No. 4

In the Supreme Court of the United States

OCTOBER TERM, 1961

BROWN SHOE COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (T. 42–76)[1] is reported at 179 F. Supp. 721.

JURISDICTION

The judgment of the district court was entered on December 8, 1959 (T. 77). The notice of appeal was filed on February 2, 1960 (T. 80), and this Court noted probable jurisdiction on June 20, 1960. 363 U.S. 825. The jurisdiction of this Court rests on

[1] References herein to the transcript of testimony are designated "T." References to the government's and the defendant's exhibits are designated "GX," and "DX," respectively, followed by a reference (designated "R.") to the appropriate page in the volumes of exhibits.

Section 2 of the Expediting Act, 32 Stat. 823, as amended (15 U.S.C. 29).

QUESTIONS PRESENTED

This case, in the context provided by the trial record, presents the following main questions:

> First, was there evidence from which the trial judge could reasonably conclude "that the merger would establish a manufacturer-retailer relationship which deprives all but the top firms in the industry of a fair opportunity to compete"? (T. 75.)
>
> Second, was there evidence from which the trial judge could reasonably conclude "that the merger would eliminate Kinney as a substantial competitive factor" among retailers of shoes? (T. 74.)
>
> Third, do either or both of these conclusions support the district court's ultimate conclusion that the merger between Brown and Kinney as a matter of law violated Section 7 of the Clayton Act?

In addition to these primary issues, the appeal also presents subsidiary questions as to whether the trial court properly found that, for purposes of its analysis of the effect of the merger upon competition in the shoe industry, (1) men's, women's, and children's shoes, considered separately, were appropriate "lines of commerce" and (2) a city and its immediate and contiguous surrounding area was an appropriate "section of the country" with respect to shoe retailing.

STATUTE INVOLVED

The relevant portions of Sections 7 and 15 of the Clayton Act, 38 Stat. 731, as amended by 64 Stat. 1125, and 38 Stat. 736, as amended by 62 Stat. 909, 15 U.S.C. 18, 25, are set forth in Appendix A, infra, pp. 141–142.

STATEMENT

A. THE PROCEEDINGS BELOW

1. THE COMPLAINT, TRIAL AND DECISION

This is a civil action by the United States charging violation of Section 7 of the Clayton Act (15 U.S.C. 18) and seeking injunctive relief under Section 15 of the Clayton Act (15 U.S.C. 25). The complaint, filed November 28, 1955, alleged that the effect of the proposed acquisition of the defendant G. R. Kinney Company, Inc. (Kinney), by the defendant Brown Shoe Company, Inc. (Brown), "may be" substantially to lessen competition or to tend to create a monopoly in the production, distribution and sale of shoes. Specifically, the complaint charged that Brown, the third leading manufacturer of shoes in dollar sales as of 1954 had, between 1950 and the date of the complaint, already acquired a large number of manufacturers and retailers of shoes and that its proposed acquisition of Kinney, which then operated four factories for the manufacture of shoes and owned or operated approximately 360 shoe stores for the retailing of men's, women's and children's shoes, might substantially lessen competition and tend to create a monopoly in the production, distribution and sale of shoes (T. 1–6). Relief was sought by way of temporary restraining order and preliminary injunction to prevent Brown from consummating the proposed acquisition of Kinney's stock and "from making any changes in Kinney's corporate structure or Kinney's commercial operations and policies" pending adjudication of the merits (T. 7). As permanent relief the government sought (1) an adjudication that the proposed acquisition violates Section 7 of the Clayton Act and (2) an injunction precluding Brown from acquiring the stock or assets of Kinney or any other corporation engaged in the manufacture, distribution or sale of shoes (T. 8).

A temporary restraining order was secured. In a subsequent ruling on the government's motion for preliminary injunction the court permitted the merger to be consummated on condition that the Brown and Kinney businesses be operated separately under terms specified by the court, so that "this Court can make an injunction effective to accomplish the purpose of the act if on final hearing it is found defendants are violating the law" (T. 37). Brown acquired all of Kinney's outstanding stock on May 1, 1956, pursuant to the terms of the court's preliminary order, but as the district court found (T. 44), the two businesses have been operated separately and their assets kept separately identifiable.

The case was tried before Judge Randolph H. Weber from August 1958 until January 1959. Some 75 witnesses testified, including 9 shoe manufacturers and 24 shoe retailers offered by the government, and 1 shoe retailer and the appellant's own executives offered by the appellant. These industry witnesses testified extensively as to the degree of competition between the shoes manufactured by Brown or sold at its outlets and those sold by Kinney. They described the scope and competitive effects of prior activities in the area of integration on the part of both Brown and other leading manufacturers, the nature and extent of the competitive advantages that would result from the merger, and the expected adverse impact of the merger upon independent shoe manufacturers and retailers. Other witnesses included suppliers of materials, shoe machinery manufacturers, multiproduct retailers and expert economists. Over 400 exhibits, amounting to almost 11,000 pages of documents, were admitted into evidence. After receiving exhaustive briefs, the district court issued its decision ruling for the government on November 20, 1959 (T. 42). A judgment directing Brown to dispose of its interest in Kinney was entered on December 8, 1959 (T. 77).

2. THE OPINION OF THE DISTRICT COURT

The district court, after summarizing the facts of record with respect to Brown (T. 44–49) and Kinney (T. 49–50), turned to the three basic elements for analysis under Section 7 as amended: whether the challenged acquisition (1) has an impact that "may be substantially to lessen competition or tend to create a monopoly" (2) in any line of commerce (3) in any section of the country (T. 52). Reviewing the facts on line of commerce in the light of the practices of the shoe industry and the "interchangeability, price, quality and style" of shoes (T. 55–56), the court concluded that the government had sustained its burden of proof in urging that men's, women's and children's shoes treated separately "have sufficient peculiar characteristics and uses to make them distinguishable and a line of commerce" (T. 58).

The court found, without dispute, that the appropriate "section of the country" insofar as shoe manufacturing is concerned is the country as a whole (T. 59). As to retailing, the court concluded that the evidence of actual competitive conditions in the various markets indicates that "retailers of 'men's', 'women's', and 'children's' shoes, whether sold separately or in combination," compete with other retailers "handling a like line for the trade of the people in their cities and the immediate and contiguous surrounding area" (T. 64). As applied to the instant case this meant (as the government had alternatively urged) that the sections of the country for analyzing the effect of the merger on shoe retailing are the approximately 140 cities of 10,000 or more population, and their surrounding areas, in which there are both a Kinney store and an outlet operated by, or otherwise tied to, Brown (*ibid.*). In so holding, the court fixed on sections of the country intermediate in size between the city areas, which were also suggested as appropriate by the government, and the standard metropolitan area or county unit, which had been suggested by the appellant (T. 58–59).

In evaluating the effects of the Brown-Kinney merger the district court concluded that Congress in

Section 7 of the Clayton Act, as modified by the 1950 amendments thereto, 64 Stat. 1125, 15 U.S.C. 18, intended to go considerably beyond Sherman Act considerations to "nip monopoly in the bud" (*United States* v. *E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 592–593, citing *Transamerica Corp.* v. *Board of Governors,* 206 F.2d 163, 169 (C.A. 3)). This objective of reaching monopoly in its incipiency, the court held, is to be met by proscribing those acquisitions that, either considered in and of themselves or in the light of industry trends and the merger history of the participants, appear to have a "reasonable likelihood" of leading to, or bringing "measurably closer," the undue concentration of economic power in any industry in the hands of a few great corporations (T. 66–67). "[T]he test is," the district court concluded (T. 68), "what do the facts show as to the trends in the industry and the true economic impact of this particular merger, which takes place among an industry having a few large firms that control a sizeable segment of the total with the balance divided among hundreds of others having only minute segments."

Evaluating the Brown-Kinney merger in the light of these precepts, the district court noted the accelerating trend in the acquisition of retail shoe chains by the largest shoe manufacturers, Brown's major role therein (T. 68–69), and the resultant increase of sales to these captive outlets, which "seriously limit the market to which independent manufacturers are able to sell" (T. 69). This development, the court found, has been accompanied by a reduction in the number of plants manufacturing shoes, coupled with an increase in the number of plants owned by the largest manufacturers (T. 69–70).

Brown's purchase of Kinney, the largest family shoe retailer in the country, was found to be a highly significant element in this development, in view of Brown's moving role in the merger trend generally, its history of increasing its sales to its acquired outlets to the detriment of their existing suppliers, and the fact that, within three years after the merger, Brown had become Kinney's largest supplier (T. 70–71). Brown's acquisition of Kinney was also found to give the merged company advantages in buying and selling and in insurance, advertising and credit arrangements that will significantly increase Brown's existing advantages over small manufacturers as one of the "small group of firms * * * [that] set the price and style trends" and are in the best situation to "finance the change over * * * [necessary] to meet the changing conditions of the retail markets * * *" (T. 72). The impact of the merger upon the small manufacturers, the court concluded, will be felt especially in their relative inability to sell their product in those cities where the combined Brown-Kinney retail outlets account for a substantial percentage of all sales of men's, women's or children's shoes (*ibid.*).

On the retail level, the court found the evidence to show that the independent shoe retailer is having an increasingly difficult time competing with manufacturer-owned or controlled outlets (T. 70). These vertically integrated stores were found to possess advantages in buying and credit, as well as in advertising, insurance, and inventory and price control, making possible the sale of shoes at lower prices, or of higher quality shoes for the same price (*ibid.*). The independent retailer, unable to compete in the low and medium-priced fields in which vertical integration is most pronounced is, the court found, being driven increasingly to concentrate in the declining market for higher-priced, higher-quality shoes (*ibid.*). Moreover, the merger makes Brown, already a leading factor in every city in which it competes, "a more dominant factor" in such markets (T. 73), while eliminating Kinney as a substantial competitive factor (*ibid.*).

On the basis of these findings the court concluded that the merger will "increase concentration in the shoe industry, both in manufacturing and retailing" (T. 74), eliminate Kinney as "a substantial competitive factor" in the retail field (T. 74–75), and establish a manufacturer-retailer relationship that "deprives all but the top firms in the industry of a fair opportunity to compete" (T. 75). The necessary conclusion, the court held, is that "the reasonable probability is the further substantial lessening of competition and the increased tendency toward monopoly" (*ibid.*).

B. THE SHOE INDUSTRY

In the shoe industry, as the district court found, "a few large firms * * * control a sizeable segment of the total with the balance divided among hundreds of others having only minute segments" (T. 68). It is also an industry, the court found (T. 68–70), that has been characterized by an accelerating process of vertical integration since about 1950; the larger manufacturers have, to an increasing extent, secured control of large retail shoe chains.

1. *Manufacturing.* With the increase in population, the national production of all types of men's, women's and children's shoes has steadily risen from about 506 million pairs in 1947 to 646 million in 1956 (DX JJ, R. 3346).[2] Excluding "canvas-upper, rubber-soled shoes" made by a different process and largely by different firms (App. Br. 15, n.), the national production was 482 million pairs in 1947 and 588 million in 1956 (DX JJ, R. 3346). The business is very unevenly distributed. As of 1956, the four largest manufacturers (International Shoe, Endicott-Johnson, Brown (including Kinney) and General Shoe) produced about 22.4% of all shoes (DX KK, R. 3348) and 24.6% of all shoes and slippers manufactured on conventional shoe machinery—*i.e.,* excluding canvas-upper, rubber-soled shoes (DX JJ, 3346). The remainder of the market was divided among roughly 1,000 manufacturers (T. 1637; GX 207, R. 928; DX GG, R. 3343).

In percentage of total value of shipments and total assets, the concentration is even more pronounced. In 1954 the four largest companies shipped about 30% of the value of all footwear (except rubber), an in-

[2] Despite the general increase in the standard of living, the number of shoes annually sold per capita has remained fairly constant during this decade at approximately 3½ pairs per year (T. 1353–54).

crease of 2% from 1947; the largest 20 companies, 45% (GX 207, R. 928). In 1955 the four largest companies had total assets of approximately $364 million out of an industry total of slightly more than $1 billion for a total of 937 reporting corporations classified as "footwear, except rubber" by the Internal Revenue Service (GX 157, R. 635).

The four largest manufacturers have vastly greater production and facilities than the remaining companies in the industry. Thus in 1956, the fifth largest firm (Shoe Corporation of America, a company that has itself engaged in an active acquisition program) had production of substantially less than one-half of the smallest of the top four (GX 58, R. 435); and the next nine companies after the top four had a combined production of 53.9 million pairs of shoes, only slightly more than the production of International Shoe alone (*ibid.*). Similarly, while the top four manufacturers in 1956 had 171 manufacturing plants between them, the next six had a combined total of only 41 (GX 20, R. 226), more than half of which were operated by two companies, Shoe Corporation of America and Melville (McElwain),[3] which, like the top four, are associated with numerous retail outlets (GX 59, R. 436).

The extent of this difference between the small group of large integrated manufacturers and their principal competitors can be illustrated by considering the example of the Weyenberg Shoe Manufactur-

[3] The J. F. McElwain Company is the principal manufacturing unit of Melville Shoe Company, the largest owner of retail shoe stores in the country.

ing Company, the nineteenth largest producer of shoes in 1956 (GX 58, R. 435), one of whose officials was a manufacturer witness for the government. In 1955 Weyenberg operated six manufacturing plants as compared with 61 for International, 41 for General, 37 for Brown, and 29 for Endicott-Johnson (GX 20, R. 226). Its total dollar sales were $17,227,000, which contrasted with sales of $262,413,000 for International and $211,142,000 for Brown (including Kinney) (GX 57, R. 434). Its total assets were slightly over $10,000,000 as compared with assets of $172,000,000 for International and $71,000,000 for General, the smallest in terms of assets of the big four (GX 19, R. 224). The figures for all other manufacturers below the big four, with the exception of the Shoe Corporation of America and Melville (McElwain), present a similar picture.

Moreover, between 1950 and 1955, the position of most of the smaller manufacturers in the industry as compared with that of the large integrated companies markedly deteriorated. Thus, the spread between the total sales of Weyenberg and those of International increased in that period from $182 million to $245 million (GX 56, R. 433), and the differential between the two in total assets grew from $106 million in 1950 to $162 million in 1955 (GX 19, R. 224). The widening gap between Weyenberg and Brown in this period was even more pronounced. In 1950 Weyenberg's sales were about $73 million less than Brown's; by 1955 the spread had about doubled to $142 million (or $213 million, including Kinney) (GX 56, R. 433). And in terms of assets, Weyenberg was about $29 million smaller than Brown in 1950, a differential that had increased to $62 million ($80 million, counting Kinney with Brown) by 1955 (GX 19, R. 224).

Despite the ever-increasing market for, and production of, shoes in the United States and the allegedly low cost of entry into the shoe manufacturing business (T. 1489, 1646), there has been a constant decrease in the number of independent shoe manufacturers. In 1947 there were 1,077 independent manufacturers of shoes. By 1954 the number had decreased, according to statistics prepared by the Bureau of the Census, by about 10% to 970 manufacturers (GX 207, R. 928).[4] And while there was a concomitant decrease in the number of shoe manufacturing plants in operation, the number of plants operated by the largest four manufacturers increased by 35%, from 127 to 171, between 1950 and 1956 (GX 20, R. 226). As the court below noted (T. 70), this increase resulted largely from the acquisition of independently-operating shoe manufacturing companies by the largest manufacturers; between 1950 and 1956, seven manufacturers independently operating 25 plants were acquired by the 10 largest shoe manufacturers.

Moreover, Brown and General Shoe, the two members of the big four that engaged most actively in an acquisition program during the mid-1950's, were

[4] By 1958 this figure had in turn decreased by another 10% to 872 manufacturers, according to census figures not available at the time of the trial. See *1958 Census of Manufactures* (MC 58(2)-31A, p. 6).

materially increasing their production at a time when the output of International and Endicott-Johnson, who participated in the merger trend to a much lesser degree, were increasing their production only slightly, if at all. Thus, Brown's production between 1951 and 1957 went from 19.6 million pairs to 29.1 million pairs and General's from 16 million pairs to 28.5 million pairs [5] (GX 58, R. 435; DX JJ, R. 3346). In the same period International Shoe's production rose by only 2.6 million and Endicott-Johnson's production actually decreased by over 1.1 million (GX 58, R. 435).

The manufacture of shoes takes place throughout the United States (T. 59); and, in contrast to the former practice, is now conducted in relatively small establishments normally employing fewer than 500 persons and producing approximately 5,000 pairs of shoes a day (DX GG, R. 3343; T. 2141–42). The larger manufacturers have been able to convert their operations to such relatively small but efficient establishments (T. 2140–43), but the smaller independent who invested his capital in the large plants that formerly

[5] The General Shoe production figures might have risen even more except for the fact that in February 1956 it entered into a consent decree in settlement of an antitrust action brought by the government under Section 7 of the Clayton Act that severely limited its power to make any further acquisitions for a five-year period. See *United States* v. *General Shoe Corp.*, Civil No. 2001 (M.D. Tenn.), judgment of February 17, 1956. Significantly, General's production had risen from 16 million pairs in 1951 to 27 million pairs in 1955, an average increase of over two and a half million pairs per year. Its increase in production between 1955 and 1956, however, was limited to 1.2 million pairs, and in 1957 its production was only 300,000 more than in 1956 (GX 58, R. 435).

characterized the industry has been less able to make this conversion. As the district court found (T. 56), production of men's, women's and children's shoes is normally undertaken in separate plants, although there is some overlapping between factories. However, a factory manufacturing men's, women's or children's shoes will frequently manufacture two or more kinds of shoe within the general category (T. 704, 949). The various manufacturers normally distribute their shoes for sale throughout the United States (T. 59, 2459).

Substantial and costly changes in plant equipment are frequently required in order for the manufacturer to keep up with competitive conditions. Thus, during the period between 1951 and 1955 Brown made at least 13 major changes in its machinery at 9 factories to increase their production or to meet shifts in styles or other new demands in the shoe market (GX 209, R. 930–965).[6] These changes were often of a temporary nature; in at least three factories the modifications or additions were dropped within a year after their introduction (*ibid.*). Rapid style changes frequently lead to substantial losses throughout the industry. Thus, Brown's president testified that his company had once absorbed a $4,000,000 loss resulting from a style change and that many of his competitors were unable to stand such a loss and went bankrupt

[6] Brown's program of factory changes and increased production was occasioned in part by its efforts to meet the demands of its newly acquired retail outlets (T. 1389–92, 1396).

(T. 1356). He further testified that, while it had cost his firm hundreds of thousands of dollars to convert manufacturing facilities to accommodate the recent trend to women's needle-toed shoes, this style could very well become obsolete within a short period (T. 1414).

2. *Retailing.* While shoes are sold through over 70,000 retail outlets throughout the country (including department stores, dry-goods stores, drug stores, novelty stores, ten-cent stores and such other multiproduct outlets as Sears, Roebuck & Co.), the most important factors in the distribution of shoes are approximately 22,000 retail outlets classified as "shoe stores" by the Bureau of the Census, *i.e.*, stores or leased shoe departments deriving over half of their gross receipts from the sale of shoes (DX MMMMM 2, R. 7134; T. 69, n. 10). These shoe stores made approximately half of the $3,464,000,000 in shoe sales in 1954 (DX NNNNN 3, MMMMM 2, R. 7153, 7134).

Of the total sales by the 22,000 shoe stores in 1954 substantially more than half were made by the operators of chains of stores (DX NNNNN 2, R. 7152). Moreover, the larger chains are taking over an increasing share of this market. Thus, in 1948, shoe companies operating 101 or more stores had 2,178 out of 19,551 establishments or 11%, and sales of $307 million out of $1,467 million or 20.9% (GX 244, R. 2823). By 1954 these large chains had 3,534 out of 21,689 shoe stores or 16%, and sales of $459 million out of a total of $1,809 million or 25.5%[7] (*ibid.*). In other words, the few firms owning 101 or more stores increased the number of their stores during the six-year period by 62% as against a rise of only 4½% for all other stores, and sales increases of 50% were registered by these large chains as contrasted with only a 16% rise in sales for the remaining firms.[8] As the district court found (T. 69), the six firms with the largest number of retail outlets in 1956 owned and operated 3,997 or 18% of the Nation's shoe stores, and the 13 largest firms operated 4,736 or 21% of them (GX 59, R. 436).

The chain shoe store is not a new phenomenon; Kinney started operation as a chain before 1900. Some of these early chains were independent shoe retailers; some were owned or operated by manufacturers. But, with the exception of Endicott-Johnson, which early established its own retail outlets, prior to the last decade the latter type of chain was largely

[7] The Census figures for 1958 indicate that this trend has been intensified, for as of that year the chains operating 101 or more establishments constituted 4,982 of the 24,437 retail shoe store units or approximately 20% of the total, and the sales of these largest chains constituted a total of $702 million out of a total of $2,130 million for all retail shoe stores or 33% of the total. See *1958 Census of Business, Retail Trade, Single Units and Multiunits* (BC58–RS3, pp. 4–6).

[8] As of 1958, Census statistics indicated that chains with more than 101 stores have increased their number of outlets by 128.7% over the 1948 figure and the value of their sales by 128.9% over 1948. In contrast, the chains with less than 101 outlets have increased their number of outlets during the decade by only 12% and the total value of their sales by only 23%. See *1958 Census of Business, Retail Trade, Single Units and Multiunits* (BC58–RS3, pp. 4–6) GX 244, R. 2823.

owned by manufacturers intermediate in size between the many small companies and the few largest ones. In the past ten years, however, the trend to larger chains of retail shoe stores has been accompanied by a major move toward vertical integration by the major manufacturers in which they acquired a substantial number of the largest chains of shoe stores or leased shoe departments in department stores.[9]

As the district court pointed out (T. 68), during the period between 1945 and 1956 the six largest manufacturers more than doubled their ownership of retail outlets. The following table shows the increase in such ownership by each of the six companies during this eleven-year period (GX 59, R. 436–37):

	1945	1956
Brown	0	845
International	0	130
General	80	526
Shoe Corp. of America	301	842
Melville	536	947
Endicott-Johnson	488	540
Total	1,405	3,830

The testimony makes clear that these "big six," and particularly Brown, International and General, were aggressively seeking to acquire the more significant shoe chains (T. 1417). Thus when International bought the large Florsheim chain, Brown was an unsuccessful bidder; and General was outbid by Brown

[9] As of 1954, 761 out of the 2,158 leased shoe departments, or 35.3% were owned by chains of 101 or more outlets and these chains accounted for $55.5 million out of $86.3 million total sales of such departments, or 64.4% thereof (GX 243, 244, R. 2821, 2823).

when the latter purchased the Regal chain and also when Brown contracted to purchase Kinney (T. 1417; GX 205, R. 914, 924). Moreover, retail acquisitions by one of the major manufacturers can start a chain reaction; as discussed below, when General bought the Innis chain in Los Angeles, Brown, being deprived of an outlet for its shoes in that area, responded by purchasing the Wetherby-Kayser stores (T. 1390). As a result of these activities, five of the six largest groups of retail outlets are now owned and operated by five of the six largest manufacturers (T. 69).

As the foregoing facts indicate, this increase of some 2,425 stores is not merely a matter of the expansion of these large companies' own retail activities. On the contrary, the district court found (T. 69) that between 1950 and 1956 nine independent shoe firms operating 1,114 stores became subsidiaries of the six largest firms and ceased their own independent operations. This finding understates the true situation, for the undisputed facts of record (GX 59, R. 436–7) indicate that between 1950 and 1956, the six largest shoe companies actually acquired shoe store chains that at the time of their acquisition were operating approximately 1,300 stores. Moreover, even this figure does not include such smaller retail acquisitions as Brown's purchases of Wetherby-Kayser (3 stores), Richardson (1 store), Wohl Shoe Company of Dallas (unspecified number of "leased shoe departments"), Barnes (2 stores) and Reilly (2 stores), all acquired between 1952 and 1955 (see pp. 24–28, *infra.*).

In addition, these figures do not take into account retail situations such as those reflected by the Brown franchise system and Wohl plan accounts (see pp. 23–24 and 25–26, *infra*) under which the large manufacturer secures an assured outlet for its product from independently owned retail stores to the virtual, if not complete, exclusion of competing brands. The extent of the role played by such operations is illustrated by the fact that, as the district court found (T. 68, n. 9), by 1958 Brown alone had such arrangements with no fewer than 855 retail stores or leased shoe departments (GX 71, R. 457)—an increase of approximately 180 stores from the end of 1951 (see GX 68, R. 452, 454). And the record makes clear that others among the larger manufacturers maintain similar arrangements (see, *e.g.*, T. 893).

An important factor affecting the retail trade in shoes has been what an analysis made for Brown's internal use characterized as a shift towards "A smaller market for higher priced shoes" and "A much larger market for the middle and lower ranges" (GX 47, R. 380–85). Thus, making due allowance for changes in the value of the dollar, between 1942 and 1955 sales of women's shoes priced at under $7.00 increased from 50% of total sales to over 72%, and sales of women's shoes at prices over $11.00 decreased from 19.7% to 9.5% (GX 79, R. 480). At the same time sales of men's dress shoes at prices below $6.00 were increasing from 2.1% to 11.1% and shoes in the $6.00–$9.00 class from 8.7% to 37.8%, while the percentage of shoes sold above $9 was declining from 89% to 51% (¾ of which were in the

$9–15 category) (GX 80, R. 493). Similar trends are evident with respect to the prices at which children's shoes are sold (GX 47, R. 384, 388).

C. BROWN SHOE COMPANY

At the time of the merger in 1955, Brown was an integrated manufacturer, distributor and retailer of men's, women's and children's shoes. It owned its own tanning facilities, as well as factories supplying it with an increasing production of soles, heels and shoe cartons (T. 48; GX 219, R. 1298). It operated 37 manufacturing plants, ranking third in the industry (GX 20, R. 226). It had total net sales of $159,481,000 (GX 56, R. 432) and total assets of $72,396,000 (GX 19, R. 224); in each of these categories it ranked third in the industry. It produced 25,648,000 pairs of shoes (T. 49; GX 58, R. 435; DX KK, R. 3348). It owned and operated some 481 retail shoe stores (GX 22, R. 230) and had franchise arrangements closely controlling the retail operations of over 590 more stores (GX 219, R. 1297).

