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Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act

In an effort to reduce the high degree of concentration and anticompetitive activity prevalent in several American industries, Congress enacted the Sherman Act in 1890.¹ Congress expected this Act to end the threat of economic concentration which it perceived as seriously endangering American political, social, and economic values.² The Sherman Act, however, did not prove fully adequate in preventing anticompetitive activity, and Congress soon realized that further legislation would be necessary.³ The result was the Clayton Act of 1914, an Act designed to halt restraints of trade in their incipency.⁴ Section 7 of this Act prohibits the acquisition of stock or assets where the effect "may be substantially to lessen competition, or to tend to create a monopoly."⁵ To aid in the enforcement of the antitrust laws, and also to provide relief to private parties harmed by violations of the antitrust laws, Congress created a private right of action in the Clayton Act.⁶ This private right of action is a powerful one; section 4 of the Act awards treble damages to a private party upon a successful showing of injury caused by an antitrust violation,⁷ and section 16 provides for injunctive relief.⁸

1. Sherman Act, ch. 647, 26 Stat. 209 (1890), (codified as amended at 15 U.S.C. §§ 1-7 (1982)). Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade; section 2 prohibits monopolization or attempt or conspiracy to monopolize.

2. See note 59 *infra*.

3. See P. AREEDA, ANTITRUST ANALYSIS ¶¶ 147-148 (3d ed. 1981).

4. Clayton Act, ch. 323, 38 Stat. 730 (1914), (codified as amended at 15 U.S.C. §§ 12-27 (1982)); see S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914); see also note 58 *infra* and accompanying text.

5. Section 7 of the Clayton Act reads, 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.

15 U.S.C. § 18 (1982). As originally enacted, section 7 applied only to stock acquisitions. It was amended in 1950 to include the acquisition of assets as well. See S. REP. NO. 1775, 81st Cong., 2d Sess., reprinted in 1950 U.S. CODE CONG. SERV. 4293.

6. See notes 98-100 *infra* and accompanying text.

7. Section 4 of the Clayton Act reads, in pertinent part:

[A]ny 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 three fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1982).

8. Section 16 of the Clayton Act reads, 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, includ-

Courts disagree as to whether a private party may, under section 16, bring a suit for divestiture⁹ of stock or assets acquired by a defendant in violation of section 7. Some courts, perceiving divestiture as a drastic remedy reserved solely for the government, have denied this remedy to private plaintiffs.¹⁰ Others, emphasizing the broad language of the statute and the court's inherent powers of equity, have held that in appropriate cases, divestiture may be granted to a private party.¹¹

This Note argues that private parties should be permitted to bring suits for divestiture under section 16 of the Clayton Act. Part I analyzes the language of section 16 and the relevant legislative history of the Clayton Act and concludes that Congress did not intend to limit the injunctive relief available to private parties. Part II argues that courts should be free to exercise their broad equity powers to grant the most appropriate and effective relief, including divestiture, to an injured plaintiff. Finally, Part III contends that policy considerations disfavor omitting divestiture from the types of equitable remedies that a court may grant in cases where a plaintiff has proven a violation of section 7 of the Clayton Act.

ing [section 7 of the Clayton Act], 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 procedures, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

15 U.S.C. § 26 (1982).

9. "Divestiture" is defined as "the order of court to a defendant (e.g. corporation) to divest itself of property, securities or other assets." BLACK'S LAW DICTIONARY 429 (5th ed. 1979).

10. See, e.g., *International Tel. and Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975) (denying divestiture remedy relying primarily upon legislative history); *Continental Sec. Co. v. Michigan Cent. R.R.*, 16 F.2d 378, 379 (6th Cir. 1926) (divestiture remedy denied with little explanation: "Section 16 has never 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."), *cert. denied*, 274 U.S. 741 (1927); *American Commercial Barge Line v. Eastern Gas and Fuel Assn.*, 204 F. Supp. 451, 453 (S.D. Ohio 1962) (divestiture denied without discussion); *Graves v. Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924) (stating without further explanation "I cannot suppose that anyone would argue that a private suit for dissolution would lie under section 16 of the Clayton Act"); *Venner v. Pennsylvania Steel Co.*, 250 F. 292, 296 (D.N.J. 1918) ("The suits covered by [section 16] are limited to those seeking preventative relief . . . [A]nd, as the relief sought in the present supplemental bill is not of a preventative character but to annul a consummated transaction, none of the venue provisions of the Sherman or Clayton Acts is available . . .") (citations omitted). For a discussion of these cases, see Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 TEXAS L. REV. 54, 66-76 (1969).

11. See, e.g., *CIA. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 413-30 (1st Cir. 1985) (divestiture remedy permissible, based on extensive discussion of legislative history, policy and principles of equity); *NBO Indus. Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3d Cir. 1975) (rejecting Ninth Circuit's reasoning in *International Telephone and Telegraph*, but refraining from ruling on availability of divestiture since less drastic remedy sufficient in this case), *cert. denied*, 429 U.S. 1090 (1977); *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F. Supp. 1016, 1024-25 (S.D.N.Y. 1979) (allowing divestiture, relying primarily on policy and principles of equity).

I. STATUTORY ANALYSIS

The proper place to begin a statutory analysis is, of course, the language of the statute.¹² Where that language is unclear or ambiguous, courts often look to the legislative history for guidance.¹³ A careful examination of the language and legislative history of section 16 of the Clayton Act fails to reveal the clear legislative intent necessary to limit the courts' broad powers of equity.¹⁴

A. *The Language of Section 16*

Section 16 of the Clayton Act explicitly provides that a private party may

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.¹⁵

No specific limitations on the permissible forms of injunctive relief appear on the face of the statute.¹⁶ Focusing narrowly on the merger transaction itself, some courts have suggested that Congress intended the words "threatened conduct" to preclude private suits for divestiture.¹⁷ This conclusion rests on the apparent assumption that once the merger is consummated, no "threatened conduct" remains to be remedied. Section 7, however, condemns mergers not only when they cause immediate harm, but also when they create a serious threat of anticompetitive conduct in the future.¹⁸ The language of section 16 does not limit courts' ability to deal with this threat. Rather, it authorizes courts to grant injunctive relief in private suits in order to eliminate the potential for anticompetitive conduct resulting from an unlawful merger.¹⁹

12. See, e.g., *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 106 S. Ct. 681, 686 (1986).

13. See, e.g., *United States v. Enmons*, 410 U.S. 396, 399-408 (1973).

14. See notes 44-53 *infra* and accompanying text.

15. 15 U.S.C. § 26 (1982).

