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Marianne E. Guerrini

Assoc., Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, IL

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Equitable Remedies in the Private Enforcement of Section 7 of the Clayton Act: Do Divestiture and Rescission Create a Panacea or Open a Pandora's Box?

Marianne E. Guerrini*

INTRODUCTION

The role of the private litigant in the enforcement of the federal antitrust laws has received much attention in recent years.¹ One area of rapid expansion has been the number of suits brought under the principal federal antitrust statute affecting mergers, section 7 of the Clayton Act.² Recent legislation has significantly expanded the reach of section 7³ and it can be anticipated that the

* Associate, Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Illinois. B.A. 1974, Loyola University of Chicago; J.D. 1977, University of Illinois College of Law; member, Illinois bar; member of the Antitrust Section of the American Bar Association and Federal Bar Association; instructor at the Illinois Institute of Technology, Chicago-Kent College of Law, Chicago, Illinois.

1. See, e.g., ABA ANTITRUST SECTION, MONOGRAPH NO. 1, *MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION VII OF THE CLAYTON ACT POLICY AND LAW* (1977) [hereinafter cited as MONOGRAPH NO. 1]; DuVol, *The Class Action as an Antitrust Enforcement Device: The Chicago Study Revisited*, 1979 ABF RES. J. 449 (1979); Richman, *Setbacks to Private Antitrust Enforcement — A Review of the Supreme Court's 1976-77 Term*, 21 HOW. L. J. 727 (1978); Rill, *Recent Developments Affecting Private Actions Under the Robinson-Patman Act*, 47 A.B.A. ANTITRUST L. J. 1415 (1979); Note, *Anti-Trust - The Ultimate Consumer has Standing Under Section 4 of the Clayton Act: Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), 10 CUMBERLAND L. REV. 835 (1980).

2. 15 U.S.C. § 18, as amended by the Antitrust Procedural Improvements Act of September 12, 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1157, provides in pertinent part: No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

3. See The Antitrust Procedural Improvements Act of September 12, 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1157. Section 6 of the 1980 Act broadened the scope of § 7 of the Clayton Act to apply to acquisitions involving "persons", rather than solely corporations, as was the case under the former statute and its predecessors. Thus, acquisitions involving partnerships, unincorporated associations, individuals and other non-corporate entities are

number of actions brought by private litigants will rise at an even faster pace than it has in the last decade.

The magnitude of the shift toward private antitrust enforcement⁴ in the merger area has generated significant issues which remain unresolved. First, policy considerations have been raised by this shift of the burden of antitrust enforcement away from the government to the private litigant. Second, the propriety of applying certain equitable remedies in private antitrust merger actions has been questioned.

An examination of these issues forms the basis of this article. Specifically, the statutory grounds for private enforcement under section 7 and the current split among jurisdictions as to the availability to private plaintiffs of the equitable remedies of divestiture and rescission will be explored. Because the scope of private antitrust enforcement in a merger context and concomitant equitable remedies have yet to be precisely defined, the range of remedies available to private litigants should be limited only by the general prescriptions applied by courts when considering equitable relief.⁵

THE STATUTORY BASIS FOR A PRIVATE RIGHT OF ACTION

Section 7 of the Clayton Act prohibits any acquisition of stock or other assets of an entity, be it incorporated or not, which is engaged in commerce or in activity affecting commerce, where the effect of such acquisition would be "substantially to lessen competition, or to tend to create a monopoly."⁶ Although section seven

now covered by § 7. Additionally, the 1980 amendments expanded the jurisdictional reach of § 7 from any transaction "in commerce" to "any activity affecting commerce," as has been the case with other federal antitrust laws for some time. For a broader discussion of the Act, see Note, *The Antitrust Procedural Improvements Act of 1980: Jurisdictional Uniformity in Antitrust Merger Law*, 12 LOY. CHI. L.J. (1981).

