Antitrust - *ITT v. GTE* - The Ninth Circuit Refuses to Extend the Divestiture Remedy to Private Litigants Under Section 16 of the Clayton Act

Todd Allen Smith

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INTRODUCTION

On April 25, 1975 the United States Circuit Court of Appeals for the Ninth Circuit held in International Telephone and Telegraph Corp. v. General Telephone and Electronics Corp.\(^1\) (ITT) that the remedy of divestiture was not available to the private litigant suing under section 16\(^2\) of the Clayton Act for a violation of section 7\(^3\) of the Act.\(^4\) In so holding the Ninth Circuit reversed a lower court decision which had found that “[i]n the absence of solid precedent or legislature history”\(^5\) divestiture\(^6\) was an available remedy within the equity concept underlying section 16, and that it was within the court’s traditionally wide latitude to fashion such an appropriate equitable remedy.

The controversy over the availability of divestiture as a remedy in a privately litigated suit under section 16 of the Clayton Act is not a new one, and several commentators\(^7\) have discussed the issue in varying degrees and depths. The issue has, however, been given new life as recent judicial decisions have taken divergent views on the availability of the divestiture remedy in private suits. These

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1. 518 F.2d 913 (9th Cir. 1975).
4. 518 F.2d 913 (9th Cir. 1975).
6. Divestiture had been discussed in the following manner:

   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 generally 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.

Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 MINN. L. REV. 267, 270 n.21 (1964) (citing S. OPPENHEIM, CASES ON FEDERAL ANTITRUST LAWS 885 (1948), and Adams, Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 IND. L.J. 1 (1951)).

cases have created a schism in the law by holding that divestiture, a preferred and traditionally appropriate remedy in government instituted antitrust litigation, is unavailable when such suits are instituted by private parties.

This article will examine the ITT case in light of the pertinent statutory provisions of the Clayton Act and the legislative history of the Act. It is submitted that divestiture is an appropriate and effective remedy in antitrust litigation regardless of the private or public character of the party initiating the law suit. No valid reason exists to preclude the use of this remedy in privately instituted litigation.

**ANTIMERGER POLICY AND ENFORCEMENT**

Distaste for monopoly is one of the more pervasive American sentiments. It consists of an essentially permanent belief that competition breeds efficient allocation of resources. No one would deny that Congress passed antimerger sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act in response to genuine public distrust of monopolies. Donald F. Turner, former head of the Justice Department Antitrust Division, in discussing the policy considerations underlying the antimerger sections stated:

The principle purpose of the antimerger law is to forestall the creation of, or an increase in, market power. Its purpose is to preserve competitively structured markets insofar as natural forces will permit . . . . If we can avoid the creation of undue market power, by and large we expect to achieve better market performance—better in terms of lower prices, higher quality products, and innovations both in product and technology. We also expect to minimize the misallocation of resources that results from monopoly or oligopoly pricing . . . . The economic purpose behind an antimerger policy is precisely the same as the purpose behind the antitrust prohibition on such anti-competitive agreements as price-fixing. The purpose is to prevent, wherever natural economic forces do not compel it, the development of the kind of concentrated market structure that produces the same adverse affects on performance as those produced by price fixing and similar agreements. The effectiveness of this policy must necessarily depend upon the

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remedies available once a violation of antimerger law has been established. Various remedies, including criminal penalties, money damages and equitable relief exist for application by and within the discretion of the trial court.

The primary antitrust enforcement responsibility lies with the Government. In detecting violations of the antitrust laws, government enforcement agencies rely heavily upon a complaint procedure whereby the public may file claims alleging injury or threats of restrained trade. Private antitrust actions were intended to provide a remedy to an injured private party and to supplement the enforcement efforts of the Government. Due to the limited manpower and financial resources of the government enforcement branches, this supplemental enforcement function provided by private antitrust suits becomes increasingly important.

It is an economic reality that limited resources will inevitably limit the Government's action to those cases where it believes it can be most successful and have the greatest deterrent effect. When the Government brings an action against a corporation for a violation of the antitrust laws, it must examine its case in view of these economic limitations.

Once the Government establishes a violation of the antitrust laws, injunctive relief in addition to other remedies, is available. Section 15 of the Clayton Act provides the basis for injunctive relief in government antitrust actions. That section has consistently been interpreted as authorizing the remedy of divestiture. In fact, sec-

13. As Mr. Justice Jackson stated in a government suit referring to the situation in which a plaintiff sustained the burden of proving the antitrust violation but subsequently received an inadequate remedy, he has "won a suit and lost a cause." International Salt Co. v. United States, 332 U.S. 392, 401 (1947).
15. The Supreme Court emphasized this aspect of the private suit with the following, and in addition stated how section 16 should be viewed:

"The purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws... Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords [injunctive relief], like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims... Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect." Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 130-31 (1969).

