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The Jurisdictional Scope of the Celler-Kefauver Act Has Been Expanded.

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TRADE REGULATIONS—Anticompetitive Mergers—The Jurisdictional Scope of the Celler-Kefauver Act Has Been Expanded

Stanley Works v. FTC, 469 F.2d 498 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).

In August of 1966 Stanley Works (Stanley), a major producer and supplier of hardware, acquired the largest seller of cabinet hardware products in America, Amerock Corporation.[1] As Stanley represented 1 percent[2] of the cabinet hardware market, the Federal Trade Commission decided that the effect of the Stanley-Amerock merger might substantially lessen competition in that market, and was therefore violative of Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act.[3] Upon the Commission's ordered divesture, Stanley petitioned the Court of Appeals for the Second Circuit to review and set that decision aside. It argued that forclosure of a *de minimis*[4] share of a market bars application of the Celler-Kefauver Act, and that the competitive overlap between Stanley and Amerock in this case was *de minimis.* Held—*Affirmed.* Acquisition of a corporate leader in a concentrated market by a corporation with merely a 1 percent share of that market substantially eliminates competition as it forecloses an undue percentage share of the market.[5]

History reveals that the backdrop against which section 7 violations of the Clayton Act have been adjudicated is entwined with the dominant theme which

1. It was agreed to by stipulation that Amerock controlled 22-24 percent of the market in 1965. Stanley Works v. FTC, 469 F.2d 498, 501 & n.6 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).

2. Stanley's national sales in 1965 ranked 10th in the stipulated market. Stanley Works v. FTC, 469 F.2d 498, 501 n.6 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).

3. 15 U.S.C. § 18 (1970). As amended, section 7 now provides:

> 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.

4. *De minimis,* in the context of antitrust litigation, refers to the direct opposite of "monopoly proportions." It is a trifling or insignificant amount having no substantial effect on competition. "If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated. . . . On the other hand, foreclosure of a *de minimis* share of the market will not tend 'substantially to lessen competition.'" Brown Shoe Co. v. United States, 370 U.S. 294, 328-29 (1962).

5. Stanley Works v. FTC, 469 F.2d 498, 499 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).

pervaded the Congressional consideration of the Celler-Kefauver Act.[6] This theme was a fear of what was considered to be a "rising tide of economic concentration in the American economy."[7] The Celler-Kefauver Act then, has become the breakwater to restrain that rising tide. It continues to stand solid where the Sherman Act has fallen short.[8] Through this Act, Congress has given the Federal Trade Commission and the courts the authority to arrest mergers while the trend toward a lessening of competition in a line of commerce[9] is still in its incipiency.[10]

In order to brake the increasing force of economic concentration, the Celler-Kefauver Act was enacted to be applied to situations involving not only actual competition,[11] but also to mergers in which the anticompetitive effects would be probable and imminent.[12] The test developed to measure this potential lessening of competition is whether at the time of the action, there was a reasonable probability that the acquisition was likely to result in a tendency toward monopoly.[13]

To resolve a question of antitrust illegality, the courts must consider several factors. First, they must analyze the product and geographic market in which the merging companies compete.[14] The product market is designated

6. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

7. United States v. Phillipsburg Nat. Bank & Trust Co., 399 U.S. 350, 366 (1970); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 363 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

8. An intended objective of section 7 was to prevent accretions of power which "are individually so minute as to make it difficult to use the Sherman Act test against them." *See* S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950).

9. A line of commerce is an "area of effective competition" and is determined in accordance with the principles established in prior decisions. United States v. Aluminum Co. of America, 377 U.S. 271, 283 (1964) (dissenting opinion). It refers to the product, service or industry market in which the effect of the acquisition influences competition. *See also* United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003, 1016-17 (D. Colo. 1971), *aff'd,* 407 U.S. 902 (1973); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 649 (1957) (dissenting opinion).

10. United States v. Continental Can Co., 378 U.S. 441, 461 (1964); *accord,* FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962).

11. Actual competition refers to the existing competition between the companies, whereby the anticompetitive effects of the merger are already in operation in the market; it is the competitive overlap between competitors in the market. Stanley Works v. FTC, 469 F.2d 498, 511 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (dissenting opinion). Here it refers to the "horizontal aspects of the case, *i.e.,* the amount of actual competition" in the line of commerce eliminated by the merger. *Id.* at 502 n.9.

