Missouri Law Review

Volume 41
Issue 2 *Spring 1976*

Article 9

Spring 1976

Antitrust--the Scope of Interstate Commerce for Purposes of Section 2(a) of the Robinson-Patman Act and Sections 3 and 7 of the Clayton Act

Chris Kirley

ANTITRUST–THE SCOPE OF INTERSTATE COMMERCE FOR PURPOSES OF SECTION 2(a) OF THE ROBINSON-PATMAN ACT AND SECTIONS 3 AND 7 OF THE CLAYTON ACT

Gulf Oil Corp. v. Copp Paving Co.[1]

Copp Paving Company operated a "hotplant" at which asphaltic concrete was manufactured. Gulf Oil Corporation sold liquid asphalt to two subsidiaries which in turn made asphaltic concrete in competition with Copp. Copp filed a complaint in federal district court against Gulf and other oil companies seeking injunctive relief and treble damages. The complaint alleged that the various defendants had committed a variety of antitrust violations with respect to both the asphalt oil and asphaltic concrete markets. Copp alleged, *inter alia,* that the defendants had violated the discriminatory pricing prohibitions of section 2(a) of the Robinson-Patman Act,[2] the tie-in sale prohibitions of section 3 of the Clayton Act,[3] and the corporate acquisition prohibitions of section 7 of the Clayton Act.[4] The District Court for the Northern District of California[5] found that asphaltic derivatives must be hot when placed and are of great weight and relatively low value. Because of these characteristics, asphaltic derivatives can be sold and delivered profitably only within a radius of approximately 35 miles from the producing plant. Therefore, the district court found that the business activities and sales in question were of necessity exclusively local, and dismissed the action for failure to satisfy the jurisdictional requirements of the Robinson-Patman and Clayton Acts.

The Court of Appeals for the Ninth Circuit reversed.[6] By virtue of the fact that this material was sold for use in constructing interstate

1. 419 U.S. 256, 95 S. Ct. 392 (1974). For general treatments of the area of antitrust law discussed in this note, see F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962) [hereinafter referred to as ROWE]; 16-16N BUSINESS ORGANIZATIONS, VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION (1969) [hereinafter referred to as VON KALINOWSKI]; Kintner & Mayne, *Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act,* 58 GEO. L.J. 1117 (1970); Note, 86 HARV. L. REV. 765 (1973).

2. 15 U.S.C. § 13 (1970).

3. 15 U.S.C. § 14 (1970).

4. 15 U.S.C. § 18 (1970).

5. This case was originally one of the *Western Liquid Asphalt* cases and was transferred, pursuant to 28 U.S.C. § 1407 (1970), to the District Court for the Northern District of California for pretrial proceedings. After these proceedings, the subject matter pertained only to asphaltic concrete claims. These remaining issues concerned the applicable scope of section 2(a) of the Robinson-Patman Act and sections 3 and 7 of the Clayton Act. Section 1407 pertains to civil actions with common questions of fact which are pending in different districts. Such actions may be transferred to any district for consolidated or coordinated pretrial proceedings. The group of which the *Copp* case was a member included common questions pertaining to liquid asphalt and its derivatives.

6. 487 F.2d 202 (9th Cir. 1973).

highways, the court held that the interstate commerce jurisdictional requirements of the Robinson-Patman and Clayton Acts had been met. Such sales made these companies instrumentalities of interstate commerce and "in commerce" as a matter of law.

After granting certiorari, the Supreme Court rejected this approach and found that the jurisdictional requirements for section 2(a) of the Robinson-Patman Act had not been met. After some discussion as to what the requirements for sections 3 and 7 of the Clayton Act might involve, the Court found that the issue need not be decided due to the plaintiff's failure to allege sufficient facts to sustain jurisdiction in any event.

Traditionally, it has not been clear what jurisdictional limits Congress sought to impose through the commerce requirements of sections 3 and 7 of the Clayton Act and section 2(a) of the Robinson-Patman Act. Even the very definition of commerce, as stated in these acts, has been subject to criticism and controversy.[7] As a result, the jurisdictional question has been heavily litigated with varying degrees of resolution.

