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Notes

Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act

Divestiture is a potent and frequently invoked remedy in suits by the federal government against corporations whose growth through stock or asset acquisitions violates section 7 of the Clayton Act. There is a dearth of authority, however, as to the availability of this remedy in suits by private litigants. The author of this Note examines and compares the statutory authority for public and private remedies for section 7 violations and considers the desirability of divestiture as a private remedy. He concludes that section 16 of the Clayton Act may reasonably be construed to afford such a remedy and that in some instances granting such relief would serve both public and private interests.

INTRODUCTION

American business growth during the last century has been accomplished to a great extent through intercorporate mergers. Horizontal integration of competing corporations and vertical acquisition of subsidiaries by parent corporations through asset mergers or the acquisition of stock are daily occurrences in our industrial society. The antitrust laws are premised on a desire to preserve a free and competitive economy in the midst of this corporate growth. The most effective remedy available under the antitrust laws with which to combat mergers having an anti-competitive effect is divestiture of the stock or assets acquired in effecting the combination. However, a decree of divestiture often imposes drastic consequences on the party in violation. A corporate organization, perhaps of long standing, may be forced to split up its assets and management; or a sale of stock with severe tax and price consequences may be required. Nonetheless, in its recent decision in *United States v. E. I. du Pont de Nemours & Co.*,¹ the United States Supreme Court, referring to mergers violative of section 7 of the Clayton Act, pointed out that "the

1. 366 U.S. 316 (1961).

very words of § 7² suggest that an undoing of the acquisition is a natural remedy."³ Since this statement was made in a case brought by the United States, it is express authority for the availability of divestiture only in section 7 suits brought by the Government. Despite the significance of divestiture as a remedy under the anti-trust laws, there is little authority bearing on its availability to private litigants. The purpose of this Note is to examine the history and scope of the antitrust laws and the remedies expressly provided for their enforcement, and in light of this examination to consider when, if ever, divestiture may be invoked in a suit by a private litigant for violations of section 7 of the Clayton Act.

I. PURPOSE AND DEVELOPMENT OF SECTION 7

The enactment by Congress of the Sherman Act⁴ in 1890 was the first legislative step toward the maintenance of an industrial system composed of large numbers of freely competing units.⁵ That act prohibits contracts, combinations, or conspiracies in restraint of trade⁶ and the monopolization or attempt to monopolize trade or commerce.⁷ By 1914, however, it was apparent that although the Sherman Act was an effective weapon against established monopolistic practices and competitive restraints, it did not adequately deal with corporate integrations that might lead to future monopoly. To attack such mergers in their incipency,⁸ Congress enacted the Clayton Act,⁹ which prohibited in section 7 the acquisition by one corporation of another's stock whenever its effect "may be substantially to lessen competition, or to tend to

2. See text accompanying notes 10-13 *infra*.

3. 366 U.S. at 329.

4. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

5. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 396 n.4 (S.D.N.Y. 1957); Bicks, *Antitrust Goals and Current Enforcement Programs*, 15 U. MIAMI L. REV. 225 (1961); Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 35 (1964). See generally FORKOSCH, *ANTI-TRUST AND THE CONSUMER* 32-211 (1956).

6. Section 1, 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1958).

7. Section 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958).

8. See S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914). See also S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5 (1950); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 394-95 (S.D.N.Y. 1957); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 117 (1955); 2 HOFFMANN, *ANTITRUST LAW AND TECHNIQUES* 384 (1963); Bicks, *supra* note 5; Note, *Section 7 of the Clayton Act: a Legislative History*, 52 COLUM. L. REV. 766, 768 (1952).

9. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958).

create a monopoly.”¹⁰ Since section 7 prohibits acquisitions that “may” lessen competition or tend to create a monopoly, only a reasonable probability need be shown that such a result will occur.¹¹ Thus the standard of proof required is less than that under sections 1 and 2 of the Sherman Act.¹² In 1950, section 7 was amended to apply to asset as well as stock acquisitions.¹³ As a result of the ability to deal with the anticompetitive effects of mergers in their incipency and the lower standard of proof imposed under this provision, emphasis has increasingly been placed on the use of section 7 to promote antitrust policies.¹⁴

II. REMEDIES FOR SECTION 7 VIOLATIONS

A. FEDERAL GOVERNMENT REMEDIES

The enforcement of the antitrust laws is largely the responsibility of the federal government acting through the Justice Department and, in appropriate cases, the Federal Trade Commission.¹⁵ In such suits the Government may seek criminal penalties, injunctive relief including divestiture, or damages. Although the criminal provisions of sections 1 and 2 of the Sherman Act and section 14 of the Clayton Act subject convicted parties to fines up to \$50,000 and imprisonment up to one year,¹⁶ the Government customarily attacks mergers under section 7 of the

10. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

11. See S. REP. NO. 1775, 81st Cong., 2d Sess. 6 (1950); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957); 35 NOTRE DAME LAW. 265, 266 (1960).

12. See S. REP. NO. 1775, 81st Cong., 2d Sess. 5 (1950); HOFFMANN, *op. cit. supra* note 8, at 382; Levi, *The du Pont Case and Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 3 (1958); 35 NOTRE DAME LAW. 265, 266 (1960).

13. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). See S. REP. NO. 1775, 81st Cong., 2d Sess. 17 (1950); 4 KAN. L. REV. 449 (1956). Prior to 1950 section 7 had been construed as inapplicable to asset acquisitions. See Note, *Aspects of Divestiture as an Antitrust Remedy*, 32 FORDHAM L. REV. 135, 138 (1963). The amendment also made it clear that section 7 was to apply to vertical as well as horizontal acquisitions of stock and assets. See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), 12 ALA. L. REV. 214 (1960).

14. See Fortas, *Small Business, Mergers, and Section 7 of the Clayton Act*, 39 U. DET. L.J. 200-01 (1961).

15. Under the Sherman Act the Justice Department is given the power of enforcement. Section 4, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958). Both the Justice Department and the FTC are given the power to enforce the Clayton Act. See notes 17-18 *infra*.

16. Criminal sanctions are directly available under sections 1 and 2 of the Sherman Act. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958) (amendment increased the maximum fine from \$5,000 to \$50,000). Under section 14 of the Clayton Act, a violation of a penal provision of the antitrust

Clayton Act. Section 7 is not a penal provision and must be enforced by the use of civil remedies. Stock and asset acquisitions violative of section 7 may be enjoined by the Justice Department pursuant to section 15 of the Clayton Act¹⁷ or by the FTC under section 11.¹⁸ Although the Government may recover damages for its injuries arising from the violation of any antitrust law,¹⁹ some form of injunction is the usual request in Government litigation.²⁰

The most effective public remedy against a consummated section 7 violation is divestiture of the stock or assets acquired.²¹ To

laws constitutes a misdemeanor by the individual directors, officers, or agents of the corporation found to have violated the antitrust laws and may subject individuals to fines up to \$5,000, imprisonment up to one year, or both. 38 Stat. 736 (1914), as amended, 15 U.S.C. § 24 (1958). The Supreme Court, in *United States v. Wise*, 370 U.S. 405 (1962), held that the congressional intent in enacting section 14 was to make it easier to convict corporate officers and not to limit the liability of individuals to \$5,000. Thus, sections 1 and 2 of the Sherman Act apply to individuals and may subject them to fines up to \$50,000. See also Whiting, *Criminal Antitrust Liability of Corporate Representatives*, 21 A.B.A. SECTION ANTITRUST L. 327, 329-33 (1962).

17. 38 Stat. 737 (1914), 15 U.S.C. § 25 (1958).

18. 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1958). Under this provision authority to enforce compliance is also vested in (1) the ICC where applicable to common carriers subject to the Interstate Commerce Act, (2) the FTC where applicable to common carriers engaged in wire or radio communication, (3) the CAB where applicable to air carriers subject to the Civil Aeronautics Act, and (4) the Federal Reserve Board where applicable to banks, banking associations, and trust companies.

19. Clayton Act § 4A, 69 Stat. 282 (1955), 15 U.S.C. § 15a (1958). Prior to the 1955 amendment it was generally agreed that while a state could sue under section 4 of the Clayton Act to recover treble damages, the provision was not intended to extend to the United States. See Cooper, *Treble Damages—Reward for Private Enforcement of Federal Antitrust Laws*, 32 *DICTA* 293 (1955). Present section 4A is essentially identical to the private treble damage provisions of section 4 except that treble damages are not available to the United States under section 4A. See generally FORKOSCH, *ANTITRUST AND THE CONSUMER* 333-34 (1956); Greenwald, *The Measurement of Damages in Private Antitrust Suits*, 5 *ANTITRUST BULL.* 293 (1960).

20. See, e.g., HAMILTON & TILL, *ANTITRUST IN ACTION* 75-77 (TNEC Monograph No. 16, 1941).

21. Although distinctions may be made between the remedies of dissolution, divorcement, and divestiture, the term divestiture is broad enough to cover the other two. Divestiture refers to divesting a defendant of property, securities, or other assets; divorcement applies to the effect of a decree ordering particular types of divestiture and is especially applicable to vertically integrated organizations; dissolution refers to any situation where the dissolving of an illegal combination is involved, including the dissolution of such combinations by divestiture and divorcement. OPPENHEIM, *CASES ON FEDERAL ANTI-TRUST LAWS* 885 (1948). See generally Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 *IND. L.J.* 1 (1951). The exact effect of a divestiture will, of course, be determined by the terms of the judgment or decree.

effect its purposes a decree of divestiture may even extend to stock or assets originally acquired for investment purposes which have, nevertheless, created a situation where competition may be lessened or monopoly result.²² Until recently, however, courts showed a marked reluctance to order divestiture,²³ and, in view of its drastic effect, the Supreme Court has, in past Sherman Act cases, refused to grant such relief in the absence of a clear showing that other methods of enforcement would be ineffective.²⁴ Thus, the trial court in *United States v. E. I. du Pont de Nemours & Co.*,²⁵ declining to require divestiture of stock, had ordered only divestiture of voting rights. On appeal,²⁶ du Pont contended that the order was sufficient to effect the purposes of section 7.²⁷ The Supreme Court considered various forms of injunctive relief, found them "cumbersome and time consuming" and requiring policing that would unnecessarily involve the Government in private affairs, and concluded that "the public is entitled to the surer, cleaner remedy of divestiture."²⁸ The Court commented:

It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. . . . The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. . . . Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.²⁹

While only four members of the Court joined in the governing

22. Thus, a divestiture order may validly require the undoing of acquisitions which did not contravene section 7 at the time they were made. See 35 NOTRE DAME LAW. 265, 268 (1960).

23. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 353-58 (1955); Howrey, *Advising Clients in the Light of the du Pont (General Motors) Decision*, 3 ANTITRUST BULL. 13, 19 (1958); Van Cise, *Limitations Upon Divestiture*, 19 GEO. WASH. L. REV. 147 (1950).

24. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593-603 (1951) (concurring opinion); *United States v. National Lead Co.*, 332 U.S. 319 (1947); Adams, *supra* note 21; Howrey, *supra* note 23, at 19-23.

25. 177 F. Supp. 1 (N.D. Ill. 1959). On an earlier appeal the Supreme Court had held that the acquisition between 1917 and 1919 by du Pont of 23% of the common stock of the General Motors Corporation was a violation of section 7. 353 U.S. 586 (1957).

26. 366 U.S. 316 (1961).

27. See generally Note, 34 TUL. L. REV. 402 (1960).

28. 366 U.S. at 334. The Court did, however, reject the Government's contention that complete divestiture is mandatory on finding a section 7 violation. *Id.* at 328 n.9. See Duke, *Scope of Relief Under Section 7 of the Clayton Act*, 63 COLUM. L. REV. 1192, 1198-99 (1963).

29. 366 U.S. at 328-31.

opinion,³⁰ their strong language indicates that in Government actions divestiture is henceforth to be the accepted and normal remedy for section 7 violations.³¹

Enforcement of the antitrust laws by the Antitrust Division of the Justice Department and the FTC has considerable remedial and deterrent value in maintaining a free competitive economy. However, the effectiveness of governmental enforcement is severely limited by a shortage of available funds, and consequently of manpower.³² Because of this limitation, federal agencies must select from among suspected violations only a portion — ordinarily those involving a nationwide market — for enforcement action.

B. PRIVATE REMEDIES

In addition to governmental enforcement, private parties injured by a violation of the antitrust laws may obtain treble damages³³ and injunctive relief.³⁴ Two purposes are effected by affording these remedies to private parties: the private party may obtain compensation for his injury and simultaneously assist the Government in enforcing the antitrust laws.³⁵

30. Justices Frankfurter, Whittaker, and Stewart dissented; Justices Clark and Harlan took no part in the decision.

31. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); Bicks, *supra* note 5, at 228. Where another remedy will afford adequate relief against the anticompetitive effect of the acquisition, it is to be expected that courts will still stop short of divestiture. See generally Comment, *Aspects of Divestiture as an Antitrust Remedy*, 32 *FORDHAM L. REV.* 135 (1963).

32. See 12 *ALA. L. REV.* 214 (1960). In 1957, funds for Justice Department antitrust litigation were limited to about three million dollars per year. Kerr, *Remedies for Violations of Antitrust Laws*, 38 *CHI. B. REC.* 469 (1957). By 1959, four million dollars per year were available. *Wall Street Journal*, May 22, 1959, p. 1, col. 6.

33. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958); Note, 68 *YALE L.J.* 949 (1959).

34. Clayton Act § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958).

35. Thus, private parties provide an "ancillary force of private investigators" to supplement the Department of Justice in law enforcement. See *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Bateman v. Ford Motor Co.*, 202 F. Supp. 595 (E.D. Pa.), *rev'd on other grounds*, 302 F.2d 63 (3d Cir. 1962); *Weinberg v. Sinclair Refining Co.*, 48 F. Supp. 203 (E.D.N.Y. 1942); *Quemos Theatre Co. v. Warner Bros. Pictures, Inc.*, 35 F. Supp. 949 (D.N.J. 1940); *ATT'Y GEN. NAT'L COMM. ANTITRUST REP.* 378 (1955); *FORKOSCH, op. cit. supra* note 19, at 17; *HAMILTON & TILL, op. cit. supra* note 20, at 82; Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 *MICH. L. REV.* 363 (1954); Cooper, *supra* note 19; Greenwald, *supra* note 19; Note, *Standing to Sue for Treble Damages Under Section 4*