4. The term "merger" as used herein includes merger, consolidations, acquisitions of all or part of the shares or assets of a company, including share acquisitions through tender offers, and joint ventures. Significantly, courts have liberally interpreted the term under § 7 of the Clayton Act. See, e.g., *Record Club of America, Inc. v. Capitol Records, Inc.*, 1971 Trade Cas. ¶ 73,694 (S.D.N.Y. 1971) (a license agreement is an acquisition of assets under § 7).

5. Issues regarding the "standing" of a private litigant under § 7 and a private litigant's right to recover treble damages in a suit brought under § 7 are beyond the scope of this article. For a general discussion of "standing," referring to the requirement that the plaintiff in federal court be an individual who is harmed by the alleged wrong, see C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS*, 42-52 (3rd ed. 1976). For a discussion regarding what circumstances will warrant the recovery of treble damages by a private plaintiff in a suit brought under § 7, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

6. See note 2 *supra*. As amended by the Antitrust Procedural Improvements Act of September 12, 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1157, § 7 now has a jurisdictional reach

defines a substantive prohibition, it does not specify a private right of action for its enforcement. Two other sections of the Clayton Act delineate the rights of private parties. Section 4 of the Clayton Act⁷ provides that a person may recover treble damages for injuries to his business or property by reason of a violation of the antitrust laws.⁸ Section 16 of the Clayton Act⁹ provides that a person may be awarded injunctive relief against an antitrust violation.

The most pressing issue regarding remedies in the private enforcement of the Clayton Act stems from conflicting interpretations by the courts of what remedies are available under section 16. The conflict arises out of the silence of section 16, and the Clayton Act in general, on several important matters. First, the statute imposes no time limitation on when an action under the antitrust laws may be commenced.¹⁰ Further, unlike the extensive requirements of notice and court approval of settlements imposed in Justice Department cases,¹¹ no court review of a proposed settlement

as sweeping as that of the other principal antitrust laws. See note 3 *supra*.

7. 15 U.S.C. § 15 (1976) provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

8. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Supreme Court emphasized that § 4 is applicable and will provide for treble damages in a private suit brought under § 7 of the Clayton Act.

9. 15 U.S.C. § 26 (1976) provides in pertinent part:

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 and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon. . . a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

The statute further authorizes the awarding of court costs and attorneys' fees in injunctive cases: "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." *Id.*

10. The only statutory time limitation imposed under the federal antitrust laws is that found in § 4b of the Clayton Act, 15 U.S.C. § 15b (1976), which limits the time period for recovery of damages in both private and government civil suits to the four years preceding the filing of the action. It has been argued that a private party may challenge an acquisition any time after it occurs. See *United States v. E.I. duPont de Nemours*, 353 U.S. 586 (1957). See generally Clayton Act Committee, *The Backward Sweep Theory and the Oligopoly Problem*, 32 A.B.A. ANTITRUST L.J. 306 (1966). But see *International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.* 518 F.2d 913 (9th Cir. 1975), where the Ninth Circuit Court of Appeals held that a challenge to an acquisition made more than four years after the confirmation of the transaction was not timely brought.

11. Detailed procedures and requirements necessary for the entry of a consent decree in a government case are set forth at 15 U.S.C. § 16(b) *et. seq.* (1976).

is required in private nonclass actions brought under section 7.¹² Finally, the statute makes no provision for government comment or informal consultation with the court in pending private anti-trust suits. Each of these factors has been deemed significant by courts faced with the determination of whether the remedies of divestiture or rescission, commonly granted in government cases, should be made available as remedies to private plaintiffs challenging mergers.

DIVESTITURE: A PRIVATE REMEDY?