It is helpful to examine first what the scope of these sections is not, before dealing with what it might be. There is no doubt that Congress presently has the power under the commerce clause to reach any activities which are within interstate commerce or have some effect on interstate commerce.[8] The full measure of this power was utilized in the Sherman Act.[9] Any activities which are "in restraint of trade or commerce among the several States" come within the scope of that act.[10] Consistently, courts have permitted Sherman Act jurisdiction where activities are either in commerce or affect commerce.[11] With the possible exception of section 7 of the Clayton Act, the sections in question in the present case do not traditionally have this expansive scope.

Section 2(a) of the Robinson-Patman Act has a threefold commerce requirement which provides in part: "It shall be unlawful for any person *engaged in commerce, in the course of such commerce,* . . . to discriminate . . . *where either or any of the purchases involved in such discrimination are in commerce.*"[12] These elements are cumulative and all-inclusive, so that the third and most specific is the controlling factor.[13] Obviously,

7. One Congressman said that this definition of commerce is "as elastic as an old maid's girdle and nobody knows when it fits." Rowe, *supra* note 1, at 77 n.138.

8. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

9. 15 U.S.C. §§ 1-7 (1970); *see, e.g.,* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944).

10. *See, e.g.,* Burke v. Ford, 389 U.S. 320 (1967); United States v. Employing Lathers Ass'n, 347 U.S. 198 (1954); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

11. Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Willard Dairy Corp. v. National Dairy Products Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied,* 373 U.S. 934 (1963).

12. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1970) (emphasis added).

13. Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

if one of the sales is "in commerce," the other two requirements are necessarily satisfied. The converse is not so, however; one may be "engaged in commerce" and discriminations may occur "in the course" of that commerce, but if the complained-of sale does not itself occur "in commerce," section 2(a) jurisdiction will not attach.[14] This third requirement has been construed to mean that one of the sales in question must cross a state line to be "in commerce."[15]

A literal interpretation of this third requirement suggests a narrower jurisdictional scope than is actually the case. Rather than examine individual sales with respect to state lines, the courts have developed the "flow of commerce" test.[16] This test basically provides that if the discriminatory sale is a segment of the larger sales continuum from market to buyer, the entire transaction is "in commerce." Therefore, individuals who buy in interstate commerce for strictly intrastate resale are not necessarily excluded from section 2(a) coverage.

The Supreme Court adopted the "flow of commerce" test in *Standard Oil Co. v. FTC.*[17] In that case gasoline had been shipped interstate but was temporarily stored in holding tanks before intrastate resale. Examination of the transactions as a whole revealed that "the flow of the stream of commerce kept surging." "Such temporary storage of gasoline . . . [did] not deprive it of its interstate character."[18] The "flow of commerce" expansion is, however, very limited in application. Activities such as warehousing for substantial periods of time or changing the form of the goods by a manufacturing process have been held sufficient to remove goods from the "flow of commerce."[19] This narrow distinction accommodates both the desire to apply section 2(a) to activities which it was certainly intended to reach and the conviction to maintain the integrity of the statute's literal requirements.

There have been limited attempts to expand the jurisdictional scope of section 2(a) to activities which do not cross a state line. These

14. *Id.*

15. Belliston v. Texaco, Inc., 455 F.2d 175, 178 (10th Cir. 1972); Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588, 589-90 (5th Cir. 1969), *cert. denied,* 396 U.S. 1042 (1970); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 9 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969).

16. Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588 (5th Cir. 1969), *cert. denied,* 396 U.S. 1042 (1970). The doctrine has evolved in three distinguishable areas: (1) where goods are purchased with the definite intention that they will be delivered immediately; (2) where goods are purchased in fulfillment of understandings with specific customers although not to be delivered immediately; and (3) where goods are purchased in anticipation of needs of specific customers.

17. 340 U.S. 231 (1951).

18. *Id.* at 237-38.

19. Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Rangen, Inc. v. Sterling Nelson and Sons, 351 F.2d 851, 860 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966); Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965); Willard Dairy Corp. v. National Dairy Products Corp., 309 F.2d 943 (6th Cir. 1962); Clausen and Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148, 158 (D. Minn. 1969), *rev'd on other grounds,* 395 F.2d 388 (8th Cir. 1968).