"No corporations... shall acquire... the whole or any part of the stock or other share capital... of another corporation... 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.
tion 15 was considered merely a recapitulation of section 4 of the Sherman Act. While neither provision expressly grants a remedy of divestiture to the Government, section 4 of the Sherman Act had been interpreted by the Supreme Court as authorizing such remedial measures as the courts deemed necessary to effectuate the antitrust policy.

The Divestiture Remedy In General

The Supreme Court in the leading case of *Standard Oil Co. v. United States* indicated two criteria to be followed by the courts in future applications of the Sherman Act, and stated to what end a prescribed remedy should be addressed:

1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

The *Standard Oil* Court utilized section 4 of the Sherman Act as the basis for granting the Government such remedies as would "effectually dissolve the combination." In *United States v. American Tobacco Co.*, the Supreme Court employed the same Sherman Act provision to establish divestiture as a remedy in an antitrust suit.

Since Congress was aware of the Court's interpretation that divestiture was an available remedy to the Government under section 4 of the Sherman Act, had it intended to preclude that interpretation of section 15 of the Clayton Act it could easily have done so. Furthermore, considering the Clayton Act was primarily enacted because of inadequacies of the Sherman Act, Congress certainly drafted and discussed remedial measures of the Clayton Act with an eye toward the deficiencies and misapplications of the Sherman Act provisions.

Perhaps, the most significant decision utilizing divestiture as a

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21. 221 U.S. 1 (1911).
22. *Id.* at 78.
23. 221 U.S. 106 (1911).
The remedy is *United States v. E. I. duPont de Nemours & Co.* The *duPont* case had the effect of making divestiture more a rule than an exception in government instituted cases under section 7 of the Clayton Act. That controversy involved significant stock holdings by the duPont Corporation of the stock of General Motors Corporation. The government suit claimed violations of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. While the lower court in effect ordered a partial divestiture of stock rights, the Supreme Court found this solution inadequate and ordered duPont to completely divest itself of its General Motors stock holdings:

> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violates § 7. That statute is specific and “narrowly directed,” . . . and it outlaws a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 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 section 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. *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.*

> Furthermore, the Supreme Court indicated that the lower court had overemphasized the hardship such a remedy would have on private interests. In analyzing the appropriateness of divestiture in future litigation, the Court stated, in effect that the test of the appropriateness of a remedy is whether it affords the necessary relief for the public interest, not the amount of hardship it might work on private interest. The Court considered divestiture the most drastic, but also the most effective antitrust remedy available.

> Thus, the Supreme Court left no question regarding the availabil-

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26. The duPont holdings amounted to approximately 63,000,000 shares or 23 percent of the total outstanding General Motors Corporation common stock. *Id.*
29. *Id.* at 326-27.
ity of divestiture in an antitrust suit, particularly when considering an illegal merger or acquisition in violation of section 7.\textsuperscript{30} It appears significant that the Court did not speak in terms of the availability of divestiture only in government suits. Rather, the Court emphasized the adequacy of the relief once a section 7 violation was proven regardless of the public or private nature of the party initiating the suit.

The Private Litigant And The Divestiture Remedy

Section 16 of the Clayton Act 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 . . . \textsuperscript{31}

In short, section 16 provides an injunctive remedy, with no attractive provisions beyond actual damage.\textsuperscript{32} It envisions remedying potential harm rather than actual harm.\textsuperscript{33}

There has been an increasing use of section 16\textsuperscript{34} by private parties

\textsuperscript{30}. Another commentator has stated in reference to the significance of the \textit{duPont} case: Thus, in \textit{duPont}, the Court made divestiture the \textit{preferred} remedy for violation of the merger laws and since that case, divestiture has been much more frequently ordered. \textit{DuPont}, therefore, had the effect of removing much of the judicial restraint surrounding the use of divestiture, and placing it in the forefront of antitrust remedies. Comment, Private Divestiture: Antitrust's Latest Problem Child, 41 \textit{Fordham L. Rev.} 569, 587 (1973).


\textsuperscript{33}. The Clayton Act contains two statutory provisions which govern the maintenance of private actions and the relief granted therein once a violation has been established. Section 4 of the Act provides the more familiar remedy of treble damages, stating: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . , and shall recover threefold the damages by him sustained, and the cost of suit . . .” 15 U.S.C. § 15 (1970). The possibility of recovering, under section 4, not only the proven damages but also the additional award trebling those damages would appear to be a particularly attractive inducement for a private party to bring an antitrust action. Encouragement of potentially successful litigation was, according to the Supreme Court, precisely the purpose underlying section 4 of the Clayton Act. The Court has reasoned that such private litigation would aid in implementing the overriding public policy in favor of competition, thus adding considerable enforcement power and serving as a prominent deterrent to antitrust violations.