16. Examining the language of section 16, the First Circuit remarked: "[W]e are first struck by the broad language Congress employed in § 16 Significantly, the statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order." *CIA. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 416 (1st Cir. 1985).

17. See, e.g., *Fein v. Security Banknote Co.*, 157 F. Supp. 146, 148 (S.D.N.Y. 1957).

18. See note 58 *infra*. The Ninth Circuit rejected a similar argument with respect to the availability of rescission as a remedy in government suits in *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222 (9th Cir. 1978). In that case, the defendant argued that the language of section 15, granting power to the government to "prevent and restrain" violations of the Clayton Act, only authorized the government to act against violations of section 7 prior to consummation of the merger. The court responded that this suggested limitation reads too much into the words "prevent" and "restrain" and is contrary to principles of equity. 575 F.2d at 230. For the language of section 15, see note 21 *infra*.

19. The First Circuit argued that the language is sufficiently clear to preclude the need for

One must look, therefore, to the "conditions and principles" of injunctive relief to determine whether divestiture is an available remedy under section 16. As discussed in Part II, the distinguishing characteristic of equity is flexibility; in granting injunctive relief, courts have broad discretion to formulate relief most appropriate to individual cases.²⁰ Thus, although section 15 (the section of the Clayton Act which grants the Attorney General the right to seek equitable relief) does not expressly provide for divestiture,²¹ courts have often awarded this remedy in cases brought by the government.²² In that context, one would expect that if Congress had intended to exclude divestiture from the forms of injunctive relief available to private litigants under section 16, it would have indicated that intent explicitly in this section's language.

B. Legislative History

The Ninth Circuit relied heavily on the legislative history of the Clayton Act in denying private parties the right to divestiture in *International Telephone & Telegraph Corp. v. General Telegraph & Electronics Corp. (ITT)*.²³ The legislative history, however, is far from conclusive on this issue. On the basis of several scattered statements in the hearings of the House Committee on the Judiciary, the *ITT* court claimed that the Committee intended to exclude divestiture from the injunctive relief available to private parties under section 16.²⁴ The court felt compelled to admit, however, that "[w]hether Congress

any further inquiry into the legislative history. *CIA. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 415-18 (1st Cir. 1985). The court proceeded, nevertheless, with an extensive analysis of the legislative history in order to refute the Ninth Circuit's contention in *International Tel. and Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913 (9th Cir. 1975), that the legislative history suggests that Congress intended to exclude divestiture. *Petrolera*, 754 F.2d at 418-29.

20. See notes 43-53 *infra* and accompanying text.

21. Section 15 of the Clayton Act reads, 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 . . . under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited.

15 U.S.C. § 25 (1982).

22. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). The district court in *International Tel. and Tel. Corp. v. General Tel. & Tel. Corp.*, 351 F. Supp. 1153, 1207 (D. Hawaii 1972), *rev'd*, 518 F.2d 913 (9th Cir. 1975), reasoned that equity would demand that, since divestiture has been approved as an appropriate equitable post hoc remedy for enforcement of the prevention and restraint language of § 15 and § 4, the same underlying equitable power and authority of the court should not be miserly withheld when by its use the court can make sure that the "threatened conduct" proscribed in § 16 can never cause "loss or damage" in the future.

23. 518 F.2d 913 (9th Cir. 1975).

24. See notes 27-31 *infra* and accompanying text.

shared this intention is not subject to rigorous proof.”²⁵ The Supreme Court has disapproved of this sort of speculation, warning that inconclusive bits of legislative history do not provide a reliable basis for determining congressional intent.²⁶

The *ITT* court pointed, in particular, to a statement made by Representative Floyd at the hearings of the House Committee on the Judiciary. Apparently intending to speak for the Committee, Floyd claimed that “[w]e 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.”²⁷ The court admitted that subsequent discussions at the hearings about the possibility of including “dissolution” among the remedies available to private parties under section 16 clearly indicate that Representative Floyd’s statement did not represent the final intent of the committee, much less the intent of Congress as a whole.²⁸ The *ITT* court made an even more tenuous argument that Floyd’s statement suggests that the members of the Committee understood the term “injunctive relief” as not including “dissolution.”²⁹ The court then argued that the Committee’s rejection of an amendment which would have explicitly provided for the right to sue for “dissolution” under section 16 indicates that this remedy was not meant to be included in the “injunctive relief” available to private parties.³⁰ Extending this already speculative line of interpretation one step further, the court concluded that the Committee members thought “dissolution” to have the same meaning as divestiture and, therefore, did not intend section 16 to include the remedy of divestiture.³¹

25. 518 F.2d at 922. It is the intent of Congress as a whole that is relevant to statutory analysis. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

26. See, e.g., *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982) (“Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and ‘a step to be taken cautiously.’”) (citing *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26 (1977)); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (“Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates . . . as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.”) (Jackson, J., concurring).

27. *Trust Legislation, 1914: Hearings on H.R. 15657 Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. 842 (1914) (testimony of Rep. Floyd) [hereinafter cited as *Hearings*].

28. 518 F.2d at 922.

29. 518 F.2d at 922. The wording of the section of the bill to which Floyd’s statement refers was identical to the final wording of section 16.

30. 518 F.2d at 922 & n.45. Mr. Untermyer, a witness who testified before the Committee, suggested amending section 16 to read that a party “shall be entitled to sue for and have injunctive and other equitable relief, including an action for the dissolution of the corporation and for a receiver thereof.” *Hearings*, *supra* note 27, at 843.

31. 518 F.2d at 922-25. The court surmised that references to cases in which courts ordered divestiture in hearing discussions on dissolution indicated that the committee members believed “dissolution” meant the same thing as divestiture.

Other discussions in the hearings cast considerable doubt on the Ninth Circuit's conclusions. The minority views in the Committee's final report, for example, strongly indicate that at least some members of the Committee thought that the injunctive relief provided for in section 16 included divestiture. The minority warned that section 16 might allow individuals to sue for "a receivership" — the complete destruction of a company.³² Because divestiture is a less drastic remedy than receivership, the members of the minority must have believed that section 16 would allow a suit for divestiture by a private party.

Other Committee discussions suggest that the members of the Committee used the terms "dissolution" and "injunction" rather imprecisely, without clearly understanding their meaning.³³ It appears that the Committee members were simply not certain what the courts' equity powers included.³⁴ In light of this uncertainty, it is surprising that the Committee would not have explicitly excluded divestiture from section 16 if the Committee members had ultimately determined that the private right should not include divestiture.