The remedy most often invoked by private parties injured by a violation of the antitrust laws is section 4 of the Clayton Act, which provides that the injured party may recover costs and attorney's fees as well as three times the damages sustained.³⁶ This section provides the private litigant strong incentive to obtain recompense for his injury, and at the same time aids the Government in antitrust enforcement. To recover treble damages he must show that the antitrust laws have been violated, that he has been injured, and that the injury has been caused by the violation.³⁷ Despite an easing of the proof of damages requirement in recent years,³⁸ the effectiveness of the private treble damage action as a mode of redressing private harm and enforcing the antitrust laws is limited by the cost of litigation, difficulty in proving causation,³⁹ and the reliance of most treble damage actions on prior Government litigation.⁴⁰

of the Clayton Act, 64 COLUM. L. REV. 570, 571 (1964); Comment, *Fifty Years of Sherman Act Enforcement*, 49 YALE L.J. 284, 296 (1939). By far the greater percentage of antitrust suits are commenced by private parties. Of 315 antitrust suits pending early in 1959, only 63 were Government suits. By the end of that year, 600 of the 693 suits pending were private suits. Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 6 ANTITRUST BULL. 441 (1961). Note the increase in private suits—as of 1940 only 175 private suits were on record. Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in Treble Damage Suit*, 61 YALE L.J. 1010 (1952). Private remedies have been called an even greater vehicle for the prevention of anticompetitive activity than governmental enforcement. See Kerr, *supra* note 32, at 471; Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958). See also *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, *supra* at 845; Bicks, *supra* note 5. The effectiveness of private remedies has been subject to doubt from other quarters, however, largely due to the cost of suit, problems of proof, and reliance on prior Government litigation. See Clark, *supra*; Comment, *Fifty Years of Sherman Act Enforcement*, 49 YALE L.J. 284, 296–99 (1939). See also text accompanying notes 39–40 *infra*.

36. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1958).

37. Pollock, *The "Injury" and "Causation" Elements of a Private Antitrust Action*, 21 A.B.A. SECTION ANTITRUST L., 341 (1962); Timberlake, *Federal Antitrust Treble Damage Actions*, 9 N.Y.L.F. 145, 172 (1963).

38. Greenwald, *supra* note 19, at 298.

39. Note, *Fifty Years of Sherman Act Enforcement*, 49 YALE L.J. 284, 296 (1939). If the recent decision in *Gottesman v. General Motors Corp.*, 221 F. Supp. 488 (S.D.N.Y. 1963), is correct, no treble damages can be recovered for a section 7 violation. The court's reasoning in *Gottesman* was that since a section 7 violation proves only that competition *may* be substantially lessened or that an acquisition *may tend* to create a monopoly, it is not a sufficient basis from which to infer resulting injury to anyone. The correctness of this decision is subject to some doubt. See BNA's Antitrust & Trade Regulation Report, ATRR No. 127, Dec. 17, 1963 (Subject: Treble Damages Under Section 7 of Clayton Act); 64 COLUM. L. REV. 597 (1964); 48 MINN. L. REV. 1001 (1964).

40. The Clayton Act permits a private party to introduce prior

In addition to treble damages, a private party may obtain injunctive relief under section 16 of the Clayton Act⁴¹ upon a showing of threatened injury for which there is no adequate remedy at law.⁴²

III. DIVESTITURE AS A PRIVATE REMEDY

A private party who has been or will be injured by an acquisition in violation of section 7 may petition the Government to bring suit against the parties in violation⁴³ or seek to intervene in an existing Government suit.⁴⁴ These possibilities, however, are severely limited because a private party has no *right* to demand

Government-obtained judgments as prima facie evidence of the defendant's violation. Section 5, 69 Stat. 283 (1914), 15 U.S.C. § 16 (1958). See generally Cooper, *supra* note 19. As a result, a large percentage of the private treble damage actions are brought in the wake of successful Government actions. See Clark, *supra* note 35, at 293. The application of the prima facie presumption is limited, however, to those matters with respect to which the judgment acts as an estoppel between the original parties. This may mean that a prima facie case is avoided when the time or locality of the violation determined by the prior judgment differs from that alleged by the private plaintiff. See Timberlake, *supra* note 35, at 446-61. The presumption does not apply at all when the Government litigation resulted in a consent decree or a judgment rendered on a *nolo contendere* plea. See Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 211 F. Supp. 712 (N.D. Ill. 1962); Note, *Government Antitrust Judgments as Evidence in Private Actions*, 65 HARV. L. REV. 1400, 1401 (1952). Acceptance of a plea of *nolo contendere* is within the discretion of the court and may be refused. See, e.g., United States v. Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955).

41. 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958). An injunction was not available to private parties before the enactment of section 16. See Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917); Bateman v. Ford Motor Co., 202 F. Supp. 595 (E.D. Pa.), *rev'd on other grounds*, 302 F.2d 63 (3d Cir. 1962); Note, *Stockholders Suits and the Sherman Act*, 5 STAN. L. REV. 480, 483 (1953). By its nature injunctive relief is not subject to the objections to enforcement of a section 7 violation raised by Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D.N.Y. 1963), as to treble damages, and it clearly is available for a section 7 violation. See e.g., American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957).

42. See Alden-Rochelle, Inc. v. American Soc'y of Composers, A. & P., 80 F. Supp. 888, 898-99 (S.D.N.Y. 1948). To obtain injunctive relief the plaintiff must show injury in its private capacity and not merely as a member of the public. See, e.g., Union Pac. R.R. v. Frank, 226 Fed. 906 (8th Cir. 1915); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 317 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953); Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325 (N.D. Ill. 1948); RCA v. Hygrade Sylvania Corp., 10 F. Supp. 879 (D.N.J. 1934); Connecticut Tel. & Elec. Co. v. Automotive Equip. Co., 14 F.2d 957 (D.N.J. 1926).