1. *History of Brown's Operations.* Brown (or its predecessors) has been engaged in the manufacture of shoes since 1877. During the period 1878–1920, Brown was engaged solely in manufacturing men's, women's and children's shoes and distributing them to the so-called general stores selling a variety of "dry goods" and to independent retailers and chain stores (T. 1376–77).

During the 20's and 30's Brown initiated various retailing and merchandising activities designed to meet the increasing competition from shoe store chain organizations such as Kinney, which were enjoying a "great growth" during this period (T. 1376). Brown salesmen were trained in the fundamentals of merchandising: setting up sales programs, advising retailers as to inventory control, laying out advertising programs and setting up the actual advertising—in general, doing everything possible to promote the sale of Brown's men's, women's and children's shoes on the retail level. In the words of Brown's president, this merchandising program "parallels the very plans and merchandising ideas that the chain stores have got" and was Brown's initial way of attempting to meet the advantages of chains (T. 1268). Under the program, Brown turned from merely supplying shoes to retail outlets to "get[ting] down on the retail level, and the consumer level, and mak[ing its] brand of shoes acceptable," so that it "would be able to get a larger volume of business from [its dealers]" (T. 1364, 1377).

In 1938 Brown commenced nationally advertising all of its various lines under their brand names. Its objective was to "pre-sell" its shoes before they reached the outlet (T. 1271). Brown has continued this extensive advertising program on the consumer level and has been the largest national advertiser in the shoe industry (GX 43, R. 287). In 1955, Brown, including its subsidiaries, spent over $5 million on advertising (GX 164, 165, R. 647, 648), over 30 times the $150,000 that Weyenberg spent in 1957 for national advertising (T. 529–30). A Kinney vice president described this program of extensive national advertising as "a tool with which he [the Brown dealer] is able to compete with any chain store" (T. 1562).

2. *The Franchise Program.* In a further effort to meet the competition of chain shoe stores, Brown inaugurated a comprehensive "franchise" program (T. 1377). Brown instructs the franchise dealers on all phases of merchandising such as stock control, inventory control, financing, store and window promotions, mark-downs and advertising campaigns (T. 1261). The franchise dealers are given financial aid in establishing their stores, and can secure group life insurance as well as fire and extended coverage insurance through Brown (T. 2073–74), and they can purchase rubber footwear through Brown at considerable saving (T. 1097–99). In addition, Brown franchise dealers are supplied with neon signs, architectural services, window decorator services, etc.[10] In return, the early franchise agreements prohibited dealers holding Brown franchises from purchasing shoes from firms other than Brown; after World War II the terms of the agreements, whether written or oral, were changed "on the advice of counsel" (T. 1383) to require the franchise dealers to "concentrate" on Brown shoes and not to carry any "conflicting lines." Where they do persist in carrying conflicting lines

[10] A Brown official testified that these latter services are also available to other "good dealers," *i.e.*, those who "concentrate" on Brown's shoes and do not carry "conflicting" lines (T. 2102–03).

they are dropped (T. 2073). At present, the vast majority of shoes sold by the franchise dealers are Brown shoes [11] (T. 310, 459, 469, 491–92, 551, 573, 1782, 1832–33, 2070).

Brown has consistently expanded its franchise program: it had 470 such outlets in 1950, 584 at the time of the Kinney merger and 647 as of May 1, 1958 (GX 68, 71, R. 452, 457). These outlets, as the district court indicated (T. 45, 64–65), are in effect a chain of retail shoe stores controlled by Brown, retailing Brown's shoes (but not those of its competitors) at prices fixed by Brown under merchandising and advertising programs set up by Brown and constituting in every real sense (save ultimate profit and loss) as integral an element in Brown's retail efforts as the stores it owns directly.

3. *Retail Acquisitions.* Beginning in 1929, Brown experimented in the complete operation of a few

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[11] As part of this franchise program as well as its over-all merchandising program, Brown effectively controls the retail prices at which its shoes are sold by its franchisees and dealers by "suggesting" the retail prices and being active in securing compliance with these "suggested" prices, although Brown does not merchandise its shoes under the so-called fair-trade laws (T. 1292). Brown's president testified that "we suggest the retail price because we want the price to be the same to all consumers all over the United States" (T. 1291), that "it is folly to cut prices on shoes until the end of the season" (T. 1367), that he did not want one Brown dealer or franchisee cutting prices on another, and that Brown's programs and policies are effective in forcing dealers and franchisees to adhere to Brown's "suggested" prices (T. 1367). The testimony of numerous Brown franchisees during the trial verified the effectiveness of this price control by Brown (T. 311, 318, 460, 492, 552–53, 570).

retail outlets, but by 1945 it had disposed of all such outlets. Subsequent to 1945, however, Brown began a program referred to by its president in 1955 as "our 3rd period and present phase of growth" (T. 45; GX 219, R. 1296). This consisted of a series of outright acquisitions of retailing and manufacturing organizations.

Wohl. Commencing in 1951, with the acquisition of Wohl Shoe Company (Wohl), Brown began to purchase major retailing organizations and to integrate them into its operations. Wohl in 1951 was the Nation's largest operator of leased shoe departments, with 250 outlets in department stores located primarily in medium-sized cities throughout the United States. This merger, as Brown's president admitted, was "the first really big acquisition by one of the leading shoe manufacturers" (GX 68, R. 450; GX 219, R. 1299). Its significance was aptly characterized in Brown's annual report in 1951 (GX 220, R. 1314):

> The acquisition of Wohl by Brown Shoe Company has been recognized throughout the shoe industry as one of the most important developments in recent years because it brings together one of the nation's largest shoe manufacturers and the nation's largest operator of leased shoe departments. * * *

Wohl's wholesale division also operated a number of "Wohl plan accounts," which were similar to the Brown franchise arrangements discussed above. Under a Wohl plan account, the Wohl dealer is sold a stock of shoes on credit. As the court found (T. 45), each week he is required to file a statement with Wohl showing his total sales and expenses, and he remits his total weekly sales receipts to Wohl after deducting a salary and expenses. This money is applied against his account (T. 393, 731). Dealers under Wohl plan accounts are also required to concentrate on Wohl shoes and generally buy the bulk of their shoes from Wohl (T. 393, 601, 726, 727). If a dealer under a Wohl plan account purchases "outside" lines, he will be dropped from the program (T. 728).[12]

Brown's acquisition of Wohl was followed by a substantial increase in the latter's purchases from Brown. Wohl's purchases in dollars from Brown and other suppliers in 1950 and 1957 were as follows (GX 35, 37, R. 271, 273):

	Calendar 1950	Fiscal 1957
From Brown	$2,884,329	$12,099,201
From others	19,638,643	23,886,491
	22,522,972	35,985,692

Thus in 1950, just prior to its acquisition of Wohl, Brown supplied Wohl with 12.8% of its shoe requirements. By 1957, 33.6% of Wohl's total purchases were from Brown. Significantly, in this period in which Wohl's total purchases were expanding by almost 60%, the dollar value of its purchases from sources other than Brown rose by only slightly more than 21.5% while the value of its purchases from

[12] As with Brown's franchise dealers (see note 11, *supra*), retail prices were also set for Wohl plan account dealers (T. 393–94, 730, 1841–42).

Brown was increasing by almost 320% (GX 34, 35, 37, R. 270, 271, 273).

Regal. In 1954, Brown acquired another large retailing and manufacturing organization, Regal Shoe Corporation (Regal), which at that time owned one manufacturing plant and 110 retail stores specializing in men's shoes. The shoes manufactured by Regal were sold primarily in its own stores, although it sold some to other firms. It purchased some shoes from outside suppliers for sale in its stores. In addition to its regular stores, Regal also operated four Curtis stores, which it obtained through the acquisition of Curtis Shoe Company in 1954.

Prior to 1953 Regal sold no shoes to Brown (GX 72, R. 459). During 1953 Brown purchased 70,000 shares of Regal's stock, and in that year, for the first time purchased $89,000 worth of shoes from Regal (*ibid.*). During 1954, as Brown increased its stock holdings in Regal preliminary to the formal merger on November 30 of that year, Regal's sales to Brown increased to $544,902 (*ibid.*). In 1955, after the merger, Regal's sales to Brown increased to $599,577 and Regal also commenced selling to Wohl (*ibid.*). By 1956 Regal was selling a total of $1,369,165 worth of shoes to the Brown organization of which $744,058 went to Brown, $265,341 to Wohl and $359,766 to Kinney (GX 73, R. 460). During the same period Regal's sales to other firms (which had reached $449,250 in 1951) declined from $278,334 in 1953 to $92,593 in 1955 (GX 72, R. 459).

Wetherby-Kayser. Up to 1953, Brown distributed its shoes in Los Angeles through the Innis chain of stores, which were acquired by General Shoe Corporation in that year. Brown, having "lost [its] distribution in Los Angeles" (T. 1390), immediately reacted by acquiring the Wetherby-Kayser Shoe Company (Wetherby-Kayser), which operated three retail outlets in Los Angeles. In the fiscal year ending May 31, 1952, Wetherby-Kayser purchased $23,144 or 10.4% of its shoes from Brown (T. 47; GX 39, R. 276). Brown acquired a partial interest in Wetherby-Kayser between May and June of 1952, and during the fiscal year ending May 31, 1953, its sales to Wetherby-Kayser jumped to $137,958 or nearly one half of that firm's total purchases (*ibid.*). In 1954, after Brown purchased the remainder of its stock, Wetherby-Kayser's purchasing was assumed by the Wohl division of Brown.

Other Acquisitions. During the period between 1952 and 1955, Brown acquired a number of other small retailing organizations. In 1952, Brown acquired the Richardson Shoe Store in Corpus Christi, Texas; in 1954, the Wohl Shoe Company of Dallas, Texas (not connected with Wohl), operating leased shoe departments; and Barnes & Company, operating two retail stores in Midland, Texas; and in 1955, the T. D. Reilly Shoe Company, operating two leased shoe departments in Columbus, Ohio (T. 21, 47).

Also as part of its "third period of growth," Brown acquired a number of shoe manufacturing organizations. In 1945, Brown acquired the Ermtree Shoe Company and its affiliate, Footkind Shoe Company. In 1948, Brown acquired the assets of Milius Shoe Company (consisting of a factory at Piggott, Missouri, and a leased plant at Festus, Missouri); in 1950, the assets of Spalsbury-Steis Shoe Company, operating one factory at Fredericktown, Missouri; in 1952 and in 1953, the stock of Monogram Footwear, Inc., operating a factory in Trenton, Illinois;[13] the stock of O'Donnell Shoe Corporation, operating a factory at Humboldt, Tennessee; the stock of Kant, Lauman, Winter, Inc. operating a factory at Dixon, Missouri; and the stock of Bourbeuse Shoe Co., a manufacturer of women's dress shoes (T. 20–21, 27, 48).

D. KINNEY SHOE COMPANY

At the time of the merger (1955), Kinney was an integrated manufacturer and retailer of men's, women's and children's shoes, but it was chiefly important as a retail chain. Kinney operated the largest family shoe store chain in the country (T. 68) and had the eighth largest dollar volume of sales of any shoe firm in the United States, amounting to \$51,661,000, of which \$47,411,126, or over 91% was from retail sales (GX 211, R. 1160). It also operated 4 shoe manufacturing plants that produced men's, women's and children's shoes, being in 1955 the twelfth largest shoe producer in the United States (T. 50; GX 58, R. 435). These Kinney factories produced approximately 3

[13] Prior to its acquisition by Brown, Monogram had sold an increasing amount of its products to Wohl, with sales of \$63,641 in 1950, \$143,552 in 1951 and \$309,429 in 1952. (GX 62, R. 441).

million pairs of shoes annually (*ibid.*) having a dollar value of over $10 million (DX X, R. 3299). Kinney ranked eighth in the Nation among shoe manufacturers in terms of total assets, having some $18,189,000 (GX 19, R. 224).

Kinney, which was established in 1899, is the second oldest retail chain in America and the oldest shoe chain (T. 1497). As of the time of the merger, its retail operations were conducted through a chain of 352 shoe stores located in 315 cities throughout the United States (T. 1440); at the time of trial (1958), there were 416 such stores (GX 71, R. 457). In 1955, 50 of these outlets were in shopping centers, increasing to 118 by 1958 (T. 1440, 1443). In 1955 all but three of its stores carried men's, women's and children's shoes (GX 205, R. 923). Prior to the merger, Kinney sold shoes only under its own name; it either manufactured these shoes or purchased them on a "make-up" basis from other manufacturers.

The cities in which Kinney's stores are located generally range in population between 10,000 and 200,000: in 1955, Kinney stores were located in 233 cities having populations in that range, in 29 cities having populations between 200,000 and 750,000, and in 8 cities having populations of more than 750,000 (GX 7, 9, R. 54–58, 60–70).[14] The Kinney stores are generally located in the downtown area of the city in close proximity to the Brown owned or controlled retail outlets (T. 173, 197, 208, 261–262, 271–272, 291, 395, 554, 688,

[14] The remainder of the Kinney stores were located in towns having a population of less than 10,000.

733, 865–66, 930, 1160). In 123 cities out of the 138 cities in which both a Kinney store and a Brown controlled or owned store are located, the Kinney store is located within 2 blocks of the Brown franchise store, Wohl plan account, Wohl department or Regal store. In 58 out of the 68 cities in which there is a Kinney store and a Wohl department, the Wohl department is located within 2 blocks of the Kinney store. In 8 cities out of 14 cities in which there is a Kinney store and a Regal store, the Regal store is located within 2 blocks of the Kinney store; the other 6 Regal stores are located within about 5 blocks. (GX 9, 10, R. 60–209.)

In most cities, the Kinney store is very large and accounts for a substantial share of all shoes retailed in that trade area. In 1955, in 27 cities, the Kinney store accounted for over 20% of all shoe sales; in 58 cities, the Kinney store accounted for over 15% of total shoe sales; and in 74 cities, the Kinney store accounted for over 13% of all shoe sales (GX 214, R. 1214–33). In terms of men's shoes, Kinney retailed over 20% of all men's shoes sold in 6 cities and over 15% in 17 cities; in women's shoes, Kinney accounted for over 20% in 25 cities and over 15% in 55 cities; and in children's shoes, Kinney accounted for over 25% of total children's shoe sales in 23 cities, over 20% in 44 cities and over 15% in 72 cities (GX 214, R. 1219–1236).

Kinney's manufacturing activities, which, as we have noted, were conducted through 4 plants manufacturing men's, women's and children's shoes, were to a considerable extent integrated with its retail operations. Approximately 60% of the shoes produced by the Kinney factories were sold in its own stores (DX X, R. 3299). The remaining 40% of its production went to other chain stores, mail order houses and other distributors (*ibid.*). About 20% of Kinney's retail sales were shoes of its own manufacture (T. 1439).

E. EXISTING BROWN-KINNEY RETAIL COMPETITION

The existence of vigorous competition at the retail level between the shoes distributed by both Brown and Kinney in the same trade areas was established at the trial by extensive testimony on the part of experienced shoe retailers, many of whom were present or past distributors of Brown or Kinney shoes; by other members of the industry, such as shoe manufacturers; and by Brown's and Kinney's own executive officers. Following is a summary of some of the pertinent testimony of these witnesses on the subject of Brown-Kinney competition.

The government's witnesses uniformly asserted that Kinney's shoes are actually sold in competition with Brown's shoes. Thus, retailers testified that Brown's Robin Hood brand of children's shoes is close to Kinney's price range and that, although Brown's Buster Brown children's shoes are somewhat higher in price, they are nevertheless competitive with Kinney's (T. 170–71, 193, 276, 334, 572, 580–81, 625, 689, 861, 1175). A number of retailers who handle or are familiar with Brown-branded women's shoes stated that the Brown women's brands such as Air Steps, Naturalizers, Life Strides, Risques, Westports and Glamour Debs are competitive with women's shoes sold by Kinney (T. 146, 205–06, 336, 496, 625–26, 656–57, 858–60, 1115, 1177, 1181–82). Numerous retailers stated that the Pedwin line, which constitutes two-thirds of Brown's production of men's shoes (T. 2209), is similar in price, style and appearance to Kinney men's shoes and very competitive with them (T. 205–06, 209, 286–87, 297, 335–36, 655–56, 1185–86). A manufacturer producing shoes comparable to Pedwins stated that he is thoroughly familiar with the Pedwin shoe and the Kinney men's shoe and that he regards them as similar in style, appearance and price and as definitely competitive with one another (T. 917–19).

Many of the witnesses testified that customers change brands and switch back and forth from Brown shoes to Kinney shoes and shop at both firms' stores. (T. 173, 296–97, 412, 557, 580, 655, 861). A Wohl plan account retailer testified that he takes Kinney shoes off of his customers (T. 412). A Brown franchise dealer, carrying more than 90% Brown brands, testified that he sells shoes to people wearing Kinney shoes (T. 310, 320). A seller of Brown shoes testified that his regular customers "stray" off to Kinney and that he seeks to sell shoes to people who purchase their shoes from Kinney (T. 598–99). A shoe department operator selling Wohl brand name shoes testified that 50% of his customers walk in "off the street" and have been "window-shopping" at Kinney and other stores up and down the street (T. 602). A department store operator who sold Brown shoes stated that he had lost customers to Kinney and in turn picked up customers from Kinney (T. 655). A Brown franchise dealer testified that 50% of his customers buy Kinney shoes for themselves or their family (T. 557). Other operators stated that they remove Kinney shoes and Brown shoes from their customers and sell the same customers their shoes (T. 173–74, 273–74, 276, 297, 320).

The testimony of executive officers of Brown and Kinney corroborates the testimony of the retailers called by the government. Brown's president stated that his company's efforts with respect to its women's shoes are directed to "the medium price, and to what we call the lower price market" (T. 1404). A vice president of Kinney stated that Kinney seeks locations in "moderate" income neighborhoods and defined its market as the "middle income and lower income group of Americans" (T. 1496, 1503). The president of Kinney added that its stores sell to a group "that * * * generally * * * would have an annual income of from about six thousand dollars down" (T. 1456), but that the Kinney suburban stores are appealing to a higher income group (T. 1462).

The court also had before it sample advertising from both companies. This material showed that both Brown and Kinney strive to obtain the trade of the entire family by featuring price, style and quality (T. 1380, 1459). Kinney advertises that Kinney stores have the "newest styles" and "smart new fashions" as well as "the greatest selection of shoe styles for every member of the family," and its stores are "America's Showplace of Shoe Values"

(GX 178, R. 820, 822). A Kinney radio announcement states that "the Kinney Family gives you thrift and quality. * * * Finest quality shoes over 800 styles to choose from" (GX 166, R. 652). Similar appeals are made to the entire family by Brown in advertising which states that Brown shoes are "America's biggest dollar's worth in shoes for the family * * * make shoes for everybody in the family * * * from Dad's Number 12's down to baby sister's first little walkers" (GX 255, R. 2882).

The court also heard testimony as to the policy of both companies with respect to styles. The president of Kinney testified that the Kinney stores carry shoes in an "assortment of sizes" and "a wide selection of styles" (T. 1461–62, 1467, 1474). Likewise, the president of Brown testified that Brown makes shoes in all sizes and styles in the range that the average family buys (T. 1380). Regarding the policy of Kinney as to the adoption of new styles or trends, Kinney's vice president testified that Kinney generally waits until a style has been rather fully accepted by the public before they put it in their stores (T. 1518). Similarly, the president of Brown stated that Brown waits until a style is fully accepted by the public before they handle it (T. 1278–79). However, both firms handle high fashion shoes. The Kinney vice president testified that its suppliers are "on top of styling trends all the time" (T. 1545), and a Brown vice president also testified to the fact that Kinney handles "high fashion" shoes (T. 1705). The same witness testified that Brown brands include shoes of both the conservative and "middle-of-theroad" type (T. 1676–77) and also shoes of a "high fashion" type (T. 1682; see also T. 1402–03, 1737–38, 1743–45 (Wohl)).

F. THE MERGED COMPANY

As a direct result of the Brown-Kinney merger, Brown moved from third to second in the industry in net sales (both manufacture and retail) (T. 71; GX 56, R. 432), with such sales amounting in 1956 to $219.1 million (*ibid.*). On the retail level, the acquisition of Kinney moved Brown into second place nationally in the number of owned and operated shoe stores with 845 stores or approximately 3.8% of the total (GX 22, R. 229; DX MMMMM 2, R. 7134). Including the Brown franchise and Wohl plan stores, the merger gave Brown a total of approximately 1585 stores, or about 7.2% of the total (see GX 68–70, R. 449–456). This had increased to 1843 stores or leased shoe departments by May 1958 (GX 71, R. 457). As a manufacturer, Brown went from a total production of 22,471,096 pairs of shoes in 1954, the last full year before the merger, to 29,105,105 pairs in 1957 (GX 58, R. 435).

At the retail level, the combined sales percentages of the Brown and Kinney outlets in the various retail market areas throughout the country where both previously competed was markedly greater after the merger than either had enjoyed alone before. In Appendices B–E of the brief, we have set out pairage statistics in a large number of cities [15] both for shoes

[15] If, as the government urged below, see note 58, *infra*, the impact of the merger at the retail level had been measured in

generally, and for men's, women's and children's shoes separately. These figures (which include only the sales of Brown shoes by its owned and operated stores, and the franchise or Wohl plan stores or shoe departments)[16] show that there were two cities in 1955 (Dodge City, Kansas, and Texas City, Texas) where the combined Brown-Kinney sales were over 40%, five more where it was over 30%, seven where they ranged from 25–30%, 14 from 20–25%, and 25 from 15–20%. In addition to these 53 cities, there were 33 cities where Brown and Kinney together had from 10–15% of all retail sales and 27 where the combined percentage was between 5 and 10%. Breaking these figures down by men's, women's and children's shoe categories yields the following results:

Brown-Kinney Combined Percentage	Men's (App. E, *infra*	Women's (App. C, *infra*	Children's (App. D, *infra*
Over 25%	1	17	20
20–25%	2	16	10
15–20%	9	33	14
10–15%	16	28	21
Total cities over 10%	28	94	65

terms of the total sales of Brown-branded shoes in the various communities, the total would have been significantly larger (see GX 214, R. 1214–40). But since the district court apparently limited its consideration to sales by retail outlets owned or controlled by Brown (see T. 64–65, 68, but cf. T. 72–73), we have used only these outlets in computing the figures in the appendices.

[16] While these are figures for sales within the city limits, as explained *infra* at pp. 127–29, they would not materially vary if sales in the suburban areas immediately surrounding and contiguous to the cities were also considered. See also Appendix F, *infra*.

In terms of sales between Brown and Kinney, the merger, despite the pendency of the suit and Judge Hulen's order (T. 24, 36–38) requiring Brown and Kinney to be operated as separate corporate entities, has already had marked effect. Prior to the merger, Brown sold no shoes to Kinney and Kinney sold no shoes to Brown. But by 1957 Brown sold $1,546,857 worth of shoes to Kinney and had become Kinney's largest outside supplier, accounting for 7.9% of all Kinney's purchases (T. 70, GX 151, 250, R. 619, 2852–53). Conversely, while Kinney sold no shoes to Brown prior to the merger, it has since that date supplied an increasing amount of shoes for distribution through Brown or Wohl outlets in amounts varying from $12,450 in fiscal 1956 to $55,515 in the first half of fiscal 1958 (GX 151, R. 619).

Significantly, the Brown sales to Kinney have not been limited to the make-up shoes that formerly represented all of Kinney's purchases, but have included a considerable number of Brown's branded, nationally advertised shoes, which Kinney has sold under their brand names. Thus, Brown's Robin Hood brand of children's shoes, introduced in Kinney stores in 1956 (with total sales of $8,681 in that year), were extensively advertised by Kinney (GX 178, R. 822), and purchases of these shoes jumped to $307,283 in fiscal 1957 and $231,286 for the first half of fiscal 1958 (GX 38, R. 274). Brown also sold certain others of its branded shoes to Kinney (*ibid.*), and the testimony of appellant's officers indicates that plans for placing Brown-brand shoes in Kinney shoe stores were part of its long-range objective in effecting the merger (T. 1316, 1323).

Moreover, even assuming Brown maintained its present price levels of wholesale sales and Kinney its level for purchases, the existing overlap is such that a considerably greater increase in Brown's sales to Kinney is feasible. Thus over 42.4% of Kinney's 1954 outside purchases of men's shoes fell within a two-dollar price range in which Brown in 1955 sold 66.2% of its men's shoes; 61.5% of Kinney's purchases of women's shoes were in a three-dollar price range in which Brown wholesaled 46.0% of its women's shoes, and 41.5% of Kinney's purchases of children's shoes fell in a price range within which Brown wholesaled 54.8% of its children's shoes (GX 252, R. 2868–78).

Even these figures do not tell the full story of the potential sales by Brown to Kinney, for there is considerable flexibility, among the larger manufacturers, in converting shoe factories to the manufacture of different grades and prices of shoes (T. 703, 834–35, 948–49, 956–57, 2229). In particular, Brown's factories have continually switched manufacturing processes (GX 209, R. 930–65) and produced shoes of varying price levels within individual plants (GX 218, R. 1265–94). Furthermore, the record establishes that Kinney's recent expansion into suburban areas has considerably increased its requirements for shoes in price brackets higher than those in which it formerly did most of its purchasing (see p. 63, *infra*).