Private plaintiffs seeking monetary damages under section 7 of the Clayton Act frequently face the problem of proving damages *prior* to the consummation of the allegedly illegal merger.¹³ The Supreme Court emphasized in *Brunswick Corp. v. Pueblo Bowl-O-Mat*¹⁴ that, although treble damages serve a remedial function once injury has occurred, section 7 was designed as a "prophylactic" provision to *prevent* lessening of competition, rather than as a remedy to correct monopoly.¹⁵ The inadequacy of treble damages to prevent the type of *potential* harm to competition that section 7 is directed against is precisely the reason that equitable relief is an appropriate remedy in a private merger challenge. The crucial issue then, is how broadly the term "injunctive relief" in section 16 of the Clayton Act will be interpreted to permit the use of flexible equitable remedies in private suits.¹⁶

A favored equitable remedy in government cases has been divestiture. Divestiture requires that the buyer or acquirer rid itself of property, securities or assets, usually by sale on the open market. In *United States v. E.I. du Pont de Nemours & Co.*,¹⁷ the Supreme court emphasized that divestiture is probably the best

12. A settlement in a private non-class action brought under § 7 of the Clayton Act need only meet the requirements set forth in Rule 41(a) of the Federal Rules of Civil Procedure. FED. R. CIV. P. 41(a).

13. For a discussion of situations in which a § 7 violation may occur without creating private damages, see II P. AREEDA & D. TURNER, *ANTITRUST LAW* 345 *et seq.* (1978).

14. 429 U.S. 477 (1977).

15. *Id.* at 485. In *Carlson Companies, Inc. v. Sperry and Hutchinson Co.*, 507 F.2d 959 (8th Cir. 1974), the Eighth Circuit Court of Appeals further emphasized: "It is difficult to visualize circumstances where actual damages are suffered from a probable or threatened lessening of competition, the criteria for a § 7 violation, though, of course, it is readily apparent that damage can easily result from completed illegal acquisitions once the monopoly take hold." *Id.* at 962. See also *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969).

16. See MONOGRAPH No. 1, *supra* note 1, at 4.

17. 366 U.S. 316 (1961).

and most natural remedy in section 7 merger challenges brought by the government.¹⁸ The Court noted: "Divestiture has been called the most important of the antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of the court's mind when a violation of § 7 has been found."¹⁹

Despite the Supreme Court's clear approval of divestiture as a section 7 remedy in government cases, lower federal courts have split on the issue of whether or not this form of relief should be available in a private action. In *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*,²⁰ the Ninth Circuit Court of Appeals expressed the view that congressional intent underlying the drafting and enactment of section 16 of the Clayton Act precluded the availability of divestiture as an appropriate remedy in a private action. The case involved a private antitrust action brought by International Telephone & Telegraph Corporation against General Telephone & Electronics Corporation and Hawaiian Telephone Company. The district court found that GTE violated sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act, and ordered a massive divestiture of subsidiary companies belonging to GTE and Hawaiian Telephone.²¹

On appeal, GTE argued that Congress did not intend to permit private suits for divestiture when it gave private parties the right to obtain "injunctive" relief under section 16 of the Clayton Act. The Ninth Circuit held that the legislative history of section 16 of the Clayton Act did indicate that Congress intended "dissolution" to be restricted to government cases.²² Although the court noted that several district courts had indicated that divestiture was available as a remedy in private section 7 actions,²³ the court refused to

18. The Court stated:

The very words of § 7 [of the Clayton Act] suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. . . .

Id. at 329-30.

19. *Id.* at 331. In addition, in cases brought by the Federal Trade Commission, the buyer of the assets typically must be approved by the Commission. The purpose of such a requirement is to avoid simply substituting one illegal merger for another.

20. 518 F.2d 913 (9th Cir. 1975).

21. *Id.* at 916.

22. *Id.* at 920.

23. *Id.* at 920, citing *Bay Guardian Co. v. Chronicle Publishing Co.*, 340 F.Supp. 76, 81-

follow this position.²⁴ In the court's view, the term "injunctive" relief was used as a substitute for "dissolution" in the drafting of section 16 because Congress viewed divestiture as a remedy too drastic and sweeping to be allowed to a private party.²⁵ By Congress' refusal to use the term "dissolution" in formulating the Clayton Act, the court found that, by implication, private "divestiture" was rejected.

