12-1-1978

Availability of Rescission in Redressing Clayton Act Section 7 Violations—United States v. Coca-Cola Bottling Company

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AVAILABILITY OF RESCISSION IN REDRESSING CLAYTON ACT SECTION 7 VIOLATIONS—*United States v. Coca-Cola Bottling Company*

I. INTRODUCTION

In *United States v. Coca-Cola Bottling Company*,[1] the Ninth Circuit Court of Appeals ruled that although a seller is technically not a violator of section 7 of the Clayton Act (the Act),[2] federal district courts may order relief which directly affects the seller through the exercise of their equity jurisdiction. The court further ruled that federal district courts are not precluded, as a matter of law, from ordering the particular remedy of rescission in acquisitions which violate section 7 of the Act. The court concluded that rescission is available as a remedy under the equitable powers conferred on the courts by section 15 of the Act.[3] The *Coca-Cola* case is of considerable significance in antitrust law; it represents the first time a federal circuit court has acknowledged the availability of the far-reaching remedy of rescission in acquisitions allegedly violative of section 7.

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1. 575 F.2d 222 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 362 (1978).

2. The Clayton Act § 7, 15 U.S.C. § 18 (1976) provides in pertinent part:
No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

3. 15 U.S.C. § 25 (1976). The section provides as follows:
The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

II. FACTS OF THE CASE

The Department of Justice brought suit against both the buyers and sellers of a purified water company. The buyer-defendants were Coca-Cola Bottling Co. of Los Angeles (CCLA) and its wholly-owned subsidiary, Arrowhead Puritas Waters, Inc. (Arrowhead). The seller-defendants were A. M. Liquidating Co. and Aqua Media, Ltd. (Aqua Media). All the defendants were engaged in the business of providing high purity industrial water services.

In 1972, Aqua Media developed a secondary line of business when it began manufacturing equipment for industrial water purification. Thereafter, its board of directors decided that the company would expand primarily into this new line of business. In this posture, Arrowhead negotiated the purchase of Aqua Media's original water services business. A complete plan for Aqua Media's liquidation was then adopted, and by December 23, 1976, the date on which the government's action was filed, liquidating distributions of $2,091,000 had been authorized and paid.[4]

On December 23, 1976, the government filed its action charging that the acquisition of Aqua Media's original water services business by Arrowhead was in violation of section 7 of the Act and sought remedies of divestiture or rescission.[5] Aqua Media moved in the alternative for dismissal, summary judgment, or an order striking the prayer for rescission on the grounds that section 7, by its terms, applied only to the conduct of *buyers* in prohibited acquisitions and that section 15 limited a court's equitable powers to those situations in which the challenged acquisition had not yet been consummated. In any event, argued Aqua Media, rescission was not an available remedy under section 7; and even if rescission were an available remedy, it was not an appropriate remedy under the particular facts of the case.[6]

The district court denied Aqua Media's motions, whereupon the government moved for a temporary restraining order and a preliminary injunction to prevent further implementation of the liquidation plan. The district court issued a preliminary injunction[7] accompanied by ex-

4. It was estimated that an additional $1,394,000 remained to be distributed under the liquidation plan. 575 F.2d at 226.

5. Divestiture refers to situations in which the buyer is required to rid itself of property, securities or assets. Rescission, on the other hand, refers to situations in which both the buyer and seller must be returned to the status quo as it existed prior to the acquisition. *See generally* H. BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS (2d ed. 1929) [hereinafter cited as H. BLACK].

6. 575 F.2d at 226. *See* note 7 *infra*.

7. The district court issued an order requiring Aqua Media to remain in a posture amena-

tensive findings of fact and conclusions of law.[8]

III. REASONING OF THE COURT

The Ninth Circuit, in affirming the holding of the district court, initially noted that it was confronted with a case of first impression in the federal circuit courts.[9] For this reason, and because of the early nature of the appeal,[10] the court's review was conducted largely in the abstract.[11]

The court was hearing an interlocutory appeal from an injunction preserving the status quo pendente lite.[12] The objection to the injunc-

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ble to the potential remedy of rescission in case the government ultimately prevailed on the merits. Generally, such orders are issued by a court on the basis of the particular facts present in the case before it. *See* FED. R. CIV. P. 65.

In ruling on motions for preliminary injunctions, the Ninth Circuit follows the test discussed in Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974), which provides that a preliminary injunction will be issued only upon "a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party seeking the preliminary relief." *Id.* at 691. *See* Aguirre v. Chula Vista Sanitary Service, 542 F.2d 779, 781 (9th Cir. 1976) ("This Circuit has adopted the *Gresham* test.").

