

IN THE MATTER OF  
ADVENTIST HEALTH SYSTEM/WEST, ET AL.

*Docket 9234. Interlocutory Order, August 2, 1991*

ORDER

This matter has been heard by the Commission upon the appeal from the initial decision of counsel supporting the complaint, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to reverse the initial decision and remand the matter for further proceedings. Therefore,

*It is ordered*, That the initial decision of the Administrative Law Judge is reversed and the matter remanded for further proceedings in accordance with this order and accompanying opinion.

By the Commission.\*

OPINION OF THE COMMISSION<sup>1</sup>

By Strenio, *Commissioner*:

The issue presented here is whether the Administrative Law Judge ("ALJ") erred when he granted Adventist Health System/West's ("AHS/West") and Ukiah Adventist Hospital's ("Ukiah Adventist") motion to dismiss and motion for summary decision on the ground that respondents' acquisition of substantially all the assets of Ukiah General Hospital ("UGH") did not satisfy the jurisdictional requirements of the Clayton Act. We find that the ALJ erred when he granted the motion to dismiss. His order is reversed and the matter remanded for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

On November 7, 1989, the Federal Trade Commission ("Commis-

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\*Prior to leaving the Commission, Commissioner Strenio registered a vote in the affirmative for the Order and Opinion of the Commission in this matter. Commissioner Yao did not register a vote in this matter.

<sup>1</sup> The following abbreviations are used in this opinion:

- STIP. - Stipulations (June 19, 1990) (in camera).
- CCAB - Appeal Brief of Counsel Supporting the Complaint (Sept. 10, 1990).
- RAB - Brief of Appellees Adventist Health System/West and Ukiah Adventist Hospital (Oct. 11, 1990).
- CCRB - Reply Brief of Counsel Supporting the Complaint (Oct. 23, 1990).
- TOA - Official Transcript of the Oral Argument before the Federal Trade Commission (Dec. 18, 1990).

sion” or “FTC”) issued a complaint alleging that respondents Ukiah Adventist and AHS/West, two nonprofit religious corporations, violated Section 7 of the Clayton Act, 15 U.S.C. 18, when they acquired substantially all the assets of UGH.<sup>2</sup> Complaint, ¶¶ 2, 4, 10, 20. The complaint sets forth two separate and distinct bases for the Commission’s subject matter jurisdiction. The first is that Section 11 of the Clayton Act, 15 U.S.C. 21, provides the FTC with jurisdiction to enforce Section 7 of the Clayton Act over assets acquisitions by not-for-profit corporations. *See* Complaint, ¶¶ 2, 4, 20. The second is [2] that this assets acquisition was “tantamount in its effects to a merger” and therefore subject to the stock or share capital provision of Section 7 of the Clayton Act. Complaint, ¶ 20.<sup>3</sup>

Respondents’ answer to the complaint denies most of the allegations and raises three affirmative defenses. Only one of those defenses, that the FTC lacks Section 7 jurisdiction over this acquisition, is relevant to this appeal.<sup>4</sup>

Respondents filed a motion to dismiss the complaint on January 19, 1990. The motion sought dismissal on the grounds that the FTC lacks jurisdiction under either Section 7 or Section 11 of the Clayton Act and that respondents’ activities in or affecting interstate commerce are insubstantial. Respondents further requested that the ALJ stay further proceedings pending a final decision on the jurisdictional issue.<sup>5</sup>

Complaint counsel opposed the motion to dismiss, arguing that: (1) the FTC has authority under Section 11(a) of the Clayton Act to enforce Section 7 of the Clayton Act against nonprofit hospitals; (2) respondents’ acquisition is subject to antitrust scrutiny under Section 7 if it is found to be “tantamount in its effects to a merger”; (3) respondents have failed to show that, as a matter of law, the interstate commerce tests of Section 7 of the Clayton Act cannot be

<sup>2</sup> The complaint alleges that the acquisition was made by both Ukiah Adventist and AHS/West, through its control of, and affiliation with, Ukiah Adventist. Complaint, ¶ 12. Respondents disagree and assert that the acquisition was made solely by Ukiah Adventist and that AHS/West “served only as the guarantor for the acquisition.” *See* STIP, at 1 n.1. Because both Ukiah Adventist and AHS/West are not-for-profit corporations, this issue has no bearing on the pending appeal.

<sup>3</sup> Of course, the complaint also alleges that “respondents have been and are now engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12.” Complaint, ¶ 6.

<sup>4</sup> The two other affirmative defenses asserted by respondents are: (1) that the Commission lacks jurisdiction because of Ukiah Adventist’s insubstantial effect on interstate commerce; and (2) that the combination of two inefficient hospitals’ operations is in the best interest of health care consumers. Answer at 8-13 (Dec. 26, 1989). In light of the procedural posture of this case, neither of these two affirmative defenses is before us for review. Thus, we intimate no decision as to their merits and await further proceedings before deciding whether these defenses are meritorious.

<sup>5</sup> *See* Respondents’ Motion to Dismiss (Jan. 19, 1990).

satisfied in this matter; and (4) respondents' request for a stay should be denied.<sup>6</sup>

On February 8, 1990, Chief Administrative Law Judge Lewis F. Parker issued his Order Ruling on Respondents' Motion to Dismiss. [3] In that Order, the ALJ granted respondents' motion to dismiss on the issue of Section 7's reach over a "pure" assets acquisition. He deferred rulings on the interstate commerce question and the issue of whether the challenged transaction is "tantamount in its effects to a merger" until the factual record on those issues could be completed. He also declined to stay the proceedings pending a final determination on the jurisdictional issue. Order Ruling on Respondents' Motion to Dismiss (Feb. 8, 1990).

Respondents then requested that the ALJ certify to the Commission the "tantamount in its effects to a merger" issue, the interstate commerce issue, and the question of whether the proceedings should be stayed pending a determination of these issues.<sup>7</sup> Complaint counsel opposed respondents' application<sup>8</sup> and filed its own request with the ALJ to file an application for review by the Commission of the portion of the ALJ's February 8, 1990 Order holding that the Commission lacks jurisdiction over the challenged transaction under the assets acquisition clause of Section 7 of the Clayton Act.<sup>9</sup> On March 6, 1990, the ALJ issued his Order Denying Complaint Counsel's and Respondents' Requests for Permission to File Applications for Review.<sup>10</sup>

After the Court of Appeals for the Seventh Circuit issued its decision in *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990), both [4] complaint counsel and respondents filed motions for reconsideration with the ALJ.<sup>11</sup> The ALJ denied both motions.<sup>12</sup>

<sup>6</sup> Complaint Counsel's Memorandum of Points and Authorities in Opposition to Respondents' Motion to Dismiss (Jan. 29, 1990).

<sup>7</sup> Application for Review of Ruling on Respondents' Motion to Dismiss (Feb. 13, 1990).

<sup>8</sup> Complaint Counsel's Opposition to Respondents' Application for Review (Feb. 26, 1990).

<sup>9</sup> Complaint Counsel's Request to File Application for Review of Order on Respondents' Motion to Dismiss (Feb. 23, 1990). Respondents replied to complaint counsel's February 23, 1990 request. *See* Respondents' Answer in Opposition to Complaint Counsel's Request to File Application for Review (March 6, 1990).

<sup>10</sup> On March 15, 1990, after the ALJ denied respondents' Application for Review of Ruling on Respondents' Motion to Dismiss, respondents filed Respondents' Request for a Writ of Mandamus to Compel Certification of a Controlling Question of Law or for Dismissal Due to the Lack of FTC Jurisdiction. Complaint counsel opposed that request. Complaint Counsel's Reply to Respondents' Request for Writ of Mandamus (March 22, 1990). The Commission never ruled on respondents' request.

<sup>11</sup> *See* Motion for Reconsideration (April 13, 1990) (complaint counsel's motion); Respondents' Motion for Reconsideration (April 25, 1990).

<sup>12</sup> *See* Order Denying Complaint Counsel's Motion for Reconsideration of Part III of Order Ruling on Respondents' Motion to Dismiss (April 26, 1990); Order Denying Respondents' Motion for Reconsideration (May 8, 1990).

After the parties agreed to be bound to a stipulated record on the issue of whether the transaction was “tantamount in its effects to a merger,” the parties filed cross-motions for summary decision.<sup>13</sup> On August 2, 1990, the ALJ issued his initial decision, in which he held that this assets acquisition was not tantamount in its effects to a merger and the Commission therefore cannot challenge it under Section 7 of the Clayton Act. The ALJ dismissed the complaint.

Counsel supporting the complaint appealed the ALJ’s initial decision to the Commission.

## II. ISSUES

The issues before the Commission are twofold. First, whether Section 7 of the Clayton Act reaches assets acquisitions by not-for-profit corporations by operation of Section 11 of the Clayton Act. Second, whether the purchase of assets that occurred in this transaction was “tantamount in its effects to a merger” and therefore subject to the stock or share capital provision of Section 7 of the Clayton Act. If the resolution of either of these two issues is in the affirmative, then the decision of the ALJ must be reversed and the matter remanded for further proceedings.