The Committee may have rejected the amendment providing for "dissolution"³⁵ for reasons other than to deny private parties the right to sue for divestiture. The Committee members may have (1) ultimately concluded that the term "injunctive relief" encompassed "dissolution" (in which case the amendment would have been redundant);³⁶ (2) decided not to give private parties as extensive a power as the government to bring about the complete destruction of a

32. The minority report of the Committee stated that

The provision giving to any individual the right to enjoin any threatened loss or damage . . . is a serious one. . . . The beginning of an investigation by the Government on any complaint that a concern has violated the antitrust law, almost immediately to some extent affects his credit, but not as seriously as an application for an injunction, and perhaps a receivership, which might be brought by any individual.

H.R. REP. NO. 627, 63d Cong., 2d Sess. pt. 2, at 10 (1914) (minority views to H.R. 15657). Statements in committee reports are given greater weight in statutory interpretation than are statements during the hearings. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring).

33. For example, while informing a witness of previous suggestions that section 16 include divestiture, Representative Carlin said "it has been contended by some that we ought to give the individual the same right to sue for *an injunction* that the Government enjoys." *Hearings, supra* note 27, at 260 (emphasis added). Since the final language "injunctive relief" was also the wording of the bill at that time, Carlin's use of the word "injunction" here is inconsistent with his apparent belief that the section did not allow for divestiture. Perhaps he was uncertain as to the precise content of "injunctive relief."

34. See, e.g., *Hearings, supra* note 27, at 264 (witness Levy uncertain as to extent of common law right to injunction); *id.* at 652 (witness Brandeis testifying about the necessity of clarifying the courts' powers in equity); *id.* at 492 (Representative Carlin asking witness whether the bill, as written, would allow for dissolution).

35. See note 30 *supra*.

36. This possibility is supported by courts' continued willingness to grant the government divestiture relief, despite the deletion from the final bill of a similar provision explicitly granting the government the right to dissolution. See note 22 *supra*; see also Note, *The Use of Divestiture in Private Antitrust Suits*, 43 GEO. WASH. L. REV. 261, 267-68 (1974).

corporation;³⁷ or (3) decided to leave it to the courts to determine, on the basis of common law principles of equity, the appropriate forms of injunctive relief available to private plaintiffs under section 16 (as the language of the statute would suggest). The committee hearings leave considerable uncertainty as to the Committee's precise intentions, and the majority views in the final committee report contain no discussion of whether the majority intended "injunctive relief" to include divestiture.³⁸

The private right of injunctive relief was hardly discussed during the floor debates in Congress. On at least two occasions when it was mentioned, it was compared, without distinction, to the government's right to "enjoin" unlawful combinations.³⁹ While these statements do not explicitly indicate that Congress intended to grant private parties the same powers as the government, they fail to suggest any intent to exclude divestiture.

Though the legislative history of section 16 does not conclusively establish that Congress intended this section to include divestiture, neither does it provide any basis to argue that Congress meant to exclude this remedy. One can fairly say that the legislative history of section 16 lacks the clear intent necessary to overcome the strong presumption against limiting courts' powers of equity.⁴⁰ This is especially true in light of the plain and broad language of the statute.⁴¹

II. COURTS' INHERENT POWERS OF EQUITY

Because section 16 of the Clayton Act directs courts to grant injunctive relief to private parties "when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity,"⁴² the interpretation of this statute necessitates consideration of the common law equity powers of courts. This section examines several cases which have emphasized the wide discretion allowed courts in granting equitable relief under federal statutes.

Courts that allow divestiture as a remedy for private parties under section 16 emphasize the courts' inherent powers of equity. In *CIA*.

37. The amendment proposed by Mr. Untermyer was in terms of a receivership. See note 30 *supra*. The phrasing of the minority's disapproval of section 16 also suggests this may have been their objection.

38. H.R. REP. NO. 627, 63d Cong., 2d Sess. (1914). The Senate committee report is also silent on this issue. See S. REP. NO. 698, 63d Cong., 2d Sess. (1914). For the significance of this silence, see note 26 *supra*.

39. Explaining section 16 to the House, Representative Floyd said "[h]eretofore there has been only one power that might enjoin an unlawful trust or monopoly in restraint of trade, and that was the Government of the United States." 51 CONG. REC. 16,319 (1914); see also 51 CONG. REC. 9261, 9270 (1914).

40. See notes 43-53 *infra* and accompanying text.

41. See note 16 *supra*.

42. 15 U.S.C. § 26 (1982).

Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.,⁴³ for example, the First Circuit argued that while Congress is free to step in and limit courts' power to grant equitable relief in a given situation, a court may assume that Congress is aware of these inherent powers and only a clear expression of legislative intent will be held to limit them.⁴⁴ The court relied on *Porter v. Warner Holding Co.*,⁴⁵ where the Supreme Court discussed the importance of courts' inherent powers of equity and the high degree of certainty in legislative intent necessary to limit these powers.⁴⁶ The *Porter* Court held that a judge's ability to reach equitable results by shaping each decree to the particular circumstances of the case before it "is not to be denied or limited in the absence of a clear and valid legislative command."⁴⁷ The Court emphatically stated a presumption against any such limitations:

Unless a statute in so many words, or by a *necessary and inescapable* inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.⁴⁸

The court's primary concern in equity, then, is to provide full and appropriate relief in the case before it.

Interpreting the same statute⁴⁹ in *Hecht v. Bowles*⁵⁰ as it had in *Porter*, the Supreme Court allowed the district court broad discretion in awarding equitable relief. The Act provided, in part, that "upon a showing by the Administrator that such person has engaged or is about to engage [in a violation of this Act] a permanent or temporary injunction, restraining order, or other order *shall* be granted without bond."⁵¹ Despite the Administrator's successful showing of a violation of the Act, and despite the apparently mandatory language of the statute, the Supreme Court upheld the district court's dismissal of the Administrator's petition for an injunction. The Court held, in essence, that the "or other order" language was meant to preserve for the court its traditionally broad discretion in granting equitable relief — even if that meant granting no relief at all.⁵² Praising flexibility as the hall-

43. 754 F.2d 404 (1st Cir. 1985).

44. 754 F.2d at 416-17.

45. 328 U.S. 395 (1946).

46. 328 U.S. at 397-98.

47. 328 U.S. at 398.