43. See Kerr, *supra* note 32, at 474.

44. See Alden-Rochelle, Inc. v. American Soc'y of Composers, A. & P., 80 F. Supp. 900, 904 (S.D.N.Y. 1948).

that the Government institute an action⁴⁵ or to intervene in a Government suit.⁴⁶ Also, even though the Justice Department is equipped to receive complaints from private persons, its limited resources require it to focus on cases involving nationwide interests.⁴⁷ Despite the general emphasis on market size⁴⁸ and the share of the line of commerce involved,⁴⁹ section 7 violations clearly may arise from much less extensive activity.⁵⁰ Small businesses operating in an area as limited as a single metropolitan community definitely may be the subject of section 7 litigation.⁵¹ As a result, private parties frequently must rely on the remedies available to them, rather than on the Government, to obtain relief from section 7 violations.

In many situations, however, the private remedies of treble damages or an injunction prohibiting acquisition will be insufficient to protect private parties. Treble damages may provide more than adequate compensation for past injuries, but when the injury is caused by the exercise of power amassed through illegal acquisition, the injury will continue so long as the corporation continues in its anticompetitive state. Neither the public interest in maintaining free competition nor the private litigant's desire to remain competitive can be fully vindicated by repeated treble damage actions. Injunctive relief may prove effective if a proposed acquisition in violation of section 7 may thereby be prevented, but reliance on such relief usually is unrealistic, since the injured party is unlikely to have had advance information of the illegal acquisition.⁵² Further, even where the proposed merger is publi-

45. While approximately 1200 complaints were made to the Antitrust Division in 1956, only 55 cases were filed. Kerr, *supra* note 32, at 469.

46. Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1035-36 (1952).

47. See 68 YALE L.J. 949 (1959).

48. See, e.g., *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

49. See Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 777 (1952).

50. This is clear since section 7 applies to acquisitions in "any line of commerce" and "in any section of the country." This language was substituted for an earlier proposal to prohibit a violation "in any community." The latter phrase was dropped to prevent the act from extending to the purchase of one local enterprise by another. Nonetheless, the present language was clearly meant to cover any substantial market area as well as the nation as a whole. See S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5, 8 (1950).

51. Speer, *Application of the Federal Antitrust Laws to Small Business in Michigan*, 39 U. DET. L.J. 213, 218 (1961); Whiting, *supra* note 16, at 337.

52. Compare *Schine Chain Theatres, Inc., v. United States*, 334 U.S. 110, 128 (1948), in which the Court stated that divestiture "is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the Government in their unlawful project."

cized, the hesitancy of courts to give preliminary injunctions makes it highly unlikely that a plaintiff could force a decision on the merits of the merger prior to its consummation.⁵³ Similarly, when the violation involves the acquisition of stock, a decree enjoining the voting of the acquired stock may sometimes be a sufficient remedy, but often the temptation to act anticompetitively by buying each other's products and giving price concessions will continue as long as the stock connection remains.⁵⁴

The limited effectiveness of both public and private remedies for section 7 violations lends significance to an inquiry into the existence of a further remedy — divestiture in a private suit — to protect private parties and further the purposes of the antitrust laws.

A. DIVESTITURE IMPLICIT IN SECTION 7

An inquiry into the availability of divestiture in private litigation must be rooted in statutory interpretation.⁵⁵ Since section 7 prohibits an acquisition of stock or assets which may lessen competition or tend to create a monopoly, the logical consequence of finding a section 7 violation arguably should be an unwinding of the prohibited merger.⁵⁶ The same concept was expressed by the Supreme Court in the context of a Sherman Act violation: "Dissolution of the combination will be ordered where the creation of the combination is itself the violation."⁵⁷ Although this approach has equitable appeal, it is generally held that where an offense is proscribed by a statute providing a remedy, that remedy is exclusive.⁵⁸ The creation of other remedies under the Clayton Act is,

53. See, *e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Fein v. Security Banknote Co.*, 157 F. Supp. 146, 148 (S.D.N.Y. 1957).

54. *Cf.* *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961).

55. It may be said at the outset that the intent, if any, of Congress on this issue is sufficiently muddled in the record to preclude helpful resort to any express statement of purpose. *Cf.* *HAMILTON & TILL, op. cit. supra* note 20, at 10.

56. The language of *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328-34 (1961), broadly read, supports this. See text accompanying notes 28 & 29 *supra*.

57. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944). See also *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 98 (1962), in which the Court stated that "it is beyond question that a court of equity has power in appropriate circumstances to order the dissolution of an association of businessmen, when the association and its members have conspired among themselves or with others to violate the antitrust laws."