We will treat respondents’ motion for summary decision as a renewed motion to dismiss and treat the ALJ’s grant of respondents’ motion in the initial decision as a grant of a motion to dismiss. As such, the standard of review for both issues before the Commission is identical. [5]

## III. SECTION 7’S REACH OVER ASSETS ACQUISITIONS BY NOT-FOR-PROFIT CORPORATIONS

We begin with the premise that “[i]mmunity from the antitrust laws is not lightly implied.” *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 348 (1963) (quoting *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962)). Our examination of the arguments and the relevant authorities has led us to the conclusion that Section 7 of the Clayton Act reaches anticompetitive assets acquisitions by not-for-profit corporations, even if those corporations are not subject to the FTC’s jurisdiction under the FTC Act. In other words, we find the Clayton Act to be a separate and distinct basis for the Commission’s jurisdiction in nonprofit transactions such as this one.

<sup>13</sup> See Complaint Counsel’s Motion for Partial Summary Decision (July 8, 1990); Respondents’ Motion for Summary Decision (July 20, 1990). Apparently, complaint counsel’s motion was “partial” because if it prevailed, other jurisdictional and substantive issues still would need to be resolved. On the other hand, if respondents prevailed, the complaint would be dismissed for lack of subject matter jurisdiction.

The complaint in this case alleges that respondents are “persons” within the meaning of the Clayton Act and thereby subject to jurisdiction of those with enforcement authority under that Act. Section 1(a) of the Clayton Act defines “persons” to “include corporations and associations existing under or authorized by the laws of . . . any State.” 15 U.S.C. 12(a). Thus, the Clayton Act contains a broad definition of “persons” who are subject thereto and that definition makes no exception for nonprofit corporations.

While broadly defining the “persons” subject to the Clayton Act, Congress created certain exemptions from the Act’s coverage in Section 6 of the Clayton Act, 15 U.S.C. 17. Where Congress specifically exempts, inference of other exemptions is difficult to assert and sustain.

Congress clarified further the application of certain provisions of the Clayton Act as to nonprofit institutions when, in 1938, it enacted the Non-Profit Institutions Act, which amended the Robinson-Patman provisions of the Clayton Act, to exempt expressly certain nonprofit institutions from Robinson-Patman coverage. The amendment provides that nothing in the Robinson-Patman Act “shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.” 15 U.S.C. 13c. This amendment demonstrates that Congress has utilized its power to exclude not-for-profit entities, including hospitals, from the requirements of certain provisions of the Clayton Act through clear language, and accordingly not by implication.

Both parties claim support for their respective positions from the text of the statutes, the legislative histories and case law. These subjects are discussed below. [6]

#### *A. The Text of the Relevant Statutes*

The Commission’s complaint refers to Section 11 of the Clayton Act as the basis for its jurisdiction. *See* Complaint ¶¶ 2, 4.<sup>14</sup> Section 11(a) provides as follows:

Authority to enforce compliance with Sections 2, 3, 7, and 8 of [the Clayton] Act by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers

<sup>14</sup> The preamble to the complaint also states that the Commission “hereby issues its complaint, pursuant to the provisions of Section 11 of the Clayton Act, as amended, 15 U.S.C. 21 . . . .”

engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . . .

15 U.S.C. 21(a). In this case, the complaint alleges that the acquisition in question violates Section 7 of the Clayton Act and jurisdiction to challenge the acquisition is based on Section 11. Section 7 provides in relevant part as follows:

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

15 U.S.C. 18. [7]

Section 7 of the Clayton Act contains two distinct clauses by which acquisitions are measured. The first is known as the “stock acquisition clause” and the second is known as the “assets acquisition clause.” While both clauses are germane to this appeal, only the assets acquisition clause is relevant to the not-for-profit corporation issue.<sup>15</sup> This is because the stock acquisition clause applies to all “persons” within the meaning of the Clayton Act and the assets acquisition clause applies only to “persons” who are “subject to the jurisdiction of the Federal Trade Commission.”

The issue in this appeal is the meaning of the phrase “subject to the jurisdiction of the Federal Trade Commission.” Complaint counsel argues that this “phrase refers to the Commission’s jurisdiction under Section 11” of the Clayton Act. *See, e.g.*, CCAB at 18. Respondents argue that this phrase refers to the Commission’s jurisdiction under the FTC Act, and that the Commission therefore lacks jurisdiction because of the limited definition of “corporation” in Section 4 of the FTC Act. *See, e.g.*, RAB at 13-14.

Respondents argue vigorously that complaint counsel’s reading of the statutory provisions is incorrect and characterize complaint

<sup>15</sup> The stock acquisition clause is relevant to the “tantamount in its effects to a merger” issue which is discussed *infra* at page 34.

counsel's argument as follows: Complaint counsel relies upon Section 11 of the Clayton Act as the jurisdictional basis for this case. For alleged anticompetitive acquisitions such as this one, Section 11 refers to persons subject to Section 7 of the Clayton Act. Section 7's assets acquisition clause (the clause relied upon by complaint counsel for this part of its case) refers to persons "subject to the jurisdiction of the Federal Trade Commission." Complaint counsel then—erroneously in respondents' view—looks back to Section 11 of the Clayton Act to see if respondents are persons subject to the jurisdiction of the FTC.

Respondents have no quarrel with complaint counsel's use of Section 11 as the starting point, or the subsequent move to Section 7. They argue that from Section 7, we should proceed to Section 4 of the FTC Act instead of returning to Section 11 of the Clayton Act. To do otherwise, they assert, is to engage in circular reasoning.

However, this argument by respondents fails to recognize that complaint counsel's statutory analysis is not necessarily circular because it goes from one paragraph of Section 11, then to Section 7, and then back to that same Section 11 paragraph. Instead, complaint counsel's statutory analysis begins with the [8] initial portion of Section 11(a) of the Clayton Act,<sup>16</sup> then moves to the assets acquisition provision of Section 7,<sup>17</sup> and finally ends with the concluding portion of Section 11(a).<sup>18</sup> Referring to two provisions within the same paragraph at different points in the analysis does not constitute a fatal "circularity" problem as suggested by respondents.

If respondents' arguments were taken to their logical conclusion, the result would be that neither the FTC, the Department of Justice, the state attorneys general nor private parties would have authority to file suit under the Clayton Act to enjoin or otherwise redress plainly anticompetitive assets acquisitions by not-for-profit corporations.<sup>19</sup>

<sup>16</sup> "Authority to enforce compliance with Sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . ." 15 U.S.C. 21(a).

<sup>17</sup> "[N]o person subject to the jurisdiction of the Federal Trade Commission shall acquire, directly or indirectly, the whole or any part of the assets of another person engaged in commerce. . . ." 15 U.S.C. 18.

<sup>18</sup> Jurisdiction to enforce, *inter alia*, Section 7 is conferred upon four specific regulatory agencies where applicable and "in the Federal Trade Commission where applicable to all other character of commerce . . . ." 15 U.S.C. 21(a). The four other specific regulatory agencies provided specific grants of jurisdiction in Section 11(a) of the Clayton Act are the: (1) Interstate Commerce Commission; (2) Federal Communications Commission; (3) Department of Transportation; and (4) Federal Reserve Board. *Id.*

<sup>19</sup> Indeed, as respondents' counsel asserted during the oral argument before the Commission, it is respondents' position that no one has jurisdiction under either the stock acquisition clause or the assets acquisition clause of Section 7 of the Clayton Act to pursue anticompetitive acquisitions made by not-for-profit corporations. See TOA at 28-32 (colloquy between Commissioner Owen and counsel for respondents as well as colloquy between Chairman Steiger and counsel for respondents); *Id.* at 47-48 (colloquy between Commissioner Strenio and counsel for respondents).

(footnote cont'd)

Respondents' reasoning is that the Section 7 assets acquisition clause may be [9] applied only to a "person subject to the jurisdiction of the Federal Trade Commission." If respondents are correct that this phrase refers to the FTC Act, and since Section 4 of the FTC Act expressly excludes most nonprofit corporations from its coverage, no one could challenge an anticompetitive assets acquisition under Section 7 of the Clayton Act if consummated by a corporation that is not "organized to carry on business for its own profit or that of its members."

Another statutory provision supplies additional guidance on how to interpret properly the phrase "subject to the jurisdiction of the Federal Trade Commission" from Section 7 of the Clayton Act. Section 11 of the FTC Act provides as follows:

Nothing contained in [the Federal Trade Commission] Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the [Federal Trade Commission] Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

15 U.S.C. 51. Section 4 of the FTC Act defines "Antitrust Acts" to include the Clayton Act. 15 U.S.C. 44. The express language of Section 11 of the FTC Act, in turn, prohibits a construction of the FTC Act that would alter or modify the Clayton Act.<sup>20</sup>

Complaint counsel argues that respondents' approach of applying the FTC Act's narrower definition of corporations to Section 7 of the Clayton Act in effect impermissibly would construe the FTC Act in a manner that would alter or modify the Clayton Act. In light of the express language used in Section 11 of the FTC Act, we agree.