attempts have been confined to an area which comes under the spirit of the section but presents technical difficulties in satisfying the literal requirements. This area and the rationale behind its treatment were explored in *Moore v. Meads Fine Bread Co.*[20] In *Moore* the Supreme Court found that even though the complained-of activity occurred exclusively in the intrastate aspect of an interstate company's operations, section 2(a) applied. The requirement that one of the sales cross a state line was ignored.[21] It was sufficient that the acts were in violation of the spirit of the Robinson-Patman Act. Although the Court concluded generally that the practices in *Moore* were included within the scope of the antitrust laws, it made no mention of the specific jurisdictional elements of section 2(a).[22] The rationale behind this decision was that where interstate commerce is the beneficiary or underwriter of local discrimination, the Robinson-Patman and Clayton Acts should apply.[23]

Subsequent decisions which have chosen to ignore the third commerce requirement of section 2(a) clearly point out that the critical fact is that interstate commerce either benefits from or supports the local discriminatory activity under attack.[24] This theory was recently applied in *Littlejohn v. Shell Oil Co.*[25] where the court found that one of the sales need not cross a state line if interstate sales were used to underwrite discriminatory intrastate price cutting.

Even though this rationale goes to the spirit, if not the letter, of section 2(a), it has met with criticism.[26] One line of cases interprets the expansive reading of *Moore* as applied to section 2(a) as pure dicta. This interpretation is based on the contention that some of the sales in *Moore* did actually cross a state line and therefore the third requirement of section 2(a) was literally satisfied.[27] Criticism of the expansive view is also based on section 2(a)'s legislative history. Originally, section 2(a) made it unlawful for anyone "*whether engaged in commerce or not,* to discriminate in price," but this language was subsequently deleted by the

20. 348 U.S. 115 (1954), *reh. denied,* 348 U.S. 932 (1955).
21. *Id.* at 115-17.
22. *Id.* at 119.
23. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate . . . sources. . . . It is we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business. . . .

Id. at 119-20.
24. Rangen Inc. v. Sterling Nelson and Sons, 351 F.2d 851, 860 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966).
25. 456 F.2d 225, 229 (5th Cir. 1972).
26. *See generally* Note, 86 HARV. L. REV. 765 (1973); Kinter & Mayne, *Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act,* 58 GEO. L.J. 1117 (1970).
27. Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Willard Dairy Corp. v. National Dairy Products Corp., 309 F.2d 943 (6th Cir. 1962); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir. 1961).

conference committee, leaving only the "in commerce" language.[28] To many, this clearly indicated that Congress intended to exclude activities which otherwise came under the Act but were not in commerce.

The Court in *Copp* strictly adhered to the traditional, non-expansive approach. The Court stated that to fall within the scope of section 2(a), one of the sales must cross a state line. The matter of *Moore* was relegated to a footnote explaining that it had never stood as authority for an expanded application of section 2(a), because one of the sales in that case was actually in commerce.[29] Consequently, it would seem that the scope of interstate commerce for purposes of section 2(a) has been frozen within the boundaries of its literal requirements as applied under the flow of commerce test. It is highly probable that any theory which attempts to circumvent the state line provision will be soundly rejected as long as this Court remains intact and Congress passes no further legislation to the contrary.

In spite of the fact that the *Copp* Court merely discussed the scope of sections 3 and 7 of the Clayton Act and did not reach a holding as to those sections, the attitudes expressed by the majority may be one of the most significant aspects of the case. A comparison of the scope traditionally associated with these sections and that alluded to by the Court raises some cause for speculation.

Section 3 of the Clayton Act has two commerce requirements, which provide: "It shall be unlawful for any person *engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale. . . .*"[30] This language is not usually interpreted to equal the broad scope of the Sherman Act,[31] although there is authority to the contrary.[32] These elements are usually applied under the "flow of commerce" theory which describes the continuum in which the prohibited activities must occur.[33] Once again, these requirements are all-inclusive and cumulative. The more specific requirement is controlling. Not only must part of one's business be within the flow of commerce, the complained-of activity must occur within the course of that flow.[34] Initially, it would seem that deletion of the state line provision would expand the applicable locus of section 3 coverage. However, this has not been a consistent result due to the narrow construction