The probable impact of the merger upon competition generally and upon independent retailers and manufacturers was the subject of extensive testimony at the trial. The independent retailers testified that their normal problems in meeting chain store prices (T. 150, 350–51, 355, 364, 366–67, 388, 478–79, 579, 661, 866, 1159–60) are significantly intensified when, upon the manufacturers' acquiring retail chain outlets, they are forced to compete with their own suppliers (T. 149–50, 366–67, 479, 662–63, 925–26, 1116, 1159–60). Typical of the many retailers who made this complaint was the witness who said manufacturers quote him wholesale prices virtually identical with the retail price charged by the manufacturers' own chains (T. 389). Another witness summed up the problem with the statement that if the captive chain operator "can buy his own products cheaper than you do, therefore, he could, and quite often does, under-price you at the retail level, which makes it very difficult to compete" (T. 150).

Retailers also testified that they lose valuable brand names and sources of supply as the result of shoe industry mergers. For example, one retailer attested to his inability to get a certain style of shoe once his supplier was acquired by the Brown Shoe Company (T. 1116). Another witness said: "We will build up a name and a brand and the first thing you know they will come into the town and open up and take the brand some place else into one of their own outlets and it is not profitable on that basis" (T. 662).

Independent manufacturer witnesses described the effect upon them of prior retail acquisitions by large manufacturers. Thus, one witness found that in 1955, his firm's sales of women's shoes to Wohl totaled $1,230,527, but by 1958 his sales to Wohl had fallen to less than $100,000 as a result of Brown's becoming a Wohl supplier (T. 966). Except for three Wohl outlets, he had "lost all the wholesale business" as a result of Brown's supplying Wohl (T. 941). Another witness testified that his firm's sales to Wohl outlets had been substantially reduced since Brown's acquisition of Wohl (T. 700). Still another witness stated that his sales of men's and boys' shoes to Wohl virtually ceased after Brown acquired that firm and that thereafter he sold only a few special shoes to Wohl (T. 835–36). And another manufacturer witness testified to the cancellation of orders after retail accounts became affiliated with Wohl (T. 430; see also 512–13, 767–68, 917, 943–44, 985).

The manufacturer witnesses also testified that these experiences as a result of specific Brown acquisitions were similar to those they experienced generally when manufacturers take over either ownership or control (through franchise agreements) of retail outlets. For in such circumstances, they testified, the integrated manufacturers, to the extent of their ability, supply their own outlets, thereby foreclosing the non-integrated shoe producers from a market for their shoes (T. 437, 520, 701, 768–70, 837, 894, 945–46). As manufacturer John Esch put it, "every time even one store becomes controlled by another manufacturer our opportunity for a sale is reduced by one store" (T. 918; see also T. 520). Frequently independent manufacturers, despite many years of satisfactory service, are prohibited from supplying a former account which has come under the control or domination of an integrated manufacturer (T. 431, 506–07, 512–15, 700, 767–68, 835–37, 888–91, 917, 984–85; GX 50–55, R. 423–31).

The result of this activity, in the words of one manufacturer witness, is that "the parent company would make all the shoes they possibly could of whatever the retailer needed and the independents like ourselves would only get the excess when the parent manufacturing company didn't want to make it or couldn't make it profitably" (T. 701). Or as another executive of an independent manufacturing company stated more colloquially, "Would you take care of your kids first, or take care of your neighbor's kids first?" (T. 948; see also T. 437–38, 768, 837–38, 894). In consequence, the government's witnesses testified, the independent manufacturers are finding it increasingly difficult to find markets for their shoes (T. 439–40, 486, 768–69, 837–38, 894, 918–21, 945). As one stated, his salesmen reported "No available outlets, all tied up by chain stores or dominated stores" (T. 768).

SUMMARY OF ARGUMENT

Section 7 of the Clayton Act, as significantly amended in 1950, prohibits the acquisition of one company by another "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." The proposed merger of the Brown Shoe Company and the Kinney Shoe Company is a classic example of the type of combination the statute was designed to prevent. Viewed vertically as the merger of Brown, a large manufacturer, with Kinney, the owner of the largest family shoe store chain in the country, the acquisition will affect competition among manufacturers by foreclosing the substantial Kinney market and by enhancing Brown's already great ability to dominate them through the advantages of size. The merger will also affect competition among retailers because of the power that a retail chain with a vast manufacturing organization behind it has over its smaller, nonintegrated competitors. Viewed horizontally, the combination of Brown, which owns, operates or controls a large number of retail outlets, with Kinney, which owns a great retail chain, the acquisition will affect competition by the elimination of Kinney, a substantial competitive factor in the many markets across the Nation in which the outlets of both have been competing vigorously with one another and with other retailers, large and small.

When these effects of the merger were viewed in the light of the marked trend toward concentration of power in the shoe industry, and the testimony of many independent retailers and manufacturers as to the threat which the trend poses to their very existence, the district court had no choice but to conclude that in important segments of important competitive markets, there is a strong likelihood that the Brown-Kinney merger will substantially lessen competition and tend to monopoly.

"Line of commerce." The district court was clearly correct in concluding that men's, women's and children's shoes, considered separately, are appropriate lines of commerce for evaluating the effect of the Brown-Kinney merger. The record disclosed that these three broad categories constitute recognized trade channels in the shoe industry and that Brown and Kinney operate and compete vigorously within these three lines of commerce. With respect to the vertical aspects of the merger, there is a high correlation between the types of men's, women's and children's shoes that Brown as a manufacturer sells and those that Kinney as a retailer purchases. With respect to the horizontal aspects of the merger, there was extensive documentary and testimonial evidence to the effect that both Brown and Kinney are substantial competitive factors in each of the three lines of commerce and that there is a high level of actual competition between Kinney's shoes and Brown's shoes for men, women and children. Moreover, the court's refusal to select narrower lines of commerce (reflecting such differences as those in style, price and intended use) was clearly justified, for Section 7 reaches mergers having the proscribed effects "in *any* line of commerce."

"Section of the Country." The record amply supports the district court's finding that the appropriate sections of the country for appraising the competitive impact of the Brown-Kinney merger are the Nation as a whole for manufacturing (a finding that is not contested), and the 138 cities of over 10,000 population and their environs in which both Brown and

Kinney own or control outlets for retailing. Shoe retailers and expert witnesses testified uniformly that the effective areas of competition in which shoe retailing is conducted are individual cities and their immediate suburbs. Nor is there any legal impediment to the court's employing cities and their environs as sections of the country. The legislative history of the 1950 amendments to Section 7 plainly indicates that if a city area constitutes "the area of effective competition for a given product," then it can qualify as a section of the country for purposes of the statute.

Standards for Judging the Effects of the Merger. Section 7 now precludes any acquisition, vertical or horizontal, that either alone, or because it is part of a trend, is shown to raise a reasonable probability of substantially lessening competition or of tending to monopoly in the relevant competitive market. The legislative history of the 1950 amendments clearly supports this conclusion. A major purpose of the amendments was to go beyond the Sherman Act prohibitions against actual restraints upon competition and to halt the development of such restraints in their incipiency. To this end, Congress plainly intended the statute to reach acquisitions that *may* increase industry concentration to a significant degree, that *may* impair the ability of the smaller firms in the industry to compete effectively, or that *may* eliminate a substantial competitive factor in a significant market or markets. It is this standard that the court properly applied to the Brown-Kinney merger.

Effects of the Merger on Manufacturing. The district court was clearly correct in finding that the vertical integration of Kinney's vast shoe retailing facilities and Brown's even larger manufacturing resources would seriously threaten the ability of smaller manufacturers to compete effectively, especially in view of the trend to concentration among the major shoe manufacturers. In recent years, there has been a marked tendency for the large manufacturers of shoes to buy up large numbers of additional plants, while the total number of plants and shoe manufacturers has been declining substantially. Even more importantly, these same manufacturers have been acquiring and then expanding great chains of retail outlets, while simultaneously tying up large numbers of smaller retailers through exclusive franchise arrangements. These developments alone pose a serious threat to the competitive ability and independence of the many smaller manufacturers in the industry.

The record fully established that Brown's sales of its manufactured shoes to Kinney for sale at retail by the latter will almost certainly increase. This has been the case with respect to the other retail outlets Brown has acquired. Since the merger, Brown has already risen from a nonsupplier of Kinney to its major outside supplier, and the already substantial overlap between the prices and kinds of shoes that Brown sells and those that Kinney buys is likely to increase still further because Brown's trend is to lower-priced shoes and Kinney's is somewhat upward; in addition, Brown's flexibility in converting its manufacturing facilities is amply shown by the record. This progressive foreclosure of the substantial Kinney market, both in itself and as part of the merger trend of which this is the most significant single acquisition, will have a seriously detrimental effect upon the smaller, independent manufacturers.

Moreover, the documentary evidence and testimony of independent shoe manufacturers demonstrated that the combination of the two huge Brown and Kinney organizations, both of them engaged in both the manufacture and retailing of men's, women's and children's shoes, would enable the merged company to dominate its smaller manufacturing competitors. The merger would enable them to pool their already great advantages and in all probability to obtain yet additional advantages in purchasing supplies, leveling production cycles, developing merchandising techniques and responding to changing consumer demands.

Effects of the Merger on Retailing. The horizontal integration of Kinney's chain of family shoe stores, the largest in the Nation, into Brown's already substantial retail operations, will replace two vital competitive forces with a single organization, significantly larger than either and free from the spirited competition that has existed between the two. The record establishes that in many of the 138 markets in which both Brown and Kinney have owned or controlled outlets, each has a substantial share of the total sales of women's and children's (and to a somewhat lesser extent, men's) shoes, and that the combination of the two would give the merged company a commanding position. The elimination of a major competitive factor in many markets that would result from the combination of these two potent forces would in itself harbor the reasonable likelihood of a substantial lessening of competition and of a tendency to monopoly.

In addition, the integration of manufacturer-retailer Brown with the large Kinney retail organization will seriously aggravate the difficulties that independent retailers are already having in competing with the substantial and ever-expanding retail chains. The manufacturer-owned or controlled retail outlet can sell its own product at a significantly lower price than the nonintegrated independent retailer can obtain for a comparable product; moreover, the integrated manufacturer will often transfer its brands from the independent retailer (who may have been developing a market for the brands for years) to its newly-acquired outlets. These and many other predictable consequences of the vertical integration of two such large organizations as Brown and Kinney were established on the record. The conclusion was inevitable that the advantages the merged company would have over its smaller retailing competitors would be so great as to threaten to become decisive.

ARGUMENT

Despite the lengthy record and appellant's challenge to practically every finding and conclusion in the district court's opinion, this case presents a relatively simple question. By 1955 Brown was the third largest shoe company in the United States. As a result of a series of major acquisitions and an expanding program of franchise agreements giving it virtually exclusive entry to many additional stores, Brown was also a major factor in the retail sale of shoes. Kinney, in addition to being a substantial manufacturer, owned the largest independent chain of retail shoe stores in the country. The acquisition merged these two already powerful units. The district judge found that this merger, considered either by itself or as part of the accelerating trend to the vertical integration of shoe manufacturers and retail outlets, would violate Section 7 of the Clayton Act because there is a reasonable probability of its lessening competition and tending to monopoly in both the manufacturing and retailing of shoes. He found that these are the likely effects upon competition in the commerce in men's, women's and children's shoes, both in the national market in which the manufacturers operate, and also in the 138 retail trade areas comprising a city and its immediate environs in which both Brown and Kinney own or control retail outlets.

The purpose of Section 7 of the Clayton Act was to prevent corporate mergers that carry a substantial risk of reducing competition in the market place. Congress, when it amended Section 7 in 1950, was well aware of the fact that some major industries are already dominated. In such industries, smaller firms had either been eliminated or were operated under the shelter of the oligopoly. Other industries approached more nearly the classical competitive market, which is characterized by numerous buyers and sellers. In amending Section 7 Congress sought to preserve the competitive structure of the latter industries by preventing further concentration of economic power before monopolistic or oligopolistic conditions developed. Because vertical and horizontal mergers are the seeds of oligopoly and monopoly, Congress forbade one firm to acquire the stock or assets of another where the effect, in *any* line of commerce in *any* section of the country, "*may* be substantially to lessen competition"—that is to say, wherever there is even an incipient substantial lessening of competition.

In our view the record demonstrates that the Brown-Kinney merger is an almost perfect example of the very evil at which Section 7 is aimed. For many years the shoe industry was characterized by large numbers of competing manufacturers selling to thousands of independent retailers and a few retail chains; the latter competed with each other within local retail trade areas. Although this is still the predominant characteristic of the industry, the most significant development in recent years has been the accelerating practice of a few of the largest manufacturers to acquire their own large chains of retail outlets either by outright purchase or by promoting franchise agreements tying the retailer to the manufacturer in a way that excludes competing lines of shoes. The continuation of this trend, the district court found (T. 70, 72), will inevitably tend to drive the small and unintegrated firms, both manufacturers and retailers, entirely out of the shoe business or into marginal and economically insignificant operations. The consequence will be the even greater domination of the industry by a few large corporations.

Brown is one of the most aggressive leaders in this trend toward concentration. The Brown-Kinney merger will give immeasurable impetus to the development of oligopoly, not only because of its immediate effect upon the market, but because the enhanced economic power of the combined organization will make it increasingly difficult for independent manufacturers and retailers to survive.

Specifically, Brown's acquisition of the Kinney retail chain has a reasonable probability of foreclosing a substantial part of the market that other manufacturers can find for their shoes, as well as enhancing Brown's position in the competition for the part of the retail market remaining unaffiliated with the large manufacturers. Thus, the vertical aspects of the merger have a tendency to lessen competition in the manufacturers' market. They also increase the already great competitive disadvantages facing the independent retailer, who must now compete with a Kinney chain able to call upon the vast resources of Brown's manufacturing organization.

Viewed horizontally, the merger also will lessen competition and tend to create monopoly in retail markets in many areas. For in most of the 138 markets throughout the country in which Brown and Kinney both own or control retail outlets they are among the major competitive factors in the sale of women's, children's and (to a somewhat lesser degree) men's shoes. The merger, by combining these two significant competitive forces into one, has eliminated a substantial competitive factor in shoe retailing. Moreover, the combination of the substantial Brown and Kinney retail facilities in this large number of markets will add to the difficulties of both the independent retailers and the smaller manufacturers in selling their products in such areas.

We discuss the findings and evidence that support these conclusions at some length in Part III of this brief, along with the applicable legal principles, but it is necessary first to consider two subsidiary problems that go not to the merits but to the method of analysis: the "lines of commerce" and "sections of the country" affected.

I. THE DISTRICT COURT PROPERLY FOUND THAT MEN'S, WOMEN'S AND CHILDREN'S SHOES CONSTITUTE APPROPRIATE LINES OF COMMERCE FOR EVALUATING THE EFFECT OF THE MERGER

The district court concluded that the most appropriate "lines of commerce" to be considered, in evaluating the impact of Brown's acquisition of Kinney upon competition in the shoe industry, were men's, women's and children's shoes, considered separately (T. 58). In adopting these categories, the court was developing a focus, within the terms of the Section 7 reference to "any line of commerce, in any section of the country," for analyzing the evidence as to the competitive impact of the merger. The court did not hold that these were the only possible lines of commerce, or (what is the same thing) the only competitive markets, in the shoe industry. Plainly enough, there is an almost infinite variety of subdivisions within the shoe business, based upon price, quality, style and intended use (to which could be added size, color and any number of other characteristics) which, depending upon the nature of the particular acquisition, might or might not be of value to the analysis of a Section 7 case. Moreover, it is clear that for some purposes "footwear generally" constitutes an integral competitive market within the shoe industry. But in undertaking an evaluation of the evidence on the effects of *this* merger, the court quite reasonably selected men's, women's and children's shoes as the most useful focus.

Just as one cannot appraise the potential effect of a merger upon competition without defining a relevant market, so the relevant market cannot be determined without an eye to the consequences of the merger in question. If the acquisition of General Motors stock by duPont had been attacked upon the ground it would lessen competition between these companies as manufacturers, it would have been appropriate to ascertain whether any of their products were sufficiently competitive in terms of buyers' preferences to sell in the same market. Since the stock acquisition was actually attacked as an unlawful vertical combination, the relevant market was the one in which General Motors purchased supplies which duPont could furnish. If two manufacturers of men's patent leather pumps were to combine, the question would be whether patent leather pumps were a sufficiently distinct product to constitute a line of commerce. If the dominant manufacturer of patent leather pumps were to merge with the largest manufacturer of formal business shoes, the question would be whether the two styles were, in terms of the buyers' preferences, sufficiently competitive to fall into one market so as to be parts of a "line of commerce." On the other hand, if the largest manufacturer of all kinds of men's shoes were to combine with the second largest, it would be idle to break the market down into categories made up of different styles and price ranges; the most relevant line of commerce would be men's shoes even though subdivisions were conceivable.

Appellant's attack upon the district court's finding that men's, women's and children's shoes are the most appropriate lines of commerce upon which to focus is largely irrelevant because it ignores or misconceives the issues in this case. Appellant treats the case chiefly in terms of the manufacturer's market and seeks to show that Brown and Kinney do not compete because they handle, as manufacturers, different lines of shoes. This analysis might be appropriate if there were any issue concerning the effect of the combination upon competition between Brown and Kinney as manufacturers. The district court found, however, that the merger would "only slightly" affect that kind of competition (T. 71). The government accepts the finding. Our contention, which the district court sustained, is that the vertical combination of Brown's manufacturing facilities with Kinney's retail outlets would lessen competition in manufacturing by enabling Brown to preempt the substantial Kinney market previously available to other shoe manufacturers. The test of that allegation, in terms of line of commerce, is the extent to which Brown manufactures or may manufacture shoes of the kind that Kinney is or is likely to purchase for retail sale. As we show at pages 60–62, *infra,* since Kinney sells broad lines of men's, women's and children's shoes, and since Brown manufactures, or is capable of manufacturing, equally broad lines, the relevant markets for appraising the vertical aspects of the merger are best described as the markets for men's, women's and children's shoes. Therefore, these are appropriate "lines of commerce" in which to appraise the effects of the merger.

The Brown-Kinney merger, we submit, will also substantially lessen competition in retailing. Both Brown's and Kinney's outlets, as we show at pages 62–67, sell broad lines of men's, women's and children's shoes. The fact that they are in the same market is shown by the mass of testimony outlined below to the effect that their retail stores are in competition with each other and with other retail shoe stores. This testimony is plainly more than sufficient to support the district court's finding that men's, women's and children's shoes were therefore the appropriate lines of commerce in which to appraise the effect of the merger upon retail competition.

As it developed, the practical consequence of such an analysis in this case was the same as it would have been had the court selected "shoes generally" as the most appropriate line of commerce. For this case involves the merger of Brown, which manufactures in large volumes all types of men's, women's and children's shoes and which sells substantial quantities of each through its owned, operated and controlled retail outlets, with Kinney, which manufactures all three types of shoes and which sells all three types at retail in its large chain of family shoe stores. Thus, to analyze the impact of *this* merger in terms of men's, women's and children's shoes is to analyze it in terms of the whole—"all shoes"—of which those three categories comprise all of the parts. What is true with respect to each of them is, with very few qualifications, true with respect to the combined sum of them. Hence, the court's delineation of three lines of commerce must be considered with the realization that they will advance the assessment of the effects of the Brown-Kinney merger in the aggregate as well as in the three separate lines.

In the following sections we set forth in more detail the evidence which sustains the district court's findings that men's, women's and children's shoes are the most appropriate lines of commerce for analyzing the effect of the vertical integration of Brown's manufacturing facilities with Kinney's retail outlets upon other manufacturers and also for judging the effect of the merger of Brown's retail outlets with those of Kinney upon competition in retailing. It will be useful, first, however, to indicate the extent of the general testimony demonstrating that these three broad categories of shoes constitute recognized lines of commerce in the shoe industry.

A. THE RECORD CLEARLY SUPPORTS THE DISTRICT COURT'S FINDINGS THAT MEN'S, WOMEN'S AND CHILDREN'S SHOES ARE RECOGNIZED LINES OF COMMERCE IN THE SHOE INDUSTRY

In essence, the district court found that considerations as to the "interchangeability" in (1) shoe manufacture, (2) price, style and quality, and (3) use by the ultimate consumer all made impractical any breakdown of shoes beyond the categories of men's, women's and children's shoes, but that no significant degree of interchangeability operates between shoes manufactured for and sold to men, women and children to invalidate their separate treatment (T. 56–57). While there is no agreement among the shoe manufacturers or retailers with respect to the various classifications of shoes sold within the general categories of men's, women's and children's shoes "there is one group of classifications which is understood and recognized by the entire industry and the public—the classification into 'men's', 'women's' and 'children's' shoes separately and independently" (T. 57–58). These conclusions look primarily to retailing and public buying rather than the specialized definitions of manufacturers, because the district court was chiefly concerned with (1) any line of commerce in which Kinney was a buyer, and (2) any line in which the separate retail outlets of Brown and Kinney would cease to compete.

The record is replete with affirmative testimony and documentary evidence supporting the court's finding that these three broad categories of shoes constitute recognized lines of commerce in the shoe industry. This recognition permeates the testimony of the government's witnesses: typical of retailer witnesses' responses to requests for a description of their operations were these: "We have a family type of operation, men's, women's and children's" (T. 195); "We carry men's, women's and children's shoes" (T. 289); "We are retail stores of ladies' shoes" (T. 612) (see also, *e.g.,* T. 198, 256, 270, 289, 474, 493, 551, 554, 571–72, 594, 614, 653–54, 730, 926). Brown's own literature and advertising [17] and its internal organization [18] reflects the tripartite breakdown. Differing pricing and mark up systems are used with respect to the three lines of commerce (T. 2094, 2098–99, 2106). As we have noted (see p. 15, *supra*), the production of men's, women's and children's shoes normally takes place in separate plants, although a factory will often make two or more kinds of shoes within one of these general categories (T. 56, 704, 949).

But far more important is the fact that the retail trade in shoes is based upon the tripartite breakdown found by the court to be the proper lines of commerce. There are many men's shoe stores (*e.g.,* T. 144, 201,

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[17] "Our brand leadership in men's, women's and children's footwear continues to increase across the nation. * * *

"SHOES FOR MEN: [Listing brands]

"SHOES FOR WOMEN: [Listing brands]

"SHOES FOR CHILDREN: [Listing brands]" (GX 221, R. 1334). See also, *e.g.*, GX 43, R. 285–86; GX 44, R. 304–05, 308–09; GX 46, R. 353; GX 137, R. 581; GX 161, R. 640–41; GX 171, R. 681–83; GX 225, R. 1391; GX 226, R. 1394; DX W, R. 3293.

[18] "The Vice-President in Charge of Sales also directs the Children's Divisions and reporting to him there is a General Sales Manager of all Women's Divisions and one for all Men's Divisions." GX 219, R. 1296. See also T. 1270, 2424.

256, 371–72, 414, 1296, 1325–26, 1344, 1504, 2391), many women's shoe stores (*e.g.,* T. 144, 201, 256, 496, 612, 730, 1135, 1290, 1504, 1528, 1756, 2391), and a considerable, albeit somewhat lesser, number of children's shoe stores (*e.g.,* T. 201, 256, 371–72, 1380). There are additionally a large number of family shoe stores selling men's, women's and children's shoes, frequently in segregated departments or portions of the store (*e.g.,* T. 195, 201, 256, 494, 653). But there are few if any shoe stores or shoe departments selling "dress" shoes but not "casual" or "play" shoes, "crib" shoes but not "first steps" shoes, shoes for two year olds but not for five or ten year olds, or women's "flat" or low heel shoes but not women's high heel shoes (*e.g.,* T. 201, 256, 614).

There are of course differences in merchandising techniques which will affect the stock of particular retail shoe outlets. One store may emphasize high-style shoes, another more practical shoes; one may stress price at the expense of quality, another will compensate for a somewhat higher price by offering a wider variety of styles and sizes. But as the testimony makes clear these are the methods by which different types of retailers compete with one another in the sales of men's, women's and children's shoes rather than evidence that different styles, prices, qualities or sizes of shoe are in separate markets from one another. Another factor that the district court quite properly took into account is the interchangeability, in terms not only of price, style and quality but of ultimate use as well, within (but not across) the three categories of shoes (T. 56–57). Thus, as the court pointed out, the style of a shoe does not necessarily reflect its price (and *vice versa*); and shoes purchased for one purpose (dress, for example) are very often used for another purpose for which a different type of shoe might be more appropriate (play or heavy work, for example) (*ibid.*).

B. THE RECORD CLEARLY SUPPORTS THE DISTRICT COURT'S FINDINGS THAT BROWN AND KINNEY OPERATE AND COMPETE IN THESE LINES OF COMMERCE

Vertical aspects of the merger. The record amply demonstrates that it was appropriate for the district court to use men's, women's and children's shoes in appraising the effects upon competition of the vertical integration of Brown's manufacturing facilities with Kinney's retail stores. The court found that this vertical integration will lessen competition in the manufacturing of men's, women's and children's shoes by foreclosing the substantial market the small shoe manufacturers previously found in the sales to Kinney that Brown will now appropriate. As we have noted, the test of that finding, from the standpoint of line of commerce, is the extent to which Brown manufactures or may manufacture men's, women's and children's shoes that Kinney purchases for retail sale.

Brown admittedly manufactures and distributes broad and general lines of men's, women's and children's shoes, and Kinney's retail operations and purchases from outside suppliers are equally extensive. There is a high level of correlation between the character of Brown's manufacturing sales and Kinney's purchases for resale, as demonstrated by the following facts, which are discussed in detail elsewhere in this brief:

(1) Brown, which supplied none of Kinney's requirements prior to the merger, is now its largest outside supplier (see p. 38, *supra*).

(2) There is a very high degree of overlap in the prices at which Brown sells and those at which Kinney buys shoes (see p. 39, *supra*).

(3) This overlap can be expected to increase because of Brown's flexibility in converting to the manufacture of different grades of shoes, and because of Kinney's increased requirements for shoes in higher-priced brackets (see pp. 39, *supra*, 63, *infra*).