Significantly, the Ninth Circuit did recognize the breadth of injunctive relief generally afforded to private litigants under section 16 of the Clayton Act,²⁶ as well as the effectiveness of divestiture as a form of antitrust relief.²⁷ The court took the anomalous position, however, that although divestiture is not only *appropriate*, but perhaps also is the *best* remedy, still it is a remedy which should be denied to private plaintiffs. The *GTE* case has continued to be followed by the Ninth Circuit without further discussion of the propriety of the decision.²⁸ No other court of appeals, however, has directly addressed the issue presented to the *GTE* court.²⁹

The better reasoned position is that a private plaintiff should have a right to a divestiture remedy in a section 7 merger challenge. First, the legislative history of section 16 of the Clayton Act does not support the *GTE* court's conclusion. The *GTE* court relied heavily on the House Judiciary Committee hearings on section

82 (N.D. Cal. 1972); *Burkhead v. Phillips Petroleum Co.*, 308 F.Supp. 120, 126-27 (N.D. Cal. 1970); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F.Supp. 521, 526 (S.D.N.Y. 1965).

24. The Ninth Circuit simply stated: "these [cases] do not furnish persuasive authority, for they do little more than assert that divestiture is, may be, or ought to be a form of 'injunctive relief.'" *Id.*

25. *Id.* at 922.

26. The court stated: "Injunctive remedies under § 16 may be as broad as necessary to ensure that 'threatened loss or damage' (footnote omitted) does not materialize or that prior violations do not recur." *Id.* at 925.

27. The court further stated: "We acknowledge that by withdrawing the remedy of divestiture we withhold from private parties the simplest, easiest and surest form of relief for antitrust violations. . . ." *Id.*

28. See, e.g., *Bosse v. Crowell Collier and MacMillan*, 565 F.2d 602, 607 (9th Cir. 1977); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976); *Robert's Waikiki U-Drive, Inc., v. Budget Rent-A-Car Systems, Inc.*, 491 F.Supp. 1199 (D.Hawaii 1980).

29. In *Kansas Power & Light Co. v. Federal Power Commission*, 554 F.2d 1178 (D.C. Cir. 1977), The District of Columbia Court of Appeals suggested that a private plaintiff in a § 7 action "might not be able to obtain the remedy of divestiture." *Id.* at 1185, n.10. The court was not, however, required under the facts of that case to directly address the issue, but merely noted that the possible unavailability of a particular remedy to a private antitrust plaintiff would not support deferral of Federal Power Commission proceedings pending the resolution of the private antitrust action.

16,³⁰ which indicated that the term "dissolution" was rejected in drafting the legislation. Although the United States Supreme Court has used the term dissolution to refer to, *inter alia*, the remedy of divestiture,³¹ it is not at all clear from the legislative history that the House Judiciary Committee rejected anything short of a complete destruction of a corporation by refusing to incorporate the term "divestiture" into section 16.³² The Ninth Circuit itself noted in the *GTE* opinion that the terms "dissolution" and "divestiture" are not interchangeable and that, although dissolution may include the remedy of divestiture, the term is not restricted to that meaning.³³

Second, a review of the history of divestiture as a remedy in government cases also supports the proposition that the remedy should not be denied to private plaintiffs merely because it is not specifically provided for in section 16 of the Clayton Act. In early government cases, courts expressed reluctance even to allow this remedy to the government.³⁴ More recently, however, the remedy has become commonplace in both Justice Department and Federal Trade Commission cases.³⁵ The availability of divestiture as an appropriate remedy in a merger challenge initiated by the government is no longer questioned, despite the fact that there is no ex-

30. *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. (1914).

31. See, e.g., *United States v. Paramount Pictures*, 334 U.S. 131 (1948), where the Court referred to the relief granted by the district court as both "divestiture" and "dissolution." *Id.* at 151-52.