\textsuperscript{34}. During the period 1960-1972, 7,436 private antitrust actions were filed with almost 1300 of those suits being filed in 1972 alone. The 1972 volume more than trebled the number filed in 1960 and was an increase of approximately 30 percent over those filed in 1971. 1972 Administrative Office of the United States Courts, \textit{Ann. Rep.} A-15.
attempting to enjoin takeover bids or acquisitions in violation of section 7 of the Clayton Act.\textsuperscript{35} However, until recently,\textsuperscript{36} divestiture had never been directly ordered in a suit brought by a private plaintiff. The availability of a divestiture remedy has seldom been questioned\textsuperscript{37} under either section 4 of the Sherman Act\textsuperscript{38} or under section 15\textsuperscript{39} of the Clayton Act. But the courts' treatment of the question of the availability of divestiture under section 16 of the Clayton Act has been less definite.

Traditionally the rationale underlying denial of divestiture in section 16 suits has been traced to two primary sources.\textsuperscript{40} In Continental Securities Co. v. Michigan Central R. Co.,\textsuperscript{41} the Sixth Circuit Court of Appeals denied a private litigant's request for a divestiture order:

The main remedy sought is dissolution of the combination. Section 16 never has been held to reach such a case. The result sought is practically the same as would be asked for in a suit by the Attorney General.\textsuperscript{42}

The apparent conclusion of the court was that the Government, but not private litigants, may obtain a divestiture order.\textsuperscript{43} However, the court failed to discuss this conclusion and presented no rationale for this dichotomy of remedies.\textsuperscript{44} Nevertheless, many courts, even if not expressly citing Continental Securities, have followed dictum in that opinion.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{41} 16 F.2d 378 (6th Cir. 1926), cert. denied, 274 U.S. 741 (1927).
\item \textsuperscript{42} Id. at 379.
\item \textsuperscript{43} See Note, The Use of Divestiture In Private Antitrust Suits, 43 GEO. WASH. L. REV. 261 (1974).
\item \textsuperscript{44} In 1904 the government obtained what was in effect a divestiture order. See Northern Securities v. United States, 193 U.S. 197, 355 (1904).
Courts, additionally, have found a second rationale for denial of such a remedy in the legislative history of the Clayton Act. The most often quoted passages of the legislative record involve statements made during the committee hearings by a member of the committee, and one witness—Louis D. Brandeis. These statements were made in opposition to a provision providing for private dissolution remedy. General Telephone and Electronics argued in the district court that these statements were probative of Congress’ intention to preclude divestiture as a remedy to the private litigant. The district court refused to accept the argument. It opined that these statements were not indicative of congressional intent and viewed them as little more than inquiry and discussion during the debates of the legislative process.

Thus, the traditional rationale for denial of a private divestiture remedy would appear to be on less than solid ground. The case law relies, in part, on dicta from the 1926 Continental Securities case, while the legislative history is supported, not by committee reports, but by colloquies made in committee hearings. Regardless, courts continue to examine the issue of availability of divestiture in a privately litigated suit in light of one or both of these rationales. The Ninth Circuit in the ITT case was no exception.

THE ITT CASE HISTORY

In October of 1967, International Telephone and Telegraph Corporation (ITT) brought an action under section 16 of the Clayton Act against General Telephone and Electronics Corporation (GTE), charging GTE with violations of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. The contention was that the acquisitions of Leich Electric Company, Automatic Electric Company, Lenkurt Company, Inc. and Sylvania Electric Products, Inc., all manufacturers of telecommunications equipment, allowed GTE to become a vertically integrated telephone company, with its telephone operating companies buying almost all of their transmission equipment, switching systems, apparatus and other telephone communications equipment from GTE’s own manufacturing sub-

46. International Telephone and Telegraph Corp. v. General Telephone and Electronics Corp., 518 F.2d 913, 921 (9th Cir. 1975).
47. Hearings on Trust Legislation before the House Committee of the Judiciary, 63d Cong., 2d Sess., at 842, 649-50 (1914).
49. The acquisitions mentioned here were vertical acquisitions because the acquired companies were suppliers of GTE.
sidiary.” ITT further alleged that GTE acquisitions of certain telephone operating companies and subsequent exclusive purchases of equipment by those operating companies from GTE’s manufacturing subsidiaries effectively foreclosed competitors from selling telephone equipment to GTE “. . . to the detriment of actual and potential competition by such manufacturers.”

ITT did not seek treble damages under section 4 of the Clayton Act but rather requested divestiture pursuant to section 16 of the Act. GTE denied any violation of the antitrust laws and in a counterclaim requested similar relief for alleged antitrust violations by ITT.