Respondents seek to apply the FTC Act's definition of "corporation" to limit the reach of Section 7. However, even though complaint counsel's appeal brief raised the Section 11 of the FTC Act issue (*see* CCAB at 19), respondents did not respond in their brief. During oral argument respondents appeared to take the position that Section 11 of the FTC Act applies only to the substantive scope of the other antitrust laws and not to the [10] identities of those who may be

We note that respondents' interpretation of Section 7 in this regard appears to run counter to the admonition of the Supreme Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 343 (1963): "It is unquestioned that the stock-acquisition provision of § 7 embraces every corporation engaged in commerce, including banks."

<sup>20</sup> See also *Haffner v. United States*, 585 F. Supp. 354, 358 (N.D. Ill. 1984), *modified*, 757 F.2d 920 (7th Cir. 1985) ("[A]ll the sections of a single statute should be presumed to have been drafted with reference to one another; the whole statute is the context for construction of any of its individual sections.").

subject to the jurisdiction of the other antitrust laws.<sup>21</sup> However, no support for respondents' proposition is evident in the text of Section 11 of the FTC Act or in the cases construing that provision.<sup>22</sup>

Respondents point out that the Clayton Act and the FTC Act are to be read *in pari materia* and conclude that "Congress did not need to delineate an *exemption* for not-for-profits in Section 11 of the Clayton Act because not-for-profits were specifically *excluded* from the jurisdiction of the FTC." See RAB at 25 (emphasis in original). We agree with respondents that the two statutes are to be read *in pari materia*, but do not agree that this leads to respondents' conclusion.

Respondents contend that "the two statutes were intended to serve the same function—to supplement the Sherman Act and prevent restraints of trade." *Id.* at 24. While the two statutes [11] clearly are complementary, their language and legislative histories show that they serve different functions.

Congress created the Federal Trade Commission with two principal objectives. The first was to gather and publish information regarding the profitability and practices of major businesses.<sup>23</sup> The second was to define and curtail unfair business practices as such practices developed. The Clayton Act, on the other hand, contained no similar information gathering and reporting provisions and deemed unlawful certain broadly-defined practices.<sup>24</sup>

The different emphases of the two Acts support an inference that

<sup>21</sup> At oral argument before the Commission, this issue was probed with respondents. See TOA at 38-41. During the oral argument the following colloquy ensued with respondents' counsel:

COMMISSIONER STRENIO: But I am curious as to why it is that Section 11 of the FTC Act ought not to be given the effect that, on the fact of it, it is apparently intended to have. At least, that is the argument.

MR. CAMPBELL: I agree. I don't view restricting the applicability to the entities enumerated to be a restriction on the scope of the Act. I think that has to do with the substantive powers of the Act, and so I frankly view that as a non sequitur.

*Id.* at 41.

<sup>22</sup> See *United States v. Chas. Pfizer & Co.*, 205 F. Supp. 94, 96 (S.D.N.Y. 1962) (even though the facts underlying a subsequent Sherman Act prosecution were "in many respects identical" to a prior FTC complaint, Section 11 of the FTC Act was construed to permit simultaneous or successive prosecutions); *United States v. Cement Inst.*, 85 F. Supp. 344, 347 (D. Colo. 1949) ("It would seem the Federal Trade Commission Act was not designed to interfere with, or detract from the exercise of the authority and duty of the Attorney General to seek enforcement of the Sherman Act, as it especially provides that no order of the Commission, or judgment, shall in any wise relieve or absolve any person from liability under the anti-trust acts, which are defined as including the Sherman Act.").

<sup>23</sup> See, e.g., H.R. Rep. No. 533, 63d Cong., 2d Sess., pt. 1, at 2-4 (1914) reprinted in 5 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, at 3756-58 [hereinafter *Kintner*]; 51 Cong. Rec. 8842-43 (1914), reprinted in 5 *Kintner* at 3783-86 (statement of Rep. Covington). See also T. Blaisdell, *The Federal Trade Commission: An Experiment in the Control of Business* 105-20 (1932); G. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* 19, 24-25, 45-46 (1924); Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 Admin. L. Rev. 461 (1990).

<sup>24</sup> See, e.g., 2 *Kintner* at 989-90 (discussing different emphasis in scope of Clayton and FTC Acts).

Congress was willing to tolerate some undefined unfair methods of competition by certain not-for-profit entities, but not those practices specifically condemned by the Clayton Act (such as unlawful tying arrangements, acquisitions and interlocking directorates). There is nothing illogical in denying the authority for the Commission to enforce the “unfairness” provisions in Section 5 of the FTC Act against certain not-for-profit corporations, but granting the authority under Section 11 of the Clayton Act for the Commission to enforce that statute’s specific prohibitions against all “persons” subject to that Act.

We conclude that the plain language of Sections 7 and 11 of the Clayton Act strongly supports the proposition that Section 7 prohibits anticompetitive assets acquisitions by not-for-profit corporations, even when such corporations are not subject to the requirements of the FTC Act. Although our analysis might end here, we nonetheless look to the legislative histories of the relevant statutes to see if they support a different resolution. In construing congressional intent as discussed below, we are mindful that to interpret the Clayton Act otherwise would create a significant loophole in the coverage of this important [12] antitrust statute. Our reading of the statute is buttressed both by the legislative histories and the case law.

#### *B. The Relevant Legislative Histories*

We now examine the legislative histories of these Acts and amendments to them, as they shed additional light on their proper interpretation.

##### *1. The Original Clayton Act*

Our examination of the relevant legislative histories begins with the original Clayton Act, as well as its amendments, because the complaint alleges a violation of that statute. Respondents have not identified, and our independent examination has not uncovered, anything in the legislative history of the Clayton Act discussing not-for-profit entities. Thus, if any congressional intent did exist to exempt not-for-profit entities from Clayton Act enforcement by the FTC, it would have to be inferred from other actions of Congress and the statements of individual Members of Congress.

Congress passed the FTC Act about one month before it passed the Clayton Act.<sup>25</sup> It thus had the opportunity to conform the Clayton Act

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<sup>25</sup> The House of Representatives was the last chamber to pass each Act. The FTC Act passed the House of  
(footnote cont'd)

to the FTC Act, if it had wanted to do so. This fact leads to a credible inference that Congress meant for the limitation on the Commission's jurisdiction over not-for-profit entities to be confined to matters arising under the FTC Act.

Respondents argue that the FTC Act's jurisdictional limitations were imported into Section 11 of the Clayton Act when Congress accepted an amendment to the original proposed Clayton Act enforcement language. See RAB at 26-28. Respondents' argument can be summarized by the following passage they quote from *United States v. FCC*, 652 F.2d 72, 84 (D.C. Cir. 1980) (*en banc*) (emphasis supplied by respondents):

During much of the time the Clayton Act was debated the enforcement provisions of the two bills [the Clayton bill and the FTC bill] were identical. In fact, the Senate committee that reported the Clayton Act proposed language in the bill stipulating that, once a complaint has issued, "thereupon [13] such proceedings shall be had as are provided for in section 5 of the [FTC] act." See 51 Cong.Rec. 14224 (Aug. 25, 1914) . . . . *Since the FTC bill had not yet been passed, however, the committee decided it would be inappropriate to refer specifically to that Act in the Clayton Act.* It therefore substituted for the formulation quoted above the actual language of Section 5 of the FTC bill as it then existed. *Id.* at 14321-14322 (Aug. 27, 1914) . . . .

There is no indication in the legislative history of the Clayton Act that that Act was intended to vest any less discretion in its enforcement agencies *than the FTC Act vested in the FTC*. On the contrary, the express purpose of using the language—as it was at the time—of Section 5 of the FTC bill was to *ensure that the enforcement provisions of the Clayton and FTC Acts would be exactly the same*. 51 Cong.Rec. 14224 (Aug. 25, 1914) (statement of Senator Walsh); see *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1374 n.9 (9th Cir.), *cert. denied*, 439 U.S. 982, 99 S.Ct. 571, 58 L.Ed.2d 653 (1978).

Respondents assert that this history evinces a congressional intention to confine Clayton Act enforcement by the Commission to entities subject to FTC Act jurisdiction. Respondents further assert that the subsequent incorporation, through substitution, into the Clayton Act of language from Section 5 of the FTC Act is an additional indication of this hypothesized intent. But, neither the statutes nor their legislative histories support this proffered conclusion. Instead, this combination of legislative history and congressional action bolsters the exercise of FTC jurisdiction over not-for-profit corporations in Clayton Act cases.