12. United States v. Continental Can Co., 378 U.S. 441, 458 (1964). This is known as a lessening of potential competition. United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003, 1010 (D. Colo. 1971), *aff'd,* 407 U.S. 902 (1973); *accord,* United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362 (1963); Ekco Prods. Co. v. FTC, 347 F.2d 745, 752 (7th Cir. 1965).

13. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957).

14. *Id.* at 593. *See also* United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003, 1016 (D. Colo. 1971), *aff'd,* 407 U.S. 902 (1973).

"in terms of the product or line of products with respect to which there is competition."[15] Its boundaries "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[16] In consideration of the relevant geographic market, courts have rejected the location where the parties to the merger do business, and the place of competition, as proper criteria for evaluating the geographic area affected.[17] Instead, the relevant geographic market is defined in terms of the area of "competitive overlap," the place where the effect of the merger on competition will be direct and immediate.[18]

The next step pertains to whether the effect of the merger "may be substantially to lessen competition" in that market.[19] To determine the merits of substantiality in a given case it is necessary to ascertain the probable effect of the merger on the relevant area of effective competition. This is done in light of the strength of the parties, the proportion of commerce involved in relation to the total volume in a particular market, and the probable immediate and future effects which preemption of that market share might have on effective competition therein.[20]

Brown Shoe Co. v. United States[21] was the first case before the Supreme Court to require a detailed analysis of the scope and purposes of the Celler-Kefauver Act.[22] In that case the Court designated the market share which the companies may control by merging as one of the most critical factors, especially where there is a history of a tendency toward concentration in the relevant market.[23] *Brown Shoe* also established that a merger resulting in a foreclosure of a market share which is *de minimis* does not have the effect of "substantially lessening competition," and therefore such a merger is acceptable under the Celler-Kefauver Act.[24] A later case, *United States v. Philadelphia National Bank*,[25] provided additional guidelines in holding that a merger which produces a firm controlling an undue percentage share of the relevant market, resulting in a significant increase in the concentration of firms

15. United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003, 1016 (D. Colo. 1971), *aff'd*, 407 U.S. 902 (1973).
16. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); *accord*, United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003, 1016 (D. Colo. 1971), *aff'd*, 407 U.S. 902 (1973).
17. United States v. Phillipsburg Nat. Bank & Trust Co., 399 U.S. 350, 362 (1970); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 357 (1963).
18. United States v. Phillipsburg Nat. Bank & Trust Co., 399 U.S. 350, 362 (1970).
19. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 355 (1963); United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003, 1010 (D. Colo. 1971), *aff'd*, 407 U.S. 902 (1973).
20. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961); *accord*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593, 595 (1957).
21. 370 U.S. 294 (1962).
22. *Id.* at 311 n.18.
23. *Id.* at 343, 346.
24. *Id.* at 329.
25. 374 U.S. 321 (1963).

in that market, is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[26] The Supreme Court in this case set out the general rule that an acquisition resulting in a combined market share of greater than 30 percent would clearly indicate control of an undue percentage of that market.[27] The Court also noted guidelines set forth by legal scholars in this area, but declined from intimating whether they are reliable as a valid criterion of unlawful concentration.[28] They did not intend their decision in *Philadelphia* to be interpreted as purporting to hold all mergers resulting in less than a 30 percent market share as necessarily not violative of the Celler-Kefauver Act.[29]

Other than the guidelines promulgated by the Justice Department,[30] there is no distinct yardstick available to establish what constitutes a substantial or undue percentage of the market. Congress has neither adopted nor rejected a specific definition of the word "substantially" by which the effects of a merger on competition can be measured.[31] The legislature's use of the words "*may* be substantially to lessen competition" is also an indication of a hesitancy to be definitive, and reveals its concern with probabilities rather than certainties.[32] Consequently, prior decisions must be resorted to when deciding whether the competition foreclosed in a market share is substantial. The resolution of this problem is embodied in three basic considera-

26. *Id.* at 363.
27. *Id.* at 364.
28. *Id.* at 364 n.41.
29. *Id.* at 364 n.41.
30. The Department of Justice would ordinarily challenge the following acquisitions or mergers between competitors: Where the four largest firms occupy less than approximately 75 percent of the market, any merger as to which:

one firm has	*the other firm has*
5 percent	5 percent or more
10 percent	4 percent or more
15 percent	3 percent or more
20 percent	2 percent or more
25 percent or more	1 percent or more