At the trial, GTE raised the defense that the injunctive relief under section 16 of the Clayton Act did not permit the court to order either directly or indirectly the divestiture of any of its subsidiaries. In support, GTE emphasized the fact that divestiture had never been granted in a privately litigated antitrust action brought under section 16, nor had a mandatory injunction been issued in a private suit alleging a section 7 violation.

The district court acknowledged the precedents which “. . . by way of bare holding, dictum, or pronunciamento have indicated that divestiture is not available to a private party suing under §

51. The acquisitions discussed here were horizontal acquisitions because they were formerly small operating company competitors of GTE.
52. The Ninth Circuit succinctly stated ITT’s theory for recovery as follows:
   The theory of ITT’s case was that GTE’s acquisitions had enabled GTE to effect a growing foreclosure of competition within the tele-communications equipment manufacturing industry. By satisfying the equipment demand of its operating subsidiaries from sales by its manufacturing subsidiaries, GTE allegedly reduced to an impermissible degree the potential sales opportunities of “independent” manufacturers such as ITT.
518 F.2d 913, 916 (9th Cir. 1975).
53. 351 F. Supp. at 1161.
56. The requested order asked for the divestiture of GTE’s . . . interests in Peninsular Telephone Company (Peninsular), the Western Utilities Group, Central Iowa, Hawaiian and Northern Ohio, as well as its manufacturing subsidiaries AE, Lenkurt and Sylvania, to the end that the independent telephone operating companies market for telecommunications equipment (i.e., excluding the American Telephone and Telegraph System (Bell)) would be opened to competition among all the independent telecommunications equipment manufacturing companies.
351 F. Supp. at 1161.
57. However, the district court noted that “[d]ivestiture was ordered in Alden-Rochelle, Inc. v. Am. Soc’y of Composers, Authors and Publishers, 80 F. Supp. 888, 900 n.2 (S.D.N.Y. 1948) with other injunctive provisions.” 351 F. Supp. at 1204 n.133.
58. Id. at 1204.
The court proceeded to compare section 15 of the Clayton Act, authorizing government equitable proceedings, with section 16, authorizing injunctive relief for the private litigant. The court noted that Congress made no reference in section 15 to a divestiture remedy available to the Government, but it provided only for "... prevention, restraint, prohibition and injunction." Nevertheless, the legislative history and judicial treatment of that section confirmed the availability of the divestiture remedy in a government initiated suit. Based on its analogy to section 15 and the Government's ability to obtain divestiture under that section, and despite previous dicta denying the availability of divestiture to the private litigant, the court found that even a conservative interpretation of the section 16 language must allow for the equitable remedy of divestiture.

The district court suggested that if necessary a "negative injunction" could be phrased in such a way as to enjoin the activities of the corporation and limit the economically feasible alternatives to one—the desired divestiture. In the district court's judgment there did not appear to be any reason why it could not do directly what would apparently be available through an indirect method.

59. Id. The court further pointed out that those precedents:

In so doing [holding], most have but asseverated that first, only the government may sue for divestiture; second, an injunction restricts only future acts, consummated transactions are therefore beyond the scope of § 16.

50. Id.

60. Id.

61. The district court observed:


62. Id. at 1205 n.141.

63. The district court noted further that "Although litigated decisions are scant, the U.S. has employed § 15 directly to secure divestiture. See United States v. Reed Roller Bit Co., 274 F. Supp. 573 (W.D. Okla. 1967) (partial divestiture)." Id. at 1205 n.141.

64. The district court indicated that the portions of section 16 which were analyzed were the phrases "threatened loss or damage" and "threatened conduct." Id. at 1207.

65. The district court cited Standard Oil Co. v. United States, 221 U.S. 1 (1911) as an example of a "negative injunction" which had the ultimate effect of a divestiture. The injunction restrained Standard Oil from voting the stock or exercising control over its subsidiaries. The only reasonable alternative available to Standard was to distribute the stock held in its subsidiaries, the effect being a divestiture of control over those subsidiaries.

66. The district court found it unreasonable to assume that Congress intended that the
Thus, the district court held that the injunctive remedy of divestiture, traditionally available to the Government, is likewise an appropriate remedy for the private plaintiff.66

THE NINTH CIRCUIT DECISION

The Ninth Circuit reversed the district court holding that divestiture was a recognized remedy in a privately litigated antitrust suit. The court found that while its holding was based upon no established precedent, the legislative history of section 16 of the Clayton Act supported the finding that, "...Congress did not intend to permit private divestiture suits."67 It rejected the district court's rationale that since a court has authority to fashion a negative injunctive order to accomplish divestiture indirectly, certainly it could do so through a direct method:68 "...injunctive relief aimed at accomplishing divestiture 'indirectly' in a private suit is as inconsistent with Congressional intent as an explicit divestiture order."69

Thus, the Ninth Circuit, although affirming in part the trial court's decision, remanded the case for the fashioning of a remedy consistent with their interpretation of section 16 of the Clayton Act.