28. Conference Rep., H.R. REP. No. 2951, 74th Cong., 2d Sess. (1936).
29. 95 S. Ct. at 401 n.17.
30. Clayton Act, 15 U.S.C. § 14 (1970) (emphasis added).
31. United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922); Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940); Lipson v. Socony Vacuum Corp., 87 F.2d 265 (1st Cir.), *cert. dismissed by counsel,* 301 U.S. 711 (1937); Lipson v. Standard Oil, 76 F.2d 213 (1st Cir. 1935).
32. *See, e.g.,* Moore v. Mead's Fine Bread, 348 U.S. 115 (1954), *reh. denied,* 348 U.S. 932 (1955); Clausen and Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148 (D. Minn. 1967), *rev'd on other grounds,* 395 F.2d 388 (8th Cir. 1968).
33. *See* cases cited note 31 *supra.*
34. Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940); Lipson v. Socony Vacuum Corp., 87 F.2d 265 (1st Cir.), *cert. dismissed by counsel,* 301 U.S. 711 (1937).

afforded to "within the course of such commerce." The scope has become a direct function of the fact situation.

Consider the case where one buys goods in interstate commerce for subsequent intrastate resale. Under these circumstances only the first requirement is satisfied, and section 3 cannot reach the activity unless the entire operation is such that its individual parts retain their interstate character and thus remain within the flow of commerce.[35] If such is not the case and individual sales are no longer considered in the flow by virtue of the overall interstate activity, the Court has interpreted the course of commerce provision to require that one of the complained-of sales must actually occur within the course of commerce.[36] Consequently, section 3 coverage is functionally no broader than that of section 2(a) of the Robinson-Patman Act in such situations. The same is true when the goods move in interstate commerce and are warehoused for prolonged periods or altered by a manufacturing process before intrastate sale.[37]

Next, consider the situation where one sells both intrastate and interstate. Originally, all of the intrastate activities were exempt from section 3 coverage.[38] However, the scope may now encompass this situation if the seller discriminates uniformly in both segments of his business. In *Standard Oil Co. & Standard Stations v. United States*[39] the Court held that where such uniformity was present, section 3 covered both aspects. As subsequent cases have pointed out, the entire operation is considered to be in the flow of commerce.[40] Where, however, the seller discriminates only in the local segment of his business, the relationship with interstate commerce may be too attenuated and the result would be the same as where one sold exclusively intrastate.[41]

To reach such activities, some courts have interpreted the language of section 3 more broadly. One such case, *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*,[42] applied the expansive rationale of *Moore* as it applied to section 3 and the Clayton Act in general. In *Clausen*, none of the challenged sales were alleged to have taken place in commerce. For this reason, the defense moved that complaints under section 2(a) of the Robinson-Patman Act and section 3 of the Clayton Act should be dismissed. The court acquiesced with respect to the section 2(a) complaint, but held that no

35. Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

36. Lipson v. Socony Vacuum Corp., 87 F.2d 265 (1st Cir.), *cert. dismissed by counsel*, 301 U.S. 711 (1937); Lipson v. Standard Oil Co., 76 F.2d 213 (1st Cir. 1935).

37. *See cases* cited note 19 *supra*.

38. United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922); Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940).

39. 337 U.S. 294 (1949).

40. Moore v. Mead's Fine Bread, 348 U.S. 115 (1954), *reh. denied*, 348 U.S. 932 (1955); Clausen and Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148 (D. Minn. 1967), *rev'd on other grounds*, 395 F.2d 388 (8th Cir. 1968).

41. *See* articles cited note 26 *supra*.

42. 284 F. Supp. 148 (D. Minn. 1967), *rev'd on other grounds*, 395 F.2d 388 (8th Cir. 1968).

sales need cross a state line to satisfy section 3 jurisdictional requirements. The court not only relied on the expansive language of *Moore,* but concluded that if the course of commerce language in itself demanded a sale across a state line, Congress would not have included the third requirement to that effect in section 2(a).[43]

These expanded readings of section 3 of the Clayton Act are not as subject to criticism as are similar treatments of section 2(a) of the Robinson-Patman Act. The language of section 3 is not so specific as to require a narrow construction and, as pointed out in *Clausen,* a broader construction may seem more logical when the text of both section 2(a) and 3 is considered.[44] There is even a measure of support for the proposition that the Clayton Act should reach to the full extent of Congress' power.[45] It is for these reasons that the Court's declarations with respect to section 3 may be considered controversial, especially in light of the Court's joint treatment of sections 3 and 7 of the Clayton Act.