Aqua Media argued that since over two million dollars in funds had been distributed subsequent to the acquisition, rescission would be an inappropriate remedy. The terse analysis employed by the Ninth Circuit in reviewing the district court's decision to grant preliminary relief is explained by the early procedural posture of the case: the court was not reviewing a final order, but only an injunction to preserve the availability of the potential remedy of rescission. Consequently, the Ninth Circuit could reverse the trial court's action in issuing the injunction only if such action constituted an abuse of discretion, *i.e.*, only if under no conceivable circumstances could a final decree involving rescission ultimately be permissible. 575 F.2d at 231. Under this standard, the Ninth Circuit found the district court's action to be proper. *Id.* at 231-32.

8. Factually, the district court judge concluded that rescission might be the only effective remedy in the event that a violation ultimately was proven; divestiture could prove unworkable due to the lack of interested and available buyers. Legally, the judge concluded that it was reasonably probable that the government would prevail on the merits, that the remedy of rescission was available under § 7 of the Clayton Act, and that if rescission ultimately proved to be the only effective remedy, the resultant economic hardships to the sellers would not outweigh the public's interest in antitrust relief.

9. 575 F.2d at 227.

10. The court was not reviewing an actual order of rescission but rather a preliminary injunction preserving the availability of rescission. *See* note 7 *supra*.

11. 575 F.2d at 227.

12. *See, e.g.*, United States v. Cities Serv. Co., 289 F. Supp. 133 (D. Mass. 1968), *appeal dismissed*, 410 F.2d 662 (1st Cir. 1969), where such an order required preservation of the acquired facilities during the pendency of litigation, and the defendant was not allowed to sell any of the facilities it acquired prior to final judgment. The court stated that such a partial sale would raise an insuperable obstacle to its ability to fashion an effective judgment in the event the government succeeded on the merits. *See also* United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (1969), *appeal dismissed*, 404 U.S. 801 (1971) (district

tion centered on the availability of rescission as a potential remedy under the Clayton Act. Thus, the issuance of the injunction was challenged on two grounds: first, that it had been based on an erroneous legal premise, and second, that it had been an abuse of the district court's discretion under the circumstances of the case.[13] Although the issuance or withholding of a preliminary injunction is ordinarily left to the discretion of the district court,[14] it is reviewable by the Ninth Circuit if based upon an erroneous legal premise, as Aqua Media charged.[15]

A. Due Process and the Clayton Act

The *Coca-Cola* court rejected several arguments grounded upon the language of the Clayton Act. Defendant Aqua Media contended that sellers could not be violators of section 7 of the Act.[16] Further, Aqua Media argued that the equitable powers for antitrust relief conferred on the district courts by section 15 only authorized court action *prior* to the consummation of an acquisition.[17] Accordingly, Aqua Media contended that the court was without authority to impose relief which would affect Aqua Media, and that any imposition of such relief by the court would constitute a denial of Aqua Media's right to due process of law.

The Ninth Circuit noted that Aqua Media was correct in its initial assertion that, technically, it was not a violator of section 7, as that section only proscribes the act of acquiring, not that of selling.[18] Indeed, many of the cases cited by the court are in accordance with this view.[19] Nevertheless, the Ninth Circuit broke new ground in relying on

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court issued order preserving status quo pendente lite in circumstances where issuance of preliminary injunction not warranted).

13. The Ninth Circuit construed Aqua Media's arguments as an implied attack on the district court's use of discretion in issuing the preliminary injunction. 575 F.2d at 231.

14. *See* Douglas v. Beneficial Finance Co., 469 F.2d 453, 454 (9th Cir. 1972).

15. *See, e.g., id.*; King v. Saddleback Junior College Dist., 425 F.2d 426 (9th Cir. 1970), *cert. denied*, 404 U.S. 979 (1971).

16. 15 U.S.C. § 18 (1976). *See* note 2 *supra.*

17. 15 U.S.C. § 25 (1976). *See* note 3 *supra.*

18. 575 F.2d at 227.

19. *See* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 488 (5th Cir. 1967) (complaint dismissed as to seller corporation) ("§ 7 by its terms proscribes only the acquiring corporation."); United States v. Parker-Hannifin Corp., [1974] CCH TRADE CAS.¶ 75,061 (C.D. Cal. 1974) ("Section 7 of the Clayton Act . . . applies only to the purchaser of assets or stock and not to the seller thereof."); *In re* Dean Foods Co., 70 F.T.C. 1146, 1290 (1966) ("It is clear under the language of [section 7] . . . that the Clayton Act prohibition was directed solely against the acquiring companies and did not encompass the activities of the acquired company.").

the sweeping language of section 15 of the Act,[20] and the broad scope of equity jurisdiction, to overcome this strict statutory argument.[21] The court cited with approval cases which specifically held that relief may be granted not only against parties who are found to have violated section 7, but also against others when necessary to eliminate the effects of the acquisition which violated that section.[22] Thus, the Ninth Circuit became the first federal appellate court to acknowledge the availability of the far-reaching remedy of rescission in section 7 cases, even though such a remedy necessarily affects the interests of "technically"[23] non-violating sellers.