(4) Past experience indicates that the large shoe manufacturers have taken over the supplying of their captive outlets to an ever-increasing degree (see pp. 40–42, *supra*). In this connection it is important to recall the way in which Brown increased its sales to Wohl, to the exclusion of other manufacturers, after it took over those outlets (see pp. 26–27, *supra*).

Thus, the effect of Brown's increasing sales to Kinney will extend to all manufacturers of men's, women's or children's shoes within the broad and general ranges within which Brown manufactures and Kinney sells, regardless of whether they make a general line of shoes in one or more of those three categories or limit their production to a particular specialty within any one category. The issue is thus not the extent to which a manufacturer of men's dress shoes competes with a manufacturer of men's sport shoes for Kinney's business, but rather the extent to which they both compete, along with manufacturers of men's shoes generally, with Brown in attempting to secure Kinney's business. Particular sales by Brown to Kinney may affect particular competing manufacturers differently, but the total impact of the Brown-Kinney relationship will be on the manufacture of men's, women's and children's shoes as a whole rather than on any particular segment. A narrower definition of the relevant market or line of commerce would not help appellant because what is true of the whole Kinney line will be true of its parts.

Horizontal aspects of the merger of retail stores. The overwhelming weight of the evidence in the record supports the district court's findings (T. 58, 59, 62–64, 71, 74–75) that, despite some differences in the emphasis of their operations, Brown and Kinney outlets are in active competition with one another at the retail level in each of the three categories—men's, women's, and children's shoes. The evidence shows that in 1955, in cities in which Brown and Kinney both sold shoes, Kinney sold over seven million pairs and Brown sold some 12 million pairs (GX 214, R. 1214–40). Analysis of an exhibit in the record (GX 206, R. 925–27) showing actual retail prices of all shoes (except make-up shoes) distributed by Brown and Kinney in that year (including in the Brown figures shoes sold by the Wohl departments and Regal stores) shows that, although the bulk of the Brown retail prices fall in a somewhat higher price range than the bulk of the Kinney prices, both Brown and Kinney sold some shoes in virtually every price category, and there is a substantial direct overlap between the sales of the two in many categories. Thus in the men's-shoe category approximately 42% of Kinney's sales were in the $7.00–$9.99 bracket that also accounted for 48% of the Brown men's shoes. In women's shoes, 35% of those sold by Kinney were in the same $4.00–$6.99 bracket as 27% of those sold by Brown. And in the children's-shoe category where 48% of Kinney's shoes were sold at prices between $3.00 and $5.99, 33% of Brown's sales fell into the same category. This, of course, is consistent with the post-merger sales of over $1.3 million of Brown's shoes in 1957 directly to Kinney for resale (GX 38, R. 274), together with the steadily increasing number of shoes manufactured by Kinney for distribution by Brown through its non-Kinney retail outlets (GX 151, R. 619). And the record contains substantial evidence that Brown and Kinney are coming even closer together in terms of price; Brown is moving into cheaper lines (T. 1315–16, 1428–29, 1682–84, 1763, 2220–21; GX 226, R. 1394; see also GX 47, R. 380–85, 388; GX 79, R. 489; GX 80, R. 493), while Kinney, particularly in its expanding markets in suburban shopping centers, is now handling more expensive shoes than formerly (T. 1323, 1409–10, 1441–43, 1462, 1509, 1511, 1525–26, 1554, 1571, 1705, 1993; see also Appellant's Brief, p. 189).

This Court has said that "[t]he existence of competition [in the shoe industry] is a fact disclosed by observation rather than by the process of logic" (*International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 299). Recognizing the validity of this proposition, the government called as its major witnesses 24 retailers who represented a cross-section of the retail shoe industry. Included among these witnesses were independent retailers, Brown franchise dealers and operators under the Wohl plan. They directly confirmed the fact that Brown shoes (including Regal and Wohl) compete at retail with Kinney shoes.

The testimony of these witnesses is discussed in some detail in the Statement (see pp. 32–36, *supra*). It is sufficient to state here that these experienced witnesses not only testified generally to the existence of active Brown-Kinney competition in the cities with which they were familiar, but gave specific information as to the basis for their conclusions. Thus they testified that the Kinney and Brown outlets were located in close proximity to one another (T. 173, 197, 261–62, 291, 320, 395, 493, 555, 601, 619, 621–23, 624–25, 654, 656, 688, 733, 859, 930, 1160; see GX 9, 10, R. 60–209); that specific customers of Kinney were also customers of Brown outlets (T. 173, 297, 320, 396); that one of Brown's brands of children's shoes sold in the same price range as Kinney's children's shoes, and that although another Brown brand was somewhat higher priced, it nevertheless also competed with Kinney's children's shoes (T. 170–71, 212–13, 276, 292, 572, 580–81, 621–23, 656–57, 689, 861, 1175, 1192, 1199), that Brown's branded women's shoes were stylistically similar to and competitive with Kinney's women's shoes (T. 146, 205–06, 496, 557, 621, 656–57, 1114–15, 1176–77, 1181–82) and that Brown's branded men's shoes bore a similar competitive relationship with Kinney's men's shoes (T. 205–06, 209–10, 286, 297, 335–36, 655–56, 661, 1186). And, of particular interest in view of appellant's insistence on the allegedly wide price-style variance between Kinney's women's shoes and those sold by Wohl, is the testimony of a number of retailers selling Wohl brand shoes that they were in fact sufficiently close in price and similar in style to be competitive with the women's shoes sold by Kinney (T. 297, 395–96, 602, 734, 742, 860; see also T. 174, 198, 209–10, 265, 337, 477, 496, 624, 656, 1160 (testimony by other retailers that Wohl and Kinney compete in their areas)).

All of this extensive testimony presents a consistent picture of actual marketing conditions in the shoe industry in which store-to-store variations in such factors as style, price, quality and size of the shoes sold, and in the location, advertising appearance and services provided by the particular retail outlet, do not insulate the stores, or any particular type of shoe, from competing with the other stores in the trade area selling men's, women's and children's shoes, or any of the shoes sold in such stores. They are, instead, the very sinews of such competition.

The formidable array of testimony by experienced retailers cannot be minimized because the government limited its retailer evidence to the competitive situation prevailing in only about 40 of the 138 markets in which both Brown and Kinney owned or controlled retail shoe outlets in 1955. For it is clear that the government witnesses constituted more than an adequate cross-section of the various types of retail situations throughout the country and that to have called more would have served only to enlarge further an already lengthy record. Moreover, it should be noted that, despite their superior opportunities to call Brown franchisees, Wohl plan account or leased department managers, or Regal or Kinney store managers, to say nothing of independent Brown retailers or other persons engaged in such operations, appellant called only one retailer, a Mr. Crawford of Peoria, Illinois, whose testimony to the general effect that Brown and Kinney did not compete (T. 1619), was impeached and substantially undermined by evidence that he had made prior inconsistent statements (T. 1620–32, 2732–37).

Finally, if any doubt remained as to whether Brown and Kinney are in active competition with one another in the sale of men's, women's and children's shoes generally, it is, we submit, disposed of by the testimony and activities of appellant itself. Thus the president of the Regal Division of Brown testified that Regal's two top competitors were Thom McAn (part of the Melville complex), which sells shoes in Kinney's price range (T. 2276) and Florsheim (owned by International), which sells shoes in a substantially higher price range than those of Brown or Regal (T. 2269).[19] The evidence further

[19] Regal's president admitted his stores competed with Kinney, but tried to narrow the area of competition by stating: "[O]ur line includes the Kinney line and goes much farther. Kinney's style approach to men's shoes, I would say, is to take the heart out of our line and a very restricted portion of the center * * * particularly as to styles" (T. 2273). This, of course, is merely a variant of the constant refrain that the line of com-

shows that after the merger Kinney started to feature Brown's Robin Hood brand of children's shoes (T. 1369). And in their responses to the government's interrogatories Kinney or Brown (including Regal and Wohl) in a number of cases specifically listed the other partner or stores carrying its shoes as among their chief competitors (see GX 30, 227, R. 263, 1399, 1406, 1421–23; see also GX 247, 249A–B, R. 2835, 2841, 2844, 2850–51).

C. THE DISTRICT COURT'S REFUSAL TO SELECT THE NARROWEST CONCEIVABLE LINES OF COMMERCE WAS ENTIRELY JUSTIFIED

Appellant contends, and relies heavily on decisions of this Court as establishing, that narrow lines of commerce broken down by style, price and intended use are as a matter of law the only appropriate ones for considering the effect of a merger between two large shoe companies selling full lines of men's, women's and children's shoes throughout the country (App. Br. 118–128). It must first be noted that appellant has never proposed any such breakdowns, nor were industry witnesses able to agree on any definitions of shoe categories below the level of men's, women's and children's (see, *e.g.*, T. 251–52, 364, 398–400, 409–10, 482–83, 503–04, 771–73, 796–97, 1725–26, 1807). Moreover, the cases in this Court and in the lower federal courts simply do not support appellant's contention.

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merce in which Kinney buys and sells is not men's shoes (or women's or children's shoes) because, although it sells all general types thereof, it does not carry as many styles or sizes as some of its competitors.

Appellant places principal reliance on *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, where a majority of this Court (with Justices Stone, Holmes and Brandeis dissenting) found that International did not compete with the McElwain Shoe Company, whose stock it had acquired, and that for this reason, among others, there was no violation of Section 7, as it read prior to the 1950 amendment. It is true that the Court, like the Commission decision under review, talked in terms of men's dress shoes rather than men's shoes as a whole and, in finding (contrary to the Commission) that the two companies did not compete, made reference to various differences in "appearance and workmanship" between the dress shoes manufactured by the two companies (280 U.S. at 295–296). But its discussion was limited to dress shoes because this was, as the Commission had found, McElwain's "principal product" (280 U.S. at 295). And the primary reason the majority gave for concluding that the two companies did not compete was that "the bulk of the trade of each company was in different sections of the country" (280 U.S. 296), with 95% of International's sales being in towns in the South and West with a population of 6,000 or less, and 95% of McElwain's sales being in cities with a population in excess of 10,000 in the North and East (*ibid.*).

Nothing in the opinion in *International Shoe* suggests that a broader classification might not have been an appropriate line of commerce, despite differences in detail in the types of shoes manufactured by the two companies, if they had been competitive in any such broader line. In fact, at the time the case was decided, Section 7 of the Clayton Act did not contain the language "any line of commerce" except with respect to acquisitions tending to create a monopoly (see 38 Stat. 30). And the Court made clear at the outset of its opinion that the charge that International's acquisition of McElwain tended to create a monopoly "has not been pressed and may be put aside" (280 U.S. at 294). The decision, therefore, was limited to a determination that the Commission had erred in finding that "the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community." Moreover, concluding that "[t]he existence of competition is a fact disclosed by observation rather than by the processes of logic" (280 U.S. at 299), the Court stressed that International's officers had testified that its shoes did not compete with McElwain's and that since "there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted."

United States v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, the most recent case in which this Court has had occasion to construe Section 7 of the Clayton Act, provides direct support for the conclusion that the lines of commerce utilized for analysis of the effects of a merger need not be the narrowest that could appropriately be supported by the record. There this Court, citing with approval its statement in *Van Camp & Sons Co.* v. *American Can Co.,* 278 U.S. 245, 253, that "if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied," held that automotive finishes and fabrics had "sufficient peculiar characteristics and uses * * * to make them a 'line of commerce' within the meaning of the Clayton Act" (353 U.S. at 593–94, 594–95, n. 13). But within the category of "automotive finishes" the Court included both "Duco," a lacquer used on automobiles (353 U.S. at 594, n. 12, 596) and "Dulux," an enamel used on refrigerators and other appliances but not automobiles (353 U.S. at 596, n. 20, 651). Similarly, the Court included within the automobile fabric category both imitation leather and coated fabrics, and both the fabrics used for the car's interior trim and the entirely different fabrics used on convertible tops (353 U.S. at 594, 652; see 126 F. Supp. 235, 296–300). In other words, while finding that the "bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics" (353 U.S. at 595), the Court recognized that the appropriate lines of commerce need not be broken down into their lowest common denominator.[20]

The district court cases that have passed upon mergers under the amended Section 7 have similarly

[20] See Barnes, *Markets, Competition and Monopolistic Tendencies In Merger Cases*, 40 Marq. L. Rev. 141, 157–58 (1956); Barnes, *Competitive Mores and Legal Tests*, 46 Geo. L. J. 564, 604 (1958); Bock, *Mergers and Markets, An Economic Analysis of Case Law*, 34 (1960).

held that an appropriate line of commerce need not be the broadest or narrowest possible, as long as it has sufficient peculiar characteristics to stand by itself. Thus, in *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D. N.Y), the court found *both* the steel industry generally and various of its subdivisions to be lines of commerce. And in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn.), affirmed, 206 F. 2d 738 (C.A. 2), the court identified the line of commerce as all jeweled watches, although recognizing appreciable differences in price, quality and distribution channels between the watches of the acquiring and acquired companies. See also *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y.), affirmed, 259 F. 2d 524 (C.A. 2) (appropriate market all refined sugar, including both beet and cane sugar); *United States* v. *Maryland & Virginia Milk Producers Ass'n, Inc.*, 167 F. Supp. 799, 803 (D.C.D.C.), affirmed, 362 U.S. 458 (milk is line of commerce despite differing classifications of milk with differing price ranges); *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 1961 CCH Trade Cases, ¶70,038 (C.A. 9) (appropriate line of commerce "census coarse" papers, including wrapping paper, envelope paper, gumming paper, waxing paper, plus manufactured paper bags).[21]

[21] Brown's brief (pp. 119–121) also refers to this Court's decisions in two Sherman Act monopolization cases, *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, and *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242. We do not

II. THE DISTRICT COURT PROPERLY FOUND THE RELEVANT SECTIONS OF THE COUNTRY TO BE THE ENTIRE NATION FOR MANUFACTURING AND CITIES AND THEIR IMMEDIATE ENVIRONS FOR RETAILING

As in the case of "line of commerce," Section 7 calls for the development of a focus in terms of "section of the country" for analyzing the evidence as to the impact of a merger on competition. The district court found (T. 59), and appellant does not dispute, that the appropriate section of the country in which to evaluate the effect of the Brown-Kinney merger upon the manufacturing of men's, women's and children's shoes is the nation as a whole.[22] It also found (T. 64–65) that

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believe that considerations of what is a relevant market for purposes of analysis in a monopolization case, where the critical questions are power over price or to exclude competition, are necessarily relevant to a determination of line of commerce under Section 7 where the issue is whether the acquisition may substantially lessen competition. See *United States* v. *Bethlehem Steel Corp.*, *supra*, 168 F. Supp. at 593, n. 36; *Crown Zellerbach Corp.* v. *Federal Trade Commission*, *supra*, 1961 CCH Trade Cases at pp. 78,152–153. See also Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 306–08, 315 (1956); Tait, *Recent American Antitrust Experience*, 22 U. of Pitt. L. Rev. 1, 10 (1960). But in any event these cases do not help appellant. The *du Pont* cellophane case obviously points toward a broad line of commerce despite marked distinctions between the particular elements thereof. And while this Court in *International Boxing* found that the trial court was not "clearly erroneous" in concluding that "there exists a 'separate, identifiable market' for championship boxing contests" (358 U.S. at 250, 251), it did not suggest that all boxing matches might not also be a relevant market for Sherman Act purposes or an appropriate line of commerce under the Clayton Act.

[22] See also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 600–601 (S.D.N.Y.); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn.), affirmed, 206 F. 2d

the appropriate sections of the country for determining the effect of the merger upon the retailing of men's, women's and children's shoes were those 138 cities of over 10,000 population [23] and their "immediate and contiguous surrounding area[s] * * * in which a Kinney store and a Brown (operated, franchise or [Wohl] plan) store [or leased department [24]] are located." While this latter conclusion is challenged by appellant on both factual and legal grounds (Br. 144–155), the district court's findings of fact (T. 61–64) are fully supported by the evidence of record, and the court applied proper legal concepts in reaching its conclusion.

A. THE RECORD CLEARLY SUPPORTS THE DISTRICT COURT'S FINDINGS WITH RESPECT TO SECTION OF THE COUNTRY

The district court found the record evidence to show that "retailers of 'men's', 'women's', and 'children's' shoes, whether sold separately or in combinations thereof, are actively, forcefully, competitively and actually vying with those handling a like line for the trade of the people in their cities and the imme-

738 (C.A. 2); *In the Matter of A. G. Spaulding & Bros., Inc.*, F.T.C. Docket No. 6478, Opinion of March 30, 1960, p. 8 (on appeal, *Spaulding & Bros.* v. *Federal Trade Commission*, Case No. 13,277, C.A. 3); *In the Matter of Pillsbury Mills, Inc.*, F.T.C. Docket No. 6000, Opinion of December 16, 1960, pp. 4, 17.

[23] As the district court noted (T. 65, n. 8), the 10,000 limitation resulted from the fact that most Kinney stores are located in the trade areas of cities of this size or larger and the government limited its evidence to such areas.

[24] While the court's ultimate conclusion is worded in terms of stores only, it makes clear in its preceding findings (T. 62–64) that it is including the shoe departments leased by Brown's subsidiary, Wohl.

diate and contiguous area" (T. 64). It made special findings concerning the St. Louis area (T. 62–63) on the basis of evidence introduced by an expert witness called by the appellant (T. 2386–2422). It determined that the shoe stores and shoe departments in the downtown area of a city were in competition with shoe stores in shopping centers in the suburbs, as well as with shoe stores located at intermediate points, and that this area-wide competition among stores as to men's, women's or children's shoes was not significantly affected by considerations of price or quality (T. 63). It also concluded, on the basis not only of evidence submitted by the government's numerous retailer witnesses but of the testimony of appellant's expert as well (T. 2391, 2411, 2412–13), that what "is true in the evidence concerning the area in which this Court is located [St. Louis] is likewise true to greater or lesser extent throughout the entire United States" (T. 63).

These findings rest on a firm evidentiary basis. The retailer witnesses called by the government testified uniformly that the effective areas of competition in which shoe retailers operate are limited to the separate cities and their immediate suburbs (T. 163–65, 170, 201–02, 210–11, 249, 255, 287–88, 290–91, 342, 372, 398, 411, 494, 618–19, 626–28, 664, 689, 1160–61, 1199). In situations where another city is located nearby, they said, the consumers in their city do not generally go to the other city to buy shoes (T. 287–88, 342, 618–19, 1160–61). The retailers consequently are not interested in the population residing appreciably beyond the city area and typically advertise in newspapers with a local city-suburb circulation and on radio stations located in their own cities (T. 249–50, 372–73, 461, 630–631). Similarly, the government's expert witnesses testified that "normally you would find about 85 to 90% of the sales in marketing concentrated in a city" (T. 1027), and that therefore the appropriate section of the country for shoe retailing should either be the city or at most the city plus the area immediately surrounding it (T. 1027, 2719–21, 2771).

There was no real evidence supporting the use of any broader area. The appellant's principal expert witness, Professor Dean, did advocate the utilization of the Standard Metropolitan Area where available and, failing this, the county in which the city was located (T. 2547–48). But he admitted that shoe retailing was local in scope and that the primary reason for his advocating the use of the broader areas was the ready availability of statistical data for such broader areas (T. 2548). The government's expert witness, Dr. Gould, in testifying on rebuttal with respect to this suggestion, pointed out (T. 2719–21) that the Standard Metropolitan Areas proposed by the appellant are often meaningless in terms of fixing the retail trade market for shoes, either because of their extreme size [25] or because such Standard Metropolitan Areas as Chicago and New York include cities

[25] For example, the Standard Metropolitan Area in which Hibbing, Minnesota, is located covers two large counties in two different states and includes 7,591 square miles—an area larger than the states of Rhode Island, Connecticut, Delaware and New Jersey combined. Similarly, the Standard Metropolitan Area for Laredo, Texas, covers 3,295 square miles.

such as Elgin, Illinois, and Newark, New Jersey, whose retailers compete to only a minimal degree with the stores in and around the principal city of the particular Standard Metropolitan Area (see T. 1161 (Elgin not in Chicago shoe market), 2771 (Hammond, Indiana, not in Chicago retail shoe market)).

The appellant argues (Br. 150) that at least without a specific market analysis of each of the 138 alleged retail sections of the country there was "literally no evidence" to support the district court's finding that the retail markets for shoes in other markets would tend to follow the St. Louis pattern. In taking this position in favor of an unmanageable extension of any merger case involving acquisition of widespread retail facilities, appellant ignores the consistent testimony of the government's retailers cited above, which bears out the court's conclusions that the pattern of competition between the shoe stores and departments in and around that city is generally followed throughout the country. See also pp. 129–30, *infra*.

Nor are the court's conclusions weakened by the fact that retailers in one suburban shopping center at the outskirts of a large city may not directly compete with retailers in a shopping center located at an opposite boundary. If the record disclosed a pattern in which the Brown outlet was located in one suburb and the Kinney store in another widely separated suburb, the issue posed might take on significance. But in fact substantially all of the Brown outlets and most of Kinney's are in or very close to the center of the cities involved (see, *e.g.*, T. 173, 197, 260–61, 460, 475, 493, 619, 859; GX 9, 10, R. 60–70, 71–209), and the consistent testimony was that the two were in competition with one another as well as with other shoe stores in the retail trade area (see pp. 32–36, *supra*).

B. THE DISTRICT COURT COULD LEGALLY FIND THAT A CITY AND ITS ENVIRONS CONSTITUTE A SECTION OF THE COUNTRY FOR EVALUATING THE EFFECT OF THE MERGER

It is well established that conduct may violate the Sherman and Clayton Acts that affects competition only in a number of separate cities (see, *e.g., Schine Chain Theatres* v. *United States,* 334 U.S. 110; *United States* v. *Paramount Pictures,* 334 U.S. 131) or even a single city (*e.g., Binderup* v. *Pathe Exchange,* 263 U.S. 291; *Lorain Journal Co.* v. *United States,* 342 U.S. 143; *United States* v. *Employing Plasterers Ass'n,* 347 U.S. 186; *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115; *William Goldman Theatres* v. *Loew's, Inc.,* 150 F. 2d 738, 743–44 (C.A. 3), certiorari denied, 334 U.S. 811. And at least two lower courts have held that under the amended Section 7 of the Clayton Act a city or metropolitan area can be a section of the country within which the effects of an acquisition upon competition may be tested. *United States* v. *Columbia Pictures Corp.,* 189 F. Supp. 153, 193–94 (S.D.N.Y.) (New York City Metropolitan Area appropriate section of the country to evaluate effect of acquisition of television film library of competitor); *United States* v. *Maryland & Virginia Milk Producers Ass'n, Inc.,* 167 F. Supp. 799 (D.C.D.C.), affirmed, 362 U.S. 458 (Washington Metropolitan Area section of country for evaluating acquisitions of dairies by milk cooperative). Appellant nonetheless advances a fanciful argument that "the geographical areas selected by the district court—towns and cities and their 'immediate and contiguous surrounding area'—cannot, as a matter of law, be sections of the country for shoe retailing for purposes of amended Section 7" (Br. 148).

This argument stems from the fact that Congress in amending Section 7 in 1950 substituted the phrase "in any section of the country" for the terms "in any section or community" and from a statement by Mr. Kelley, the General Counsel of the Federal Trade Commission during the course of legislative hearings on the bill that culminated in the 1950 amendments, that he did not believe the Act would be violated if Sears, Roebuck took over Montgomery Ward or "maybe four of the big department stores in New York went over into one ownership" (Hearings on H.R. 2734 before a Subcommittee of the Senate Judiciary Committee, 81st Cong., 1st and 2nd Sess., p. 43). But, as shown below, Congress made clear that the amendment eliminating the word "community" did *not* necessarily preclude a city from qualifying as a section of the country, and Mr. Kelley subsequently in his testimony expressly stated his opinion that New York City could well be a "section of the country" (*id.* at 44, and see pp. 42–43, 46).

The reason why the word "community" was eliminated at the time of the 1950 amendments to Section 7 is set out in the Senate Report accompanying the bill. The "problem," the Committee indicated, was that, while "on the one hand it was desired that the test [of a violation of Section 7] be more inclusive and stricter than that of the Sherman Act, on the other hand, it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies" (S. Rep. No. 1775, 81st Cong., 2nd Sess., p. 4). The use of the word "community," the Report indicated, "raised a storm of controversy" since it was argued that the Act as so worded "might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence, the word 'community' was dropped from the subsequent versions of the bill" (*ibid.*). But the Committee went on to point out that the bill had been "broadened" by making the phrase "in any section of the country" applicable to both lessening of competition and the tendency to create a monopoly, instead of relating only to the former as in the original laguage of Section 7. The consequence of this change, the Committee indicated, was that the Act would be violated "if, as a result of an acquisition, there would be a * * * tendency to create a monopoly in any section of the country" (*id.* at 5). Finally, the Report, directly addressing itself to the meaning of the term "section of the country", stated (*id.* at 5–6):

> What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large

machine tools, might well be meaningless for a light product, such as milk.

As the Supreme Court stated in *Standard Oil Co.* v. *U.S.* (337 U.S. 293), "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."

In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.

It is thus perfectly clear from this and similar statements in the legislative history (see, *e.g.*, Hearings on H.R. 2734, before Subcommittee of Senate Judiciary Committee, 81st Cong., 1st and 2nd Sess., pp. 68–69, 132–33; H. Rep. No. 1191, 81st Cong. 1st Sess., p. 6) that the elimination of the word "community" was not intended to, and does not, foreclose the court from fixing upon a city (or a city plus its contiguous suburbs) as the appropriate section of the country. This is particularly the case where, as here, the question presented is the impact upon retailing in a large number of major trade areas of a merger between two major components of an important industry.[26] The ultimate fallacy in appellant's argu-

[26] We do not mean to suggest that a single city area could not be of sufficient competitive significance to qualify as a section of the country in a particular case. See *United States* v. *Columbia Pictures Corp.* and *United States* v. *Maryland & Virginia*

ment is that its inescapable logical consequence is the conclusion that there can be no merger which violates Section 7 because of its effect upon retail markets. This is obviously contrary to the intention of Congress.