58. See, *e.g.*, *Globe Newspaper Co. v. Walker*, 210 U.S. 356 (1908); *Meyer v. Kansas City So. Ry.*, 84 F.2d 411 (2d Cir. 1936); *Hassel v. United States*, 34 F.2d 34 (3d Cir. 1929); *Decorative Stone Co. v. Building Trades Council*, 23

therefore, strong evidence of an intent to preclude the implication of additional remedies from section 7.

B. DIVESTITURE WITHIN SECTION 16

Notwithstanding that the remedy of divestiture might not be implied from section 7, the logical relation between the two should be a factor in determining whether section 16 of the Clayton Act, which authorizes injunctive relief for private litigants, might reasonably be construed to provide a private action for divestiture.

1. *Comparison of Section 16 to Provisions Giving the Remedy of Divestiture to the Government*

Section 16 provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions . . . as injunctive relief against threatened conduct . . . is granted by courts of equity . . .⁵⁹

The provision makes no express reference to a power of private parties to obtain "divestiture." However, divestiture has become the normal remedy in government suits under section 15 of the Clayton Act for section 7 violations notwithstanding that section 15 also contains no express authorization of the remedy.⁶⁰ Section 15 provides in part:

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 . . . 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.⁶¹

Also, divestiture has long been available to the Government under the substantially identical provisions of section 4 of the Sherman

F.2d 426 (2d Cir. 1928); cf. *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917) (no injunctive relief available to private parties prior to enactment of section 16). In *A. B. Small Co. v. Lamborn & Co.*, 267 U.S. 248, 252 (1925), the Supreme Court stated that with one exception the remedies for violation of the Sherman Act are exclusive.

59. 38 Stat. 737 (1914), as amended, 15 U.S.C. § 26 (1958).

60. See notes 23-28 *supra* and accompanying text. See generally Comment, *Aspects of Divestiture as an Antitrust Remedy*, 32 *FORDHAM L. REV.* 135 (1963).

61. 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1958).

Act,⁶² although it too does not expressly authorize the remedy.⁶³ Indeed, the only express grant of divestiture in the antitrust laws is found in section 11 of the Clayton Act, which confers this power upon the FTC.⁶⁴

Comparing the right of a private party to sue for "injunctive relief" under section 16 with the right of the Government to petition that a "violation . . . be enjoined or otherwise prohibited" under section 15, it would appear that the Government can derive no greater claim to the remedy of divestiture from the language of section 15 than can a private party from the language of section 16. It is doubtful that the remedy was meant to be conferred exclusively on the Government by the phrase "or otherwise prohibited," which appears in section 15. Thus, from the language of the statute, there does not seem to be any reason why divestiture as a private remedy could not be implied under section 16 if the other conditions imposed by that section are fulfilled.

2. *Analysis of Section 16*

In light of the foregoing analysis, divestiture should be available to private litigants if it is the kind of injunctive relief that could be "granted by courts of equity" against "threatened conduct" as provided by section 16.

(a) General Equity Powers

The classic injunction is couched in preventive terms. The general equity power to avert loss or harm by preventive injunctions that is incorporated in section 16 clearly allows private litigants to prevent illegal stock and asset acquisitions. In addition, however, a substantial body of equity decisions grant injunctions which require that the defendant perform some affirmative act.⁶⁵ For instance, the equitable power to dissolve a corporation is clear.⁶⁶ Thus, unless limited by other language of the provision,

62. See *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (dictum); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *Standard Oil Co. v. United States*, 221 U.S. 1 (1910); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

63. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958).

64. 38 Stat. 735 (1914), as amended, 15 U.S.C. § 21 (1958). "If upon such hearing the Commission . . . shall be of the opinion that any of the provisions of said sections [15 U.S.C. §§ 13, 14, 18 & 19] have been or are being violated, it . . . shall . . . [require] such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held"

65. See, e.g., *Steggles v. National Discount Corp.*, 326 Mich. 44, 39 N.W.2d 237 (1949).

66. See Hornstein, *A Remedy for Corporate Abuse—Judicial Power to*

a court should be able to grant injunctive relief under section 16 requiring the divestiture of stock or assets.

(b) "Threatened Conduct or Loss"

Section 16 permits the grant of an injunction upon the request of a private party if a court of equity would grant such relief against "threatened conduct" that will cause loss or damage. If the grant of equitable power where loss is "threatened" is regarded as a limitation, the power to deal with stock or asset acquisitions that have already occurred is perhaps proscribed by negative implication. That is, since section 16 is couched in preventive terms, it may be construed to be inapplicable where the acquisition violative of section 7 has already occurred. Several decisions have accepted this view.⁶⁷ Nevertheless, although it is clear that these decisions squarely oppose the granting of divestitive relief under section 16, there is reason to conclude that they have incorrectly interpreted the statute. They are based on the proposition that relief against threatened conduct or loss cannot be had where some loss or conduct that will cause loss has already occurred, holding in effect that the acquisition of stock or assets is the sole proscribed event, and that once the acquisition has occurred no further equitable relief is available. But although the injurious acquisition of stock or assets occurred in the past, the injury will continue as long as the acquiring corporation continues to operate. It is anomalous to allow private parties to prevent such acquisitions without allowing the same result by divestiture once a merger has taken place. An interpretation of section 16 to deny divestiture to private plaintiffs because it is worded in preventive terms plainly conflicts with the result reached in non-divestiture cases under section 16. For instance, injunctions preventing the voting of stock have been granted even though the original stock acquisition occurred long before an injunction was requested.⁶⁸ Similarly, as seen above, divestiture is often granted in Government suits despite the seemingly preventive design of section 15 in providing for "proceedings in equity to prevent and restrain such violations."⁶⁹

Recent decisions lend some support to the proposition that

Wind Up a Corporation at the Suit of a Minority Stockholder, 40 COLUM. L. REV. 220 (1940); Note, 41 MICH. L. REV. 714 (1943).