Percentages not shown should be interpolated proportionately with those that are. Justice Department Merger Guidelines, 1 TRADE REG. REP. ¶ 4510, at 6884. According to these tables the Stanley-Amerock merger would not ordinarily be challenged unless Stanley's market share was at least 1.5 percent or .5 percent larger than it was. The Department notes that where two distinct products are grouped within the same line of commerce, "some modification in the minimum market shares subject to challenge may be appropriate to reflect the imperfect substitutibility of the two products." *Id.* at 6884. Hence a horizontal merger of distinct products probably would not be challenged on the basis of market share unless the market shares of the companies were somewhat greater than the percentages indicated in the tables.

This was precisely the case in *Stanley*, for the two distinct products of residential and architectural cabinet hardware were grouped into the single cabinet hardware line of commerce.

31. Brown Shoe Co. v. United States, 370 U.S. 294, 321 (1962).
32. *Id.* at 323 (emphasis added), *quoting* S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950).

tions: (1) whether the line of commerce has been determined on the basis of the case's specific facts, (2) whether the area of effective competition has been carefully charted in the seller's market, and (3) whether the competition foreclosed constitutes a substantial share of the relevant market.[33]

Regarding concentration, the Court in *Philadelphia* went a step beyond the "tendency toward concentration" mentioned in *Brown Shoe*, and considered the effects of a merger in an already concentrated market.[34] "[I]f concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great."[35] *Philadelphia*, then, has initiated a simple test to evaluate decreases in competition, based upon market share and concentration.[36] The noteworthy element of this case, however, lies not in attributing any differences between a market which is tending toward concentration and one which is already concentrated, but rather in recognizing any lessening in competition which is likely to result from a merger in such markets. Consequently, where the evidence clearly shows that a merger is not likely to have anticompetitive effects, the existing amount of concentration or tendency toward it is not critical.[37]

Unlike the cases which are cited as authority by the majority in *Stanley*,[38] the matter of the relevant product and geographic markets is of little consequence in the instant case. Though the court readily admits that the determination of these markets would be of critical importance,[39] they are rendered virtually insignificant because of a stipulation agreed upon by Stanley and the FTC.[40] The court also declined to entertain the merits of the poten-

33. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-28 (1961).

34. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 365 n.42 (1963).

35. *Id.* at 365 n.42.

36. *Id.* at 363.

37. *See* Stanley Works v. FTC, 469 F.2d 498, 516-17 (2d Cir. 1972), *cert denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (dissenting opinion).

38. United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

39. Stanley Works v. FTC, 469 F.2d 498, 500 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).

40. Under the stipulation, the sales of cabinet hardware products in the nation constituted the appropriate product and geographic markets. It was also agreed that sub-markets were irrelevant for the purposes of this case. Stanley Works v. FTC, 469 F.2d 498, 500 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973). No doubt, as the court points out, the parties have agreed upon a set of facts, and they as well as the court must be bound by them. *Id.* at 506. However, the unfortunate aspect of this arbitrary situation, lies in the court's own realization that it does not portray the actual market structure which they deem to be of critical significance in the resolution of antitrust disputes.

The court discusses the probability of the appellant's increasing activities in the *residential* cabinet hardware market, as noted by the Commission. It then points to the appellant's contention of possible expanded production in the *architectural* market. The court concludes that the acceptance of either view is of no consequence in light tial competition issue, and chose instead to base its conclusions solely on the elimination of actual competition.[41] In reaching its decision, the majority relied most heavily upon the "expertise" of the Commission in interpreting the relevant market as being already concentrated.[42] Several cases were cited in an attempt to establish that actual concentration is far more insidious than a mere trend toward concentration.[43] Likewise, the court in *Stanley* attempted to discredit the appellant's contention that the competitive overlap resulting from the merger was *de minimis*, though it did recognize that the Celler-Kefauver Act can tolerate an inconsequential foreclosure of the market share.[44]