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Representatives on September 10, 1914 (See 51 Cong. Rec. 14943 (1914), *reprinted in* 5 *Kintner* at 4756) and the Clayton Act passed the House of Representatives on October 8, 1914 (see 51 Cong. Rec. 16344 (1914), *reprinted in* 3 *Kintner* at 2833-34).

The language respondents cite deals with procedural, and not jurisdictional, provisions.<sup>26</sup> While Congress intended to keep the procedures under the Clayton Act and the FTC Act harmonious, [14] there is not discernible legislative intent to bring into conformity the respective jurisdictions conferred under the two Acts. Indeed, Senator Walsh, whose remarks are cited by the court in *United States v. FCC*, viewed the rationale as “obvious”:

Section 2 deals with one phase and aspect of unfair competition, as that expression is understood . . . in the trade commission bill. If therefore complaint were made of unfair competition by price cutting, charged as a violation of Section 5 of the trade commission bill, the procedure before the trade commission would be after one manner. If, however, price cutting were charged in violation of the provisions of Section 2 of this bill, the procedure would be before the trade commission, but by entirely different proceeding. I apprehend that no one would question that the two should be harmonized if that system is to go into force and effect at all.

51 Cong. Rec. 14266 (1914), *reprinted in* 3 *Kintner* at 2114.

Respondents’ arguments also are not supported by the remaining fragments of the legislative history they have cited,<sup>27</sup> [15] including one sentence uttered by Senator Reed during an extended floor debate on the Clayton bill in which he asked that the Senate reconsider its

<sup>26</sup> Respondents’ quotation from *United States v. FCC*, as repeated in the text of this opinion, deleted the following sentence from the end of the first paragraph: “This language was ultimately adopted as Section 11(b) of the Clayton Act and is with us still.” 652 F.2d at 84. Section 11(b) of the Clayton Act is a purely procedural provision. That provision is almost identical to Section 5(b) of the FTC Act, which sets forth similar procedures.

<sup>27</sup> For example, respondents quote an exchange between Senator Poindexter and Senator Walsh in which Senator Walsh concluded that “a Federal Trade Commission will be created *with some powers*.” RAB at 20, quoting 51 Cong. Rec. 14323 (1914), *reprinted in* 3 *Kintner* at 2161 (emphasis added by respondents). Respondents assert that the underlined portion is a “jurisdictional reference to the FTC Act.” *Id.* This is simply incorrect. The entire relevant exchange is as follows:

Mr. Poindexter. Mr. President, I understood that the Senator from Montana substituted the amendment which was adopted this morning for the one he offered yesterday because the Federal trade commission referred to had not yet been established. I notice that the amendment he offered this morning sets out the specific procedure; but it still vests the jurisdiction in the Federal Trade Commission, and there is no such institution. I just thought I would call the Senator’s attention to that, in view of the fact that he has been dealing with that general subject.

Mr. Walsh. Mr. President, the fact had not been overlooked. We have indulged the expectation, or at least the hope, that a Federal Trade Commission will be created with some powers.

Mr. Poindexter. I hope the Senator’s expectation will be realized, but I much prefer the amendment he had on yesterday, as being simpler in form, rather than repeating in a second statute the details of procedure. If you are going to anticipate you might as well anticipate in one case as in the other. 51 Cong. Rec. at 14323 (1914), *reprinted in* 3 *Kintner* at 2161 (emphasis added).

While Senator Poindexter’s principal point was that it made little sense to delete a reference to a non-existent agency and replace it with a procedure provision adopted from a non-existent statute, the import of the dialogue is significant. The amendments related solely to procedure and law enforcement actions. The Clayton Bill, both before and after the amendments, had jurisdictional provisions distinct from those in the FTC Act.

vote to delete Section 4 from the Senate version of the bill. *See* RAB at 20, quoting 51 Cong. Rec. 14090 (1914), *reprinted in* 3 *Kintner* at 1990. The decision to delete Section 4, which forbade tying arrangements, had been made “in consequence of the passage of the trade commission bill.” 51 Cong. Rec. 14089 (1914), *reprinted in* 3 *Kintner* at 1988 (statement of Senator Culberson).<sup>28</sup> In urging reconsideration, Senator Reed said:

As I was remarking, the trade commission finds its authority to act with reference to the practices referred to in Section 4 of this bill, if it finds it anywhere, in Section 5 of the trade commission bill. Section 5 simply provides “that unfair competition in commerce is hereby declared unlawful.”

*Id.* at 14090, *reprinted in* 3 *Kintner* at 1990. [16]

As of August 21, 1914, at the moment Senator Reed was urging the Senate to put Section 4 back into the Clayton bill, the trade commission bill was still pending in the Congress; its “exact nature and terms” were unknown (*Id.* at 14322 (statement of Senator Walsh)); the version of the Clayton bill that had passed the House of Representatives did not even provide for FTC enforcement of the Clayton Act (H.R. 15657, 63d Cong., 2d Sess. (1914), *reprinted in* 2 *Kintner* at 1728-38); and the Senate had not yet voted on the committee proposal that the trade commission be given enforcement authority over certain provisions in the Clayton Act.<sup>29</sup> Senator Reed’s comments concern the future Commission’s likely ability, or inability, to challenge tying arrangements under Section 5 or the trade commission bill. (51 Cong. Rec. 14089-92 (1914), *reprinted in* 3 *Kintner* at 1987-95). His reference to the Commission’s subject matter jurisdiction under Section 5 of the trade commission bill cannot be equated with a congressional intention to exempt not-for-profit entities from FTC enforcement actions brought under the Clayton Act.<sup>30</sup> [17]

<sup>28</sup> “Passage” in this case cannot refer to final action by both Houses of Congress before sending the bill to the President, since such action occurred several weeks later. Here, it likely refers to action by one of the Houses.

<sup>29</sup> The Senate began its debate on Section 9b on August 25, 1914. 51 Cong. Rec. 14223, *et seq.* (1914), *reprinted in* 3 *Kintner* at 2066, *et seq.*; *see id.* at 14266, *reprinted in* 3 *Kintner* at 2114 (statement of Senator Walsh).

<sup>30</sup> In its report on H.R. 15657, the Senate Judiciary Committee stressed that the bill was not intended to alter the Sherman Act (which had defined corporations in a way that included not-for-profit corporations), and stated that certain provisions of the proposed law should be enforced by a new agency, “to be created,” the Federal Trade Commission, “in the case of individuals and corporations other than banks and common carriers.” S. Rep. No. 698, 63d Cong., 2d Sess. 2, 42 (1914), *reprinted in* 2 *Kintner* at 1744-45.

## 2. The Original Federal Trade Commission Act

There appears to be no disagreement in this case that Section 4 of the FTC Act contains an express limitation on the definition of “corporation” that precludes any enforcement of Section 5 of the FTC Act against a corporation unless it “is organized to carry on business for its own profit or that of its members.” Respondents have not pointed to anything in the legislative history of the FTC Act, express or implied, that this definition of “corporation” was meant to apply to the Clayton Act. Our examination of this legislative history also has not yielded any support for such an interpretation of Section 4 of the FTC Act. To the contrary, as discussed previously, we think that Section 11 of the FTC Act expressly precludes such an interpretation. Furthermore, as previously noted, in Section 6 of the Clayton Act, 15 U.S.C. 17, and in the Non-Profit Institutions Act, 15 U.S.C. 13c, Congress chose to provide certain exemptions which pointedly do not include the one urged by respondents.

## 3. The 1950 Amendments

By 1950 it was clear that Section 7 of the Clayton Act was an ineffective tool for preventing anticompetitive acquisitions and mergers. As we have noted, the original Section 7 prohibited only stock acquisitions. Asset acquisitions were beyond the statute’s reach. *See United States v. Columbia Steel Co.*, 334 U.S. 495, 507 n.7 (1947). Hence, the statute’s strictures were easily evaded. Furthermore, the Supreme Court had held that the Federal Trade Commission could not remedy an unlawful stock acquisition by ordering the divestiture of assets. *See Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934); *Thatcher Mfg. Co. v. FTC* and *Swift & Co. v. FTC*, decided together with *FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

It was against this general background that Congress in 1950 enacted the Celler-Kefauver Antimerger Act, 64 Stat. 1125-29 (1950). The Act amended Section 7 to include an assets acquisition provision. As amended, Section 7 provided 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, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to [18] lessen competition, or to tend to create a monopoly.

*Id.* (emphasis added). The Act also amended Section 11 to make clear the Commission's power to compel the divestiture of assets, but did not modify, in any significant way,<sup>31</sup> the language in the first paragraph of Section 11, which vests jurisdiction in the various agencies to enforce Sections 2, 3, 7 and 8 of the Clayton Act.