48. 328 U.S. at 398 (emphasis added) (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

49. The Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 23, 33, *repealed by* Price Control Extension Act of 1946, ch. 671, § 1, 60 Stat. 664, 664.

50. 321 U.S. 321 (1944).

51. The Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 23, 33, *repealed by* Price Control Extension Act of 1946, ch. 671, § 1, 60 Stat. 664, 664 (emphasis added).

52. 321 U.S. at 328-29.

mark of equity jurisdiction, the Court concluded that "if Congress had desired to make such an abrupt departure from traditional equity as is suggested, it would have made its desire plain."⁵³

The same can be said of section 16 of the Clayton Act. As discussed in Part I of this Note, the language and legislative history of section 16 do not exhibit the "clear and valid legislative command" necessary to limit the courts' power to grant divestiture to private parties.⁵⁴ In ordering injunctive relief under a federal statute, a court should seek to effectuate Congress' purposes in enacting the statute.⁵⁵ Congress created the private cause of action in the Clayton Act to grant protection to private parties and to ensure more effective enforcement of the antitrust laws.⁵⁶ Allowing private parties to sue for divestiture provides an effective remedy to further these goals.⁵⁷

III. POLICY CONSIDERATIONS

Because neither the statutory interpretation of the Clayton Act nor general principles of equity preclude the availability of divestiture in private actions under section 16, courts should look to policy considerations to determine whether divestiture is a proper remedy for private plaintiffs. This section argues that the availability of divestiture in private antitrust actions furthers important policy goals by enabling courts to remedy more effectively violations of section 7, while encouraging the consummation of lawful, socially desirable mergers.

53. 321 U.S. at 330; *cf.* *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), where the Court held that the Endangered Species Act of 1973 required that the court enjoin the completion of a multimillion dollar dam project in order to protect an endangered species of fish inhabiting the river where the dam was to be built. In this Act, Congress did not seem to restrict courts' range of remedies more than it had in *Hecht*, yet the Court concluded that Congress had limited the court's discretion in granting equitable relief. The Court relied on the legislative history of the statute which it said made very clear that Congress placed a high value on protecting endangered species. What is clear from the legislative history of the Clayton Act is that Congress wanted private parties to be able to protect themselves and to act as private attorneys general to aid in the enforcement of the antitrust laws. See notes 98-100 *infra* and accompanying text. These goals favor allowing private parties to sue for divestiture.

54. See notes 15-41 *supra* and accompanying text.

55. See, e.g., *CLIA. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 428-29 (1st Cir. 1985) ("[W]hen Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important Congressional goals.") (citing several Supreme Court cases); *cf.* *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Implying a private right of action under section 14(a) of the Securities Exchange Act of 1934, the Court in *Borak* said:

While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.

... Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of proxy requirements. 377 U.S. at 432.

56. See notes 98-100 *infra* and accompanying text.

57. See notes 66-82 *infra* and accompanying text.

A. Remedying Section 7 Violations

In ruling on the legality of a merger under section 7 of the Clayton Act, a court must consider a variety of factors including market shares of the merging firms, industry trends toward concentration, degree of concentration within the industry, prior mergers by the firms in question, and barriers to entry in the industry.⁵⁸ Given this wide range of relevant considerations, each case inevitably presents unique problems requiring individually structured remedies to restore competition to the marketplace properly.⁵⁹ Realizing that a remedy well-suited to one case may be entirely inappropriate in another, a court seeks to order that relief which will respond most effectively to the necessities of the case before it.⁶⁰ To achieve this goal, courts have available to them a number of equitable tools which they can use in various combinations to mold decrees that best fit individual cases. These include, among others, preliminary injunctions,⁶¹ hold separate or-

58. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 343-44 (1962); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1162-63 (9th Cir. 1984); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 379-80 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

59. It is undisputed that the preservation of competition is the primary goal of antitrust: [The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

Considerable debate exists, however, over how best to achieve the goals embodied in the antitrust laws. The "Chicago School" argues that competition and efficiency are the only goals of antitrust enforcement. These commentators would prohibit mergers or other business activity only where inefficient or anticompetitive. Other commentators question the assumptions of the Chicago School and point to aspects of American history which motivated the passage of the antitrust laws, as well as the legislative history of these statutes, which demonstrate that market concentration itself is a threat to social and political values. These scholars insist that antitrust law cannot be reduced to simple economic models to the exclusion of these other considerations; an evaluation of economic efficiency should not be the sole determinant of the legality of business conduct. This heated debate has generated considerable uncertainty as to the appropriate standards for antimerger law. Compare Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984), and Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977), with Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEXAS L. REV. 41 (1984), and Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977). See also Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEXAS L. REV. 661, 671 n.51 (1982) (listing the major books and articles on both sides of this debate); Cann, *Section 7 of the Clayton Act and the Pursuit of Economic "Objectivity": Is There Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273 (1985).

60. See, e.g., *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1084 (D.C. Cir. 1981) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 228 (9th Cir. 1978) ("The equity jurisdiction of the federal courts traditionally has permitted the fashioning of broad and flexible decrees molded to the necessities of the individual case.").

61. See, e.g., *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984) (preliminary injunction granted); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982) (same); *Sonesta Intl. Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247 (2d Cir. 1973) (same). See generally Note, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act*, 40 N.Y.U. L. REV. 771 (1965).

ders,⁶² divestiture,⁶³ and, at least in some jurisdictions, rescission.⁶⁴ A court must have each of these remedies available in order to respond best to the particular exigencies of each case that may come before it.

B. *Divestiture as a Remedy for Section 7 Violations*

Because unlawful mergers involve a structural antitrust violation,⁶⁵ structural relief, such as divestiture, is often the most appropriate remedy.⁶⁶ The Supreme Court espoused this view in *United States v. E.I. du Pont de Nemours & Co.*,⁶⁷ saying

[t]he 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.⁶⁸

A successful divestiture provides the greatest assurance that an unlawful merger will not lead to anticompetitive results.⁶⁹

Despite the Supreme Court's favorable view of divestiture, several commentators have noted courts' difficulties in administering divesti-

62. See, e.g., *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981) (hold separate order made preliminary injunction unnecessary); *FTC v. PepsiCo, Inc.*, 477 F.2d 24 (2d Cir. 1973) (same). See also, notes 93-95 *infra* and accompanying text. See generally Note, *Hold Separate Orders in Government Antimerger Suits*, 70 GEO. L.J. 1337 (1982).