In an effort to uphold its position that the competition eliminated was indeed substantial, the majority enlisted as its standard two Supreme Court decisions.[45] It specifically relied upon the percentages[46] contained in *United States v. Pabst Brewing Co.*[47] and *United States v. Aluminum Co. of America.*[48] The former consisted of a merger between two huge national brewers which was found to violate the Celler-Kefauver Act on state, regional, and national levels. The industry in this case was marked by a steady trend toward concentration in that the number of competitors had drastically declined while the size of the industry leaders had correspondingly increased.[49] The *Aluminum Co.* case involved the merger of the first and ninth ranked competitors in the aluminum conduction market. The relevant market was extremely concentrated with the two top competitors alone controlling 50 percent of the market, and the first nine firms retaining a 95.7 percent market share among them. There had also been a rapid trend toward concentration in that the merger involved was the fifth acquisition by the producers of primary aluminum within the preceding 7 years. This resulted in the reduction of non-integrated aluminum fabricators from nine to only four.[50] The basis of the court's decision in *United States v. Aluminum Co. of America*[51] was the

of the stipulation. *Id.* at 508 n.22. In referring to the stipulation the majority points out that a "strategic litigation tradeoff" may have been involved. It blankets the market structure in a mystery of the unknown, the discovery of which "we may not permit ourselves to engage." *Id.* at 506.

41. *Id.* at 501 n.8. In his dissent, Judge Mansfield claims this actual competiton issue was adopted by the majority as a new ground because they had recognized the weakness of the case based upon elimination of potential competition. *Id.* at 509-10. He supports his contention with the decisions of the Hearing Examiner and the Commission. *Id.* at 509-10 nn.1 & 2.

42. *Id.* at 505.

43. *Id.* at 503-04.

44. *Id.* at 506.

45. *Id.* at 506-07.

46. *Id.* at 506-07.

47. 384 U.S. 546 (1966).

48. 377 U.S. 271 (1964).

49. United States v. Pabst Brewing Co., 384 U.S. 546, 550-51 (1966).

50. United States v. Aluminum Co. of America, 377 U.S. 271, 278, 279 n.6 (1964).

51. 377 U.S. 271 (1964).

"disciplining effect" which the acquired firm had upon the market in question.[52] It pointed out that the lessening of competition might "well be thwarted by the presence of small but significant competitors,"[53] and therefore chose to preserve Rome Cable Company (the acquired firm) as an important competitive factor in the aluminum conduction market. Though *Pabst* and *Aluminum Co.* share similarities with the instant case, there was an enormous disparity of anticompetitive effect between those cases and that evidenced in *Stanley*.[54]

An examination of *Stanley* reveals the difficulties involved in locating and applying suitable precedent in antitrust cases. Because there are no prescribed standards for illegality upon which the courts can rely,[55] decisions concerning violations of the Celler-Kefauver Act require the utmost understanding of the complexities of the given market.[56] The court, although acknowledging[57] this established requirement,[58] seemed to ignore the market

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52. *Id.* at 281.

53. *Id.* at 280.

54. *See* Stanley Works v. FTC, 469 F.2d 498, 516-17 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (dissenting opinion).

55. Brown Shoe Co. v. United States, 370 U.S. 294, 320-21 (1962). Regarding the level of market concentration in the *Stanley* case, the majority relied upon the parameters given in K. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 133 (1959) and Stigler, *Mergers and Preventive Antitrust Policy,* 104 U. PA. L. REV. 176, 182 (1955). Stanley Works v. FTC, 469 F.2d 498, 503 n.11, 504-05 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973). The United States Supreme Court, however, declined to intimate any view on the validity of these very parameters. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 364 n.41 (1963).

56. Brown Shoe Co. v. United States, 370 U.S. 294, 322 (1962).

57. The court states that in resolving the legality of all questions of antitrust activity, they are required to describe the involved companies, analyze the appropriate markets and explore the affected industry structure. Stanley Works v. FTC, 469 F.2d 498, 499 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973). The most striking feature of the *Stanley* case is the very fact that these complexities of the cabinet hardware market are never really brought to bear.