Nothing in the language of the Celler-Kefauver Act or in its legislative history suggests a congressional purpose to limit or restrict the Commission's jurisdiction. Indeed, respondents concede that "[i]n none of the reports and debates leading up to the enactment of the 1950 Amendments to Section 7 is there any discussion of the activities of either not-for-profit community hospitals or any other not-for-profit institutions." RAB at 29; *see United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1280-81 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990). Similarly we divine no intent in the Celler-Kefauver Act to change the Clayton Act's jurisdictional bases to require the FTC to enforce the Clayton Act under the jurisdictional limitations of a separate statute.<sup>32</sup> [19]

One more point regarding the Celler-Kefauver Act merits discussion. Congress reenacted much of the original language in Sections 7 and 11 when it passed the Celler-Kefauver Act. This is significant, because the unambiguous purpose of the 1950 amendment was to expand the coverage of Section 7 and close loopholes in the existing legislation. In *Philadelphia National Bank*, the Court held that Section 7's stock acquisition clause took on a broader coverage because of the 1950 amendments, even though the words in the clause were unchanged:

Thus, the stock-acquisition provision of § 7, though reenacted *in haec verba* by the

<sup>31</sup> In the intervening years the section had been amended to vest enforcement authority in the Federal Communications Commission and the Civil Aeronautics Authority. The only modification to Section 11's first paragraph made in 1950 was to change "Civil Aeronautics Authority" to "Civil Aeronautics Board." *See* S. Rep. No. 1775, 81st Cong., 2d Sess., 8 (1950), *reprinted in* 4 *Kintner* at 3526.

<sup>32</sup> The logical conclusion of respondents' argument is that the "jurisdiction" clause in Section 7 is nonsense. Assuming *arguendo* that the Commission's authority to enforce the Clayton Act derives from Section 5 of the FTC Act, it follows that the Commission lacks authority to enforce any provision of Sections 2, 3, 7, or 8 of the Clayton Act against not-for-profit entities, including the stock acquisition clause in Section 7. But if that were correct, it would follow that Congress was redundant in eliminating, as respondents contend, the Commission's jurisdiction over not-for-profit entities in the asset acquisition clause. *See Philadelphia Nat'l Bank*, 374 U.S. at 346.

While respondents might answer that the "jurisdiction" clause works to exempt not-for-profit entities not only from FTC jurisdiction but also from law suits by any other plaintiff, this answer is untenable. Nothing in Celler-Kefauver evinces a purpose to exempt not-for-profit entities. If Congress intended to create so broad a gap in Section 7 coverage, it could have spelled out that intention in the language of the statute. We decline to hold that we can imply congressional intent to exempt not-for-profit entities from jurisdiction when no express language, intent or purpose exists to support that determination.

1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer.

374 U.S. at 346.

Doubt—if any—about the Commission’s jurisdiction under the original, 1914, version of Section 11 should be resolved by the “new context” in which the reenacted language appears in 1950. As we have noted, and as respondents have conceded, Congress did not even consider exempting not-for-profit entities in 1950.

4. The 1977 and 1989 Proposals to Amend the FTC Act and the 1980 Amendment to the Clayton Act

Respondents have implied in their brief and during oral argument that statements made by former FTC officials to Congress concerning the scope of FTC Act coverage in the nonprofit area limit the Commission’s jurisdiction over nonprofit corporations under the Clayton Act. *See* RAB at 15 n.5; TOA at 34. It is clear from the full context of the statements of those former FTC officials that their remarks were limited to a discussion of FTC Act jurisdiction and there was no consideration given to the FTC’s authority to enforce the Clayton Act.

In 1977, then-FTC Chairman Collier testified in support of a bill that would have amended several provisions in the FTC Act, including Section 4’s definition of “corporation.” Federal Trade Commission Amendments of 1977 and Oversight: [20] Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 68 *et seq.* (1977) (statement of Hon. Calvin J. Collier, Chairman, FTC). In his oral statement, Chairman Collier said: “The bill would make several changes in the jurisdiction of the Commission. In particular, it would: (1) *Broaden the reach of the FTC Act* by redefining “corporation” to include nonprofit corporations . . .” *Id.* at 69 (emphasis added). This oral testimony focuses solely on the Commission’s authority under the FTC Act and does not bear in any way on its authority, responsibilities, or jurisdiction under the Clayton Act.

Chairman Collier’s written testimony (*Id.* at 81-82) is even clearer in this regard. After discussing the difficulties the Commission had

experienced in dealing with “nonprofit” respondents in several FTC Act cases,<sup>33</sup> he said:

Thus, recent interpretations of Section 4 have made it difficult for the Commission, without considerable delay and expense, to reach the anticompetitive or deceptive practices of any nonprofit corporation, whether of a charitable character or not. The result has naturally been to discourage Commission activities with respect to nonprofit organizations, even though *it is increasingly clear that “charitable” organizations have been responsible for very substantial fraud and other conduct that violates the FTC Act.*

*Id.* at 82 (emphasis added).<sup>34</sup> [21]

Thus, there is nothing “inconsistent” between Chairman Collier’s congressional testimony in 1977 and our conclusion in this case that the Commission has jurisdiction under Section 11 of the Clayton Act to enforce that Act against not-for-profit corporations.<sup>35</sup>

The same result obtains with respect to then-Director of the FTC Bureau of Consumer Protection MacLeod’s 1989 testimony which respondents offered into the Record. *See* pages 171-84 of the Record. Deceptive Fundraising by Charities: Hearing Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 82-88 (1989). Mr. MacLeod never refers to the Clayton Act in that testimony. Moreover, he states, in part: “Absent some other grounds for jurisdiction, we are unlikely to open an investigation into charities that have been granted tax-exempt status by the IRS under Section 501(c)(3) of the Internal Revenue Code.” *Id.* at 176 (emphasis added). Thus, Mr.

<sup>33</sup> Chairman Collier discussed or mentioned: *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *FTC v. National Comm’n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1972); *Community Blood Bank of Kan. City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969); *Chamber of Commerce v. FTC*, 13 F.2d 673 (8th Cir. 1926).

*Cement Institute* actually concerned violations of both the FTC Act and the Clayton Act, but the trade association was plainly operating for the profit of its members, and Chairman Collier cited the case as an example in which “the language of Section 4 did not present a serious problem.” Hearings on H.R. 3816 at 82. Indeed, it appears that the jurisdictional issue was not even litigated in that case.

<sup>34</sup> That Chairman Collier’s comments involved the FTC Act, and not the Clayton Act, is further evinced by a dialogue between Congressman Rinaldo and Chairman Collier in which Chairman Collier referred only to expanded Commission jurisdiction over entities engaged in “unfair or deceptive acts or practices affecting commerce and unfair methods of competition affecting commerce” to reach, for example, false solicitations and false advertising by nonprofit entities. Thus, his answers were directed to the FTC Act’s definition of “corporation” and the Commission’s power to enforce the FTC Act, not the Clayton Act. *Id.* at 99.

<sup>35</sup> Respondents also point to a comment by a representative of nine nonprofit organizations, stating her understanding that an amendment to the FTC Act would work to make nonprofit entities subject to Section 7. RAB at 30, citing Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Practice and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. at 537 (1977) (testimony of Frances T. Farenthold). Another representative of those organizations stated that it was not clear whether nonprofit entities were then subject to Section 7 of the Clayton Act. *Id.* at 547 (testimony of Julian Atwater). These, however, are the views of witnesses with whom we disagree for the same reasons we disagree with respondents.

MacLeod's testimony leaves open the possibility of alternative grounds for Commission jurisdiction over certain not-for-profit corporations.

In 1980, Section 7 of the Clayton Act was amended, once again, to prohibit anticompetitive acquisitions by any "person" of another "person." Previously, the statute had prohibited such acquisitions by, or of, a "corporation." *Compare* 15 U.S.C. 18, *with* 64 Stat. 1125 (1950). The amendment was intended to close a loophole in Section 7's coverage and to bring Section 7 into line with the coverage of the Hart-Scott-Rodino Antitrust Improvements Act. 15 U.S.C. 18a. [22] *See* H.R. Rep. No. 871, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 2732.

This amendment is worth noting for two reasons. First, it again expanded the coverage of Section 7 and manifests a repeated congressional intention to reach nearly all transactions that may have anticompetitive effects, exempting only "pure" asset acquisitions in certain regulated industries. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 342 (1963). This suggests that the jurisdictional provisions in Section 11 of the Act should not be construed narrowly to exempt a class of entities by implication. Second, by deleting the reference to "corporation" in favor of "person," the 1980 amendment makes Section 7 reach all entities, as defined in Section 1 of the Act, 15 U.S.C. 12, subject to the Act. If prior to 1980 there was an argument that the term "corporation" under the Clayton Act was synonymous with the term "corporation" under the FTC Act, that argument has been precluded by inserting the term "person" into Section 7.<sup>36</sup> [23]

<sup>36</sup> We think the two statutes would not support such an interpretation merely because both define "corporation." Any confusion on the point might arise only because the FTC Act defines the term expressly, while the Sherman and Clayton Acts define the term by stating that "person" includes corporation.