The Ninth Circuit noted that by making such a remedy unavailable:

...we do not jeopardize the district court's ability to restrain GTE effectively from violating the antitrust laws. Injunctive remedies under § 16 may be as broad as necessary to insure that "threatened loss or damage" does not materialize or that prior violations do not recur... We are confident that the pernicious manifestations or tendencies of an illegal vertical combination... are susceptible to direct injunctive restraint.70

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66. The district court answered a final contention by GTE in stating:

There is no question that actions seeking divestiture, whether by public or private attorneys general, are dangerous to the defending corporations, and GTE argues that only the government should be entitled to request such relief because of its more objective, less selfish posture. This position clearly runs counter to the [Supreme] Court's admonition in Perma Life Mufflers, that "the purposes of the antitrust laws are best served by insuring that the private action will be an everpresent threat to deter anyone contemplating business behavior in violations of the antitrust laws." 392 U.S. at 139, 88 S.Ct. at 1984.

67. 351 F. Supp. at 1209.
68. International Telephone and Telegraph Corp. v. General Telephone and Electronics Corp., 518 F.2d 913, 920 (9th Cir. 1975).
69. 518 F.2d 913, 924 (9th Cir. 1975).
70. Id. at 924-25.
This ruling is significant because prior to *ITT* no court had analytically dissected the issue of a private divestiture remedy in an antitrust suit. Although some courts had considered the availability of divestiture in private suits, none had examined the legislative history of section 16 of the Clayton Act and utilized its interpretation of that history as a basis for its holding. The Ninth Circuit found the section 16 reference to injunctive relief ambiguous and ruled that the failure of Congress to provide an explicit statutory grant of divestiture relief within section 16 precluded the availability of such a remedy to the private litigant.

**Ninth Circuit Analysis of the Section 16 Legislative History**

The district court in *ITT* based its decision, in part, on the failure of congressional Committee Reports\(^7^1\) to expressly exclude a divestiture remedy from section 16. The Ninth Circuit, however, was not as easily dissuaded in its analysis of the legislative record.\(^7^2\) In attempting to ascertain the legislative history of the Act the Ninth Circuit, unlike the district court, went beyond the Committee Reports.

The court first addressed the district court's rationale for disregarding the House Judiciary Committee hearings on section 16. The district court had refused to consider GTE's presentation of evidence of testimony before the Committee, stating:

... this court, acutely aware of the legislative process and the many obstacles a bill must overcome and changes it must undergo

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\(^7^1\) Section 14 [now § 16] authorizes a person, firm, or corporation or association 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 an injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. Under section 7 of the Act of July 2, 1890, a person injured in his business and property by corporations or combinations acting in violation of the Sherman Antitrust law, may recover loss or damage of such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law. This provision is in keeping with the recommendation made by the President in his message to Congress on the subject of trusts and monopolies. H.R. REP. No. 627, 63d Cong., 2d Sess. 21 (1914).

\(^7^2\) Judge Goodwin, writing for the court, initially qualified the scope and necessity for their reference to the legislative history as an aid in interpreting a statutory provision. According to the traditional view expressed by the court, analysis of a legislative record is appropriate in two situations: (1) where the statutory language is ambiguous, and (2) where a literal interpretation would thwart the overall statutory scheme and lead to an absurd result. The Ninth Circuit characterized the divestiture issue within section 16 of the Clayton Act as meeting the former criteria. The court found that "Section 16's reference to 'injunctive relief' is ambiguous." 518 F.2d 913, 921 (9th Cir. 1975).
before emerging as a law, is usually dubious of the worth of any legislative material other than committee reports accompanying bills.\textsuperscript{73}

The Ninth Circuit admitted that greater weight is validly given Committee Reports as opposed to lesser indicia of congressional intent, such as floor debates.\textsuperscript{74} However, the court emphasized that merely because greater weight is afforded Committee Reports, statements made during congressional hearings may be considered in interpreting congressional intent.\textsuperscript{75} The Ninth Circuit further noted, in reference to the acceptability of legislative materials other than Committee Reports that "the Supreme Court, far from approving the exclusion of less formal material, has repeatedly interpreted legislation by referring to statements made in floor debates and hearings."\textsuperscript{76}

In constructing a foundation for its ultimate holding, the Ninth Circuit referred to several statements in the Judiciary Committee hearings. These statements were made in reference to the allowance of dissolution suits by the private party under section 16 of the Clayton Act.\textsuperscript{77} The first such exchange involved a statement by Congressman John Floyd in response to comments by Samuel Untermeyer, an attorney, advocating the expansion of section 16 to include private dissolution suits. Congressman Floyd stated: "We did not intend by section [16] to give the individual the same power to bring a suit to dissolve the corporation that the government has . . . . We discussed that very thoroughly among ourselves and we decided he should not have [it]."\textsuperscript{78} The court recognized that

\textsuperscript{73} International Telephone and Telegraph Corp. v. General Telephone and Electronics Corp., 351 F. Supp. 1153, 1207 n.150 (D. Hawaii 1972).