63. See notes 9 & 22 *supra*; see also notes 66-82 *infra* and accompanying text.

64. See, e.g., *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227-30 (9th Cir.) (rescission is within courts' powers of equity), *cert. denied*, 439 U.S. 959 (1978); *Arnett v. Gerber Scientific, Inc.*, 575 F. Supp. 770, 771-72 (S.D.N.Y. 1983) (same). See generally Note, *Section 7 Clayton Act Remedies — The Rescission Decision*, 64 CORNELL L. REV. 736 (1979).

65. A structural violation is one resulting from a change in the associations of participants in the market in question. This is generally distinguished from behavioral or conduct violations which result from conduct of individuals in the market. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 23-25, 33-34 (1977).

66. Elzinga & Breit provide a definition of structural relief:

In common parlance structural relief is called "trust-busting"; the legal nomenclature is dissolution, divorcement, and divestiture. . . . Many experienced antitrust lawyers cannot draw the precise terminological distinctions between the three terms. Consequently, structural relief, and the "three D's" of antitrust, can best be considered in a generic sense. That is, they will refer to any effort to prevent or undo an antitrust violation through dismembering or reducing the assets of the defendant firm.

K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 44-45 (1976).

Conduct remedies, the alternative to structural relief, attempt to avert anticompetitive results by placing restrictions upon the defendant's future activity. For a comparison of structural and conduct remedies, see O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV. J. ON LEGIS. 687, 730-52 (1976).

67. 366 U.S. 316 (1961).

68. 366 U.S. at 329-31 (footnote omitted).

69. See *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128-29 (1948) ("[Divestiture] serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act."). For a discussion of the inadequacy of other forms of relief to accomplish these goals, see notes 106-07 *infra* and accompanying text.

ture as an antitrust remedy.⁷⁰ These commentators conclude that courts have been reluctant to order divestiture in the past and remark that divestiture has proved to be an ineffectual remedy in many cases where it has been ordered.⁷¹ The two complaints most often leveled against divestiture are the difficulty in finding an appropriate buyer for the divested assets⁷² and the problems in determining which assets to divest where the assets of the merged firms have become "scrambled" or have been sold or otherwise disposed of.⁷³ While these problems often can pose serious roadblocks to an effective order of divestiture, in cases where these problems do not exist,⁷⁴ or where they can be cir-

70. See, e.g., Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951); Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J. L. & ECON. 43 (1969); Pfunder, Plaine & Whittemore, *Compliance With Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 ANTITRUST BULL. 19 (1972).

71. One explanation commonly offered for the failure of divestiture orders is that judges are reluctant to order as complete divestiture as is necessary to remedy adequately the violation for fear of treating the defendant punitively. Adams, *supra* note 70, at 20; Pfunder, Plaine & Whittemore, *supra* note 70, at 40. While the Supreme Court in *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), ruled that antitrust remedies are not intended to inflict punishment, it also emphasized that a court's primary concern should be to order relief that will adequately remedy the violation. The Court directed that this consideration should take precedence over the hardship an effective remedy may cause the parties involved:

If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences.

366 U.S. at 327. For an argument that divestiture is often less punitive than other forms of relief, see O'Connor, *supra* note 66, at 741-49.

Another source of judges' reluctance to grant divestiture is, undoubtedly, the uncertainty surrounding antimerger standards. See note 59 *supra*.

72. The primary objective is to find a buyer whose ownership of the stock or assets in question will not create antitrust concerns. Professor Kauper has noted this difficulty. "The search for a new purchaser of previously acquired assets may pose as many competitive problems as did the initial acquisition. Defendants may delay, assets may be changed or disappear altogether, and the market itself may be considerably altered by the time divestiture is achieved (if it ever is)." Kauper, *Antitrust Relief and Innovation*, 50 ANTITRUST L.J. 71, 76 (1981). While problems created by the defendant's delay or misappropriation of assets can be resolved through greater use of sanctions for such conduct, NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL reprinted in 80 F.R.D. 509, 611-12 (1979) [hereinafter cited as COMMISSION REPORT], the absence of an appropriate purchaser may preclude an order of divestiture. But see note 75 *infra* for possible solutions to this problem.

The fact that the defendant may be forced to sell on unfavorable terms should not deter the court from ordering divestiture if necessary to redress effectively defendant's violation. See note 71 *supra*.

73. See, e.g., *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (where a joint venture called for the prompt sale of the acquired company's assets, which made it impossible to reestablish the acquired company as an independent entity through divestiture at a later time); *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966) (same problem with a proposed merger plan).

74. This is often the case in a conglomerate merger where the acquired company is to be held as a separate company. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 869 (2d Cir. 1974), cert. denied, 419 U.S. 883 (1974). This may be true in the case of a horizontal merger as well. *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 30 (2d Cir. 1973).

cumvented,⁷⁵ divestiture can be a viable remedy.

Many commentators assert that past failures of divestiture are due not to any inherent inadequacies of the remedy but rather to its misapplication by the courts.⁷⁶ If properly applied, divestiture can prove to be an effective and efficient means of remedying a section 7 violation.⁷⁷ Thus, while acknowledging the imperfect track record of divestiture, the Supreme Court reaffirmed its approval of this remedy in *Ford Motor Co. v. United States*.⁷⁸ Concurring in that case, Justice Stewart pointed out that "while divestiture remedies in § 7 cases have not enjoyed spectacular success in the past, remedies short of divestiture have been uniformly unsuccessful in meeting the goals of the Act."⁷⁹

Indeed, other forms of injunctive relief can impose significantly greater dilemmas for a court. In *United States v. E.I. du Pont de Nemours & Co.*, for example, the Court noted difficulties in policing conduct injunctions, burdens involved in litigation of contempt proceedings for violations of those injunctions, and the impossibility of designing a sufficiently detailed injunction to provide for all the ways in which improper conduct might manifest itself.⁸⁰ Commentators have reiterated this concern over the infeasibility of other forms of injunctive relief.⁸¹ Given the serious difficulties inherent in alternative

75. See ABA ANTITRUST LAW DEVELOPMENTS 205-06 (2d ed. 1984) [hereinafter cited as DEVELOPMENTS]. In appropriate circumstances, the lack of a viable purchaser may be resolved by ordering the divestiture in the form of rescission, see Note, *supra* note 64, or a spin-off (where the acquired firm is made an independent company and the stock distributed to the shareholders of the acquirer, if the acquirer is a large, publicly held corporation). See T. BRUNNER, T. KRATTENMAKER, R. SKITOL & A. WEBSTER, *MERGERS IN THE NEW ANTITRUST ERA* 191-92 (1985); COMMISSION REPORT, *supra* note 72, at 604-05.