Moreover, there is a second aspect of the court's findings on section of the country that must be taken into account. In evaluating the effects of a merger between two nationwide concerns, both engaged in shoe retailing in a large number of separate retail trade areas, the court necessarily had to focus on the particular retail markets in which both Brown and Kinney operated. But at the same time, the total impact of the merger could be appraised only by looking to the national retail picture as a whole. Thus, it was altogether appropriate for the district court to consider not only the competitive effect of the merger on shoe retailing in each city and its environs in which both Brown and Kinney have outlets, but also the impact on competition in shoe retailing generally of a tendency to lessen competition in numerous important retail markets.

The nationwide impact upon retailing cannot be ignored. A violation of Section 7 of the Clayton

Milk Producers Ass'n, both *supra*. For, as indicated in the Senate Report cited above, Congress' intent in eliminating the word "community" was merely to avoid the implication that it was precluding "*any* local enterprise in a small town from buying up another local enterprise in the same town" (S. Rep. No. 1775, 81st Cong., 2nd Sess., p. 4, emphasis added). There was no suggestion that even a "small town" might not be an appropriate section of the country if a merger of competing concerns therein had a significant impact "from an economic point of view" (*id.* at 5) upon the competitive structure therein.

Act might well exist if a substantial competitive factor were eliminated in only one section of the country, even though in all or most of the other sections of the country no such finding could be made. See *United States* v. *Columbia Pictures Corp.,* 189 F. Supp. 153, 192–94 (S.D.N.Y.); *Erie Sand & Gravel Co.* v. *Federal Trade Commission,* 1961 CCH Trade Cases, ¶ 70,028 at 78,096–97 (C.A. 3). But where, as here, the acquisition actually results in the elimination of a substantial competitive factor in each of a large number of markets, a court can and should consider this circumstance as indicating a probable lessening of competition or tendency to monopoly in the industry generally, as well as in the specific trade areas directly affected. The court was therefore clearly correct in considering the total nationwide impact upon shoe retailing of Kinney's elimination as a substantial independent competitive force, as part of the analysis leading to its ultimate determination that the gravity of the violations required a complete divestiture of Brown's interest in Kinney.

III. THE DISTRICT COURT PROPERLY FOUND THAT THE MERGER MAY SUBSTANTIALLY LESSEN COMPETITION AND TEND TO CREATE A MONOPOLY IN THE MANUFACTURING AND RETAILING OF SHOES

The district court, finding that the merger of Brown and Kinney "would establish a manufacturer-retailer relationship which deprives all but the top firms in the industry of a fair opportunity to compete" (T. 75), and that "the merger would eliminate

Kinney as a substantial competitive factor to Brown in the shoe retailing field" (T. 74–75), concluded that in both the manufacturing and retailing of men's, women's and children's shoes, "the reasonable probability is the further substantial lessening of competition and the increased tendency toward monopoly" (*ibid.*).[27] It emphasized "the trends in the industry and the true economic impact of this particular merger, which takes place among an industry having a few large firms that control a sizable segment of the total with the balance divided among hundreds of others having only minute segments" (T. 68). Section 7 of the Clayton Act, as amended, the court concluded from examination of its legislative history and the relevant judicial determinations, goes beyond the Sherman Act's proscription of acquisitions that demonstrably restrain commerce or actually achieve monopoly power, to reach acquisitions that have a "reasonable likelihood" of leading to a substantial lessening of competition in the relevant market. Its aim is to stop in their incipiency combinations looking towards the concentration of business into the hands of a few large concerns able to dictate the terms of competition under which all other elements of the industry must operate.

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[27] The court recognized that "due to the nature of the shoe industry, no one manufacturer, no one retailer, no one manufacturer-retailer combined, has a large percentage of the market" (T. 72), and that, if only the horizontal impact of the merger at the manufacturing level is considered, "the acquisition of the manufacturing facilities of Kinney by Brown, would but slightly lessen competition or tend to create a monopoly when considered alone" (T. 75).

The essential issue in this case is thus a simple but significant one: at what stage in a developing process of industrial concentration, in which the largest and most powerful manufacturers in an industry are acquiring control over major retail outlets, does Section 7 of the Clayton Act step in to call a halt? As we show below, the district court, in determining that Brown's acquisition of Kinney was such a stopping point, applied the proper legal criteria for evaluating the effects of such mergers (pp. 84–97, *infra*) and correctly found that this particular merger has a reasonable probability of such a number of substantial adverse effects upon competition in the manufacture and retailing of men's, women's and children's shoes—effects that clearly require its undoing (pp. 98–137, *infra*).

A. THE DISTRICT COURT EMPLOYED THE CORRECT LEGAL STANDARD FOR JUDGING THE EFFECTS OF THE MERGER ON COMPETITION AND CONCENTRATION

Section 7 of the Clayton Act, as enacted in 1914, was intended to go beyond the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1–7) to halt the trend to undue industrial concentrations by preventing mergers or acquisitions that might substantially lessen competition or tend to monopoly but that could not be shown to result in the degree of restraint or market control precluded by the Sherman Act. See S. Rep. No. 698, 63rd Cong., 2nd Sess., p. 1; *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 589. Section 7 was aimed at restraints of competition "in their incipiency."

As interpreted by the courts, however, Section 7 did not fulfill expectations because of three shortcomings. (1) It was limited to stock acquisitions, which left untouched acquisitions of corporate assets even in cases where the latter resulted from previous stock purchases. See *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554; *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U.S. 587. (2) The prohibition against stock acquisitions "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition," if read literally, might have precluded all mergers between rival firms, including those having no significant impact upon competition; therefore, a tendency developed to limit Section 7 by what amounted to a "rule of reason" and to judge acquisitions by standards closely approximating those applicable to the Sherman Act. See, *e.g.*, *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346; *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117, 123–124 (N.D. Ohio). This test was too loose. (3) It was generally understood, prior to this Court's decision in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 590–92, that the section did not apply to vertical mergers between non-competitors.

The 1950 amendments, 64 Stat. 1125, sought to correct these three shortcomings. The stock acquisition "loophole" was remedied by a provision making the section applicable to such acquisitions among companies subject to the jurisdiction of the Federal Trade Commission. To dispose of the other two problems, Section 7 was amended to eliminate the reference to competition between the buyer and seller and to make the test whether "in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."

The intent behind these changes in the law was clearly spelled out in the complementary reports of the House and Senate Judiciary Committees on the bill (H.R. 2734, 81st Congress) that led to the 1950 amendment of Section 7. (See H. Rep. No. 1191, 81st Cong., 1st Sess. (hereinafter "H. Rep."); S. Rep. No. 1775, 81st Cong., 2nd Sess. (hereinafter "S. Rep.").) As the Senate Report makes clear, while the "purpose [of the bill] was to make this legislation [Section 7] extend to acquisitions which are not forbidden by the Sherman Act," a problem facing the Congress was that "on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act," while "on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies" (S. Rep., p. 4). To accomplish this dual aim the references in the original language of Section 7 to competition between the acquiring and acquired firms and to the lessening of competition "in any community" (see pp. 78–79, *supra*) were eliminated. The Senate Committee explained (S. Rep., pp. 4–5):

> [T]he excessive sweep that has been given to Section 7 of the present Clayton Act by these two features of that section has been largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test. By eliminating the provisions of the existing section which appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. * * * *The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.* [Emphasis added.] [28]

The two reports also discuss in some detail a number of the specific antitrust problems with which Congress intended Section 7 to deal. Both devote considerable attention to the increasing tendency towards concentration of economic power (see S. Rep., p. 3, H. Rep., pp. 2–3). The Senate Report, after asserting that the bill's purpose "is to limit future increases in the level of economic concentration resulting from

[28] The report goes on to stress (p. 5) that the bill extended the coverage of the term "in any section of the country" (previously applicable only to "lessening of competition") to make it relate to tendencies to create a monopoly as well, and that conversely the term "in any line of commerce" was, for the first time, to cover acquisitions substantially lessening competition. Thus acquisitions were to be unlawful that either substantially lessen competition or tend to create a monopoly "whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition."

corporate mergers and acquisitions" (S. Rep., p. 3) and that "there is substantial agreement that the level of economic concentration is extremely high" (*ibid.*), states that the bill's enactment "will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy" (*ibid.*). Further stressing the objective of preserving the existing areas of multiple competition, it cites, as "[t]he type of problem to which this bill is addressed," a Federal Trade Commission Report on the Merger Movement, pointing out that a series of small acquisitions by a large firm may be "individually so minute as to make it difficult to use the Sherman Act test against them" but that:

> Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interests of its rival * * *. [S. Rep., p. 5.]

The House Report is equally emphatic. Citing evidence that "the long-term trend of concentration has been steadily upward" (H. Rep., p. 2) and that "[t]he importance of mergers and acquisitions as a cause of economic concentration has increased rapidly during recent years with the acceleration of the merger movement" (*ibid.*), it goes on to state that "recent merger activity has been of outstanding importance in several of the traditionally 'small business' industries. More acquisitions and mergers have taken place in textiles and apparel and food and kindred products—predominantly 'small business' fields—than in any other industries." (H. Rep., p. 3.)

The House Report, like that of the Senate (see pp. 86–87, *supra*), stresses that the standards under which acquisitions are to be tested under Section 7 are much stricter than those applicable in Sherman Act cases. The report sets out a number of specific tests for judging the validity of a particular acquisition which are of the utmost importance as a guide to proper resolution of this case:

(1) The report specifies that the section's prohibitions are "not intended to be applicable only where the specified effect may appear on a Nation-wide or industry-wide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country" (H. Rep., p. 8).

(2) The two Section 7 standards of illegality are to be interpreted in the same manner "which the courts have applied in interpreting the same language as used in other sections of the Clayton Act" (*ibid.*).

(3) Since acquisitions "have a cumulative effect" and market control may be achieved by a series of transactions rather than a single transaction, Section 7 is intended to "permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition"

even though it does not amount to a Sherman Act violation (*ibid.*).

The report goes on to specify a number of conditions, any one of which, if shown to result from a given merger, would demonstrate that the merger may substantially lessen competition or tend to create a monopoly. They include (*ibid.*):

> a. "elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition."
>
> b. "increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to become decisive."
>
> c. "establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete."[29]

These precepts for transforming Section 7 into an effective bar to the concentration of American industry through the merger route have been followed in all of the lower court decisions which have passed upon acquisitions under the amended language. See *United States* v. *Bethlehem Steel Corp.* 168 F. Supp. 576 (S.D.N.Y.);[30] *American Crystal Sugar Co.* v.

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[29] This emphasis on the fact that the new language covers vertical acquisitions is reiterated in the Senate Report (pp. 8, 11).

[30] In *Bethlehem Steel* Judge Weinfeld succinctly summed up the purposes of the 1950 amendments (168 F. Supp. at 583):

> As stated in those Reports they were, in some instances in haec verba, (1) to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the

Cuban-American Sugar Co., 152 F. Supp. 387 (S.D. N.Y.), affirmed, 259 F. 2d 524 (C.A. 2); *Hamilton Watch Co.* v. *Benrus Watch Co.* 114 F. Supp. 307 (D. Conn.), affirmed, 206 F. 2d 738 (C.A. 2); *Crown Zellerbach Corp.* v. *Federal Trade Commission,* 1961 CCH Trade Cases, ¶70,038.[31] Moreover they were

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> merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and (4) to avoid a Sherman Act test in deciding the effects of a merger.

See also 168 F. Supp. at 603, 606 (cited by the court below at T. 65–66).

[31] The illuminating opinion of Judge Pope in *Crown Zellerbach* points out, *inter alia:*

> Congress by the use of the words "may be" made it plain that the purpose of the amended statute was to arrest restraints of trade "in their incipiency and before they developed full fledged restraints violative of the Sherman Act." * * * And to accomplish this end it is plain that Congress had to see to it that no dominant operator in any industry should be permitted to frustrate the purposes of the Act by absorbing its rivals bit by bit * * * a substantial lessening of competition was to be prohibited whether the acquiring corporation accomplished these results by one immense gobble of another large producer or whether it set out to produce the same results by nibbling away at small producers. (1961 CCH Trade Cases at 78,160.)

and further:

> Congress was not concerned about increased efficiency; it was concerned about the competitor, the small businessman whose "little independent units are gobbled up by bigger ones," and about other competitors whose opportunities to meet the prices of the larger concerns and hence compete with it might be diminished by a merger which

in large part anticipated by this Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, in passing upon the legality of du Pont's acquisition of approximately one quarter of General Motors' stock under the old language of Section 7. The section's application to vertical mergers was affirmed (353 U.S. at 590–92), as was the inappropriateness of Sherman Act tests (353 U.S. at 589).[32] The ultimate question, the Court held, is whether a "reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce" (353 U.S. at 592), and the Court observed that "[t]he statutory policy of fostering free competition is obviously fur-

increased the concentration of power in the large organization. * * *

As the legislation was under consideration by Congress it was duly appreciated that decentralized and deconcentrated markets are often uneconomic and provide higher costs and prices. All this it laid aside in its concern over the "curse of bigness" and the concentration of power in the nation's markets which Congress thought advantaged the big man and disadvantaged the little one. (*Id.* at 78,163, footnotes omitted.)

[32] The Court there said:

Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. * * *

thered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute" (353 U.S. at 607). What was true of the unamended Section 7 is at least equally true today.

Appellant does not directly dispute the district court's parallel analysis of the legal framework in which the Brown-Kinney merger is to be judged. It does, however, challenge (Br. 179) the court's reference (T. 73) to the fact that a series of small accretions may well be as significant as one large acquisition.[33] This, it contends, is to apply a purely speculative standard under which any merger, no matter how small its impact upon the competitive scene, might be forbidden. But it is clear that the district court was not suggesting that a small merger is as important as a large one but only that "[w]here several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases" (S. Rep., p. 5) must be looked to in determining whether the particular acquisition challenged has a reasonable likelihood of substantially lessening competition.

This necessity for examining a particular merger in the light of the trends in the industry, and the

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[33] The district court's simile, equating a series of acquisitions to a number of bites at an apple, is similar to that appearing in the dissenting opinion *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 534. As the court of appeals pointed out in *Crown Zellerbach* v. *Federal Trade Commission*, *supra* at 78,163 n. 25, a principal objective of the amendment to Section 7 of the Clayton Act was to insure that mergers would not be judged thereunder by the standards of the majority decision in the *Columbia Steel* case. See *e.g.*, H. Rep., pp. 9–11.

acquiring company's role therein, was also clearly stated in the decisions in *United States* v. *Bethlehem Steel Corp., supra,* 168 F. Supp. at 606, and *Crown Zellerbach v. Federal Trade Commission, supra,* 1961 CCH Trade Cases at 78,164. The concept is not novel, nor is it restricted to the amended Section 7 of the Clayton Act. This Court has long held that, even where no conspiracy is charged, the competitive impact of a practice engaged in by a particular company must be viewed in relation to the practices of the industry as a whole. See *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346, 357; *Standard Oil Co.* v. *United States,* 337 U.S. 293, 309–10; *Federal Trade Commission* v. *Motion Picture Advertising Co.,* 344 U.S. 392, 395, 399–400. And in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 532, this Court made clear that a company's past acquisitions could be considered in evaluating the validity of its latest acquisition. See also *id.* at 534–536 (dissenting opinion), *United States* v. *Griffith,* 334 U.S. 100, 102, 107; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 178, 181 n. 4.

Appellant also argues (Br. 116) that the district court "did not seek to measure the impact of the acquisition upon *competition*" (emphasis in original) but, instead, directed its attention to the effect of the merger upon "particular manufacturers and retailers who might be potential competitors of Brown or Kinney." The contention is totally inaccurate. The district court, as its opinion makes clear, did not concern itself with the effect of the merger upon any particular competitors of Brown and Kinney to the exclusion of others of the same class. It is quite true that Judge Weber devotes his primary attention to the merger's serious effects upon the smaller, unintegrated manufacturer of shoes, and the independent shoe retailer. But if appellant's point is that the judge's analysis of the merger is deficient because he did not analyze its immediate impact upon the other large integrated manufacturer-retailers (or upon such large multi-product chain stores as Sears-Roebuck, Montgomery Ward or J. C. Penney), the short answer is that the legislative history of Section 7 makes it absolutely clear that the elimination of small competitors and the concentration of an industry into the hands of a few large concerns as a result of stock or asset acquisitions was exactly what Congress intended to prevent.

Finally, appellant, in an effort to support its basic reliance upon the Sherman Act "rule of reason," attempts to salvage the "public injury" test by which *International Shoe Co.* v. *Federal Trade Commission, supra,* and a number of other cases in the 1920's and early 1930's, limited the reach of the original Section 7 to those acquisitions that "probably will result in lessening competition to a substantial degree * * *; that is to say, to such a degree as will injuriously affect the public" (280 U.S. at 298). It relies for this position upon portions of the House Report (pp. 7, 8) and Congressional debates (95 Cong. Rec. 11487; 96 Cong. Rec. 16435) in which *International Shoe* was cited to still fears that the bill might preclude mergers between two small companies even though they would not have any substantial effect upon competition. However, nothing in these statements is inconsistent with the repeated insistence in the House and Senate Reports (see H. Rep., pp. 3, 8; S. Rep., pp. 4–5, 6) and in the floor debates (96 Cong. Rec. 16502–16503) that Section 7 was intended to go far beyond the Sherman Act to stop "in their incipiency" combinations which might subsequently develop into those actual restraints or monopolies outlawed by the Sherman Act.

What appellant is clearly attempting to do here, and throughout its brief, is to have this Court apply to the instant merger the same Sherman Act standards by which it evaluated the impact of United States Steel's acquisition of Consolidated Steel in *United States* v. *Columbia Steel Co.,* 334 U.S. 495. What appellant overlooks is that this Court, in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 311–13, construed the standard of Section 3 of the Clayton Act, 15 U.S.C. 14, which is identical to the standard of amended Section 7, much more strictly than the Sherman Act.[34] The Court stated that the prohibition of conduct whose effect "may" be to substantially lessen competition or tend to create a monopoly "has not left at large for determination in each case the ultimate demands of the 'public interest'" (337 U.S. at 311) and that "[w]e are faced, not with a broadly phrased expression of general policy,

[34] This distinction between the Sherman Act approach and the standards by which Congress intended acquisitions to be judged under the broader reach of Section 7 of the Clayton Act is well expressed in the concurring opinion of Commissioner Elman in the recent decision of the Federal Trade Commission in *Matter of Union Carbide Corp.*, Docket No. 6826, Sept. 25, 1961 (mimeo.).

but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision" (*id.* at 312). It further observed that acceptance of the Sherman Act tests "would be to stultify the force" of the congressional purpose in enacting the section in question (*id.* at 313). *Standard Stations* (although not specifically named) was plainly one of the decisions the House Committee had in mind when a year later it stated that the standards for judging acquisitions under the amended language of Section 7 of the Clayton Act "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act" (H. Rep., p. 8).

In sum, as the district court found (T. 51–52), Section 7 of the Clayton Act, as amended in 1950, precludes any acquisition, vertical or horizontal, that to any significant degree threatens to increase industry concentration or to impair the competitive ability of the smaller companies in the particular industry. The touchstone is not whether the acquisition demonstrably will have these effects, but rather whether there is a reasonable likelihood that it will. And this is to be determined by application of such empiric tests as whether the acquisition eliminates a substantial competitive factor in a significant market or markets, or results in vertical or horizontal accretions of power jeopardizing the capacity of the smaller companies in the market to compete.[35]

[35] See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226 (1960); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. of Pa. L. Rev. 176 (1955).

B. THE RECORD CLEARLY SUPPORTS THE DISTRICT COURT'S FINDING THAT THE MERGER MAY SUBSTANTIALLY LESSEN COMPETITION IN THE MANUFACTURING OF SHOES

The district court determined that, while Brown's acquisition of Kinney's manufacturing facilities, as such, would "but slightly lessen competition" between manufacturers of men's, women's and children's shoes, the vertical combination of Brown's manufacturing facilities with Kinney's retail outlets would substantially lessen competition among shoe manufacturers and tend to monopoly in each of the three lines of commerce (T. 75). The court reached this ultimate conclusion upon basic findings that the merger would foreclose a substantial market otherwise available to Brown's competitors in the manufacture of each of the three categories of shoes, and would further adversely affect Brown's smaller competitors by increasing the total resources of the merged company and enhancing the already great competitive advantages that Brown possesses to an extent threatening to become decisive (T. 71–72). When "weighed in the same scale" with a series of acquisitions increasing concentration in the shoe industry generally, in which Brown has played a major role, "the trend," the court found, is toward the "eventual elimination of small manufacturers" (T. 73).

1. The merger trend poses a serious threat to competition among shoe manufacturers

The two-pronged trend among the major shoe manufacturers toward ever-larger accretions of economic power was amply established on the record. First, the major manufacturers have been buying up large numbers of additional plants, while the total number of shoe manufacturers has been declining substantially. Second, these same manufacturers have been acquiring and then expanding great chains of retail outlets. The threat that these activities pose to the independence of the smaller manufacturers has plainly reached such proportions as to make the Section 7 proscriptions operative.

Concentration of Manufacturing Facilities. There has, in recent years, been a marked tendency toward horizontal concentration at the manufacturing level of the shoe industry. The district court found (Tr. 70) that between 1950 and 1956, 7 companies independently operating 25 manufacturing plants were acquired by the ten largest companies.[36] During the same period, while the total number of shoe manufacturing plants was decreasing by over 150, or some 10 to 15%, the number of plants operated by the four largest manufacturers increased by almost 35% from 127 to 171 (GX 20, 21, R. 226, 228). This increase in the number of plants owned by the largest manufacturers disposes of appellant's contention (Br. 184) that the total reduction in shoe manufacturing plants only reflects increased efficiency and thus has "no bearing on the fate of the smaller manufacturer." It is apparent that a manufacturer with a number of plants is in a far better position to cope with changes in style and technique and to offer a full line of shoes than his competitor who must rely on a single plant (see, *e.g.*, pp. 15–16, *supra*). Especially is this so in view of the fact that the small factory has become the

[36] The record actually indicates that between 1950 and 1955 the five largest shoe manufacturers acquired a total of 19 independent shoe manufacturing companies (GX 11, R. 210–212).

optimum-size plant in the shoe industry (see pp. 14–15, *supra*).

Moreover, between 1947 and 1954 the total number of shoe manufacturers declined by almost 10% from 1077 to 970 (GX 207, R. 928).[37] Appellant attempts to discount these figures by reference to the alleged ease of entry into shoe manufacturing (Br. 16, 203–05). But aside from the fact that the undisputed figures show a steady decline in the total number of shoe manufacturers, there is no evidence in the record of any significant degree of actual entry into the shoe manufacturing business since 1950 when the period of widespread mergers commenced. The best appellant can point to is evidence with respect to three or four manufacturers who entered the trade in the early 1940's (App. Br. 16) or "in the last comparatively few years" (T. 1647) or "within the last ten years" (T. 1651). This is coupled with a vague statement by an officer of the United Shoe Machinery Company, in response to an inquiry as to whether there have been a "large number" of new manufacturers entering the industry "in the recent past," that "they continue to come in at about the same rate each year" (T. 1652). But this was directly after he had been asked to name examples of other firms "which have come into business in the recent past and have been successful" and had responded "I don't think of any too outstanding at the moment" (*ibid.*).[38]

[37] And by another 10% to 872 by 1958. See *1958 Census of Manufactures* (MC 58(2)–31A, p. 6).

[38] The court later asked the witness what he meant by the words "same rate" and whether there was any fixed rate of entry within the "past ten years." But the witness was unable to provide any information (T. 1669).

We submit that this lack of evidence of any substantial new entry into shoe manufacturing during the period of the merger trend is highly significant, especially against the background of an expanding market in which the total quantity of shoes manufactured and distributed is constantly increasing (see p. 10, *supra*). See *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 152 F. Supp. 387, 400 (S.D.N.Y.), affirmed, 259 F. 2d 524 (C.A. 2); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 606–07 (S.D.N.Y.). The allegedly low cost of establishing a new shoe manufacturing business (App. Br. 19–20, 204)[39] only highlights the lack of new concerns and supports the conclusion that any new firm would find that the large vertically integrated companies significantly limit its chances for successful development.[40]

Appellant's other principal argument against the existence of a merger trend harmful to the small independent manufacturer is based upon statistics showing that the four largest manufacturers of shoes had the same 23.2 percentage of the total industry shoe

[39] But see the testimony of Brown's vice president as to the "tremendous cost" of opening a new plant and as to the 18-month operating period in which there would be no profits (T. 2221–22).

[40] Appellant's references (Br. 21–22, 205) to the growing competition from imported shoes, and from canvas-top, rubber-soled shoes made by entirely different processes by a largely different group of manufacturers (in addition to being inconsistent with its insistence upon narrower lines of commerce), only serve further to demonstrate the difficulties the small manufacturers face in competing for the more and more limited number of retail outlets.

production by pair in 1956 as they did in 1939, whereas the many small manufacturing companies below the top 50 increased their share of the market from 48.7 percent to 54.5 percent of the total. From these figures appellant draws the conclusion that "the shoe manufacturing industry shows no tendency towards an increase in concentration" (Br. 15, see *id.* at 16–22).