58. For cases where the courts were able to recognize the complexities of their respective given markets, *see* United States v. Phillipsburg Nat. Bank & Trust Co., 399 U.S. 350, 362 (1970); United States v. Continental Can Co., 378 U.S. 441, 458 (1964); United States v. Aluminum Co. of America, 377 U.S. 271, 283 (1964) (dissenting opinion); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 355 (1963); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957); United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003, 1017 (D. Colo. 1971), *aff'd,* 407 U.S. 902 (1973). It should be noted here that the majority criticize the appellant for relying upon the *Tampa* case because it also involved a section 3 violation of the Clayton Act. The court stated that the "parameters of analysis in § 7 cases are not the same as in § 3 cases." Stanley Works v. FTC, 469 F.2d 498, 507 n.20 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973). *But see* Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962). There the Court stated that the tests of illegality under section 7 were intended to be similar to those applied in interpreting the same language in other sections of the Clayton Act. In citing the legislative history, H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949), the court related that

complexities in their conclusion that the Stanley-Amerock merger violated the Celler-Kefauver Act. Judge Mansfield, in a well-reasoned dissent, emphasized the importance of dealing with the economic realities of the market. He reiterated that actual competition is determined by actual competitive facts (competitive overlap).[59] Not straying from the evaluative criteria established in the *Brown Shoe* case,[60] Judge Mansfield reasoned that

> Product markets and market percentages, whether or not stipulated, are of significance in determining the probable effect of a merger on competition where they reflect actual competition between the parties. . . . This process does not, as the majority suggests, change the parties' stipulation as to the overall market, or create distinct lines of commerce or sub-markets. It merely judges actual competitive effects according to economic realities within the stipulated market rather than ignore undisputed competitive facts of record.[61]

In looking to the *Pabst* case, the majority in *Stanley* holds out the 1.47 percent control of the national market by Blatz Brewery to indicate that such a market share is an "undue percentage" calling for the automatic application of the Celler-Kefauver Act to the instant case because the market was already concentrated. Yet, the court paid no attention to the anticompetitive effects evidenced by the *Pabst* case.[62] The majority also ignored the economic realities referred to by Judge Mansfield and instead insisted there was no decisive significance between the 1.47 percent market share in *Pabst* and the 1 percent in *Stanley*.[63] Similarly, the court in *Stanley* refers to the 1.3 percent market share held by the Rome Cable Company in the *Aluminum Co.* case, emphasizing the existence of a small but significant competitor.[64] It draws an analogy between these two cases, but in doing so fails to attribute any weight to the differences between them. In *United States v. Aluminum Co. of*

Congress intentionally chose language for section 7 that was virtually identical to that of section 3 of the Clayton Act.

59. Stanley Works v. FTC, 469 F.2d 498, 511 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (dissenting opinion).

60. Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962).

61. Stanley Works v. FTC, 469 F.2d 498, 511 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (dissenting opinion).

62. The *Pabst* case reveals a market characterized by a 30-year decline in the number of brewers and a sharp rise in the size of market controllers in recent years. On the national level Pabst controlled 4.49 percent of the market before the merger and 5.83 percent afterwards. The number of brewers declined from 714 in 1934 to 229 in 1961. In the period from 1957 to 1961, Pabst's competitors dropped from 206 to 162. In that same period the nation's 10 leading brewers increased their combined market share from 45.06 percent to 52.60 percent. In the Wisconsin market the number of competitors was reduced from 77 to 54 in the 5-year period ending in 1961. Furthermore, the market share of the four leading sellers increased from 47.74 percent to 58.62 percent. United States v. Pabst Brewing Co., 384 U.S. 546, 550-51 (1966).

63. Stanley Works v. FTC, 469 F.2d 498, 507 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).

64. *Id.* at 507.

America,[65] the three leading competitors controlled 76 percent of a market marked by prior acquisitions and notably tending toward high concentration.[66] In relating the disciplining effect which Rome Cable Company had on the market in question, the court further characterized the acquired company as an "aggressive competitor," a "pioneer" with special "aptitude and skill," and as being "active and efficient" in research and sales organization.[67] The facts in *Stanley* show that the four leading firms in its market controlled only 49-51 percent,[68] there was no tendency toward concentration, no evidence of any other acquisitions or mergers in the industry, prior, during, or since the merger with Amerock, and that Amerock's share remained constant during the 3-year existence of the merged corporation.[69] Furthermore, the majority admits there has been no evidence indicating a disciplining effect of Stanley upon the relevant market.[70]