Respondents turn the 1980 amendment on its head when they assert that, by amending Section 7, but not Section 11, "Congress reaffirmed that the 'jurisdictional reach of Section 7 of the Clayton Act [was] co-extensive with that of Section 5 of the FTC Act.'" RAB at 30-31, quoting H.R. Rep. No. 871, at 5, *supra*. As with respondents' other citations to the legislative history, this one needs to be put into context. The entire relevant quote is:

Section 7 was intended to supplement the Sherman Act by reaching incipient monopolies and restraints of trade before they become full fledged monopolies subject to the proscriptions of Section 2 of the Sherman Act. It is anomalous that the statute designed to prevent incipient monopolies has less jurisdictional reach than the statute designed to prevent the use of monopoly power in contravention to the law. . . .

[The pending legislation] would remove an arbitrary limitation on the law, thereby bringing Section 7 into jurisdictional harmony with Sections 1 and 2 of the Sherman Act and Section 7A of the Clayton Act. The jurisdictional reach of Section 7 of the Clayton Act will also become co-extensive with the authority granted to the FTC under Section 5 of the FTC Act.

*Id.* at 4-5.

It is difficult to see how a statute can be "in harmony" with Sections 1 and 2 of the Sherman Act, and Section 7A of the Clayton Act (all of which reach nonprofit entities—and one of which is enforced by the

(footnote cont'd)

We think that the structures and plain meaning of the FTC and the Clayton Acts and their legislative histories taken together demonstrate that acquisitions by not-for-profit entities are within the Commission's reach in enforcing the Clayton Act.

### *C. The Relevant Case Law*

#### *1. The Philadelphia National Bank Decision*

The most significant case expounding upon the jurisdictional basis for Section 7 of the Clayton Act is the Supreme Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). In that case, the Department of Justice challenged the consolidation of the second- and third-largest commercial banks in the Philadelphia metropolitan area under both Section 1 of the Sherman Act and Section 7 of the Clayton Act.

In the text of its opinion, the Court makes a straightforward statement concerning the limitations on the FTC's jurisdiction: "The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. 45(a)(6). Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7."<sup>37</sup> This is a fairly strong conclusion by the Court that it is the FTC Act, rather than anything else, that precludes the FTC from enforcing Section 7 of the Clayton Act against banks. Indeed, if this were the end of the analysis and we had to apply the quoted sentences to not-for-profit corporations without more, we would be reluctant to decide that assets acquisitions by not-for-profit corporations are subject to the Clayton Act. [24]

However, the above quote is not the end of the analysis. First, the issue of the FTC's jurisdiction over assets acquisitions involving banks was not the subject of more than a cursory analysis by the parties before the Court.<sup>38</sup> In fact, the parties appear to have assumed that

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Commission (i.e., Section 7A, 15 U.S.C. 18a)) and "co-extensive" with Section 5 of the FTC Act. Unless the whole quotation is considered in context, it is ambiguous. In context, it demonstrates a congressional purpose to expand Section 7 to its full limit and not a desire to limit FTC enforcement authority. See *United States v. Rockford Memorial Corp.*, 898 F.2d at 1281.

<sup>37</sup> 374 U.S. at 336 (footnote omitted).

<sup>38</sup> See *United States v. Philadelphia National Bank* in 13 Antitrust Law: Major Briefs and Oral Arguments of the Supreme Court of the United States, 1955 Term - 1975 Term 1-376 (P. Kurland & G. Casper eds. 1979). This probably explains the first sentence of Justice Harlan's dissent: "I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court." 374 U.S. at 373 (Harlan, J., dissenting) (Justice Stewart joined in that dissent).

the Commission lacked such jurisdiction and the record is, at best, confusing regarding the basis for this assumption.<sup>39</sup>

Second, in the footnote that accompanies the quote from the Court's opinion, the Court addressed the relationship of Sections 7 and 11 of the Clayton Act. In relevant part, the Court stated:<sup>40</sup>

[I]t is clear from the language of § 11 that "banks, banking associations, and trust companies" are meant to comprise a distinct "character of commerce," and so cannot be part of the "other character of commerce" reserved to the FTC.

The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that the banks were already subject to extensive federal administrative controls. See *T. C. Hurst & Son v. Federal Trade Comm'n*, 268 F. 874, 877 (D.C.E.D. Va. 1920).

Obviously, not-for-profit corporations are different from banks in the sense that not-for-profit corporations do not "comprise a distinct 'character of commerce'" as defined under Section 11. While hospitals may comprise a distinct character of commerce, [25] respondents are not arguing that it is their status as hospitals that makes them exempt from FTC jurisdiction, but their status as not-for-profit corporations. After all, there is no doubt that proprietary hospitals are subject to the assets acquisition clause of Section 7 of the Clayton Act.

Third, the Court appeared to be impressed that the banking industry was "already subject to extensive federal administrative controls." Neither not-for-profit corporations nor hospitals are included in the four highly-regulated industries specified in Section 11 (*i.e.*, ICC-regulated common carriers, FCC-regulated common carriers, DOT-regulated air carriers, and FRB-regulated banks).<sup>41</sup>

Fourth, respondents' interpretation of *Philadelphia National Bank* runs counter to the overall thrust of the Court's opinion. The Court construed broadly the 1950 Celler-Kefauver amendment to Section 7 that added the assets acquisition clause to fill a perceived gap in antitrust enforcement: "[T]he basic congressional design clearly

<sup>39</sup> Of course, because the Justice Department argued in *Philadelphia National Bank* and the Court agreed that it was the stock acquisition clause of Section 7 that provided the jurisdictional basis for the proposed bank consolidation, there was little need for precision on the issue of why the assets acquisition clause did not provide jurisdiction.

<sup>40</sup> *Id.* at 336 n.11.

<sup>41</sup> Later in its opinion, the Court added that excluding from Section 7 coverage assets acquisitions not by merger in industries outside the FTC's jurisdiction "does not appear to create a lacuna of practical importance." *Id.* at 344 (footnote omitted). In an accompanying footnote, the Court explained that administrative agencies such as the CAB (whose functions were taken over by DOT years after the Court's opinion), FRB, and ICC provide adequate review of industry participants within their jurisdiction so that "the exclusion of assets acquisitions in such industries from § 7 would seem to have little significance." *Id.* at 344 n.22. Once again, this analysis does not apply to acquisitions by not-for-profit corporations or hospitals.

emerges and from the design the answers to these questions may be inferred. Congress primarily sought to bring mergers within § 7 and thereby close what it regarded as a loophole in the section.” 374 U.S. at 341.

In addition, it appears that the Court sought to interpret the amended Section 7 as broadly as possibly while placing the least possible limitation on the assets acquisition clause:

In other words, Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, read together, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the [26] spectrum . . . . So construed, the specific exception for acquiring corporations not subject to the FTC’s jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.

*Id.* at 342 (emphasis in original). The Court made this point most forcefully when it provided its rationale for the statutory construction it employed: “Any other construction would be illogical and disrespectful of the plain congressional purpose in amending § 7, because it would create a large loophole.” *Id.* at 343. Similarly, the Court declared that the 1950 amendment to the Clayton Act “was clearly intended to remove all question concerning the FTC’s remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC’s jurisdiction.” *Id.* at 348.

Thus, it is fair to read the Court’s opinion in *Philadelphia National Bank* as interpreting Section 7 expansively. A corollary point buttresses this conclusion. As the Court said:

It is settled law that “[i]mmunity from the antitrust laws is not lightly implied.” *California v. Federal Power Comm’n*, 369 U.S. 482, 485. Cf. *United States v. Borden Co.*, 308 U.S. 188, 198-199; *United States v. Southern Pac. Co.*, 259 U.S. 214, 239-240. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry from the stock-acquisition as well as the assets-acquisition provision.

*Id.* at 348. As Part III.B. of this opinion establishes, there is no indication in the legislative history to the FTC Act, the Clayton Act or amendments to those statutes that Congress intended to confer a

special dispensation upon not-for-profit entities for purposes of Section 7 of the Clayton Act or that Congress intended to have the FTC Act interpreted as a restriction on the Clayton Act. To the contrary, as noted earlier in this opinion, Section 11 of the FTC Act expressly provides that the FTC Act is not to be construed to alter or [27]modify the Clayton Act or any other antitrust act.<sup>42</sup> Further, if Congress had intended to confer such a special dispensation, it logically would have exempted not-for-profit entities from the assets acquisition provision as it did for not-for-profit entities originally covered by the Robinson-Patman Act provisions of the Clayton Act.<sup>43</sup>

The Supreme Court subsequently has applied this “canon of construction” in the context of nonprofit hospitals. In its *Abbott Laboratories* decision,<sup>44</sup> the Court examined Section 2c of the Clayton Act, 15 U.S.C. 13c, and decided that the exemption added to the Robinson-Patman Act for nonprofit hospitals was “to be construed strictly.”<sup>45</sup> The Court analyzed the legislative history of this statutory exemption and determined:<sup>46</sup>

The Congress surely did not intend to give the hospital a blank check. Had it so intended, it would not have qualified purchases by nonprofit institutions in the way it did in § 13c. [28]See H.R.Rep. No. 1983, 90th Cong., 2d Sess., 78-79 (1968). We are concerned, after all, with an exemption from an antitrust statute, and the accepted general principles [that antitrust exemptions are to be construed strictly], do have application even in the nonprofit hospital context.