Section 7 of the Clayton Act has only one commerce requirement. It provides in part: "No corporation *engaged in commerce* shall acquire . . . any other corporation *engaged in commerce* . . ."[46] where such acquisitions will destroy competition or tend to create a monopoly. As alluded to earlier, this language may support a jurisdictional scope equal to that constitutionally allowable under the commerce clause. Even though the courts apply the flow of commerce test to section 7, the results are not the same as with sections 2(a) and 3. This is because section 7 prohibits activities by entities which need only be involved in the flow of commerce, whereas sections 2(a) and 3 prohibit activities which must occur at some specified place within the flow of commerce. This lack of specificity of locus makes it a great deal easier for a corporation to be "in commerce" than for a sale to be "in commerce."[47]

In situations where a corporation which bought goods in interstate commerce for intrastate resale might be beyond the coverage of section 2(a) or 3, the corporation as a whole would be considered "engaged in commerce" for purposes of section 7. This is equally true in the other fact situations previously examined. If the goods are originally in commerce, but are warehoused or altered before intrastate sale, the corporation involved is in commerce.[48] The fact that certain segments lose their interstate character is of no significance. Where a business has temporarily

43. *Id.* at 156.
44. *Id.*
45. *See* note 51 and accompanying text *infra.*
46. Clayton Act, 15 U.S.C. § 18 (1970) (emphasis added).
47. *See* A.B.T. Sightseeing Tours, Inc. v. Gray Line N.Y. Tours Corp., 242 F. Supp. 365 (S.D.N.Y. 1965); Foremost Dairies, Inc., CCH TRADE REG. REP. ¶ 15877 (F.T.C. 1962).
48. *See* cases cited notes 15, 27 *supra;* Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943) (storage); Hardrives Co. v. East Coast Asphalt Corp., 329 F.2d 868 (5th Cir.), *cert. denied,* 379 U.S. 903 (1964) (storage); Foremost Dairies, Inc., CCH TRADE REG. REP. ¶15877 (F.T.C. 1962) (manufacture).

ceased all of its activities but is still *able* to continue business, it may still be "engaged in commerce" for purposes of section 7.[49]

The pertinent fact is that section 7's scope is a great deal broader than that of section 2(a) or 3. There is no incongruity between the flow of commerce theory and a broad jurisdictional scope. This theory is used to determine whether activities are in interstate commerce and subject to the broad coverage of the Sherman Act.[50] At the extremes, activities which are still within the flow of commerce and those which merely affect it are indistinguishable, and in the absence of further restrictive language, section 7 coverage has been construed quite broadly. Sometimes the coverage is limited to where the effect is direct and immediate, but more often it is simply stated in general terms that the Clayton Act was meant to be coextensive with Congress' power to regulate under the commerce clause.[51] Finally, some cases do not even deal with the commerce elements when applying section 7 to activities which are otherwise prohibited by its provisions. *United States v. Von's Grocery Co.*[52] concerned acquisitions by a local food store chain which were allegedly destroying competition and creating a monopoly. Although the jurisdiction of the Clayton Act was held to be satisfied, the only mention of the commerce provisions in the Court's opinion was the quotation of the text of section 7.[53] Perhaps, where the activity is exactly that type which the Act proscribes, the satisfaction of the commerce provisions is presumed.

The majority in *Copp* chose to treat sections 3 and 7 together. All comments were directed toward "these sections" or to the Clayton Act in general. No effort was made to deal with the specific elements of either. While recognizing on the one hand that "these sections" had been passed as a complement to the Sherman Act, the Court characterized a suggestion that the Clayton Act's scope had also evolved with Congress' power under the commerce clause and was therefore coextensive with it as a "radical expansion . . . beyond that which the statutory language defines. . . ."[54] The Court further stated that if such "expansion" were to occur, it would likely be from the legislature rather than the judiciary.[55]

There was one concurring opinion and one dissent. Justice Marshall's concurring opinion took exception to the "radical expansion" language as a reference to a matter which was not being decided, and he declined to express an opinion on the subject until it should be properly presented.[56] Justice Douglas' dissent was joined by Justice Brennan. As it is relevant

49. Erie Sand and Gravel, 56 F.T.C. 449, *rev'd on other grounds*, 291 F.2d 279 (3d Cir. 1961).
50. VON KALINOWSKI, *supra* note 1, at § 16.03(1).
51. Page v. Work, 290 F.2d 323, 333-34 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).
52. 384 U.S. 270 (1965).
53. *Id.* at 271.
54. 95 S. Ct. at 402.
55. *Id.*
56. *Id.* at 403.