32. In *N.B.O. Industries Treadway Co. v. Brunswick Corp.*, 523 F.2d 262 (3rd Cir. 1975), *rev'd sub nom*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Third Circuit Court of Appeals questioned the Ninth Circuit's reliance in *GTE* on the 1914 legislative history of the Clayton Act. The court pointed out that there is: "danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of the statutes which are almost an economic constitution for our complex national economy." 523 F.2d at 279. Similarly, in *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 402 F.Supp. 636 (S.D.N.Y. 1975), the district court found the legislative history of § 16 to be inconclusive, and in contrast found the comprehensive nature of the powers of a court in equity persuasive support for the view "that divestiture is a potential remedy for private parties injured by violations of the Clayton Act." *Id.* at 640. See also *Julius Nasso Concrete Corp. v. Dic Concrete Corp.*, 467 F.Supp. 1016, 1024-26 (S.D.N.Y. 1979); *Bay Guardian Co. v. Chronicle Publishing Co.*, 340 F.Supp. 76 81-82 (N.D. Cal. 1972); *Burkhead v. Phillips Petroleum Co.*, 308 F.Supp. 120, 126-27 (N.D. Cal. 1970); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F.Supp. 521, 526 (S.D.N.Y. 1965).

33. 518 F.2d at 923, n.49.

34. For an in-depth review of these cases, see Comment, *Private Divestiture: Antitrust's Latest Problem Child*, 41 *FORDHAM L. REV.* 569, 579-97 (1973) [hereinafter cited as Comment, *Private Divestiture*].

35. *Id.* at 580.

press statutory basis for divestiture in government actions.³⁶

Third, divestiture offers many benefits that are not available in a private case from alternative forms of relief. Foremost among those benefits is the fact that divestiture is not a penalty, but rather is "an equitable return to the status quo prior to the illegal acquisition."³⁷ Moreover, private litigants who might be discouraged from bringing suit because of an inability to show present monetary damages may be encouraged to bring an action if the remedy of divestiture is available.

Fourth, private parties now bring almost as many section 7 actions as either the Department of Justice or the Federal Trade Commission,³⁸ and it appears that the number of actions brought by private litigants will continue to increase. The controversy over the propriety of divestiture in private section 7 cases is, therefore, of continuing importance in shaping the scope of a significant amount of future antitrust enforcement efforts. Parties opposing the availability of divestiture in private section 7 actions argue that the proposition that private litigants are not entitled to divestiture was a position solidly followed by the courts until 1960 which should be followed again, and that divestiture is a harsh and sweeping remedy which should be available only to the government.³⁹ Such arguments, however, underrate the proper role of the private litigant in the scheme of antitrust enforcement efforts and undermine the basic antitrust policy of promoting competition in commerce.⁴⁰

36. The statutory basis for government injunctive relief is found in § 15 of the Clayton Act, 15 U.S.C. § 25 (1976) which provides in pertinent 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 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.

37. Comment, *Private Divestiture*, *supra* note 34, at 599. In *Schire Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948), the Supreme Court stated, in the context of a merger challenge initiated by the government:

To require divestiture. . . is not to add to the penalties that Congress has provided in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It 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.

Id. at 128. See also *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

38. See MONOGRAPH No. 1, *supra* note 1, at 43.

39. *Id.* at 60-61.

40. As the district court stated in *Julius Nasso Concrete Corp. v. Dic Concrete Corp.* 467 F.Supp. 1016 (S.D.N.Y. 1979):

Finally, it should be noted that even those courts which have held divestiture to be a proper private remedy have on occasion found it to be inappropriate under the circumstances of a particular case.⁴¹ At least one commentator has suggested that the public interest in the grant or denial of divestiture may be better served if provisions are made for government participation at the stage of formulation of relief, in particular cases.⁴² Similarly, objections to divestiture based on the fact that private suits could be brought months or years after the consummation of the transaction,⁴³ at which time assets of the acquired company may have already been inexorably merged or even sold by the acquirer, may be met by the imposition of a strict time limitation on the commencement of suit.