See notes 85-95 *infra* and accompanying text for a discussion of the possible use of preliminary injunctions and hold separate orders to prevent problems created by scrambling or disposal of assets.

76. See, e.g., Adams, *supra* note 70, at 33 ("The inadequacies of present practices are mostly self-imposed by the courts and the Antitrust Division: the solution to the problem is within their domain."); Pfunder, Plaine & Whittemore, *supra* note 70, at 129-37 (offering recommendations for more effective use of divestiture); cf. O'Connor, *supra* note 66, at 772-75 (concluding that divestiture should be the presumed remedy in monopolization cases because it is more effective, easier to administer, and less harsh than conduct restrictions). The National Commission for the Review of Antitrust Laws and Procedures agreed and offered recommendations for more extensive and effective use of divestiture. COMMISSION REPORT, *supra* note 72, at 600-16.

Finally, now-Circuit Judge Posner has suggested that divestiture is a more workable remedy in section 7 cases (as opposed to monopolization cases under section 2 of the Sherman Act) because "[t]he mergers suggest the lines along which the firm can be broken up with minimal disruption." R. POSNER, *ANTITRUST LAW* 84 (1976).

77. Thus, courts continue to order divestiture in appropriate cases. See note 22 *supra*.

78. 405 U.S. 562 (1972).

79. 405 U.S. at 582 (Stewart, J., concurring).

80. 366 U.S. 316, 333-34 (1961).

81. See, e.g., T. BRUNNER, T. KRATTENMAKER, R. SKITOL & A. WEBSTER, *supra* note 75, at 196:

Conduct restrictions are difficult to police precisely because they undercut the economic interest of a single corporate unit and try to curb activity occurring entirely within that unit. A divestiture order requires distinct, visible action; a conduct limitation invites constant, secret violation.

equitable remedies,⁸² courts should be reluctant to rule out divestiture in cases where it can provide the most efficient and effective means of remedying section 7 violations.

C. *Promotion of Socially Desirable Mergers*

Not only can divestiture serve as an effective means of remedying section 7 violations,⁸³ its availability can also promote the consummation of legal, socially desirable mergers.⁸⁴ This favorable effect results from courts' greater willingness to deny preliminary injunctions in section 7 cases when divestiture is available.

To avoid the prospect of breaking apart a merger after it has been consummated, a court may prefer to order a preliminary injunction prohibiting the merger once the plaintiff has shown a probable violation of section 7.⁸⁵ This solution, however, is problematic. The complex issues involved in section 7 cases⁸⁶ are not fully developed at a preliminary hearing,⁸⁷ so that a court might mistakenly issue a preliminary injunction against a lawful merger. Because a prospective acquiring company often abandons its merger attempt once a preliminary injunction has issued,⁸⁸ such mistakes could result in the

See also COMMISSION REPORT, *supra* note 72, at 603-04; O'Connor, *supra* note 66, at 730-52; Adams, *supra* note 70, at 21.

82. See notes 79-81 *supra* and accompanying text.

83. See notes 66-75 *supra* and accompanying text.

84. As Judge Friendly pointed out in *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974), lawful acquisitions, especially in the context of conglomerate mergers, can promote the efficient allocation of resources:

Where, as here, the acquisition would be neither horizontal nor vertical, there are "strong reasons for not making the prohibitions of section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are procompetitive in their facilitation of entry and expansion that would otherwise be subject to serious handicaps."

498 F.2d at 854 (quoting Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1318 (1965)). See generally Y. BROZEN, *MERGERS IN PERSPECTIVE* (1982).

85. See, e.g., *Gulf & W. Indus., v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 698 (2d Cir. 1973) (where the court ascertained that "if this Court permitted the tender offer to be consummated and at some later date were to find the violations charged by A&P, it would be almost impossible to unravel the situation.").

According to Professor Kauper, "[t]he best alternative is the preliminary injunction, a remedy which by having an acquisition [prevented] prior to its consummation avoids a great many of the problems and frustrations of divestiture." Kauper, *supra* note 72, at 77; see also, Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 HARV. L. REV. 391 (1965); Note, *supra* note 61, at 774-77.

86. See note 58 *supra* and accompanying text.

87. In *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 231 (9th Cir.), *cert. denied*, 439 U.S. 959 (1978), for example, the court remarked that "numerous factors which have not yet been fully developed at trial may color the availability of relief against Aqua Media. The trial judge specifically noted . . . that he has not yet had the benefit of cross-examination and presentation of argument by counsel to develop a complete picture of the transaction in dispute."

88. In *Missouri Portland Cement Co. v. Cargill Inc.*, 498 F.2d 851 (2d Cir. 1974), *cert. denied*, 419 U.S. 883 (1974), the Second Circuit warned:

termination of lawful, socially desirable mergers.⁸⁹

In cases where divestiture would be the only effective remedy if the merger is permitted and later found unlawful, a court faces the quandary that any preliminary decision will result in a final determination of the matter if divestiture is unavailable. On the one hand, if the judge grants a preliminary injunction, the merger will likely fall through,⁹⁰ thereby effecting a final decision against the defendant. The denial of a preliminary injunction, on the other hand, will result in a final determination against a plaintiff who cannot later seek divestiture of the merged companies.

As an important element of its decision whether to grant a preliminary injunction, a court balances the hardship to the defendant if a preliminary injunction is granted against the injury to the plaintiff if the injunction is denied.⁹¹ Numerous cases demonstrate that the availability of divestiture influences this balancing. In close cases, the availability of divestiture will tip the scales in favor of denial of a preliminary injunction, thereby reducing the likelihood of the undesirable consequences resulting from mistakenly granted preliminary injunctions.⁹²

Allowing divestiture in private actions also enables courts to make effective use of another form of injunctive relief — the hold separate order.⁹³ With a hold separate order, the court permits the consummation of the merger, but requires the defendant to keep all or part of the acquired assets as a separate and independent entity during the course of the proceedings.⁹⁴ In cases where the court fears that the denial of

Experience seems to demonstrate that just as the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger, the grant of a temporary injunction on antitrust grounds at the behest of a target company spells the almost certain doom of a tender offer.

498 F.2d at 870; *see also*, DEVELOPMENTS, *supra* note 75, at 196 n.374.

89. *See* note 84 *supra*.

90. *See* note 88 *supra*.