Thus, the Court subjected nonprofit hospitals to possible treble damage liability under the Robinson-Patman Act in certain situations, despite the statutory exemption for nonprofit hospitals.<sup>47</sup>

<sup>42</sup> See *supra* at pages 9-10.

<sup>43</sup> During oral argument, respondents contended that since not-for-profit corporations do not issue stock, the implication is that such corporations are exempt from Section 7 of the Clayton Act. See TOA at 31. We note that the antitrust laws are strictly construed and we disfavor their implied repeal. No language in Section 7 of the Clayton Act states that not-for-profit corporations are exempt from FTC scrutiny. Moreover, the question of whether Section 7 of the Clayton Act limited coverage only to corporations makes no difference since the jurisdictional language in Section 1 of the Act was expanded in 1980 to reach acquisitions done by any person. We also note that respondents contend that one must examine the Clayton and FTC Acts *in pari materia* to determine the meaning of each of the Acts. The FTC Act strictly defines a not-for-profit corporation under Section 4 of the Act. It would be anomalous indeed if Congress, which showed it could specifically delineate definitions for a not-for-profit corporation under Section 4 of the FTC Act, suddenly meant to exclude a not-for-profit corporation from coverage under the Clayton Act, enacted within a month of the FTC Act, without explicitly saying so.

<sup>44</sup> *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976).

<sup>45</sup> See 425 U.S. at 11. Section 2c of the Clayton Act is also discussed *supra* at page 5.

<sup>46</sup> 425 U.S. at 13.

<sup>47</sup> For other Supreme Court decisions emphasizing that exemptions from the antitrust laws are to be narrowly construed, see, e.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

## 2. The *University Health*, *Rockford* and *Carilion* Decisions

In the decades after the *Philadelphia National Bank* decision, three federal courts have considered the issue of whether not-for-profit hospitals making assets acquisitions may be subjected to a government antitrust prosecution under the Clayton Act. We discuss these three cases, and their significance, below.

The most recent case pertaining to assets acquisitions by nonprofit hospitals is *FTC v. University Health, Inc.*, No. 91-8308 (11th Cir. May 6, 1991). In that case, the FTC sought a preliminary injunction to prevent the acquisition of St. Joseph Hospital, a nonprofit hospital, by University Health, Inc., a nonprofit corporation that owns University Hospital, another nonprofit hospital in the Augusta, Georgia area. While the district court denied the request for a preliminary injunction, it also denied defendants' motion to dismiss on the nonprofit issue.

The Commission appealed the adverse decision on the preliminary injunction to the Eleventh Circuit. The appellate court issued an order reversing the district court's denial of the preliminary injunction. While the Eleventh Circuit's terse order contains no discussion of jurisdiction (the parties at this time are awaiting an opinion), that issue was briefed by both parties and the court necessarily had to find that assets acquisitions by nonprofit hospitals are covered by Section 7 in order for it to reach its decision on the merits of the preliminary injunction. [29]

The next most recent case, which also contains a thorough analysis of the issues presented here, is *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990). The *Rockford* case involved a suit by the Antitrust Division of the Department of Justice to enjoin a proposed consolidation of two nonprofit hospitals. The complaint alleged that the proposed consolidation would violate both Section 7 of the Clayton Act and Section 1 of the Sherman Act. The district court held that the merger violated Section 7 and issued an injunction without reaching the Section 1 issue. The defendants appealed, raising the argument that the consolidation of two nonprofit hospitals was not encompassed by Section 7 of the Clayton Act.

In defense of the appeal, the Justice Department argued that the consolidation was covered by the stock acquisition clause of Section 7. The Justice Department did not argue that the consolidation was

covered by the assets acquisition clause of Section 7.<sup>48</sup> The Seventh Circuit agreed with the defendants that the stock acquisition clause did not apply because nonprofit corporations were forbidden by Illinois law to have stock or share capital and because the court was unwilling to extend the broad reading of the stock acquisition clause that was used by the Supreme Court in *Philadelphia National Bank*. See 898 F.2d at 1280, 1281.

Judge Posner, writing for the court, evaluated the assets acquisition clause argument. Because his analysis represents the most comprehensive discussion by any court to date of the applicability of this clause to not-for-profit corporations [30]generally (and not-for-profit hospitals in particular), we set it out in full:<sup>49</sup>

[Defendants'] second argument [that Section 4 of the FTC Act limits the scope of Section 7 of the Clayton Act], in assuming that the reference in Section 7 to "person[s] subject to the jurisdiction of the Federal Trade Commission" is to the Federal Trade Commission Act, overlooks the possibility that the reference is actually to the provision in the Clayton Act itself concerning the jurisdiction of the FTC—namely Section 11, 15 U.S.C. 21. Section 11 vests authority to enforce the prohibitions of the Clayton Act in five agencies. These are the Interstate Commerce Commission, with respect to the common carriers regulated by that Commission; the Federal Communications Commission, with respect to the common carriers regulated by it; ditto for the Civil Aeronautics Board (now defunct); the Federal Reserve Board, for banks; and, for everyone else, the FTC: "Authority to enforce compliance with Sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . the Federal Trade Commission where applicable to all other character of commerce." Section 11 goes on to prescribe the procedure to be followed by these commissions and boards that have been given jurisdiction to enforce the Act. The procedure is self-contained and does not depend on particular provisions in the agencies' organic statutes, so that when in 1950 Congress amended Section 7 to broaden its reach, it amended Section 11 as well. We believe that the force of the assets-acquisition provision in Section 7 is, therefore, merely to exempt mergers in the regulated industries enumerated in Section 11. Areeda & Turner, *Antitrust Law* ¶ 906, at p. 797 n. 2 (1989 Supp.). Those industries do not include the hospital industry. The Clayton Act evinces a purpose of limiting the Federal Trade Commission's jurisdiction vis-a-vis that of other federal agencies charged with

<sup>48</sup> Indeed, as respondents point out in their brief in this case, the Justice Department's lawyers in *Rockford* conceded that the FTC has no Section 7 jurisdiction over assets acquisitions by not-for-profit corporations because "the FTC has no jurisdiction over nonprofit corporations under Section 5 of the [FTC] Act." See RAB at 35 (citing Memorandum of the United States in Support of its Motion for a Preliminary Injunction at 5-6, *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989)). This admission by the Justice Department does not bind the FTC. We are not privy to the trial strategy considered and chosen by the Justice Department's lawyers. We note that merely because the Justice Department may have conceded this point before trial does not mean that after full briefing and argument an adjudicative body would not decide otherwise. To the contrary, the precise issue is now being considered in contested litigation with full briefing by the parties.

<sup>49</sup> *Id.* at 1280-81.

enforcing the Act in the industries that [31]they regulate, but it evinces no purpose of exempting nonprofit firms in industries within the domain that the Act bestows on the Commission ("all other character of commerce").

After providing this analysis, the Seventh Circuit commented on the district court decision in *United States v. Carilion Health System*.<sup>50</sup>

[W]e believe (contrary to *United States v. Carilion Health System*, 707 F.Supp. 840, 841 n. 1 (W.D.Va.), aff'd without opinion, 892 F.2d 1042 (4th Cir.1989)) that the merger is subject to Section 7, once the reference in that section to the jurisdiction of the FTC is understood, as we think it should be understood, to refer to Section 11 of the Clayton Act rather than to Section 4 of the FTC Act.

Despite the willingness of the appellate court to evaluate the merits of the applicability of the assets acquisition clause to not-for-profit acquisitions, the court's analysis is dicta.<sup>51</sup> As pointed out previously, the Department of Justice conceded before trial that the FTC has no jurisdiction over nonprofit corporations under the FTC Act and that this precluded the Commission's jurisdiction under the Clayton Act. Although the court's analysis is dicta, it is well-considered and is accorded due respect by the Commission.<sup>52</sup> [32]

The Seventh Circuit had the benefit of two briefs that explicitly addressed the assets acquisition argument. One brief was from the defendants/appellants, raising the same arguments as those raised by respondents here.<sup>53</sup> The second brief was from the Voluntary Hospitals of America, Inc., as amicus curiae in support of the defendants/appellants.<sup>54</sup> Yet, despite two briefs arguing against assets acquisition jurisdiction, and no counterarguments offered, the Seventh Circuit reached the opposite conclusion from that urged by the *Rockford* defendants.