Using combined figures for the big four manufacturers gives a misleading picture of the results of the mergers. International and Endicott-Johnson were relatively minor participants in the merger trend (GX 58, 59, R. 435, 436). Their combined production increased less than 2% from 85.8 million pairs in 1951 to 87.3 million in 1957. In contrast Brown and General Shoe, who were among the most active participants in the merger movement, increased their combined production during that period from 35.6 million to 57.6 million pairs of shoes or by almost 70% (GX 58, R. 435). It is also noteworthy that the figures upon which appellant relies break off in 1956 and thus do not reflect the marked production increase by Brown in 1957 when it manufactured 29.1 million pairs of shoes, 2.2 million more than in 1956, in a year in which all its major competitors were either just about holding their own or actually retrogressing (*ibid.*).[41]

[41] As indicated, note 5, *supra*, the upward curve in General's production, previously as marked as Brown's, was blunted after the government brought an antitrust suit that culminated in a consent decree in February 1956, restricting General from making further acquisitions for a five-year period.

But the main vice in appellant's statistical argument is that it is necessarily directed to the problem of what has happened rather than what has been shown to be reasonably likely to happen. In the first place, it often takes some little while before a merger movement such as that in the shoe industry in the mid-1950's has its full effect on competition.[42] Secondly, and far more importantly, it will obviously not be possible to "nip monopoly in the bud" (*Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163, 169 (C.A. 3)) if we must first await statistical proof that the adverse consequences have already occurred.

Acquisition of Retail Outlets. Of even greater significance here than the concentration of manufacturing facilities is the vigorous programs of the leading shoe manufacturers—indeed, in competition with one another—to acquire large retail shoe chains (as well as a number of smaller retail outlets). This "definite trend in the shoe industry of manufacturers of 'men's', 'women's' and 'children's' shoes obtaining retail outlets" (T. 68), and Brown's major role therein are perfectly clear on the record below.

As indicated in the Statement, *supra,* at a time when chain stores with more than 100 units had increased as a percentage of all shoe stores from 11% to 20% and their sales had increased from 21% to 33% (GX 244, 2823; *1958 Census of Business, Retail Trade, Single Units and Multiunits* (BC58-RS3, pp. 4-6))

[42] Between 1955 and 1956 four large manufacturers increased their products by 1.2% while the small companies below the top fifty were declining by .7% (DX LL, R. 3349).

the largest manufacturers were staking out their claims to such retail outlets. Thus in the five-year period from 1950 to 1955 the six largest shoe manufacturers acquired 13 retail shoe chains with 1300 outlets at the time of purchase. During the period between 1945 and 1956 the six increased their total number of owned and operated outlets from 1405 to 3830, 17.4% of the total number of shoe stores (GX 22, R. 230). To these figures should be added the increasing number of stores, that, although remaining independent as to ownership, were entering into franchise arrangements with the large manufacturers under agreements to feature their shoes to the exclusion of competing brands. While there are no statistics on this development for the industry as a whole, Brown alone expanded this type of operation in the period from 1950 through 1956 from 470 to 631 outlets (GX 68, 221, R. 452, 1325) and there is testimony that the other members of the "big four" were also increasing their activities in this area (see T. 889–93).[43]

In this race to gobble up available shoe outlets Brown was both an instigator and a highly successful practitioner. It started the decade with no stores of its own. Its 1951 purchase of Wohl (the nation's fourth largest chain in 1945) was, according to Brown's president, "the first really big acquisition by one of the leading shoe manufactur-

[43] Recent testimony before the Senate Small Business Committee indicates that International alone has about 600 franchise dealers similarly committed not to carry conflicting lines. See *Shopping Centers—1959*, Hearings Before a Subcommittee of the Senate Select Committee on Small Business, 86th Cong., 1st Sess., pp. 96–97.

ers in the industry" (GX 219, R. 1299).[44] It sought to purchase Florsheim, a major producer-distributor of men's shoes (T. 1417) but, losing out to International, purchased instead the Regal Company. When General purchased the Innis chain with which Brown had been doing business, Brown promptly bought Wetherby-Kayser (T. 1390, 1392). And now it seeks to cap its efforts[45] by the purchase of Kinney, the largest shoe chain in the country previously outside the control of the six largest manufacturers.[46]

Appellant attempts to minimize this trend in several ways. It argues that the court's figures refer to shoe stores[47] and that these stores make up only 22,000 out

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[44] In Brown's annual report for 1951 the Wohl acquisition was stated to have "been recognized throughout the shoe industry as one of the most important developments in recent years because it brings together one of the nation's largest shoe manufacturers, and the nation's largest operator of leased shoe departments" (GX 220, R. 1314).

[45] But not necessarily to end them. Appellant's president has stated (see GX 219, R. 1298) that it had an "open mind" as to possible further purchases.

[46] As Brown's president modestly put it, "General and Brown and International acquired the larger companies" (T. 1397).

[47] Appellant contends (Br. 173, 180, footnotes) that it was improper for the court to consider the Wohl leased shoe departments as among the 22,000 shoe stores on grounds that these outlets are listed by the Census Bureau among the other shoe "outlets" making up the grand total of 70,000 shoe outlets of all types. This is not correct. The 1954 census of manufactures, from which both the 22,000 and 70,000 figures were derived, expressly included leased shoe departments as shoe stores. See *1958 Census of Business, Retail Trade, Single Units and Multiunits* (BC 58–RS 3, p. I) (discussing the "comparison of the 1954 and 1958 census"). See also T. 2588.

Appellant also suggests (Br. 180) that the district court expanded the number of retail outlets controlled by Brown of the approximately 70,000 retail outlets for shoes in the country. But these shoe stores account for nearly half of the retail sales and are, as appellant asserts (Br. 33), the "backbone of shoe retailing" upon which all manufacturers of branded shoes must necessarily rely. Appellant also points out that as of 1954 only 7% of the dollar value of all shipments of shoes went directly from manufacturers to their own retail outlets (Br. 23). But this figure apparently does not include indirect distribution to owned retail outlets through wholesale subsidiaries like the Wohl Division of Brown (9.5% of Brown's sales in 1955, GX 33, R. 268) and it ignores the controlled franchise stores (16% of Brown's total sales of branded shoes in 1955, GX 219, R. 1297). In any event, the figure understates the impact of vertical integration, because it predates many of the important acquisitions (including, of course, Kinney) and is too close in point of time to most of the others to reflect the full intra-company sales potentials.[48]

by listing all of the Wohl leased departments separately even though a number of them were located in the same department store. But the decision recognizes this fact (see T. 68, n. 9), and the individual treatment of Wohl leased departments by the court is paralleled by the similar treatment given these separate departments by the appellant in its annual report announcing the Wohl acquisition (see GX 220, R. 1314) and in its exhibits filed in this case (see, *e.g.*, DX N, R. 154, 155; DX P-1, R. 158-651 (compare R. 178 with R. 189, R. 282 with R. 305)).

[48] Appellant also argues that a number of the acquired firms were at least partly integrated prior to their purchase by one of the big six (Br. 181). However, the other smaller manufacturers obviously stood a better chance of selling such stores a portion of their requirements than is the case when they

Appellant also objects (Br. 153–154) to taking into account the shoe stores which the large manufacturers do not directly own or operate but which they control under arrangements such as the Brown franchise or Wohl plan programs (see pp. 23–24, 25–26, *supra*). It argues that these retailers are "completely independent," that the arrangements are "completely voluntary and readily terminable," and that the district court erred in treating these "independent retailers who purchase shoes with their own money at their own risk" as captives of the large manufacturers, who merely give them "advice" (Br. 153–154). But appellant cannot and does not challenge the court's finding (T. 45) that the Brown franchise arrangements "consist of committing the retailers not to carry competing lines of shoes of other manufacturers and in return they receive certain aids and assists from Brown by way of advertising, insurance, rubber footwear purchases, advice and help on inventories and inventory sales." [49] See App. Br. 44–45; see

are taken over by companies, like Brown, manufacturing a full line of shoes. Thus, prior to the merger Brown had been unable to secure any of Kinney's business, yet it subsequently became its largest supplier despite the pendency of the suit and the limiting effect of Judge Hulen's order (T. 38–41). And in any event this argument is hardly of much consolation to Brown since of its largest acquisitions, Wohl was entirely unintegrated and Kinney purchased more than three quarters of its goods from outside sources.

[49] There is also a required "concentration" by Wohl plan accounts on Wohl shoes (GX 205, R. 920; T. 393, 1878–80). As to the operation of this plan see Appellant's Brief, pp. 47–49; T. 728–729, 1842–48, 1878–79.

also GX 24–29, 43, 111, 112, 114–119, 219, R. 249–260, 280–98, 553, 554, 556–561, 1297; T. 2067–2076.[50]

The only real difference between a manufacturer-owned retail outlet and one independently owned but operated under such a plan lies in who gets the profits or losses from the operation. But this difference has scant significance in terms of competition. Both types of outlet are dominated by the manufacturer. They sell his shoes. They do not carry competing lines. Both types of outlet, therefore, cease to be available markets for competing manufacturers. The fact that the franchise arrangements are mutually terminable does not detract from their significance as additional retail outlets unavailable to competing small manufacturers, particularly in view of the constant expansion of such operations. The testimony of the manufacturer witnesses was that when one of their accounts went on a Brown (or other large manufacturer's) franchise plan they lost business just as surely as when the store was actually acquired by a major manufacturer (T. 510–517, 890–91). And the record makes quite clear that this loss of business was frequently not the franchisee's choice but rather was dictated by Brown as a condition for continuing the agreement and the special advantages flowing therefrom to the franchisee (see GX 50–55, 107–121;

[50] The written Brown franchise contracts contain a clause obligating the franchisee to "concentrate [his] business within the grades and price lines of shoes covered by Brown Shoe Company Franchises and [to] have no lines conflicting with the Brown Shoe Company brands" (GX 24, R. 250).

R. 423–431, 548–564).[51] The district court thus correctly treated Brown's franchise and Wohl plan stores as if they had been owned by Brown. See *Standard Oil Co.* v. *United States,* 337 U.S. 293, 295–96.

Finally, appellant argues that vertical integration in the shoe industry is not significant, since a number of integrated companies (all markedly smaller than Brown) have not been successful (Br. 182–83). We need not speculate, however, as to why some integrated companies have been less successful than some that were not integrated, or whether the present trend to vertical integration through merger will in the long run benefit the participants as much as they hope. For the undisputed evidence (discussed below) is that ownership or control of retail outlets by shoe manufacturers, and particularly by the few largest shoe manufacturers, was intended as a device to increase their sales through excluding competing lines from these captive out-

[51] Government exhibits 50–55 (R. 423–31) present a dramatic example of a case where a new franchisee was eliminated from the program because it was unwilling to meet Brown's demands that it immediately eliminate a conflicting Weyenberg line of shoes in which it had developed an appreciable trade ("Gimre must agree to throw out Weinberg [sic] . . . or deal is off & all Gimre stores go off franchise . . ." GX 54, R. 430). The case of a franchisee reluctantly going along with Brown's orders to eliminate all conflicts, in order to retain the special benefits of the franchise plan, is spelled out in government exhibits 107–113 (R. 548–555). In another case, retailers wishing to sell competing Stride-Right children's shoes were told if they did so they "would have to live without Buster's [Brown's Buster Brown brand] and also be dropped from our Franchise Program, which would mean cancelling their complete insurance program . . ." (GX 116, R. 558).

lets, and that the developing trend has already resulted in substantial harm to the small manufacturers and is reasonably likely to have an even greater adverse impact upon shoe competition in the future. This Court has held that while vertical integration is not illegal *per se*, "it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs." *United States* v. *Paramount Pictures*, 334 U.S. 131, 174; see *United States* v. *Columbia Steel Co.*, *supra* at 524–27; *United States* v. *Griffith*, 334 U.S. 100, 105. *A fortiori* this is true under Section 7 of the Clayton Act, which seeks to prevent industrial concentration in its incipiency, before the violation of the Sherman Act can occur.

The purpose of the acquisitions was to preempt against other manufacturers a larger share of the retail outlets. In a 1955 speech Brown's president, Mr. Gamble, responding to "criticism" that "the 'big three' of the industry * * * were going into the retail business in competition with their present dealer organizations" (GX 219, R. 1300), frankly stated his purpose in acquiring retail stores (*ibid.*):

> My viewpoint can be pretty well summed up like this—one of our principal objectives in acquiring retail stores is to protect and guarantee distribution of our products in areas where independent retailers could not give our brands adequate distribution because of their affiliations with other branded manufacturers.

He went on to list five "secondary" reasons for manufacturers' entering the retail field. They were (1) less dependence on the seasonal buying of independent retailers, thus making it possible to even out the seasonal peaks and valleys in manufacturing; (2) additional opportunities for developing merchandising and promotion ideas; (3) help in introducing new styles; (4) aid in enhancing brand prestige; and (5) greater opportunities for local promotions (*ibid.*). All of these advantages are gained, of course, at the expense of the smaller manufacturers frozen out of the markets thus sequestered.[52]

The record also makes it clear that the large manufacturers markedly increase their sales to their owned or controlled outlets after they take over control. As indicated in the Statement, pp. 26–27, *supra,* Brown's sales to Wohl in 1950, just prior to that acquisition, were approximately \$2.9 million or slightly less than 15 percent of Wohl's purchases. By fiscal 1957 Brown's sales had risen to \$12.1 million, an increase of almost 320 percent, and amounted to over one-third of Wohl's total purchases. Exactly the same process took place after Brown's purchase

[52] While Mr. Gamble went on to argue (GX 219, R. 1300–01) that the "alert, eficient, aggressive, and sales-minded independent retailer should be perfectly able to participate in these advantages" (but see pp. 131–37, *infra*), he notably did not suggest that the independent manufacturer would similarly benefit.

of Wetherby-Kayser (see p. 28, *supra*).[53] It is true that with the expansion of the shoe business generally and an increase in Wohl's total purchases by almost 60 percent, the dollar value of its purchases from outside sources also rose by about 21½ percent. It is clear, however, that because of its ownership by Brown, Wohl substituted Brown's shoes for those that it had purchased or would have purchased from outside manufacturers making a comparable shoe. See *Standard Oil Co.* v. *United States,* 337 U.S. 293.

There was considerable testimony as to the way in which the acquisition of retail outlets by the large manufacturers (either through outright purchase or through "franchise" arrangements) would affect their smaller competitors. Eight experienced executives of smaller, unintegrated shoe manufacturers described their experiences in losing business when one of the large manufacturers purchased or otherwise secured control of retail outlets with which they had previously done business. See T. 429, 700, 767, 836, 917, 942 (loss of sales when Brown purchased Wohl); 510–11, 512–13, 891 (sales losses when retail outlets

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[53] Brown's purchase of Regal was similarly motivated in part by its desire to increase the distribution of Brown's shoes (T. 1390). While this objective had not eventualized to any material extent by the time of the trial, the acquisition, by strengthening Brown's position in the men's shoe field, in which it previously was weakest, has also aided Brown in its competition with smaller manufacturers. For, as indicated, at p. 27, *supra*, Regal has been able to supply shoes to Brown and Wohl (though at the expense of its sales to outside firms), thus strengthening Brown's position in its increasing efforts to secure exclusive positions in the sale of its product through franchise stores and other retail outlets.

became Brown franchises or Wohl plan accounts); 516–17, 768, 890, 891 (losses to stores acquired by International or becoming International franchise outlets); 514–15, 836–37, 841–42, 889–90 (sales losses when retail outlets were purchased by General or went on a General "plan"); 891 (loss of business to stores going on Endicott-Johnson plan).

2. Brown's increased sales to Kinney will foreclose a substantial manufacturers' market

If anything was clearly established on the record, it was the likelihood—indeed, it would be fair to say, the certainty—that Brown's sales of its manufactured shoes to Kinney, for resale by the latter, will increase radically as a result of the merger to the serious detriment of independent manufacturers. As we just noted, the testimony and documentary evidence proved that a major purpose of Brown's acquisition of retail outlets generally (T. 1396; GX 219, R. 1300) and of Kinney particularly (T. 1396) was to gain an assured outlet for its product. This is substantiated by the fact that Brown *had* greatly increased its sales to retail outlets it had previously acquired (see pp. 25–28, *supra*) and by the fact that, within three years after the Brown-Kinney merger, and despite the pendency of this suit, Brown became Kinney's largest outside supplier, although it had previously been unable to break into the Kinney market at all (see p. 38, *supra*). Furthermore, there is a very considerable overlap between the prices at which Brown sells the broad, general lines of shoes it manufactures, and those at which Kinney purchases the broad, general lines of shoes it retails in its chain of family shoe stores, an overlap that is very likely to expand in view both of Brown's ability to convert its facilities to meet Kinney's needs and of Kinney's increasing requirement for higher-priced shoes.

Measured by 1955 price levels of Brown production and Kinney consumption, Brown would be able to supply over 35% of Kinney's men's shoe requirements, over 30% of its women's shoe requirements and over 50% of its children's shoe requirements (see GX 252, R. 2876-2878). Price overlap is not a perfect test because differences in style or type might require some downward adjustment of the figures. The figures showing the present overlap, however, by no means establish an outer limit upon Brown's ability to appropriate the large Kinney market for itself. For, as indicated at p. 63, *supra*, even before the merger Brown and Kinney were moving toward one another in terms of price, as Brown more and more emphasized cheaper grades of shoes (T. 1315–16, 1428–29, 1682–84, 1763, 2220–21) and Kinney, conversely, found a need for upgrading its product, particularly in its increasing number of stores in suburban shopping centers (T. 1323, 1409–10, 1443, 1462, 1509, 1511, 1525–26, 1554, 1571, 1705, 1993).

Moreover, Brown's three "make-up" shoe divisions, from which Kinney procured over 75% of its Brown shoes in fiscal 1957 (GX 38, R. 274), had a phenomenal growth during the preceding seven years from a production of slightly more than $19 million worth of shoes in 1950 (GX 33, R. 268) to almost $34 million in 1957 (GX 36, R. 272). This large increase belies appellant's suggestion (Br. 190) that it would be impractical for it to convert its manufacturing operations to take care of Kinney's needs for products, particularly since the make-up shoes are at the lower end of Brown's production price range. See GX 252, R. 2868–78.[54] And, while Brown in the past has shown both its ability and willingness to convert its factories to new types of shoe production (see GX 209, R. 930–65), little if any plant conversion would in fact be necessary. For Brown already is manufacturing some shoes in almost every price range in which Kinney purchases (GX 252, R. 2868–78).

We do not suggest, and the district court did not find, that Brown will necessarily find it expedient to take over all of Kinney's outside requirements. But the court's determination that Brown could, and probably would, markedly increase its sales to Kinney, to the detriment of those smaller manufacturers who might otherwise hope to enjoy this substantial market, is clearly correct. It is not only supported by the documentary evidence and extensive testimony of experienced shoe manufacturers and retailers, testimony that the district court was in a peculiarly good position to weight and evaluate. It is also borne out by

[54] This expansion also casts doubt upon appellant's contention (Br. 42), based on an unsupported statement by its president that the "current trend" of operations in one of its three make-up divisions was unprofitable (T. 1320), that "Brown's sales of make-up shoes have not been profitable." In any event, what is marginally profitable in sales to outside retailers may be very profitable when distributed by a unit of the manufacturer's own organization.

human experience, recognized by this Court in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 523, when it said, "A subsidiary will in all probability deal only with its parent for goods the parent can furnish."

It is suggested, however, that even if Brown were to supply all Kinney's requirements, this could not result in any substantial lessening of competition in view of the fact that Kinney's total outside purchases amount to only about 1% of the national shoe production (Br. 191–192). Appellant points to this Court's recent decision in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, where a requirements contract attacked under Section 3 of the Clayton Act, was held not to violate that section where the requirements of the electrical company were slightly less than 1% of the total sales in what the Court found to be the relevant market. But the situation here differs markedly from that obtaining in *Tampa Electric.* For, as this Court pointed out there (365 U.S. at 334), that case involved no increasing pattern of the elimination of available outlets for distribution of competing products and there was no showing that the seller had a dominant position in any market. Instead, the Court believed that the circumstances revealed a typical requirements contract of mutual benefit to buyer and seller (and the public dependent upon the buyer for adequate utility services at reasonable prices) which, upon a "weighing [of] the various factors," did not tend to foreclose a substantial volume of competition (*id.* at 335).

Here, however, the merger must be judged in the light of two critically important facts not present in the *Tampa Electric* case: (1) the merger caps a trend toward concentration in the shoe industry, and (2) the merger is between a seller and a buyer, both of whom already enjoy special positions of dominance in the market. The situation insofar as the smaller shoe manufacturers are concerned is at least as serious as that facing du Pont's competitors in the finish and fabric fields in *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U.S. 586, and the small producers of gasoline products affected by the requirements contracts in *Standard Oil Co.* v. *United States,* 337 U.S. 293. For the steadily decreasing number of outlets available for the distribution of their shoes has now been further depleted by the elimination of the largest single remaining shoe store chain not already owned or controlled by one of the six largest manufacturer-retailers. Short of a merger between two of the six or seven major shoe manufacturers, it is hard to conceive of any acquisition that would be more harmful to competition in the shoe manufacturing business than Brown's acquisition of the largest independent shoe chain, whose 352 stores (as of 1955) raised from 5.5% to 7.2% the share of the total number of shoe stores in the country owned or controlled by Brown (GX 68–70, R. 450–56).

Appellant's position, in essence, is that there can never be a violation of Section 7 in the shoe field, resulting from the continuing trend to vertical integration, since no single purchase can affect any larger share of the market than Brown's acquisition of Kinney, the largest existing independent retail chain.

But the whole point of Section 7 is to prevent a large concern from swallowing all or a significant portion of an industry by a series of individual bites, even though any single bite might involve a relatively small segment. Congress' very objective in amending Section 7 in 1950 was to prevent oligopolistic situations from arising, particularly in those consumer goods industries, such as the shoe business, that were still relatively open to the small business man.[55] See pp. 88–89, *supra*.

Moreover, the effect of the Brown-Kinney merger upon competing manufacturers, considered by itself, cannot properly be determined solely in terms of Kinney's relatively small percentage of total shoe purchases nationwide. For these purchases, amounting in 1955 to 6.4 million pairs of shoes at a total cost of $16,860,000 (GX 151, 208, R. 619, 929), accounted for substantial percentages of the total sales of many of Kinney's small suppliers (see GX 250, R. 2852–53), in some cases ranging from 30% to 100% of a firm's total output. See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 613 (S.D.N.Y.), where

[55] If Brown had requirements contracts with 7% of the Nation's shoe stores there seems little doubt that it would be in violation of Section 3 of the Clayton Act under this Court's decision in *Standard Oil Co.* v. *United States*, 337 U.S. 293. As indicated at pp. 96–97, *supra*, the House Report on the 1950 amendments, in order to insure that Section 7 would be effective in preventing the development of oligopoly, stated that the term "substantially lessening competition" was intended to be interpreted in a manner "similar to [that] which the courts have applied in interpreting the same language as used in other sections of the Clayton Act" (H. Rep., p. 8).

the vertical foreclosure of 1.3% of the market for wire rope was considered to be substantial in the light of the fact that "in some cases" the acquired company had purchased about 10% of the independent fabricator's total output.[56]

What is more, the Kinney purchases from outside sources constituted a very much higher percentage of the total shoe purchases for resale in the particular areas of the country in which Kinney operated, where its sales accounted for an average of 10.8% of all shoes sold in 150 of the cities in which its stores were located, over 13% of all retail sales in 74 cities and over 20% in 27 cities (see Statement, *supra,* at p. 31; GX 214, R. 1219–36). This fact is of great significance in the national market in which Brown and the small unintegrated manufacturers compete (particularly when added to the high percentages of shoe sales in many of these areas by Brown's other owned or controlled outlets). For if, as they testified (see pp. 40–42, *supra*), the shoes of large numbers of smaller manufacturers are being forced out of more and more retail trade areas as Brown (along with the other major integrated manufacturers) takes over increasing shares of the market, it is clear that their position in the national market will become increasingly marginal.

[56] Judge Weinfeld noted that "in one case" these sales had amounted to about $1,000,000 a year (168 F. Supp. at 613). In one case for which 1955 figures are available a manufacturer sold $976,727 worth of shoes to Kinney—41% of its total output (GX 250, R. 2852).

3. The merged company's size advantages will enable it to dominate shoe manufacturing

The adverse competitive impact of the Brown-Kinney merger upon independent shoe manufacturers is not limited to the foreclosure of the substantial Kinney market. The record makes it perfectly clear that the combination of these two huge organizations, both of them engaged in both the manufacture and retail of men's, women's and children's shoes, would, because of the pooling of their already great advantages over their smaller manufacturing competitors, "definitely increase the final consumption of their combined product" (T. 71–72). The impact of the merger would extend not only to the substitution of Brown for other manufacturers as a supplier of much if not all of the pre-merger Kinney market, but also to the substantial advantages the merged company would have in competing for a larger share of the shoe purchases by the remaining unaffiliated retail shoe outlets.

Even before the merger Brown enjoyed substantial purchasing advantages over its competitors, including advantages not available to any other manufacturer, in the price at which it secured rubber and synthetic heels, soling materials and other products from B. F. Goodrich (T. 990–1012) and from the Avon Sole Company (T. 1054–1056). These and other concessions were made available to the Regal manufacturing plant when it joined the Brown empire (T. 997–998) and it is clear they will now be available to Kinney in the plants it operates for the manufacture of shoes to be sold in its stores or otherwise distributed (T. 999–

1000). In fact, in view of the increasing production of Brown after the absorption of Kinney's plants, and the increase in the assured market it secures from Kinney's retail chain, it seems highly likely that Brown will be able to secure even greater concessions from its suppliers in the future. On the other hand, to the extent that Kinney continues to purchase from outside sources, the very fact that it has the vast Brown production resources available to it should enable it to secure even better terms from the small manufacturers than it already does in its capacity as a large chain store with limited production facilities of its own.