67. See *Continental Sec. Co. v. Michigan Cent. R.R.*, 16 F.2d 378 (6th Cir. 1926); *Fein v. Security Banknote Co.*, 157 F. Supp. 146 (S.D.N.Y. 1957); *Westor Theatres, Inc. v. Warner Bros. Pictures, Inc.*, 41 F. Supp. 757 (D.N.J. 1941); *Venner v. Pennsylvania Steel Co.*, 250 Fed. 292 (D.N.J. 1918).

68. See, e.g., *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953).

69. 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1953).

divestiture is available to a private litigant under section 16. In 1953 the Court of Appeals for the Second Circuit considered the propriety of a temporary injunction prohibiting an acquisition pending trial without suggesting that the ultimate relief prayed for — divestiture of stock — was improper.⁷⁰ Other courts have, in dictum, suggested that divestiture may be available to private parties,⁷¹ and at least one court refused divestiture only because it believed that a lesser injunction was sufficient in that case.⁷² Finally, a Pennsylvania District Court has held that a complaint by private litigants for injunctive relief including divestiture of stock interests stated a good cause of action under section 16 of the Clayton Act.⁷³ Of course, these decisions are not clear authority for the availability of divestiture as a private remedy, but in each one the court was faced at least tangentially with the issue and did not indicate that divestiture is unavailable under section 16.⁷⁴

In summary, two lines of approach are open to a private party

70. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953).

71. See *Alden-Rochelle, Inc. v. American Soc'y of Composers, A. & P.*, 80 F. Supp. 900, 903 (S.D.N.Y. 1948); *Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd.*, 78 F. Supp. 1, 6 (D. Hawaii 1948).

72. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd on other issues*, 259 F.2d 524 (2d Cir. 1958). It is significant that the court apparently refused divestiture on the authority of pre-*du Pont* notions of reluctance to resort to divestitive relief. *Id.* at 401 n.16. In the *du Pont* case, the *American Crystal Sugar* case is cited as the only clear instance of refusal of divestiture for a section 7 violation. Although the Court noted that "the authority of that case is somewhat diminished by the fact that it was brought not by the Government but by a private plaintiff," 366 U.S. at 330 n.13, it gave no hint that it considered the remedy to be unavailable to private parties.

73. *National Supply Co. v. Hillman*, 57 F. Supp. 4 (W.D. Pa. 1944).

74. Another factor supporting the availability of divestitive relief under section 16 is that courts construing the antitrust laws often take a broad approach similar to that used in interpreting constitutional provisions. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933), in which the Court said that "as a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." Cf. *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962), in which an injunction was granted although the injunction provisions of section 16 of the Clayton Act do not apply to the "Dealer's Day in Court Act." See also *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964), in which treble damages were granted although by the express language of the McCarran Act the treble damages provision of section 4 of the Clayton Act was inapplicable. Although the latter decision is based in large measure on the intent of Congress in repealing section 7 of the Sherman Act, it also evinces a willingness to interpret the antitrust laws liberally in the light of their underlying purposes. Compare Rashid, *What Is Right With Antitrust*, 5 ANTITRUST BULL. 5 (1960).

seeking divestiture. It would not be unreasonable to imply the remedy of divestiture from the substantive provisions of section 7, but in light of the remedies expressly provided in other sections of the Clayton Act, such an approach probably cannot be sustained. On the other hand, despite some judicial interpretation to the contrary, divestiture should be available to private litigants as a kind of injunctive relief allowable under section 16.

C. OBJECTIONS TO DIVESTITURE AS A PRIVATE REMEDY

The argument most likely to arise against granting divestiture as a private remedy is that it would lead to a flood of indiscriminate litigation designed to harass competitors.⁷⁵ This argument is not well founded since it applies equally to suits for treble damages and injunctive relief, and since the cost of litigation should deter most nonmeritorious suits. The objection that the interest of private parties may often be inconsistent with the public interest is also untenable. Private parties have traditionally been granted remedies under the antitrust laws to aid in their enforcement. Moreover, since an order of divestiture must be premised upon a section 7 violation, it will by definition always reflect a finding of potential public injury.