RESCISSION IN PRIVATE ACTIONS: A FORM OF DIVESTITURE OR ONE STEP BEYOND?

Rescission, an equitable remedy similar to divestiture, has the effect of reversing an acquisition: buyer and seller are both returned to the status quo ante through the buyer's transfer of the acquired assets to the seller in exchange for the return of the original consideration.⁴⁴ In *United States v. Coca Cola Bottling Co.*,⁴⁵ the Ninth Circuit Court of Appeals became the first federal circuit court to acknowledge the potential availability of the remedy of rescission in an action involving an acquisition alleged to be in violation of section 7 of the Clayton Act.⁴⁶

The structure of both the economy and anti-trust law itself have developed so significantly since 1919 that formalistic adherence to a doubtful legislative history is a less reliable means of ascertaining Congressional intention than a consideration of the general purposes behind the adoption of the anti-merger provisions. Carving out an exception for divestiture from the general grant of power to fashion equitable remedies is contrary to the general purpose behind § 7, and . . . there is not sufficient reason to so absent express congressional mandate.

Id. at 1025.

41. See, e.g., *N.B.O. Industries Treadway Co. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975), *rev'd sub nom*, *Brunswick Corp. v. Pueblo Bow-O-Mat, Inc.*, 429 U.S. 477 (1977), where the court recognized divestiture as an available remedy, but determined that "less drastic relief [would] provide sufficient redress." *Id.* at 279.

42. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SYMPOSIUM: PRIVATE ENFORCEMENT OF ANTIMERGER LAWS 255-56 (1976). See also MONOGRAPH No. 1, *supra* note 1, at 66-73.

43. See note 10 *supra* and accompanying text.

44. For a general discussion of rescission, see H. BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS (1929).

45. 575 F.2d 222(9th Cir. 1978), *cert. denied*, 439 U.S. 959 (1978).

46. See generally Note, *Availability of Rescission in Redressing Clayton Act Section 7 Violations - United States v. Coca Cola Bottling Company*, 12 LOY. L.A. L. REV. 255 (1978).

In the *Coca Cola* case, the government charged that the acquisition of Aqua Media, Ltd. by the Coca Cola Bottling Company of Los Angeles and its wholly-owned subsidiary, Arrowhead Puritas Waters, Inc., was a violation of section seven of the Clayton Act. The government named both the buying and selling corporations as defendants in the lawsuit. Rejecting Aqua Media's contention that section 7 could be directed only against buyers, the district court issued a preliminary injunction to prevent further implementation of the liquidation plan between the companies.⁴⁷ The court further concluded, in extensive findings of fact, that rescission might be the only effective remedy available if a violation of section 7 ultimately was established, due to the lack of interested buyers and the high entry barriers in the relevant service market⁴⁸ which would make divestiture difficult.

On appeal, the Ninth Circuit Court of Appeals considered whether the lower court properly preserved the availability of rescission as an appropriate remedy in the pending litigation.⁴⁹ The Ninth Circuit found that section 15 of the Clayton Act⁵⁰ authorizes relief necessary in order for the government to effectively enforce section 7 of the Clayton Act and eliminate the effects of an acquisition offensive to the statute.⁵¹ The court held that in appropriate circumstances rescission would be a proper remedy to accomplish such enforcement policies.⁵²

The *Coca Cola* case is of interest in a discussion of the availability of equitable remedies to private parties in section 7 cases not only because it recognizes the availability of rescission as a remedy in cases brought by the government under the same section,⁵³ but also because it emphasizes the liberal equity powers of the courts to enforce the antitrust laws.⁵⁴ The rationale of the *Cola*

47. 575 F. 2d at 226.

48. *Id.* at 227, n.6.