91. *See* Note, *Standards for Evaluating Requests for Preliminary Injunctive Relief in Merger Cases*, 12 LOY. U. CHI. L.J. 503 (1981).

92. In *Allis-Chalmers Mfg. v. White Consolidated Indus.*, 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970), for example, the Third Circuit commented on the uncertain status of divestiture as a private remedy and concluded that "[i]f divestiture is unavailable or uncertain as an ultimate remedy . . . there may be even more reason for affording preliminary relief to appellant at this stage." 414 F.2d at 516; *see* *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 698 (2d Cir. 1973) (admonishing district judges to consider what remedies will be available later in deciding whether to grant a preliminary injunction); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969) (same); note 84 *supra*.

93. *See generally* *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083-87 (D.C. Cir. 1981) (discussing the appropriate circumstances for the issuance of a hold separate order and its benefits); *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 30 (2d Cir. 1973) (agreement of defendant to enter into a hold separate arrangement alleviated any concern about the impossibility of ordering divestiture at a later date); Note, *supra* note 62, at 1349-66 (discussing limitations and suggesting guidelines for proper application of hold separate orders).

94. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1075 n.7 (D.C. Cir. 1981).

an injunction and subsequent merging of the companies may make it difficult to order divestiture at a later date because of "scrambling" or disposal of assets, a hold separate order may be the most appropriate solution.⁹⁵ In this manner, a court can safely allow a possibly lawful merger while reserving the possibility of an effective remedy should the merger later prove to be in violation of section 7. This potentially effective scheme of relief, of course, is only possible where divestiture is an available remedy once the merger is complete.

D. *Divestiture as a Remedy in Private Actions*

As part of its statutory scheme of antitrust law,⁹⁶ Congress created a powerful private right of action.⁹⁷ Congress granted this generous right of relief both to protect private parties suffering from antitrust violations and to encourage private parties to take part in the enforcement of the antitrust laws.⁹⁸ In *Perma Life Mufflers v. International Parts Corp.*,⁹⁹ the Supreme Court emphasized the importance of private actions, stating that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."¹⁰⁰ Thus, private actions play an integral role in antitrust enforcement. And in section 16 Congress specifically listed section 7 among the antitrust laws for whose violation private parties may seek injunctive relief.¹⁰¹ Established principles of statutory interpretation dictate that courts should interpret section 16, a remedial statute, to allow all remedies necessary to further the statute's objectives of protecting private parties and enforcing the antitrust laws.¹⁰²

95. Admittedly, a hold separate order is no panacea. In cases where a hold separate order cannot prevent certain anticompetitive consequences of a merger — such as exchange of trade secrets or other confidential information, reduced competitiveness of the acquired firm as a result of its uncertain status, or lack of economic interest on the part of the defendant to hold the acquired company as a separate entity pending a final determination — such an order will be inappropriate. But as one court noted, "absent such factors, a hold separate order may effectively secure ultimate divestiture as an adequate remedy." *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1086 n.34 (D.C. Cir. 1981); see also Note, *supra* note 62, at 1362 (suggesting three types of situations where hold separate orders are effective); COMMISSION REPORT, *supra* note 72, at 611 (offering recommendations for more effective use of hold separate orders).

96. For an outline of this statutory scheme and its enforcement, see P. AREEDA, *supra* note 3, at 45-102.

97. See notes 6-7 *supra* and accompanying text.

98. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide relief, but was to serve . . . the high purpose of enforcing the antitrust laws.").

99. 392 U.S. 134 (1968).

100. 392 U.S. at 139.

101. See note 8 *supra*.

102. See note 55 *supra*. Also, private suits for equitable relief are in many ways less objectionable than suits for damages. The possibility of windfalls to remote plaintiffs, the threat of debilitating multiple recoveries from a defendant for a merger whose legality may have been unclear at the time of consummation, and the difficulties posed by the complex economic analy-

Government enforcement agencies alone cannot adequately protect the goals that private actions were created to promote. The limited resources of the agencies make it impossible for them to investigate and prosecute all violations of the antitrust laws.¹⁰³ This limitation, along with many other factors affecting the administration's enforcement decisions, may prevent the adoption of enforcement strategies¹⁰⁴ which fully vindicate all the rights and values that the courts determine the antitrust laws were intended to protect.¹⁰⁵ Indeed, in deciding where to allocate their finite resources, the enforcement agencies make judgments as to which areas private actions will serve as a reliable alternative source of enforcement.¹⁰⁶

Where the government fails to enforce certain antitrust laws, private actions can assure that violations of these laws are brought before the courts. In this way, private litigation serves to further the development of the antitrust laws.¹⁰⁷ In creating a private right, Congress necessarily intended private parties to play this vital role. Courts should not allow the government agencies alone to determine, through their enforcement policies, the substance of antitrust law.¹⁰⁸

ses necessary for damage determinations do not apply to suits for injunctive relief. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-62 (1972) ("[T]he fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one . . . [T]here is a striking contrast between the potential impact of suits for injunctive relief and suits for damages."); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-11 (3d Cir. 1980); 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* § 328(a) (1978); Note, *supra* note 36, at 272-74.

103. See Baxter, *supra* note 59, at 661.

104. For the Antitrust Division's current policy on merger law enforcement, see DEPARTMENT OF JUSTICE MERGER GUIDELINES, reprinted in 2 TRADE REG. REP. (CCH) ¶ 4490 (1984). For commentary, see *Merger Law Update*, 53 ANTITRUST L.J. 319 (1984).

105. Commentators have criticized the current Antitrust Division's policy in this respect. See Flynn, "Reagonomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 UTAH L. REV. 269 (1983); Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEXAS L. REV. 649 (1982).

106. See Baxter, *supra* note 59, at 691 (where then Assistant Attorney General Baxter says it may "be in the public interest for the Division to decline prosecution where an alternative plaintiff could prosecute and the Division's limited resources could be put to even better use in some other enforcement activity"). This is especially true where private actions have significant cost and efficiency advantages over government enforcement. See note 113 *infra*.

107. Baxter places considerable reliance on private suits for this purpose: "To the extent that suits by private plaintiffs produce an efficient development of antitrust law, it becomes less critical for the executive branch to ensure that the courts have appropriate cases and arguments before them." Baxter, *supra* note 59, at 682.

108. Sanford Litvack argues that the Antitrust Division has a duty to enforce well-established antitrust laws: "While the shield of prosecutorial discretion is broad, it is not intended to authorize categorical nonenforcement of the law simply because the prosecuting authority disagrees with prevailing judicial interpretation of a governing statute." Litvack, *supra* note 105, at 652.