to this topic, they found no authority in the language, pertinent case law, or legislative history of "these sections" which contracted the scope of the term "commerce." Consequently, they would apply sections 3 and 7 whereever activities affected the flow of commerce whether they were in the flow or not.[57]

The *Copp* opinion serves both to clarify and confuse the applicable scope of interstate commerce for purposes of section 2 (a) of the Robinson-Patman Act and sections 3 and 7 of the Clayton Act. The Court's opinion regarding section 2 (a) left little room for speculation as to the acceptable limits of jurisdiction. It will be applied where the challenged sale crosses a state line or where the sale, although intrastate in form, is such an integral part of an interstate activity that it retains an interstate character. This narrow holding eliminates section 2(a) coverage under any "effects" theory, including where interstate commerce benefits from or subsidizes local discrimination. The scope is not in harmony with the bulk of relevant case law and legislative history. One should expect no significant judicial deviation from this position in the near future.

The treatment of sections 3 and 7 does not lend itself to a clear statement of what the Court intended to accomplish or what course it will follow in the future. First, one should examine the Court's purpose for characterizing the suggested liberal interpretation of "these sections" as "a radical expansion of the Clayton Act's scope." The Court has previously oscillated concerning the scope of section 3.[58] Perhaps, this case is a reaction to the more liberal approach taken in cases such as *Standard Stations* and the criticism these cases have received. If the Court abandons the "effects" theory in those situations, it would no doubt return to the narrow reading of "in the course of such commerce" which required the complained-of sale to occur in commerce. The net effect of this retreat would be to establish identical jurisdictional scopes for section 3 of the Clayton Act and section 2 (a) of the Robinson-Patman Act. Section 7 of the Clayton Act, however, has most often been interpreted broadly with its scope being equal to Congress' full power under the commerce clause. It seems rather arbitrary to insinuate that an attempt to do no more is "radical."

The real issue, then, is why the Court chose to deal with sections 3 and 7 jointly. Herein lies the possible significance of this decision. It is certainly obvious to the Supreme Court that sections 3 and 7 have different literal requirements and are aimed at two different types of activities. One must assume the Court chose to deal with them in this manner for some reason. Apparently, the Court is advocating internal uniformity for all these sections. Having succeeded in reducing the scope of section 2 (a) of the Robinson-Patman Act to a compact formula, which has already been applied to some extent to section 3 of the Clayton Act, the Court may be attempting to do the same with the Clayton Act as a whole. If this is

57. *Id.* at 403-08.
58. *See* cases cited notes 33-37 *supra.*

in fact the Court's rationale, "the propriety of extending [a] doctrine in mechanical fashion in the interest of symmetry and ease of review is doubtful."[59] Although it may be reasonable to apply the state line test to sections 2 (a) and 3, both of which prohibit discriminatory sales, it does not logically follow that the same approach should be used with section 7, which prohibits the acquisition of corporations. If sales of corporations had to cross a state line before the corporation would be considerd "engaged in commerce," rather than merely requiring a substantial effect on the flow of commerce, the purpose of section 7 could easily be defeated. For example, activities such as those prohibited by *Von's Grocery* would be exempt. Corporations could easily insulate themselves from coverage while monopolizing and impairing competition.

The statements of the majority become even more significant when viewed in light of the concurring and dissenting opinions. Without these, one could assume that sections 3 and 7 were treated together merely because they were not to be decided, and the characterizations as to scope were but generalizations. But with three justices taking exception to the terms used in the discussion of the scope of sections 3 and 7, one may only conclude that these terms were retained as a significant portion of the majority opinion.

Although its purpose may be to announce the pursuit of uniformity, it is also possible that the Court used this characterization to emphasize the confusion which exists in this area and thereby invite Congress to pass legislation which would clarify the intended scope for each of these sections. By calling attention to the issue without deciding it, the Court could make its point, but the language would be only dicta, and thus not binding on subsequent cases. Regardless of the actual motive, it seems safe to conclude that in the absence of further legislation the Court will at least do nothing to expand the jurisdictional scope of these sections and may well further limit it.

CHRIS KIRLEY

59. Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: of Balancing, Hostile Motive, Dogs and Tails,* 52 CORNELL L.Q. 491 (1967).