The Seventh Circuit then evaluated the hospital merger under

<sup>50</sup> *Id.* at 1281 (emphasis in original).

<sup>51</sup> As the Seventh Circuit exclaimed: "The government amazingly has failed to make this [assets acquisition] argument (thus waiving it) . . . ." *Id.* at 1281.

<sup>52</sup> See, e.g., *Max M. v. Thompson*, 585 F. Supp. 317, 324 (N.D. Ill. 1984) ("In the absence of a controlling Supreme Court ruling, a federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of dictum."); *Harvey v. Levine*, 204 F. Supp. 947, 953 (N.D. Ohio 1962) (unless dictum from the court of appeals had been repudiated by that court, it must be accorded great weight by a district court); *United States v. Certain Lands in Jackson County, Mo.*, 69 F. Supp. 565, 569 (W.D. Mo. 1947) ("Although not essential to the disposition of a case, judicial dictum, as distinguished from obiter dictum, becomes an authoritative statement when it is expressly declared by a court and announced as a guide for future conduct.").

<sup>53</sup> See CCAB, Appendix A (Brief of Appellants Rockford Memorial Corporation and SwedishAmerican Corporation at 7-13, filed before the Seventh Circuit in *Rockford*).

<sup>54</sup> See CCAB, Appendix B (Brief of Amicus Curiae Voluntary Hospitals of America, Inc. in Support of Appellants at 2-10, filed before the Seventh Circuit in *Rockford*).

Section 1 of the Sherman Act and determined that it posed a restraint of trade within the meaning of the statute. The appellate court affirmed the decision of the district court to enjoin the merger.

The last case, but earliest decided in this series, is *United States v. Carilion Health System*, 707 F. Supp. 840 (W.D. Va.), *aff'd mem.*, 892 F.2d 1042 (4th Cir. 1989) (per curiam). In the *Carilion* case, like the later *Rockford* case, the Antitrust Division of the Department of Justice brought an antitrust action to prevent the merger of two nonprofit hospitals— this time in Roanoke, Virginia. The government claimed that defendants' planned affiliation would violate Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act.

In an unpublished memorandum opinion referred to in its later published memorandum opinion, the district court dismissed the government's Clayton Act claim. *See id.* at 841 n.1 (citing the district court's Memorandum Opinion on Defendants' Motion to Dismiss dated Sept. 30, 1988). The district court found that the stock acquisition clause of Section 7 did not apply to defendants because as non-stock, not-for-profit corporations no stock was involved in their transaction. The court further ruled that the assets acquisition clause of Section 7 did not apply to defendants because the FTC Act did not confer jurisdiction over nonprofit entities.<sup>55</sup> The case proceeded to trial on the Sherman [33] Act claim and the district court found that the merger would not constitute an unreasonable restraint of trade under that Act.

The government appealed the adverse decision to the United States Court of Appeals for the Fourth Circuit. The appellate court issued a *per curiam* decision designated "not for publication," which affirmed the district court's Sherman Act findings as not "clearly erroneous." *United States v. Carilion Health System*, 1989-2 Trade Cas. (CCH) ¶ 68,859 (4th Cir. Nov. 29, 1989) (per curiam). The Fourth Circuit declined to address the Clayton Act jurisdictional issue, stating: "Because we see no need for further proceedings in the district court,

<sup>55</sup> *See id.* The unpublished memorandum opinion of September 30, 1988, of which we take judicial notice, does not shed much light on the reasoning the district court employed to reach the conclusion that the reference in Section 7 to "the jurisdiction of the Federal Trade Commission" refers to the FTC Act rather than to Section 11 of the Clayton Act. On page 4 of that opinion, the court wrote "[t]he FTC lacks jurisdiction over the defendants because of their nonprofit status. 15 U.S.C. 44 (1982)." After discussing why the acquisition in question was not covered by the stock acquisition clause of Section 7, the district court stated: "Section 7's [assets acquisition] clause does not apply to the transaction either, because defendants are not subject to the FTC's jurisdiction." The court's opinion does not reveal whether it considered and rejected the argument that Section 11 might provide an independent basis for the FTC's jurisdiction over the nonprofit hospital assets acquisition. *See United States v. Carilion Health Sys.*, No. 88-0249-R, slip op. at 4, 6 (W.D. Va. Sept. 30, 1988) (memorandum opinion granting defendants' motion to dismiss as to Section 7 of the Clayton Act).

we have no occasion to consider whether § 7 of the Clayton Act would apply to this merger.” *Id.* at 62,516.

In assessing the contrasting analyses employed by the *Carilion* and *Rockford* courts on the assets acquisition issue, we find the *Rockford* decision more persuasive for three reasons. First, it is not apparent from the district court decision in *Carilion* that the court even considered the possibility that Section 11 of the Clayton Act might provide an independent basis for the FTC’s jurisdiction to enforce Section 7. It is evident, however, from the Seventh Circuit’s decision in *Rockford* that the appellate court analyzed this possibility as well as the argument accepted by the *Carilion* court that Section 7 of the Clayton Act refers to Section 4 of the FTC Act.

Second, on appeal, the Fourth Circuit declined to consider whether Section 7 of the Clayton Act would apply to the merger at issue in the *Carilion* case. Accordingly, even though the *Rockford* court’s analysis of the assets acquisition issue is dictum, we find Judge Posner’s thoughtful explication more persuasive than the conclusory findings of the district court in *Carilion*. Third, the Seventh Circuit had the benefit of the *Carilion* district court’s decision (in addition to two briefs on [34] the assets acquisition issue). As such, the question of jurisdiction over acquisitions by nonprofit entities received the fullest airing to date in the Seventh Circuit forum.

#### IV. WHETHER THIS ACQUISITION WAS “TANTAMOUNT IN ITS EFFECTS TO A MERGER”

We have concluded that Section 7 of the Clayton Act covers assets acquisitions by nonprofit entities, even if we accept respondents’ assertion that the Commission could not challenge the acquisition here if it were considered solely under the FTC Act.<sup>56</sup> Thus, we need not and do not address the second issue raised on appeal from the ALJ’s initial decision of whether this acquisition was tantamount in its effects to a merger.

#### V. CONCLUSION

Upon a full review of the existing record, the initial decision and the arguments presented by complaint counsel and respondents, we have concluded that Section 7 of the Clayton Act reaches assets acquisitions by nonprofit hospitals. In our view, the plain language of the

<sup>56</sup> We reiterate that the issue of the FTC’s jurisdiction under the FTC Act is not an issue in this case and we intimate no views in that regard.

Clayton Act compels that result. This conclusion is well buttressed by relevant legislative histories and case law. Further, unlike the situation that exists for the other four specified regulatory agencies denominated in Section 11 of the Clayton Act, assets acquisitions by not-for-profit corporations would be exempt from scrutiny by anyone under Section 7 of the Clayton Act if we adopted respondents' contentions to hold that nonprofit entities are not subject to the FTC's Clayton Act jurisdiction. Without divining any congressional intent to create such a chasm in antitrust enforcement, and for the other reasons set forth above, we think such a result was not intended by Congress in enacting and amending the Clayton Act.

For the reasons discussed above, we hereby reverse the Administrative Law Judge's initial decision and remand for further proceedings consistent with this opinion.

SEPARATE STATEMENT OF CHAIRMAN JANET D. STEIGER

I join in Commissioner Strenio's opinion. I am writing separately only to note that on July 26, 1991, after Commissioner Strenio departed from office, the United States Court of Appeals for the Eleventh Circuit issued its opinion in *FTC v. University Health, Inc.*, No. 91-8308 (11th Cir. July 26, 1991). The Court held, *inter alia*, that Section 7 of the Clayton Act reaches assets acquisitions by non-profit entities. The Court's May 6, 1991, order in that case is discussed at page 28 of the Commission's decision.

IN THE MATTER OF  
THE PERRIER GROUP OF AMERICA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3339. Complaint, Aug. 5, 1991—Decision, Aug. 5, 1991*

This consent order prohibits, among other things, a Connecticut-based company and its subsidiary from making false claims that any mineral water it sells is unprocessed or unfiltered, or regarding the manner by which the water is carbonated.

*Appearances*

For the Commission: *Robert C. Cheek* and *Joel Winston*.

For the respondents: *Lewis Rosen* and *Christopher Smith*, *Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Perrier Group of America, Inc., and Great Waters of France, Inc. ("respondents"), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondents The Perrier Group of America, Inc. and Great Waters of France, Inc. are Delaware corporations with their offices and principal places of business located at 777 W. Putnam Avenue, Greenwich, Connecticut. Great Waters of France, Inc. is a wholly-owned subsidiary of The Perrier Group of America, Inc.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed carbonated mineral water to the public under the registered trademark Perrier. Perrier water is a "food" as that term is defined in Section 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and other promotional materials for