Moreover, the ownership of the extensive Kinney retail organization can confidently be expected to produce for Brown all or most of the various advantages that Brown's president indicated were the reasons for the larger manufacturers' entering the retail field (see pp. 110–11, *supra*). Brown, but not its unintegrated manufacturer competitors, can fall back on its own retail stores, including the huge Kinney organization, to avoid production gyrations caused by the seasonal buying of individual retailers. Brown, but not its unintegrated competitors, can utilize the modern, efficient Kinney retail organization to introduce new styles, and in developing merchandising and promotion ideas. Brown, but not its unintegrated competitors, has in Kinney an assured, ready market as it downgrades its production from the standpoint of price and quality to meet the corresponding downward trend in consumer demand (see pp. 20–21, *supra*). In short, Brown with Kinney is a substantially greater competitive threat to the small manufacturer of men's, women's or children's shoes in seeking the business of the shoe retailer outside the immediate Brown-Kinney orbit, than it was before.

We submit, therefore, that considered as an isolated acquisition, and even more clearly when considered, as it must be, as part of an industry trend in which Brown has played a major role, the Brown-Kinney merger results in a combination of manufacturing and retailing facilities that has a reasonable probability of substantially lessening competition in the manufacturing of men's, women's, and children's shoes.

C. THE RECORD CLEARLY SUPPORTS THE DISTRICT COURT'S FINDING THAT THE MERGER MAY SUBSTANTIALLY LESSEN COMPETITION IN THE RETAILING OF SHOES

The district court found that the Brown-Kinney merger would substantially lessen competition in the retail sale of men's, women's and children's shoes in two ways. It found that Kinney would be eliminated as a substantial competitive factor in the retail markets for shoes (T. 73, 74–75). It further found that the combined Brown-Kinney organization would, by virtue of its size advantage, seriously impair the ability of the remaining independent retailers to compete (T. 71–73, 75). Each of these determinations is clearly supported by the great weight of the evidence of record below.

1. The merger eliminates a substantial competitive factor in many significant retail markets

Brown, in acquiring the Kinney chain, was not merely extending its ever-growing retail operations into new territory. On the contrary, in the approximately 315 cities in which Kinney operated stores in 1955, Brown already owned or controlled retail outlets in 138 (GX 9, 10, R. 60–70, 71–209). In most of these 138 retail trade areas, scattered throughout the country, and with city populations ranging from 10,000 to several millions, both Kinney and Brown were major competitive factors in the retailing of women's and children's shoes, and, in a somewhat smaller number of areas, in men's shoes as well. The result of the combination of the two companies would thus be that in 138 retail market areas two vital competitive forces would be replaced by a single organization, significantly larger than either and freed from the spur of the competition between the two. The district court concluded that "the merger would eliminate Kinney as a substantial competitive factor to Brown in the shoe retailing field. The most aggressive retail chain in the nation, now a potent competitor of Brown, would become but another adoptive child of an already big family" (T. 74–75). A review of the impressive evidence of record in support of this finding leaves no doubt as to its correctness.

The government's evidence as to the horizontal impact of the merger on shoe retailing consisted both of testimony by experienced retailer and manufacturer witnesses as to the general pattern of the competitive structure in the various retail markets, and also of documentary evidence showing the large shares of the total sales in each of the three categories of shoes sold in such markets held by Brown and Kinney, separately and combined.

The retailer witnesses, describing the situation with which they were familiar in some 40 of the 138 retail trade areas in which both Brown and Kinney own or control outlets, stressed, as we have seen (see pp. 32–36, *supra*), that Brown and Kinney were in active competition with one another and the other retail shoe stores and departments. They also made clear that the very differences in some of the methods and techniques of this competition between Brown and Kinney (to which appellant points in its abortive efforts to show that the competition did not exist) were among the important forces for the improvement of merchandising techniques and services of value to the public. Obviously, to the extent that Brown has now absorbed Kinney, a major impetus impelling the two organizations to improve their services will be eliminated.[57] And the independent manufacturer witnesses highlighted the significance of the elimination of competing outlets in the various retail markets when they testified to their increasing inability to find any market for their shoes in the many trade areas in which the principal retail outlets for shoes had come under the ownership or control of a few large integrated manufacturers (T. 429, 517, 769, 892–93).

In this context, the government's documentary evidence of the consequences of Kinney's elimination as an independent competitive factor in a large number of the retail markets provides overwhelming support for the district court's conclusions. This evidence

[57] Thus one of the reasons Brown gave for purchasing Kinney was that it did not wish to undertake the financing necessary to secure outlets for franchise stores (or to build and operate its own stores) to compete with Kinney and the other chains in the suburban shopping centers (T. 1315–16). The merger deprives the public patronizing these centers of the chance to profit from Brown-Kinney competition.

showed the percentages of the sales of all shoes combined, and of men's, women's and children's shoes separately, sold by Brown's owned or controlled outlets,[58] by Kinney, and by the two combined in each of the 138 joint Brown-Kinney markets in 1955, the year of the merger. These figures confirm the fact that in a large number of areas, including many of the major retail markets, both Brown and Kinney had appreciable percentage shares of the retail trade prior to the merger and that their combined operations would account for clearly substantial percentages of all retail shoe sales in these markets.

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[58] The government argued below that, in evaluating the impact of the merger on shoe retailing, *all* Brown sales, including those made by independent retailers not tied to Brown by franchise agreements, should be considered since, from the standpoint of the public, their opportunities for choice were limited regardless of the contractual relations between the retail outlet and Brown. If this position had been adopted by the court below, the figures for the Brown-Kinney shares of the retail markets would have been substantially greater. See GX 214, R. 1214–40. The extent of Brown's dominance (after the merger with Kinney) in the various retail markets in which both Brown's and Kinney's shoes were sold is shown by the following table:

Number of cities included	Average percentage share of total shoe distribution represented by Brown and Kinney shoes			
	All shoes	Men's	Women's	Children's
25	36.3	22.6	38.8	42.4
50	30.4	19.2	32.8	35.0
75	27.2	16.7	28.4	30.2
100	23.9	14.8	26.0	27.2
125	21.8	12.2	24.0	24.2
150	20.3	10.6	21.4	21.3
175	17.4	9.1	19.2	19.1
200	15.5	7.3	17.2	17.1
225	14.3	5.3	15.5	13.7
250	11.1	(1)	12.1	10.2

[1] Both Brown and Kinney's men's shoes sold in fewer than 250 cities (source GX 75, 214, 253, R. 462–78, 1214–1240, 2079).

In Appendices B–E to this brief, we have set out the figures for all shoes, and for men's, women's and children's shoes separately, for those communities in which the combined totals of the two companies were over 5%. In women's shoes alone, these figures indicate there were no fewer than 66 cities throughout the country in which the merged company would have, as of 1955, over 15% of all shoe sales, in 17 of which its share would be over 25% (ranging up to a high of 57.7% in Dodge City, Kans., and 48.5% in Texas City, Texas). In addition there were 33 more cities in which the merged company would have between 10% and 15% of the total retail business in women's shoes. In the sales of children's shoes there would be 44 cities where the combined Brown-Kinney share of the market would be over 15%, in six of which (Coatesville, Pa.; Dodge City, Kans.; Council Bluffs, Iowa; Ardmore, Okla.; and Borger, Texas) the joint percentage would be over 40%, and 14 more over 25%. In addition there would be 21 more cities in which the merged company would have between 10% and 15% of the children's shoe business. The figures for men's shoes (where Brown has a lesser share of the sales in many markets) do not run as high. But even here there were 28 cities with combined Brown-Kinney percentages of over 10%.

This is not a case of a whale swallowing a minnow, nor is it one where the major impact of the merger is felt only in the smallest of the markets in which both Brown and Kinney have operated. As the figures in the Appendices indicate, Kinney alone had over 10% of the sales of women's shoes in 51 cities, of the children's shoes in 40 cities, and of men's shoes in 10 cities.[59] The population of many of the cities in which Brown and Kinney both had substantial sales participation prior to the merger exceeds 100,000 (see Appendices B–E, *infra;* see GX 7, R. 57–58 for 1955 est. population figures). For example in Tulsa, Oklahoma (population 226,700), Kinney had 7% of the women's shoe sales and Brown 6.9% for a total of 13.9%; in children's shoes, Kinney had 8.6% and Brown 5.2%, for a total of 13.8%. In Wichita, Kansas (population 222,500) Kinney sold 7.5% of the women's shoes and Brown 8.3%, for a total of 15.8%; Kinney sold 9.6% of the children's shoes and Brown 5.6%, for a total of 15.2%. In Des Moines, Iowa (population 185,300), Kinney sold 4.9% of the women's shoes and Brown 13.8%, for a total of 18.7%; Kinney sold 6.5% of the children's shoes and Brown 5.1%, for a total of 11.6%. Similar figures will be found in the tables in the Appendices for such cities as Corpus Christi (156,500), and Amarillo (104,500), Texas, Baton Rouge, Louisiana (151,500), and Gary, Indiana (155,100).

The government's figures are based upon pairage sales[60] in 1955 in the cities which form the core of the

[59] The equivalent figures for Brown's owned or controlled outlets were 30 cities for women's shoes, 15 cities for children's shoes and 6 cities for men's shoes.

[60] In its Reply to our Motion to Affirm (p. 20, n. *) appellant challenges the government's use of pairage figures, despite the fact that only by converting dollar sales into sales by pairs could meaningful figures as to percentages of men's, women's and children's shoes sold by Brown and Kinney be derived (T. 2555). (Appellant introduced no figures breaking down

city-and-environs area which the district court found to be the proper section of the country for retailing, and thus to a limited extent may overstate or understate the percentage figures that would be shown if figures were also available for sales in the areas immediately surrounding and contiguous to the city. But the testimony of the government's expert witnesses was that these figures would give a close approximation of the percentages which would apply if suburban sales were also included, and that they provided a much more useful tool for this purpose than the standard metropolitan area and county figures advanced as the appropriate measure by the appellant (T. 2690–91, 2697–99, 2771–72). The figures set out in the chart in Appendix F, *infra*, support this conclusion. For they show, on the basis of

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retail shoe sales into the three lines of commerce found by the court.) But contrary to appellant's statement that the pairage figures were based upon a "number of assumptions concerning national income and age/sex which are wholly invalid" (Reply to Motion to Affirm (p. 20, n. †)), the bases for the computations were fully explained, to the satisfaction of the district court, by Dr. Jay Gould, a recognized expert in the field of marketing statistics (see T. 1040–45, 2694–97). The further statement by appellant that Dr. Gould "disavowed" the figures as applied to any particular city is completely misleading. While the witness indicated that there was a necessary margin of error—one way or the other—that would be applicable to the universe figures for the various cities, he made clear that this would not be likely to exceed five or six percent at the maximum (T. 2699), that this would be reflected by an even smaller error in the Brown-Kinney percentages (T. 2698), and that while the actual universe figures for a majority of the cities listed might tend to be slightly higher than those upon which he based his percentage figures, any such error would have the effect of minimizing the Brown-Kinney percentage of that retail market (T. 2697–2698).

statistics supplied by the appellant for dollar sales of all shoes by cities and standard metropolitan and county areas in 1954, that the figures for city shoe sales do not very often deviate from those for county areas by more than a few percentage points.[61]

Appellant argues that this strong evidence that the Brown-Kinney merger would eliminate a substantial competitive factor in the retailing of men's, women's, and children's shoes in a large number of important markets throughout the country, could not be dispositive in the absence of a detailed analysis by the court of the particular facts governing shoe retailing in each of these markets. To the extent it contends that the competitive structure of the Nation's retail shoe business varies to such a degree from market to market that no basis exists for any generalization as to the overall significance of the combination of the Brown and Kinney facilities, the short answer is that the district court was fully justified in reaching a contrary conclusion on the basis of its evaluation of the

[61] As the chart also indicates, there is usually a close correlation between city figures and standard metropolitan area figures where the city is the principal city of the standard metropolitan area (see, *e.g.*, Topeka, Kans.; Corpus Christi, Texas; Rochester, Minn.; Fort Smith, Arkansas). Where this is not the case, as in Elgin, Ill. (in the Chicago Standard Metropolitan Area) or Council Bluffs (in the Omaha Standard Metropolitan Area), the figures deviate greatly. But the testimony of retailer witnesses familiar with such areas makes clear that in such cases the standard metropolitan area does not properly reflect the retail trade area and that a very high percentage of the residents of these smaller cities purchase their shoes in that city rather than in the principal city of the standard metropolitan area (see T. 1160–61 (Elgin), 664, 670 (Council Bluffs); see also n. 25, *supra*).

testimony of the numerous retailer witnesses called by the government. There are, of course, special local situations in some markets that are not present, at least to the same degree, in others. Thus, as the figures cited above indicate, there are some areas where Brown's owned or controlled outlets are largely devoted to the sales of women's and children's shoes and where the immediate impact of the merger may largely be limited to these lines of commerce; in other situations, the retailing of men's shoes is also directly affected. But the detailed descriptions of the competitive structure in the forty markets with which these witnesses were intimately familiar clearly demonstrate that the similarities between markets outweigh the differences. And, in view of the uniformity of the testimony as to the major roles played by both Brown and Kinney in shoe retailing in all of the markets in which they own or control retail outlets, as well as the many markets, large and small, in which the two concerns had sizable percentages of the existing retail business, the district court was clearly correct in concluding that it could make general conclusions as to the probable overall effect of the merger in eliminating a significant competitive factor in the many areas in which Brown and Kinney both owned or controlled retail outlets. The court's disinclination to embark upon a detailed market-by-market analysis under these circumstances was not only understandable but obviously proper.

A more fundamental difficulty with appellant's argument lies in the decisional standard for which it implicitly contends. For it appears to urge that it is not sufficient to show the strangling of competition between two potent forces in a large number of significant markets, and that instead this showing must be accompanied by an extended economic analysis of the actual, or at least the potential, effects of the elimination of competition itself. But Congress, in adopting the amended version of Section 7 made clear its intent to avoid the necessity for any such analysis. As indicated at p. 90, *supra,* the House Committee expressly stated that "elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition" (H. Rep., p. 8) was to be deemed to reflect a likelihood of a substantial lessening of competition or of a tendency to monopoly. The situation on the horizontal level is thus analogous to the rule laid down by this Court in the vertical area that foreclosure of a substantial share of a substantial market will in itself violate Section 7. See *United States* v. *E. I. du Pont de Nemours & Co., supra,* 353 U.S. at 595.

2. *The merger will substantially impair the ability of other retailers to compete effectively*

Kinney's president, in his *apologia* for manufacturer entry into the retail shoe market referred to above (pp. 110–11), argued that the large manufacturers' increasing entry into the retail shoe market through ownership or control of retail outlets might actually prove of benefit to the "alert, efficient, aggressive, and sales-minded independent retailer" (GX 219, R. 1300–01). In fact the testimony of the government's retailer witnesses strongly supports the district court's contrary conclusion that independent retailers are having a harder and harder time competing with manufacturer-owned and manufacturer-controlled retail outlets (T. 70) and that "as independent retailers are forced to other lines or from the market" there is a marked tendency towards retail monopoly (T. 73).

The reasons for this are clear. The independent shoe retailers, like all other small businessmen in our society, have had an increasingly difficult task in competing with the chain stores, whether they be chains of shoe stores as such, or large multiproduct chains (like Sears, Roebuck) also selling shoes (T. 149–50, 350, 364–65, 366–67, 478–79, 578–79); see p. 40, *supra*. But as long as these chains are independent of the largest shoe manufacturers there are techniques by which the operator of a single shoe store or department or a small local or regional chain can hope to maintain his position successfully. The Robinson-Patman Act amendments to Section 2 of the Clayton Act, 15 U.S.C. 13, as amended by 49 Stat. 1526, plus the criminal provisions of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a, provide some protection against undue preferences to the chains not based upon actual cost savings due to differences in the quantities and methods by which shoes are sold and distributed. Moreover, by providing a number of important services that the chains cannot or do not offer, in such areas as fitting, choice of size and style, charge accounts, etc., the independents may be able to compete on relatively favorable terms. In addition, as long as some of the largest chains are engaged primarily in the sale of make-up shoes under their own trade names, the independent retailer or small shoe chain can benefit from the extensive national advertising of the brand name shoes produced by the larger manufacturers. But where the manufacturers themselves invade the retail field, and particularly where they take over the large chains, the situation is quite different.

The independent retailers who testified as government witnesses made it clear that, where a manufacturer with whom they had been dealing acquired its own outlet in an area, they soon found it impossible to compete, since the same shoe or its equivalent would appear on the shelves and in the windows of the manufacturer-owned outlet at considerably less than the price at which they could afford to sell the particular type of shoe (see, *e.g.*, T. 150, 350–51, 358–60, 364–66, 476–79, 661–662, 1159–60). One experienced retailer—a member of the Board of Directors of the National Shoe Retailers Association and past president of the Independent Shoe Men (T. 143)—stated that as Brown and General had acquired chains in competition with his stores he had found it necessary to drop the lines of their shoes he had been carrying because "[o]bviously, if the person can buy his own products cheaper than you do, * * * he could, and quite often does, under-price you at the retail level" (T. 150). On the other hand, as the court found (T. 70), if the manufacturer enters into a franchise arrangement with a retailer, his competitors find that the franchise dealer (in return for agreeing to concentrate on the manufacturer's brand) secures great competitive advantages in advertising, insurance, discounts on purchases, and financial, architectural and store site assistance (see T. 311–15, 459–61, 490–91, 552–53, 686).[62]

Often the manufacturer will transfer to its newly acquired retail outlet in the area the brand name shoes upon which the independent retailer had built his reputation. Thus, one retailer witness stated, "We will build up a name and a brand and the first thing you know they will come into the town and open up and take the brand some place else into one of their own outlets and it is not profitable on that basis" (T. 662; see also, *e.g.*, T. 926–27). The end result, as the court found (T. 70), has been to force increasing numbers of independents to seek refuge in a higher retail price bracket, leaving the expanding market for lower and medium priced shoes to the manufacturer-owned outlets (T. 150, 365–68, 478–79, 661–62, 925–27, 1158–60). An independent retailer testified that Kinney's up-grading of its product had allowed it to undersell him at progressively higher price levels, that "my shoes began to look sick," and that "I had to discontinue three-ninety-nine, four-ninety-nine, as a matter of fact five-ninety-nine, and get up into six-ninety-nine and up and just stay there, thus the result was I had lost about twenty percent of my sales" (T. 479). He added that Kinney was now moving in on his \$6.99–\$10 price range (*ibid.*, see also T. 487–88).

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[62] Appellant suggests (Br. 43–44) that some of these advantages were also available to its better independent retailers. But clearly in most areas where it had franchise stores it was those outlets that reaped by far the larger share of its beneficence. And see p. 23, n. 10, *supra*.

A number of retailers testified to their extreme difficulty in finding a new supplier among the independents when they lose, or find they are unable to continue to carry, the shoes of a large integrated manufacturer (T. 367–68, 389, 1160). Moreover, the competitive difficulties in which both the independent retailer and independent manufacturer find themselves as a result of the trend to vertical integration inevitably drives them both into a higher price bracket where they are able to get together. The small unintegrated manufacturer, not having the assured outlets and other advantages of his larger integrated competitor (and finding it hard to maintain any outlets in the many markets where the larger shoe concerns have appropriated most of the retail shoe stores or departments) just cannot offer a shoe of equivalent style and quality which the independent retailer can hope to sell at a price competitive with his manufacturer-owned or controlled competition. Conversely the independent retailer finds that even if he can secure a like-quality shoe to sell at a similar price, he will be competing against the best known trade names in the business (often those he has spent years in building up to his customers), backed by the ever-increasing national advertising budgets of such concerns as Brown. Since they cannot hope to succeed by lowering their price-grade standards below the level of the integrated manufacturer-retailers, they are forced to take at least temporary refuge in the shrinking market for better grade shoes.

The fact that Kinney, prior to its acquisition by Brown, sold only under its own trade names, by no means indicates that its admission into the Brown fold will not have as great or greater impact upon the independent retailers as previous acquisitions of chains by the large manufacturers. To the extent that Kinney increases the amount of sales of Brown's brand-name shoes (see T. 1368–69), the impact will be direct. But it will be no less significant in those areas where Kinney continues to sell its shoes under its own name. For its already powerful competitive position will be strongly enhanced by its affiliation with the Brown organization. Thus, a number of retailers testified that Kinney had in fact already become more of a competitive force since the merger (T. 149–151, 479, 487, 661). Kinney shoes selling at several dollars below the brand name shoes of the independent retailer were, many of these retailers testified, already considered to be about on a par with their product by many of their customers (T. 396, 478, 661). Obviously this situation will be further aggravated when Kinney (in the 20 percent share of its shoes it secures from its own factories) is able to take advantage of the marked discounts on raw material purchases previously available to Brown alone in the industry. Similarly, to the increasing extent Kinney's shoes are acquired directly from Brown it will be able, in view of the intercorporate savings (such on salesmen's salaries, see T. 359), to retail them at lower prices than it could offer if the same shoes were purchased from outside sources.[63]

[63] Thus, for example, the Wohl leased shoe departments purchased Wohl-branded shoes at appreciably lower prices than Wohl sells the same shoes to independent retailers (T. 2051).

And finally, regardless of the trade name Kinney uses, independent retailers selling Brown brand-name shoes, or comparable branded shoes of other manufacturers, are going to be adversely affected when shoes similar in appearance and workmanship are available at substantially cheaper prices in the Kinney stores.

The prospect, if the trend to manufacturer-retailer integration is not halted, is, as one retailer witness put it, that "[w]e would have the big three in the shoe business like we have in the automobile business or the big six in steel" (T. 702). Or, as another witness, who had found it necessary to stop selling Brown shoes when Brown acquired Kinney, stated, the shoe industry would "deteriorate to the point where it was so standardized that no one would have a chance to expand without being involved with one of the giants" (T. 151).

CONCLUSION

The Brown acquisition of Kinney presents a classic example in both its vertical and horizontal aspects of the type of merger Section 7 of the Clayton Act was intended to prevent. The shoe industry, with a few large manufacturers and retail chains already dominating a large number of small producers and retailers, has been the subject of a rapidly accelerating trend to vertical integration in which the six largest manufacturers, led by Brown, have purchased numerous retail shoe outlets and have established exclusive franchise agreements with many more. Brown's purchase of Kinney's 352 stores is the largest single purchase in this entire movement. Independent shoe manufacturers, who find it progressively more difficult to sell their product in market after market as the major manufacturers acquire more and more of the important retail outlets, are now to be cut off from the large Kinney shoe market which Brown can and undoubtedly will "insulat[e] from free competition" (*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 318–19) as a result of the merger. And both the independent manufacturer and retailer will, as the government's many industry witnesses testified, find it more difficult to compete against the vast resources and special advantages of the merged company. At the same time, at the retailing level, the Brown-Kinney merger will, in many of the 138 markets where both have owned or controlled outlets, combine into a single unit two of the principal competitive forces in the retailing of men's, women's and children's shoes. This elimination of a major competitive factor in those markets will in itself have a reasonable likelihood of substantially lessening competition and tending to monopoly.

In short, this is the case, and this is the time, to call a halt to a trend that is otherwise certain to convert the shoe industry into one of those oligopolistic industries in which a few large concerns exercise decisive control over the market structure and the smaller companies that are able to survive continue on sufferance only so long as they follow the leaders.

The judgment below should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS

Section 7 of of the Clayton Antitrust Act, 38 Stat. 731, as amended, 64 Stat. 1125 (15 U.S.C. 18):

> 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.