\textsuperscript{74} One court recently observed this approach taken by the Ninth Circuit and commented with, what could be termed at the least, a degree of skepticism: "In their efforts to resolve this problem, [the issue of a private divestiture remedy] the courts have entered the quagmire of legislative history." Fuchs Sugars & Syrups, Inc. v. Amstar Corporation, No. 74 Civ. 2945 (S.D.N.Y. Oct. 8, 1975).

\textsuperscript{75} Hearings on Trust Legislation Before the House Comm. on the Judiciary, 63d Cong., 2d Sess. (1914) [hereinafter cited as House Hearings].

\textsuperscript{76} 518 F.2d at 921, citing United States v. Auto Workers 352 U.S. 567, 585 (1957). The court cited several cases in which the Supreme Court utilized either statements made in floor debates or in hearings. E.g., Arizona v. California, 373 U.S. 546, 575-78 (1963); Schwengmann Bros. v. Calvert Corp., 341 U.S. 384, 394-95 (1951). The Ninth Circuit further stated that the district court could have looked to such statements for guidance in determining what Congress meant by the term "injunctive relief" in section 16. \textit{But see} Schwengmann Bros. v. Calvert Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring), criticizing the Court's opinion for "going beyond Committee reports, which presumably are well considered and carefully prepared . . . and relying on "casual statements from floor debates . . . as a basis for making up our minds what law Congress intended to enact . . . ."

\textsuperscript{77} House Hearings, supra note 75, at 261, 492, 649-50, 1372-73.

\textsuperscript{78} Id. at 842.
although Congressman Floyd spoke in terms of the intent of the Committee, his statement indicated only his opinion of the Committee's intent at the time he spoke. This becomes apparent upon examining subsequent exchanges between the Committee members and witnesses. In particular, the Ninth Circuit mentions an exchange between Congressman Charles Carlin and witness Louis D. Brandeis. The exchange indicated that the Committee was considering suggestions and taking testimony regarding dissolution and was still uncertain of the availability of that remedy to the private litigant. The court, nevertheless, considered that the various exchanges and discussions revealed that the reference in the proposed bill to injunctive relief clearly did not include at that time the remedy of dissolution or divestiture. "The Committee viewed the provision of private injunctive relief as allowing 'injunctive relief only' and not actions for dissolution."  

The Ninth Circuit placed a great deal of emphasis on statements in the Committee hearings which indicate that dissolution or divestiture and injunctive relief are two very distinct concepts. Therefore, if Congress intended that section 16 allow for private divestiture, the language of the bill would have been altered to provide for such a remedy. "The inescapable conclusion is that the committee chose to reject the proposed amendments and permit 'injunctive relief only'."  

**ANALYSIS**

The Ninth Circuit's opinion and analysis of the legislative history of section 16 of the Clayton Act is exhaustive. There appears to be little doubt that several members of the Senate and House Committees assumed section 16 did not create a private divestiture remedy. Recently, however, courts commenting on the private divestiture issue have questioned not the logic of the Ninth Circuit's interpretation of the legislative history, but disputed (1) the strength given statements made in Committee hearings toward determining congressional intent, and (2) the wisdom of looking to such statements and allowing them to control the contemporary application of the Act. These recent decisions have intimated that the emphasis in

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79. Id. at 649-50.  
80. 518 F.2d at 922.  
81. Samuel Untermeyer, in advocating the availability of dissolution under section 16, proposed the following amendment: "injunctive and other equitable relief, including an action for the dissolution of the corporation and for a receiver thereof . . . ." House Hearings, supra note 75, at 843.  
82. 518 F.2d at 922.  
83. Judge Ward in a recent case raising the divestiture issue, noted authority on both
analysis of the Ninth Circuit was misplaced. Their position is that the overall policy of the antitrust laws, and not the discussions in the House Judiciary Committee in 1914, should guide the determination of the validity of a private divestiture remedy. The inquiry concerning the availability of divestiture to the private litigant must be an inquiry into the interpretation of the current socio-economic policy and purpose of the antitrust laws. This policy is, and has been, to preserve competition within markets, avoid concentration of economic power and promote the most efficient allocation of resources. With these policy considerations in mind, several conceptual aspects of the antitrust laws in relation to private divestiture warrant discussion: (1) private divestiture may prove to be the only effective relief available to insure enforcement of the economic goals underlying the antitrust laws; (2) a court should have the authority to undo what it might have prevented initially; and (3) divestiture may well go further than any other remedy toward meeting the overall purposes of the antitrust laws.