The court in citing *Pabst* and *Aluminum Co.* neglects the market complexities presented in those cases as it does in deciding its own case. The majority rests its decision on bare market share percentages without determining if anticompetitive effects exist, reaching out to quash any "slight increase" because the market is supposedly already concentrated. Nonetheless, even the *Philadelphia* opinion, from which the court in *Stanley* quotes,[71] concedes that an undue percentage share resulting in a significant increase in concentration is inconsequential where the evidence clearly shows that the merger is not likely to have anticompetitive effects.[72] The court in *Stanley* failed to consider this factor, and seems to overlook the Commission's burden of proof in this respect.[73] Congress has not merely mandated the Commission or the courts "to campaign against 'superconcentration' in the absence of any evidence of harm to competition."[74] It has also been pointed out that where a merger involves two lines of commerce (i.e. bottles versus cans, or residential cabinet hardware versus architectural cabinet hardware), the shortcut "market share" approach developed in the *Philadelphia* case is without merit, for the legality of the merger can only depend

65. 377 U.S. 271 (1964).
66. *Id.* at 278 n.6.
67. *Id.* at 281.
68. Stanley Works v. FTC, 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).
69. *Id.* at 514 (dissenting opinion).
70. *Id.* at 501 n.8.
71. *Id.* at 504.
72. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 363 (1963).
73. Stanley Works v. FTC, 469 F.2d 498, 521 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (dissenting opinion). *See also* United States v. First Nat'l Bancorporation, 329 F. Supp. 1003, 1010 (D. Colo. 1971), *aff'd,* 407 U.S. 902 (1973).
74. FTC v. Procter & Gamble Co., 386 U.S. 568, 584 (1967) (Harlan, J., concurring), *citing* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1395 (1965).

upon an inquiry into the competitive effects involved.[75] In citing the admonition set forth in the *Philadelphia* case,[76] Judge Mansfield concludes in his dissent that in the present situation the undisputed evidence clearly shows the merger is not likely to have such anticompetitive effects.[77] What the court appears to be advocating then, is that on the basis of a concentrated market, any similar merger warrants a *per se* holding of illegality.[78]

The decision in *Stanley Works v. FTC*[79] displays a manifest intent by the court to vigorously foreclose any rising tide of economic concentration. Such an intent cannot be interpreted as anything less than noble where the effects of a merger may substantially lessen competition. However, since all mergers have not been outlawed by Congress, the courts must keep in mind that each case requires individual analysis.[80] The significance of the *Stanley* decision lies not only in the court's designation of a 1 percent market share as an undue percentage or a substantial market share, but also in the fact that it did so without resorting to the anticompetitive effects of the merger on competition. The court's decision, therefore, amounts to a holding that any merger of this type in a concentrated market must be considered *per se* illegal regardless of its effect on competition. In its eagerness to erect a barrier against a "rising tide," the court has been swept away from applying the appropriate criteria. In its opening statement, the court in *Stanley Works v. FTC*[81] sets out the proper approach to litigations involving the Celler-Ke-

75. United States v. Continental Can Co., 378 U.S. 441, 475 (1964) (dissenting opinion).

76. The Court there called for an injunction as to any merger producing a firm which controlled an undue share of the market resulting in a significant increase in concentration "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." United States v. Philadelphia Nat. Bank, 374 U.S. 321, 363 (1963).

77. Stanley Works v. FTC, 469 F.2d 498, 517 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (dissenting opinion). Judge Mansfield reveals that the cabinet hardware market was devoid of any trend toward concentration, devoid of parallel action by leading producers, and that there is no "appreciable enhancement in the market power of the merged enterprise as compared with its two components." *Id.* at 509 (dissenting opinion). He also relates that Amerock's share of the market remained constant from 1965 to 1968, which is uncontested, plus there is no evidence of other mergers in the industry at any time prior to or since the Stanley-Amerock merger. Finally, Judge Mansfield points out that the number of firms in the market has actually increased from 1963 to 1968 without evidence of price leadership or uniformity. *Id.* at 514 (dissenting opinion).

78. The court adamantly denies this, stating that such a conclusion is regrettable as "nothing we decide today remotely hints at such a conclusion." *Id.* at 508.

79. 469 F.2d 498 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).

80. Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962). Also a policy of a case-by-case examination must be enacted by the courts to distinguish between mergers which threaten anticompetitive consequences and those which do not. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313 (1965).

81. 469 F.2d 498 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973).