of the acquisition of Ballard, both Pillsbury and Ballard were important factors in certain metropolitan areas in the Southeast; in some cities Pillsbury was more of a factor and in other cities Ballard was more of a factor. As hereinbefore indicated, Pillsbury and Ballard as well as General Mills confined their sales primarily to chain stores and supermarkets in the metropolitan areas of the Southeast.

The record shows that in the two principal chain stores of the city of Jacksonville, Florida, as a result of the acquisition, the combined deliveries of Pillsbury's Best and Ballard's Obelisk in the Jacksonville and surrounding marketing area, represented approximately 44% of the total sales of flour, that is, all brands, standard or low-priced brands as well as premium brands; and 73% of the sales of premium brands only.

Also in the New Orleans metropolitan area, as a result of the acquisition, the bulk of the sales of family flour was concentrated in the Obelisk and Pillsbury's Best brands. The same is true of Mobile, Alabama.

Another metropolitan marketing area, in which, as a result of the acquisition, the sales of family flour were concentrated in Ballard's Obelisk and Pillsbury's Best, is Louisville, Kentucky, where the Ballard plant was located. In other cities, although the combined sales of Ballard and Pillsbury did not place Pillsbury first in popularity, there was a definite advance in percentage of sales through chain stores and supermarkets as a result of the acquisition. That is true in such cities as Atlanta, where a local mill had the most popular brand, and also in Birmingham. The record shows that Pillsbury benefited most in the way of the added volume of sales of the Ballard Obelisk brand and in an increase in share of market in the metropolitan areas surrounding and including the following cities: Atlanta, Georgia; Augusta, Georgia; Birmingham, Alabama; Charleston, South Carolina; Jacksonville, Florida; Louis-

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ville, Kentucky; Mobile, Alabama; Montgomery, Alabama; New Orleans, Louisiana; Raleigh, North Carolina; Savannah, Georgia; Thomasville, Georgia; and Winston-Salem, North Carolina. The acquisition also increased the relative position of Pillsbury in the Norfolk, Virginia, market.

(c) No new entries in the market. While local mills have gradually been disappearing from the market, no new mills have taken their place and the family flour sales of the regional mills that are still in business have, for the most part, declined substantially, partly because of the aggressive competitive practices employed by the respondent Pillsbury in that area since the date of the acquisition.

(d) Competition has been lessened. While there are quite a large number of small flour mills selling family flour in the Southeast, they do not furnish the competition to Pillsbury that Ballard did prior to the acquisition, for the reason that the sales of the small local mills in the Southeast are principally in standard or lower grades, and are in the country territory where Pillsbury has never been a strong competitive factor until recently. Very few of the local millers sell substantial quantities of premium grades of family flour in the urban areas. It is the policy of the chain stores and supermarkets to carry the two leading national brands, Gold Medal and Pillsbury's Best, and also Obelisk, the most popular regional brand now owned by Pillsbury, and one or two local brands, that is, brands of local mills located in the immediate area, and one or two lower-priced brands of standard or inferior grades of family flour, including usually a private brand of the chain store.

Since the acquisition, Pillsbury has continued its national advertising by television, radio, regional magazines and newspapers and by other similar media, designed to keep the Pillsbury name before the public, and to make Pillsbury-owned brands a common household word for commodities to which they are attached. It has thus been enabled to build up a consumer demand, not only for the Pillsbury Best brand, but also for Obelisk, the Ballard brand.

Because of the size of the organizations and the far-reaching effects of the acquisition, it is difficult to measure the full effect, but one definite fact is established—the number of independent competing brands of premium flour being offered for sale by the chain stores and supermarkets has been reduced, and the principal brands now on the shelves of such retail outlets throughout the Southeast in the urban market areas consist of brands owned by Pillsbury and General Mills, who are in a position financially through substantial expenditures for advertising and promotion to prevent other manufacturers of family flour from successfully competing for the preference of the consumers being served by these chain stores and