D. STANDING TO SUE FOR DIVESTITURE

In addition to the practical safeguards against nonmeritorious suits for divestiture, private suits will be further restricted by the requirement under section 16 that to be entitled to relief a private litigant must show threatened loss or damage to himself.⁷⁶ Thus private parties may assume the role of private Attorneys General in enforcing the antitrust laws⁷⁷ only where they are personally affected. The nature of this limitation in any given case will depend upon the context in which the section 7 violation occurs and the relation between the parties. In the case of a horizontal acquisition by one corporation of the stock or assets of another, the latter should be required to prove not only a consequent lessening

75. *Cf. Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 71 (1904).

76. See, e.g., *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307, 317 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953); *Connecticut Tel. & Elec. Co. v. Automotive Equip. Co.*, 14 F.2d 957 (D.N.J. 1926); *Union Pac. R.R. v. Frank*, 226 Fed. 906 (8th Cir. 1915); *Revere Camera Co. v. Eastman Kodak Co.*, 81 F. Supp. 325 (N.D. Ill. 1948); *RCA v. Hygrade Sylvania Corp.*, 10 F. Supp. 879 (D.N.J. 1934). Further, a court in its discretion may require the private plaintiff to prove a greater injury to himself under section 16 than the standard of section 7 alone would require. See *Hamilton Watch Co. v. Benrus Watch Co.*, *supra*.

77. See note 35 *supra*.

of competition or tendency to create a monopoly, but also the threat of direct losses to itself resulting from such factors as decreased ability to compete. In the case of vertical acquisitions, the acquired corporation could request relief under section 7 only upon a showing that the acquiring corporation was forcing it to deal on competitively unfavorable terms. In both cases acquiescence by the plaintiff corporation in the acquisition would usually be strong evidence that the acquisition did not directly injure it.

A competing corporation, however, should be allowed to request the unwinding of a merger of its competitors if threatened loss can be shown, regardless of whether the acquisition was horizontal or vertical. A horizontal merger may tend to create a monopoly which would drive the competitor out of business; a vertical merger of, for example, a wholesale and a retail corporation might injure competitors at the wholesale level by capturing actual or potential retail customers for the merged wholesale corporation, and at the retail level by the competitive advantage gained by the merged retail competitor from its affiliation with a wholesaler.⁷⁸

Further complications in determining standing may develop when the plaintiff is a corporate shareholder. Although courts have dismissed individual suits and even class actions by shareholders on the ground that the alleged injury to the plaintiff was too remote,⁷⁹ stockholders' derivative suits for antitrust violations have met with some success in recent years.⁸⁰ In general such suits should be limited to cases where competitive injury to the shareholder's corporation is clearly proved.⁸¹

E. DISCRETION OF COURTS IN GRANTING DIVESTITURE

Even in those cases where the plaintiff can show injury, the determination that section 16 permits a court to grant divestiture

78. See *Hawaiian Airlines v. Trans-Pacific Airlines, Ltd.*, 78 F. Supp. 1 (D. Hawaii 1948).

79. See *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910). See also *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955); Note, *Stockholders' Suits and the Sherman Act*, 5 STAN. L. REV. 480, 481-84 (1953).

80. See *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953).

81. The present status of stockholders' derivative antitrust suits is discussed in Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143 (1961); cf. Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 581-83 (1964); Annot., *Stockholder's Action as Remedy to Recover Damages for Violation of Antitrust Laws*, 36 A.L.R.2d 1345 (1954).

to private parties in no way requires divestiture in all cases.⁸² By incorporating the power of equity courts, section 16 implicitly confers upon the courts the discretion of equity courts to give the remedy best suited to the situation. For example, in vertical acquisitions such as occurred in *du Pont*, divestiture may be the only sure method of preventing further anticompetitive dealing. On the other hand, where one firm acquires the stock of a competitor the necessity of divestiture is by no means as clear. Unless a potential exercise of control by other means is shown, an injunction to prevent the voting of the stock by the acquiring corporation may well be sufficient relief in a suit brought by the acquired corporation.⁸³ The express sanction in section 7 of acquisition for investment purposes reinforces this conclusion.

CONCLUSION

Although there is some case law to the contrary, making the remedy of divestiture available to a private party suing under section 16 of the Clayton Act for violations of section 7 is not an unreasonable interpretation of its provisions or purposes. The liberal interpretation of the remedial provisions of the antitrust laws and the recent *du Pont* decision, indicating that at least in government suits divestiture is the normal remedy for section 7 violations, lends support to this view. Though divestiture may seldom be sought by a private litigant, that is not a ground for denying it in appropriate cases when requested. Despite the objection that such a sweeping remedy should not be placed in the hands of private parties, the public interest as well as the interests of private parties would be served by allowing private litigants as well as the Government to request such relief in a proper case. The potential for abuse of this remedy by private litigants is mitigated by the cost of suit, the requirements of proving both a violation and an injury to the litigant, and the discretion of the court to determine the appropriateness of divestiture in each case. Whatever quantum of danger exists will probably cause courts to grant divestiture more sparingly in private than in Government actions, but this should not color the determination of whether section 16 creates the remedy. The public interest as well as the interests of private parties would be served by allowing private litigants to obtain divestiture in the proper case.

82. In the *du Pont* case the Court rejected the Government's contention that once a section 7 violation is found, divestiture must be decreed. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 & n.9 (1961).

83. *Cf. Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953).