Private Divestiture: Potentially The Only Adequate Remedy

Under the rationale of ITT, section 16 allows for broad injunctive remedies "to ensure that 'threatened loss or damage' does not materialize or that prior violations do not recur," but does not allow divestiture. From this language it might appear that the Ninth Circuit would accept both negative and mandatory injunctive relief. The situation is conceivable in which a violator is ordered by court through a mandatory injunction to take affirmative steps to insure that a threatened loss does not materialize or actual harm continue. Such injunctions commonly issue in "refusal to deal" cases. In such cases, the court may order the violator to deal with the plaintiff, in order to reestablish the prior competitive state of the market. The negative injunction, however, is traditionally utilized to enjoin or restrain one from continuing activities which violate the antitrust laws. Effective enforcement of the antitrust laws and policies requires remedial measures which adequately protect the public and

85. 518 F.2d at 925.
the individual competitors in the market. Negative injunctions and the type of mandatory injunctions apparently available under ITT may not always be adequate antitrust remedies.

Perhaps the most telling situation exists in the case of the acquisition or merger which substantially alters the competitive structure of the market. In *NBO Treadway Companies, Inc. v. Brunswick Corp.* the district court, in discussing its divestiture order, indicated its concern that the traditional negative injunctive relief would not in fact remedy the imbalance in economic power caused by the violations of section 7 of the Clayton Act.

For the Court simply to enjoin these particular methods of doing business would not prevent the defendant from possibly creating other means and practices by which the same anti-competitive effects could be produced in the market. . . . This danger can effectively be removed only by rescinding the merger.

There would appear to be no injunctive relief available, short of divestiture, which could actually remedy the harm done in the particular market. The relative competitive positions in the market have been altered and the violator, absent divestiture, will retain his illegally acquired power in the market.

The denial of divestiture eliminates the only appropriate and effective remedy when a violation of the antitrust laws alters a market structure. Proper and full enforcement of the laws in such a case is not achieved. If a primary concern underlying the private remedy is the private attorneys general concept as an enforcement aid, then denying divestiture merely because the plaintiff is a private party rather than the Government is incongruous. Where an acquisition or merger has been found to be a violation of the antitrust laws and it is determined that the remedy which will most efficiently carry out the antitrust policy is divesting the violative acquisition, no reason exists for denying adequate and effective enforcement by a private attorney general.

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87. Some courts have held that divestiture is a type of mandatory injunction. See, e.g., Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 526 (S.D.N.Y. 1965). Since ITT found divestiture unavailable, they certainly did not agree with that theory.


89. *Id.* at 98,306-07. Although the Third Circuit reversed the lower court's divestiture order, stating "At this late stage, ten years after the acquisition, divestiture of going, thriving bowling centers to other purchasers will not change the competitive picture." 5 TRADE REG. REP. ¶ 60,479 at 67,129 (3d Cir. 1975). The court made it clear that its ruling did not preclude the divestiture remedy in general, but only in this instance.

90. While some may argue that the private litigant and the remedial policy are concerned with the relief available to the individual, the very idea underlying the enactment of the private remedial provisions was to motivate the private litigant to enforce the public policy.
An ancillary argument, questioning the adequacy of injunctive relief short of divestiture, concerns the position the plaintiff is placed in following such an injunctive order. If the remedy is to have any force at all, the plaintiff will be required to "police" the defendant's activities. Most plaintiffs are not in a position to enforce the injunction against the defendant every time a violation of that injunction is suspected. A divestiture is a final and complete remedy. Under a divestiture order the plaintiff, to insure compliance, would not be required to continually monitor the activities of the defendant. Divestiture is a severe and drastic remedy. However, the effective enforcement of the antitrust laws and the protection of the competitive market system require that courts order divestiture when necessary to meet these goals.\textsuperscript{91}

Courts' Equity Power

In \textit{Venner v. Pennsylvania Steel Co.},\textsuperscript{92} the United States District Court for the District of New Jersey held that section 16 of the Clayton Act could not reach a consummated transaction because the language of the provision was preventive in nature. Therefore, once the prohibited conduct had occurred, section 16 of the Act was of no aid to the private plaintiff. This holding apparently stems from the statutory language "threatened" loss or damage. The implicit conclusion being that once the acquisition or merger has been consummated, the loss or damage is no longer "threatened." Such a rationale inappropriately assumes that harm or damage cannot occur after a violator has wrongfully increased his market power. In fact, the more threatening harm may well be that which a competitor faces once a violator has completed the illegal transaction and begins to reap the fruits of that act.\textsuperscript{93}

In \textit{ITT} the Ninth Circuit appears to be taking an analogous position. The court was prepared to grant \textit{broad} injunctive relief under section 16 to ensure against "threatened" loss, but would not allow a remedy of divestiture to reach the consummated merger and left the illegal transaction intact.