* * * * *

Section 15 of the Clayton Antitrust Act, as amended, 62 Stat. 909 (15 U.S.C. 25):

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States Attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before

final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

APPENDIX B

Combined sales of men's, women's and children's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

[Ranked by combined Brown owned and controlled outlets and Kinney shares]

City	Total sales (pairs)	Kinney percentage share (percent)	Brown owned or controlled share (percent)	Combined Brown-Kinney share (percent)
Dodge City, Kans	57,600	24.9	23.8	48.7
Texas City, Tex	59,300	30.1	11.3	41.4
Council Bluffs, Iowa	125,200	26.8	10.2	37.0
Ardmore, Okla	114,900	14.6	19.5	34.1
Keokuk, Iowa	63,400	24.3	8.1	32.4
Coatesville, Pa	84,700	16.5	14.8	31.3
Borger, Tex	92,000	17.0	13.1	30.1
Ottumwa, Iowa	123,400	26.1	3.0	29.1
Marshalltown, Iowa	133,300	20.1	8.3	28.4
Lawton, Oklahoma	174,700	17.9	10.2	28.1
Hobbs, N. Mex	93,200	25.3	2.7	28.0
Uniontown, Pa	265,800	15.1	12.9	28.0
Pine Bluff, Ark	115,700	22.7	5.1	27.8
Pueblo, Colo	279,600	15.8	10.1	25.9
Carlisle, Pa	101,900	17.8	6.9	24.7
Batavia, N.Y	138,200	12.5	11.5	24.0
Topeka, Kans	411,400	12.1	10.5	22.6
Franklin, Pa	58,700	13.6	8.6	22.2
Dubuque, Iowa	218,300	14.3	7.8	22.1
Iowa City, Iowa	132,500	14.5	7.3	21.8
Berwyn, Ill	176,000	19.3	2.4	21.7
Texarkana, Ark	120,700	15.9	5.5	21.4
Concord, N.H	105,200	14.8	6.3	21.1
Roswell, N. Mex	148,500	12.3	8.6	20.9
Manitowoc, Wis	111,500	14.4	6.4	20.8
Bartlesville, Okla	115,700	15.6	4.9	20.5
Fremont, Nebr	103,000	11.6	8.8	20.4
McAllen, Tex	165,500	12.9	7.1	20.0
Laredo, Tex	304,900	18.0	1.8	19.8
Gulfport, Miss	183,000	16.4	3.2	19.6
Mason City, Iowa	187,900	14.1	5.3	19.4
Muskogee, Okla	125,000	8.1	10.9	19.0
Cortland, N.Y	101,400	11.6	7.2	18.8
Kingsport, Tenn	194,800	12.2	6.6	18.8
Hibbing, Minn	81,900	16.3	1.8	18.1
Corpus Christi, Tex	608,200	2.8	15.1	17.9
Fort Dodge, Iowa	190,800	10.3	7.4	17.7
Steubenville, Ohio	380,100	12.1	5.2	17.3
Rochester, Minn	238,700	8.9	8.3	17.2
Clarksburg, W.Va	247,000	14.9	2.1	17.0
Marion, Ohio	168,000	8.4	8.6	17.0
Salina, Kans	188,600	12.1	4.8	16.9

Men's, women's, and children's shoes—Continued

City	Total sales (pairs)	Kinney percentage share (percent)	Brown owned or controlled share (percent)	Combined Brown-Kinney share (percent)
Emporia, Kans.	81, 200	13. 0	3. 5	16. 5
Fargo, N.Dak.	298, 800	11. 8	4. 3	16. 1
Grand Forks, N.Dak.	222, 200	11. 6	4. 2	15. 8
Freeport, Ill.	161, 400	11. 2	4. 5	15. 7
Fort Smith, Ark.	303, 200	10. 5	5. 2	15. 7
Johnson City, Tenn.	139, 000	11. 3	4. 2	15. 5
Davenport, Iowa	422, 600	6. 8	8. 5	15. 3
Sioux City, Iowa	407, 400	7. 0	8. 3	15. 3
Muskegon, Mich.	315, 700	5. 1	10. 1	15. 2
Baton Rouge, La.	730, 400	4. 8	10. 3	15. 1
Kingston, N.Y.	205, 600	10. 9	4. 1	15. 0
Enid, Okla.	257, 600	10. 1	4. 8	14. 9
Odessa, Tex.	307, 500	10. 5	3. 8	14. 3
St. Cloud, Minn.	162, 100	9. 3	4. 8	14. 1
Elgin, Ill.	232, 800	9. 0	5. 0	14. 0
Springfield, Mo.	386, 100	3. 5	10. 3	13. 8
Des Moines, Iowa	1, 032, 600	4. 8	8. 9	13. 7
Burlington, Iowa	136, 600	11. 5	2. 1	13. 6
Wichita, Kans.	1, 223, 100	7. 4	6. 1	13. 5
Muncie, Ind.	289, 900	8. 1	4. 9	13. 0
Abilene, Tex.	338, 100	11. 6	1. 1	12. 7
Greensburg, Pa.	216, 100	7. 5	5. 2	12. 7
Little Rock, Ark.	858, 800	2. 7	9. 9	12. 6
Meridian, Miss.	220, 200	4. 6	8. 0	12. 6
Kansas City, Kans.	332, 600	10. 5	2. 0	12. 5
Portsmouth, Ohio	259, 100	8. 6	3. 9	12. 5
Colorado Springs, Colo.	414, 000	7. 0	5. 2	12. 2
Galesburg, Ill.	175, 400	11. 0	1. 1	12. 1
Hutchinson, Kans.	280, 900	8. 6	3. 5	12. 1
Reading, Pa.	765, 500	4. 9	7. 0	11. 9
South Bend, Ind.	797, 300	2. 0	9. 9	11. 9
Lubbock, Tex.	560, 500	4. 6	7. 2	11. 8
Tulsa, Okla.	1, 374, 300	6. 5	5. 3	11. 8
Bloomington, Ill.	237, 800	6. 0	5. 7	11. 7
Ithaca, N.Y.	151, 000	5. 3	6. 4	11. 7
San Angelo, Tex.	208, 800	8. 8	2. 5	11. 3
Sioux Falls, S.Dak.	315, 700	8. 4	2. 7	11. 1
Green Bay, Wis.	403, 700	6. 7	4. 1	10. 8
Zanesville, Ohio	254, 700	8. 4	2. 4	10. 8
Waterloo, Iowa	411, 100	9. 3	1. 3	10. 6
Williamsport, Pa.	281, 500	4. 4	6. 1	10. 5
Glens Falls, N.Y.	211, 600	7. 5	2. 8	10. 3
Kenosha, Wis.	197, 600	8. 0	2. 3	10. 3
Mankato, Minn.	183, 300	6. 7	3. 4	10. 1
Toledo, Ohio	1, 507, 800	1. 2	8. 4	9. 6
Oklahoma City, Okla.	1, 540, 400	1. 8	7. 7	9. 5
Flint, Mich.	1, 152, 700	2. 3	7. 1	9. 4
Pottsville, Pa.	269, 700	5. 6	3. 7	9. 3
Amarillo, Tex.	612, 900	6. 1	3. 1	9. 2
Wheeling, W. Va.	571, 700	6. 1	3. 1	9. 2
Altoona, Pa.	442, 200	6. 0	3. 0	9. 0
Mobile, Ala.	802, 000	2. 0	7. 0	9. 0
Decatur, Ill.	406, 900	4. 6	4. 1	8. 7

Men's, women's, and children's shoes—Continued

City	Total sales (pairs)	Kinney percentage share (percent)	Brown owned or controlled share (percent)	Combined Brown-Kinney share (percent)
Fort Worth, Tex	2,003,800	1.6	7.0	8.6
Gary, Ind	760,300	4.6	3.9	8.5
Waco, Tex	312,600	5.0	3.0	8.0
Minneapolis, Minn	3,504,300	5.2	2.2	7.4
Lancaster, Pa	580,600	4.5	2.8	7.3
Grand Rapids, Mich	1,193,200	6.2	0.9	7.1
York, Pa	631,500	4.3	2.6	6.9
Asheville, N.C	388,900	6.0	0.6	6.6
Milwaukee, Wis	3,641,900	6.1	0.4	6.5
Peoria, Ill	861,000	4.6	1.9	6.5
Springfield, Ill	558,500	5.7	0.7	6.4
Columbus, Ga	565,600	4.1	2.2	6.3
Rockford, Ill	692,500	4.6	1.7	6.3
Saginaw, Mich	598,800	2.5	3.7	6.2
Jacksonville, Fla	1,356,200	1.1	4.8	5.9
Montgomery, Ala	665,900	2.2	3.5	5.7
Evansville, Ind	892,800	3.5	2.0	5.5
St. Paul, Minn	1,859,000	2.7	2.7	5.4

Source: GX 9, 214, R. 60-70, 1214-40; DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

APPENDIX C

Sales of women's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)	Combined Brown-Kinney share. (%)
Dodge City, Kans	31,400	23.3	34.4	57.7
Texas City, Tex	32,300	27.8	20.7	48.5
Council Bluffs, Iowa	68,200	27.3	15.4	42.7
Marshalltown, Iowa	72,600	21.8	13.4	35.2
Uniontown, Pa	144,900	16.3	18.8	35.1
Ardmore, Okla	62,600	14.4	20.3	34.7
Keokuk, Iowa	34,600	18.4	14.8	33.2
Ottumwa, Iowa	67,200	28.2	4.3	32.5
Pine Bluff, Ark	63,100	21.6	9.4	31.0
Lawton, Okla	95,200	20.2	9.8	30.0
Borger, Tex	50,100	15.5	13.8	29.3
Roswell, N. Mexico	80,900	11.7	15.8	27.5
Topeka, Kans	224,000	11.7	15.8	27.5
Coatesville, Pa	46,200	17.2	10.0	27.2
Hobbs, N. Mexico	50,800	22.2	5.0	27.2
Iowa City, Iowa	72,200	15.3	10.7	26.0
Dubuque, Iowa	119,000	14.3	11.5	25.8
Dodge City, Kans	12,000	16.4	8.4	24.8
Carlisle, Pa	55,500	17.5	5.9	23.4
Texarkana, Ark	65,800	15.9	7.5	23.4
Fort Dodge, Iowa	104,000	10.8	12.5	23.3
Steubenville, Ohio	207,200	14.9	8.1	23.0
Mason City, Iowa	102,400	14.4	8.3	22.7
Marion, Ohio	91,600	6.7	15.7	22.4
Pueblo, Colo	152,400	14.1	7.5	21.6
Hibbing, Minn	44,600	18.1	3.4	21.5
Fargo, N.Dak	162,800	15.3	6.2	21.5
Franklin, Pa	32,100	14.4	7.1	21.5
Corpus Christi, Tex	331,500	2.4	19.0	21.4
Batavia, N.Y	75,300	13.2	8.1	21.3
McAllen, Tex	90,200	13.0	8.3	21.3
Concord, N.H	57,300	15.6	4.7	20.3
Sioux City, Iowa	222,000	7.7	12.3	20.0
Muskogee, Okla	68,100	7.6	12.2	19.8
Rochester, Minn	130,100	11.2	8.6	19.8
Bartlesville, Okla	63,100	15.8	3.9	19.7
Berwyn, Ill	95,900	17.8	1.9	19.7
Clarksburg, W. Va	134,600	15.5	3.9	19.4
Davenport, Iowa	230,300	6.4	12.8	19.2
Freeport, Ill	88,000	10.7	8.3	19.0
Grand Forks, N.Dak	121,100	12.8	6.1	18.9
Muskegon, Mich	172,000	4.0	14.9	18.9
Baton Rouge, La	398,100	3.8	14.9	18.7
Des Moines, Iowa	562,800	4.9	13.8	18.7
Springfield, Mo	210,400	3.7	14.9	18.6

Women's shoes—Continued

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)	Combined Brown-Kinney share (%)
Laredo, Tex	166,200	15.3	3.2	18.5
St. Cloud, Minn	88,400	9.6	8.9	18.5
Fort Smith, Ark	165,200	11.8	6.5	18.3
Kingsport, Tenn	106,200	13.0	5.1	18.1
Gulfport, Miss	99,700	14.2	3.7	17.9
Cortland, N.Y	55,300	12.2	5.5	17.7
Fremont, Nebr	56,100	11.8	5.6	17.4
Manitowoc, Wis	60,800	13.9	3.5	17.4
Salina, Kans	102,800	13.8	3.3	17.1
Muncie, Ind	158,000	7.9	9.0	16.9
Portsmouth, Ohio	141,200	9.2	7.2	16.4
Reading, Pa	417,200	6.0	10.4	16.4
Greensburg, Pa	117,800	8.0	7.9	15.9
Little Rock, Ark	468,100	2.7	13.2	15.9
Flint, Mich	628,300	2.7	13.1	15.8
Wichita, Kans	666,600	7.5	8.3	15.8
Lubbock, Tex	305,500	3.9	11.7	15.6
Kingston, N.Y	112,100	11.6	3.9	15.5
Emporia, Kans	44,300	14.3	.8	15.1
Johnson City, Tenn	75,800	12.0	3.1	15.1
Odessa, Tex	167,700	8.1	7.0	15.1
Bloomington, Ill	129,600	6.2	8.6	14.8
Elgin, Ill	126,900	6.7	8.0	14.7
Enid, Okla	140,400	10.7	4.0	14.7
Burlington, Iowa	74,500	10.7	3.9	14.6
South Bend, Ind	434,500	1.6	13.0	14.6
Galesburg, Ill	95,600	12.4	2.1	14.5
Abilene, Tex	184,300	12.4	2.0	14.4
Meridian, Miss	120,000	3.7	10.6	14.3
Toledo, Ohio	821,800	1.3	12.6	13.9
Tulsa, Okla	749,000	7.0	6.9	13.9
Colorado Springs, Colo	225,600	7.5	6.1	13.6
Williamsport, Pa	153,400	4.1	9.2	13.3
Mankato, Minn	99,900	7.9	5.3	13.2
Green Bay, Wis	220,000	7.5	5.2	12.7
Waterloo, Iowa	224,100	10.2	2.3	12.5
Sioux Falls, S.Dak	172,000	7.4	4.9	12.3
Glens Falls, N.Y	115,300	7.6	4.6	12.2
Kansas City, Kans	181,300	8.6	3.6	12.2
Oklahoma City, Okla	839,500	1.8	10.4	12.2
Hutchinson, Kans	166,400	9.0	2.4	11.4
Kenosha, Wis	107,700	7.0	4.3	11.3
Pottsville, Pa	147,000	6.0	5.3	11.3
San Angelo, Tex	113,800	6.5	4.6	11.1
Wheeling, W. Va	311,600	6.9	3.9	10.8
Ithaca, N.Y	82,300	5.8	4.7	10.5
Zanesville, Ohio	138,800	9.0	1.5	10.5
Mobile, Ala	473,100	1.0	9.4	10.4
York, Pa	344,200	5.1	4.9	10.0
Gary, Ind	414,400	4.3	5.3	9.6
Decatur, Ill	221,800	3.9	5.5	9.4
Amarillo, Tex	334,100	5.6	3.2	8.8
Minneapolis, Minn	1,909,900	5.3	3.1	8.4
Fort Worth, Tex	1,092,100	1.4	6.9	8.3

Women's shoes—Continued

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)	Combined Brown-Kinney share (%)
Waco, Tex	170,400	5.4	2.9	8.3
Altoona, Pa	241,000	4.8	3.3	8.1
Lancaster, Pa	316,400	3.9	4.2	8.1
Rockford, Ill	377,400	5.0	3.1	8.1
Saginaw, Mich	326,300	2.1	5.6	7.7
Grand Rapids, Mich	650,300	5.8	1.6	7.4
Jacksonville, Fla	739,200	0.6	6.7	7.3
Columbus, Ga	308,300	3.4	3.5	6.9
Evansville, Ind	486,600	3.1	3.6	6.7
St. Paul, Minn	1,013,200	3.1	3.5	6.6
Montgomery, Ala	437,100	1.7	4.7	6.4
Peoria, Ill	469,300	3.6	2.8	6.4
Springfield, Ill	394,400	5.1	1.3	6.4
Milwaukee, Wis	1,984,900	5.9	0.3	6.2
San Antonio, Tex	1,476,000	1.0	4.7	5.7
Cedar Rapids, Iowa	256,600	3.9	1.2	5.1

Source: GX 9, 214, R. 60-70, 1214-40; DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

APPENDIX D

Sales of children's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)	Combined Brown-Kinney share (%)
Coatesville, Pa.	20,900	20.8	31.0	51.8
Dodge City, Kans.	14,200	35.5	13.5	49.0
Council Bluffs, Iowa	30,900	36.6	6.5	43.1
Ardmore, Okla.	28,400	20.7	21.0	41.7
Pueblo, Colo.	69,100	25.4	15.8	41.2
Borger, Tex.	22,700	24.8	16.1	40.9
Berwyn, Ill.	43,500	31.2	3.4	34.6
Batavia, N.Y.	34,100	14.0	19.3	33.3
Ottumwa, Iowa	30,500	30.4	2.5	32.9
Carlisle, Pa.	25,200	21.4	11.3	32.7
Lawton, Okla.	43,200	18.3	12.6	30.9
Franklin, Pa.	14,500	14.4	14.9	29.3
Gulfport, Miss.	45,200	24.5	4.5	29.0
Fremont, Nebr.	25,400	14.3	14.6	28.9
Bartlesville, Okla.	28,600	20.7	7.8	28.5
Concord, N.H.	26,000	16.3	11.8	28.1
Uniontown, Pa.	65,700	18.9	8.3	27.2
Marshalltown, Iowa	32,900	22.8	4.2	27.0
Cortland, N.Y.	25,100	13.8	12.4	26.2
Kingsport, Tenn.	48,100	14.8	10.6	25.4
McAllen, Tex.	40,000	17.0	7.5	24.5
Topeka, Kans.	101,600	15.7	7.2	22.9
Texarkana, Ark.	29,800	19.2	3.6	22.8
Johnson City, Tenn.	34,300	13.0	9.4	22.4
Dubuque, Iowa	53,900	17.6	4.5	22.1
Emporia, Kans.	20,100	14.5	7.4	21.9
Iowa City, Iowa	32,700	15.8	5.8	21.6
Muskogee, Okla.	30,900	10.7	10.9	21.6
Salina, Kans.	46,600	12.5	8.7	21.2
Mason City, Iowa	46,400	16.8	3.4	20.2
Enid, Okla.	63,700	12.1	6.9	19.0
Kingston, N.Y.	50,800	12.8	5.1	17.9
Rochester, Minn.	59,100	7.5	9.9	17.4
Ithaca, N.Y.	37,300	5.5	11.8	17.3
Hutchinson, Kans.	70,900	10.9	6.0	16.9
Baton Rouge, La.	180,400	8.0	8.6	16.6
Grand Forks, N. Dak.	54,900	12.7	3.4	16.1
Sioux City, Iowa	100,600	9.8	5.9	15.7
Altoona, Pa.	109,300	12.5	2.9	15.4
Elgin, Ill.	57,500	13.1	2.3	15.4
Meridian, Miss.	54,400	6.7	8.7	15.4
Wichita, Kans.	302,200	9.6	5.6	15.2
Colorado Springs, Colo.	102,300	8.0	7.1	15.1
Fort Smith, Ark.	74,900	12.1	3.0	15.1

Children's shoes—Continued

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)	Combined Brown-Kinney share (%)
Fort Dodge, Iowa	47,100	12.5	2.4	14.9
Zanesville, Ohio	62,900	9.7	4.8	14.5
Muskegon, Mich	78,000	7.4	6.6	14.0
Steubenville, Ohio	93,900	11.4	2.4	13.8
Tulsa, Okla	339,500	8.6	5.2	13.8
Corpus Christi, Tex	150,300	4.4	8.8	13.2
Davenport, Iowa	104,400	8.4	4.8	13.2
Fargo, N. Dak	73,800	9.0	3.8	12.8
Wheeling, W. Va	141,200	8.7	4.1	12.8
Amarillo, Tex	151,400	8.5	4.2	12.7
Little Rock, Ark	212,200	3.0	9.5	12.5
South Bend, Ind	197,000	2.9	9.4	12.3
Greensburg, Pa	53,400	8.9	3.0	11.9
Des Moines, Iowa	255,100	6.5	5.1	11.6
Glens Falls, N.Y	52,300	10.2	1.2	11.4
Green Bay, Wis	99,700	7.3	3.8	11.1
Decatur, Ill	100,500	6.3	4.4	10.7
Fort Worth, Tex	495,100	3.3	7.4	10.7
Mobile, Ala	198,100	4.5	6.2	10.7
Gary, Ind	187,800	7.0	3.6	10.6
Bloomington, Ill	58,800	6.5	4.0	10.5
Springfield, Mo	95,400	3.1	6.5	9.6
Williamsport, Pa	69,600	5.0	4.5	9.5
Waco, Tex	77,200	6.3	3.2	9.5
Lubbock, Tex	138,500	6.4	2.8	9.2
Pottsville, Pa	66,600	5.9	3.3	9.2
Milwaukee, Wis	899,800	8.3	.4	8.7
Lancaster, Pa	143,400	6.2	2.3	8.5
Tampa, Fla	251,600	4.5	4.0	8.5
Oklahoma City, Okla	380,600	2.5	5.8	8.3
Manitowoc, Wis	45,300	6.8	1.1	7.9
Mankato, Minn	45,300	6.8	1.1	7.9
Minneapolis, Minn	865,800	6.7	1.2	7.9
Peoria, Ill	212,700	6.7	1.0	7.7
Columbus, Ga	139,700	6.4	1.2	7.6
Reading, Pa	189,100	4.4	3.1	7.5
Toledo, Ohio	372,500	1.5	5.3	6.8
Jacksonville, Fla	335,100	2.0	4.5	6.5
Springfield, Ill	558,500	5.7	.7	6.4
Montgomery, Ala	164,500	3.3	2.9	6.2
Brownsville, Tex	100,500	4.3	1.8	6.1
Saginaw, Mich	147,900	3.5	2.5	6.0
St. Paul, Minn	459,300	2.7	2.5	5.2
Detroit, Mich	2,483,900	4.4	.6	5.0

Source: GX 9, 214, R. 60-70, 1214-40; DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

APPENDIX E

Sales of men's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)	Combined Brown-Kinney share (%)
Dodge City, Kans	12,000	16.4	8.4	24.8
Ardmore, Okla	23,900	8.1	15.5	23.6
Batavia, N.Y	28,700	8.9	11.3	20.2
Lawton, Okla	36,300	11.3	8.2	19.5
Borger, Tex	19,100	11.5	7.8	19.3
Pueblo, Colo	58,100	8.6	10.3	18.9
Carlisle, Pa	21,200	14.3	4.2	18.5
Freemont, Nebr	21,400	8.0	10.4	18.4
Coatesville, Pa	17,600	9.3	8.2	17.5
Manitowoc, Wis	23,200	10.1	7.3	17.4
Franklin, Pa	12,200	10.5	5.3	15.8
Council Bluffs, Iowa	26,000	14.0	1.1	15.1
Texarkana, Ark	25,100	12.1	2.6	14.7
Corpus Christi, Tex	126,500	2.0	12.3	14.3
Muskogee, Okla	26,000	6.5	7.6	14.1
Emporia, Kans	16,900	7.8	5.7	13.5
Kingsport, Tenn	40,500	7.2	5.9	13.1
Bartlesville, Okla	24,100	8.9	4.1	13.0
Concord, N.H	21,900	7.6	5.2	12.8
Cortland, N.Y	21,100	7.6	5.2	12.8
Dubuque, Iowa	45,400	10.2	2.1	12.3
McAllen, Tex	34,400	8.4	3.5	11.9
Berwyn, Ill	36,600	9.1	2.6	11.7
Salina, Kans	39,200	7.2	3.9	11.1
Kingston, N.Y	42,800	6.9	3.7	10.6
Elgin, Ill	48,400	10.1	.4	10.5
Enid, Okla	53,600	5.9	4.6	10.5
Uniontown, Pa	55,300	7.3	2.9	10.2
Rochester, Minn	49,600	4.3	5.5	9.8
Fort Smith, Ark	63,000	5.2	4.5	9.7
Topeka, Kans	85,500	9.0	.5	9.5
Hutchinson, Kans	59,700	5.1	3.7	8.8
Johnson City, Tenn	28,900	7.7	1.0	8.7
Davenport, Iowa	87,900	6.0	1.7	7.7
Ithaca, N.Y	31,400	3.5	4.2	7.7
Zanesville, Ohio	53,000	5.2	2.1	7.3
Muskegon, Mich	65,600	5.1	1.7	6.8
Steubenville, Ohio	79,000	5.7	1.1	6.8
Springfield, Mo	80,300	3.6	2.8	6.4
Amarillo, Tex	127,400	4.6	1.3	5.9
Asheville, N.C	80,900	2.9	2.9	5.8
Green Bay, Wis	83,900	4.0	1.6	5.6
Waco, Tex	65,000	2.6	3.0	5.6
Greensburg, Pa	44,900	4.4	1.0	5.4
Peoria, Ill	179,000	4.7	.7	5.4
Reading, Pa	159,200	2.7	2.6	5.3
Wichita, Kans	254,300	4.3	.9	5.2
Colorado Springs, Colo	86,100	4.4	.7	5.1

Source: GX 9, 214, R. 60-70, 1214-40; DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

APPENDIX F

Comparison of Brown-Kinney percentage of industry shoe sales for selected cities, and counties or standard metropolitan areas

[Appellant's percentages of 1954 dollar sales adjusted to include sales of Brown franchise and Wohl plan stores]

City	City percentage [1]	County or SMA percentage [2]		
		Name	SMA	County
Texas City, Tex	35.8	Galveston	12.2	
Coatesville, Pa	32.9	Philadelphia, Pa	1.9	
Ottumwa, Iowa	27.3	Wapello County		26.5
Uniontown, Pa	27.2	Fayette County		12.4
Texarkana, Ark	25.3	Miller County		23.9
Marshalltown, Iowa	24.9	Marshall County		22.6
Council Bluffs, Iowa	24.2	Omaha, Nebr	7.9	
Corpus Christi, Tex	24.0	Corpus Christi, Tex	22.6	
Ardmore, Okla	23.4	Carter County		20.4
Iowa City, Iowa	18.9	Johnson County		16.6
Muskogee, Okla	17.7	Muskogee County		16.5
Steubenville, Ohio	17.5	Wheeling-Steubenville	8.7	
Grand Forks, N. Dak	17.1	Grand Forks County		14.4
Mason City, Iowa	16.6	Cerro Gordo County		15.6
Topeka, Kans	16.4	Topeka, Kans	16.1	
Baton Rouge, La	16.0	Baton Rouge	15.9	
Rochester, Minn	15.9	Rochester, Minn	15.4	
Dubuque, Iowa	15.4	Dubuque, Iowa	13.9	
Fort Smith, Ark	15.4	Fort Smith	14.7	
Little Rock, Ark	15.2	Little Rock & North Little Rock.	13.2	
Fort Dodge, Iowa	14.8	Webster County		14.3
Springfield, Mo	14.3	Springfield, Mo	13.3	
Berwyn, Ill	14.1	Chicago, Ill	2.5	
Davenport, Iowa	14.1	Davenport, Moline, & Rock Island.	12.2	
Fargo, N. Dak	13.9	Cass County		13.5
Altoona, Pa	13.1	Altoona, Pa	10.6	
Muskegon, Mich	13.1	Muskegon County		12.0
Reading, Pa	12.2	Reading, Pa	10.7	
South Bend, Ind	11.9	South Bend, Ind	11.1	
Greensburg, Pa	11.3	Pittsburgh, Pa	2.5	
Bloomington, Ill	11.0	McLean County		9.8
Kansas City, Kans	10.7	Kansas City, Mo	3.1	
Colorado Springs, Colo	10.6	El Paso County		10.5
Elgin, Ill	10.5	Chicago, Ill	2.5	
Oklahoma City, Okla	10.0	Oklahoma City, Okla	10.1	

[1] Based on dollar values from DX DDDD-1, DDDD-2, NNNN, UUUUUU, R. 4939-5299, 5780-5818, 7155-7313; GX 241D, R. 2014-2365.

[2] Total area dollar estimates of footwear sales from GX 242, R. 2807-19, and DX UUUUUU, R. 2014-2365. Area dollar sales of footwear by Brown and Kinney owned or controlled outlets from DDDD-1, DDDD-2, NNNN, UUUUUU, R. 4939-5299, 5780-5818, 7155-7313; GX 241D, R. 2014-2365.

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