Professor Easterbrook recognizes that where private parties are denied the right to enforce the merger law, the substance of that law is in the control of government enforcement agencies. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEXAS L. REV. 705, 711-12 (1982). But Easterbrook takes a different view from Litvack. He argues that if current teaching suggests that an antitrust law is unjustified, the Antitrust Division should refuse to enforce it. Expressing a rather cynical attitude toward judicial precedent, Easterbrook maintains that "[w]hether these

Courts that deny divestiture in private suits appear concerned that private parties will not adequately represent the broader public interest.¹⁰⁹ The best response to this concern, and one commonly given by other courts, is that enforcement of the antitrust laws is in the public interest.¹¹⁰ Therefore, weakening antitrust enforcement by denying private parties the right to sue for antitrust violations has worse implications for the public interest than does allowing private claims. American common law tradition assumes that the determination of private suits in adversary proceedings will lead to the development of standards that reflect the public interest.¹¹¹ By allowing private parties to sue for injunctive relief for violations of section 7, Congress directed that merger law develop in this manner. If a court believes that the opinion of an enforcement agency would be helpful, it can always request such advice.¹¹²

While private parties may lack the investigative and evaluative ca-

[current] scholars are right or wrong, however, the objections to their position must be on the merits and not on the basis of precedent or a misty-eyed vision of a Golden Age." *Id.* at 708. Easterbrook's lack of faith in the courts' ability to resolve properly the difficult issues involved in antitrust cases leads him to conclude that "[t]his makes it a propitious time for the Division and the Commission to chart their own courses and lead the courts rather than follow them." *Id.* at 717.

This cavalier treatment of fundamental principles of separation of powers places the Antitrust Division in the position of law-maker rather than law-enforcer. If new learning suggests that a law is unfounded, the court or the legislature, not the Antitrust Division, should overrule it. A private right to divestiture can serve as a check on the Division's ability to usurp the role of the judiciary in establishing proper standards for merger law. Since private parties do not have the benefit of the advance notice that the Hart-Scott-Rodino Act premerger notification requirements provide the government enforcement agencies (allowing them to prevent unlawful mergers before their consummation), T. BRUNNER, T. KRATTENMAKER, R. SKITOL & A. WEBSTER, *supra* note 107, at 112, private parties can only enforce section 7 effectively if they are allowed to sue for divestiture of unlawful mergers of which they had no advance warning.

109. Or, at least, that seems to be the implication of some of the summary statements with which these courts have dismissed the issue. *See* note 10 *supra*.

It is not entirely clear why this should be of significantly greater concern in the case of divestiture as opposed to preliminary injunctions or permanent injunctions prohibiting the consummation of a merger (which section 16 clearly makes available to private parties). In terms of ultimate effect on market structure, there seems to be little difference in the result.

110. *See, e.g., Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 699 (2d Cir. 1973) ("Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public . . . perform a vital public service."); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F. Supp. 1326, 1332 (E.D. Mich.), *aff'd*, 753 F.2d 1354 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985) ("I find that enjoining the proposed merger will not injure, and may well serve the public interest. Enforcing the antitrust laws of the United States clearly serves the public well."); *see also* notes 97-102 *supra* and accompanying text.

111. *Cf. Baxter, supra* note 59, at 684-85 (where Baxter suggests that private suits are efficient as well as effective in this respect); Sullivan, *supra* note 59, at 1241-42.

112. *See, e.g., Private Enforcement of the Antimerger Laws*, 31 N.Y. ST. B.A. ANTITRUST L. SYMP. 239, 246-47, 262 (1976) (where two commentators advocate courts' requesting input from the government when necessary); COMMISSION REPORT, *supra* note 72, at 613 (Commission recommends same). Baxter points out that the Supreme Court often requests the views of the government in private litigation. Baxter, *supra* note 59, at 700.

pacities of the government enforcement agencies, commentators have noted that a private plaintiff, through participation in the market in which the violation allegedly occurred, a business relationship with the defendant, or even through involvement in the alleged violation itself, is likely to have easier access to more accurate information than the government.¹¹³ Private parties generally have excellent expert assistance,¹¹⁴ and in an adversary proceeding, both parties will have the incentive to develop all the relevant information necessary to a final judgment by the court.¹¹⁵ If the court desires further assistance, it can request the opinion of a government enforcement agency,¹¹⁶ hire full-time economic experts,¹¹⁷ or call on a professional consultant.¹¹⁸

IV. CONCLUSION

Where Congress has not expressly limited courts' equity jurisdiction, a court should be free to exercise its inherent powers to the full extent necessary to provide the most appropriate and adequate remedy in the case before it. In creating a private right in the Clayton Act, Congress intended to provide protection and compensation to private parties and to ensure vigorous enforcement of the antitrust laws. Courts should order divestiture when it is an appropriate and workable remedy to further these important congressional goals.

— *Paul V. Timmins*

113. See C. KAYSEN & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 119 (1959). Consequently, private litigants can produce this information at a lower cost to society. It may also result in higher costs to society for antitrust enforcement. As Assistant Attorney General William Baxter intimated, "[private plaintiffs] who have prior specialized knowledge of the circumstances of the putative antitrust violation or the environment in which it allegedly occurred, may have a comparative advantage over the Division in the cost of and efficiency in prosecuting a given case." Baxter, *supra* note 59, at 690 (footnote omitted); see also *id.* at 690 n.127.

114. See, e.g., *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, (6th Cir. 1981) (where Professor Scherer was Marathon's expert witness, and Professor Stigler testified for Mobil); *White Consol. Indus. v. Whirlpool Corp.*, 612 F. Supp. 1009, 1012 (N.D. Ohio 1985) (Plaintiff's expert witnesses were Professors Bower of Harvard, Sichel of the Hoover Institute at Stanford, and Williamson of Yale. Defendant's witness was Professor Klein of the University of California at Los Angeles).

115. See C. KAYSEN & D. TURNER, *supra* note 113, at 118-19.

116. See note 112 *supra*.

117. One famous example of this was when Judge Wyzanski hired Carl Kaysen, then a Ph.D. candidate in economics at Harvard, as a law clerk while hearing the case *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953). See C. KAYSEN, *UNITED STATES V. UNITED SHOE MACHINERY CORPORATION: AN ECONOMIC ANALYSIS OF AN ANTI-TRUST CASE* (1956).

118. Adams, *supra* note 70, at 33-36.