49. Because the district court ruling was rendered in a preliminary injunction context, the Ninth Circuit was not required to determine the propriety of an actual order requiring rescission.

50. See note 36 *supra* and accompanying text.

51. 575 F.2d at 229.

52. The court noted: "rescission is not without the pale of equitable discretion in appropriate circumstances." *Id.* at 230.

53. In two prior § 7 cases brought by the government, separate district courts had retained sellers as parties while considering rescission as an appropriate remedy. Other forms of relief, however, were ultimately granted. See *United States v. Phillips Petroleum Co.*, 367 F.Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974); *United States v. Reed Roller Bit Co.*, 274 F.Supp. 573 (W.D. Okla. 1967).

54. 575 F.2d at 228-31.

Cola decision suggests that the rescission remedy also should be available to private litigants.⁵⁵ Further support for the propriety of rescission is based on factors similar to those which support divestiture as an appropriate remedy under section 7: policy considerations underlying the legislative history of section 16 of the Clayton Act,⁵⁶ the benefits of the remedy as compared to alternative forms of relief,⁵⁷ and the increasing role of private parties in bringing section 7 action.⁵⁸

Parties bringing private actions under section 7 should seriously consider seeking rescission as a remedy. The argument can be made that rescission, although used sparingly to date, has significant advantages over divestiture. The use of rescission, for example, would not require any continuing supervision by the court of the sale of assets, as is the case with divestiture, because the assets are simply returned to the original owner in exchange for return of the purchase price. Moreover, rescission is the only remedy which can, in effect, "turn back the clock."⁵⁹ At the same time, it should be recognized that there are various problems arising from a rescission order which may not be present in the case of divestiture. It is entirely possible that the selling company may have already disposed of the assets received from the buyer. Further, in the case of a "friendly" merger or takeover, it may well be that the acquired company has no desire to be returned to its separate state and be forced to find another buyer. As the Ninth Circuit noted in the *Coca Cola* case, however, the fact of economic hardship is not enough to override enforcement of the antitrust laws.⁶⁰

CONCLUSION

Private enforcement of section 7 of the Clayton Act is increasing.

55. Although no reported decision has yet suggested that rescission is appropriate in private § 7 actions, the remedy has been approved in various other types of private litigation. In *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), for example, the Supreme Court recognized the appropriateness of rescission in a case involving a violation of § 14(a) of the Securities Exchange Act of 1934. The case involved a merger where the consent of the stockholders was obtained through the use of false and misleading proxy statements. The Supreme Court justified the remedy by reference to the broad equitable powers of a court to effectuate congressional policy. *Id.* at 433.

56. See notes 30-33 *supra* and accompanying text.

57. See note 37 *supra* and accompanying text.

58. See note 38-40 *supra* and accompanying text.

59. See generally *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 607 (1957).

60. 575 F.2d at 231.

The majority of these actions arise out of tender offers or similar situations where the acquired company is fighting a hostile takeover. In such cases, it may be very difficult for a private plaintiff to prove monetary damages and equitable relief may be the only effective form of redress. The availability of equitable relief in private section 7 cases, particularly the remedies of divestiture and rescission, cannot be determined with certainty because of the failure of courts to reach accord as to whether or not such forms of relief are proper. The better-reasoned cases have made the remedy of divestiture available to private plaintiffs under the same circumstances where it would be deemed appropriate if the action were brought by the government. Similar considerations suggest that rescission also should be deemed an appropriate form of equitable relief available to private litigants in section 7 enforcement actions.

The increasing importance of private antitrust enforcement efforts under section 7 of the Clayton Act has made the uncertainty of the scope of available relief a more pressing issue. Courts should be encouraged to fashion innovative relief where necessary to effectuate the long-standing policy underlying the federal antitrust laws of promoting competition in commerce. If necessary, clarification by Congress of section 16 of the Clayton Act should be considered. Such legislative action seems unnecessary, however, in light of the broad inherent power of the courts to fashion equitable relief.