The concept that a court of equity can do equity prior to an illegal transaction, but once the transaction is consummated is without

\textsuperscript{91} See United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), in which the district court had initially denied a divestiture requested by the Government, finding injunctive relief short of divestiture adequate. Several years later the Supreme Court had an opportunity to examine the relief question and found injunctive relief inadequate as it had failed to alter the defendant's monopolistic position.

\textsuperscript{92} 250 F. 292 (D.N.J. 1918).

power to restore the status quo is inapposite. In fact, the Supreme Court in *Schine Chain Theatres, Inc. v. United States*,94 noted in reference to the divestiture remedy: "Like restitution it merely deprives the 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."95 The Chain Theatres Court recognized the authority and power of the judiciary to act and undo the consummated transaction. The validity of the *Venner* position and subsequent decisions relying on it is doubtful.96

**Divestiture: A Remedy More Responsive to Antimerger Goals**

There is a two pronged approach or purpose to both private remedial provisions of the Clayton Act. Section 497 and section 16 of the Act are clearly concerned with allowing the individual the ability to defeat a violation of the antitrust laws and derive recompense for damage caused thereby. This private interest factor is perhaps more clearly recognized under section 4 where the private plaintiff actually receives a monetary award for damages proven. However, section 16 certainly embodies a private interest as well. The difference is that under section 16 the individual interest is in avoiding potential damage rather than acquiring an award for actual damage. The private interest factor of these remedial provisions is the primary stimulus for bringing suits. It is also clear that the ultimate purpose of the private remedial provisions, protecting the public interest, is met.98 By motivating private parties in this manner the public is assured of an army of private attorneys general. This increases the likelihood that an antitrust violator will be discovered and has the affect of deterring potential violators. The remarks of Congressman Webb concerning the purpose of section 4 during the congressional hearings on the Clayton Act highlight this concept:

Now let a businessman somewhere in the United States, or 40 or 50 of them, be damaged by the things that are denounced as unlawful in this section, and let them all bring suit. That...will have a more deterrent effect on the men who practice those things than mere criminal penalties. . . .99

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94. 334 U.S. 110 (1948).
95. Id. at 128.
97. See note 33 supra.
99. 51 CONG. REC. 16274 (1914) (remarks of Congressman Webb).
In comparing section 4 and section 16 there can be little doubt that section 4 would be more appealing to the private party who can realize immediate rewards from a successful suit. Conversely, section 16 would be the more beneficial remedy for the public if a divestiture remedy were available, especially in section 7 cases where a merger or acquisition has altered the market structure. A successful divestiture suit under section 16 would aid the public by restoring the market to a pre-merger or pre-acquisition point in time. The benefit accrues to the public because of the decreased degree of economic concentration in the pre-merger market. Thus, the public policy underlying the antitrust laws is most effectively implemented by a private action under section 16.

In NBO Treadway Companies, Inc. v. Brunswick Corp., the Third Circuit Court of Appeals emphasized, not committee hearings, but the fundamental national economic policy of the antitrust laws. The antitrust laws are statements of general principle and "must be given meaning in specific applications on a case-by-case basis." While the Ninth Circuit was willing to determine congressional intent from Judiciary Committee hearings, the Third Circuit took the position that the antitrust laws must be given a degree of flexibility in order to most effectively meet the underlying economic policies. The rationale is sound. Reliance on 1914 legislative hearings as the controlling factor for the application of antitrust laws now, at a time when the complexity of economic and business conditions is certainly beyond that perceived by the enacting legislators, is unreasonable. The Third Circuit advocates an application of the antitrust remedies which follow the overall economic policy underlying the antitrust laws, not legislative comment. The Ninth Circuit in the ITT case failed to consider this overall policy in determining that divestiture is not a proper remedy under section 16.

CONCLUSION

The Ninth Circuit found various colloquies between witnesses and Congressmen concerning proposals for allowing the private litigant a divestiture remedy under section 16 of the Clayton Act sufficient to show congressional intent. The court, on the other hand, failed to examine the overall policy of the antitrust laws or the aim of the statutory scheme. A private plaintiff and the public will be left without an effective remedy if divestiture is not allowed under section 16 of the Clayton Act.

100. 5 TRADE REG. REP. (1975 Trade Cas.) ¶ 60,479 (3d Cir. 1975).
101. Id. at ¶ 67,128.
The Ninth Circuit did not consider the desirability of competitive markets, as opposed to concentrated economic power, and the unique ability of divestiture to restore a market to its status quo. The remedy is necessary in those situations where traditional relief has proven ineffective. Only by eliminating illegal market activities can the protection sought by the antitrust laws be achieved. Only by allowing a private divestiture remedy can realistic enforcement to that end exist.

TODD ALLEN SMITH