In its second statutory argument, Aqua Media contended that section 15 of the Act authorized court action against improper acquisitions *prior* to their consummation. The Ninth Circuit rejected this argument, viewing it as an attempt to strain the meaning of the statutory language.[24] There is ample support for the Ninth Circuit's position. The Supreme Court has held that the legality of a stock acquisition under section 7 of the Act depends on whether, at the time of the suit, there is a reasonable probability that the acquisition may lead to a restraint or a monopoly.[25] Indeed, in 1949, the Supreme Court allowed the government to maintain a suit based on an acquisition which had been completed in 1919.[26] In *Coca-Cola*, the Ninth Circuit adhered to the well established judicial rule of not limiting the scope of equitable

20. 15 U.S.C. § 25 (1976). *See* note 3 *supra*.

21. It is interesting to note that the Justice Department had previously predicted such a conclusion. In a speech delivered during his tenure as Assistant Attorney General in charge of the Antitrust Division, William Orrick warned selling companies that they are not "home free" when they succeed in consummating a merger or acquisition over Justice Department opposition. It was the Antitrust Division's view that the selling company could be ordered to reacquire the assets or stock which were illegally sold. E. ROCKEFELLER, ANTITRUST QUESTIONS AND ANSWERS 246 (1974).

22. 575 F.2d at 229. *See* United States v. Pabst Brewing Co., 183 F. Supp. 220, 221 (E.D. Wis. 1960) ("[T]he court has authority to grant relief not only against parties who are found to have violated [section 7], but also against other parties if such relief is necessary to eliminate the effects of an acquisition offensive to the statute."); United States v. Phillips Petroleum Co., [1966] CCH TRADE CAS. ¶ 71,872 (S.D. Cal. 1966) (court declined to rule that rescission was unavailable as a matter of law simply because it affected seller).

23. *See* notes 16 & 17 *supra* and accompanying text.

24. *See* note 3 *supra*. Aqua Media read the terms "prevent" and "restrain" in the first sentence of § 15 as authorizing court action only prior to § 7 violations. 575 F.2d at 230. Statutory language, however, should not yield to light inferences or doubtful construction. *See* Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836).

25. *See* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957) ("Section 7 is designed to arrest in its incipiency . . . restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from [that] acquisition . . . .").

26. *Id.* at 588.

jurisdiction absent a clear and valid legislative command to the contrary.[27] Moreover, the court's action is supported by numerous cases which have consistently espoused the flexibility and comprehensiveness of equitable jurisdiction.[28]

In light of both the applicable case law and the extensive powers of courts of equity, the ease with which the *Coca-Cola* court overcame these statutory arguments is not surprising. Nevertheless, the legislative grant of judicial authority to impose affirmative relief against a party who has technically not even violated the law warrants examination. Section 15 of the Clayton Act reads, "Whenever it shall appear to the court . . . that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned . . . ."[29] This language is identical to that used in section 5 of the Sherman Act.[30] By means of comparison, the Congressional inclusion of that provision in the Sherman Act was to ensure nationwide service of process, thus enabling a single court to resolve antitrust violations which reached outside the court's actual territorial jurisdiction.[31] It did not, however, broaden the definition of parties capable of violating the Sherman Act. The Congressional Record does not contain discussions indicating the reasons for the inclusion of the identical language in section 15 of the Clayton Act. Despite this lack of legislative guidance, the Ninth Circuit read the language as evidencing a congressional conclusion "that on occasion third parties whose conduct is not specifically addressed by the Clayton Act would be so related to the anti-competitive effects at which the act was directed that their presence would be

27. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1945) (delineating the scope of the equitable powers of the federal courts to award relief against law violators); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been [that] . . . [f]lexibility rather than rigidity has distinguished it.").

28. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947) ("[District courts] are invested with large discretion to model their judgments to fit the exigencies of the particular case.") *See generally* Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 ANTITRUST BULL. 1 (1972); Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 HARV. L. REV. 391 (1965).

29. 15 U.S.C. § 25 (1976). *See* note 3 *supra*.

30. 15 U.S.C. § 5 (1976).

31. 21 CONG. REC. 2640-42 (1890). Pertinent portions of the legislative history read as follows:

> Mr. SPOONER [sponsor of the amendment, now § 5]: Mr. President, I offer this amendment to cure what seems to me to be a very great defect in the bill.
>
> . . . Manifestly to deal efficiently with a trust or combination of that character it must be possible to bring into one action, into one court, the essential parties defendant.
>
> . . . One object of the amendment is to provide that the court may bring in these parties wherever they reside or wherever they are doing business . . . .

Id. at 2640.

necessary in order to fashion complete relief."[32]

Thus, the *Coca-Cola* court interpreted section 15 as encompassing both buyers and sellers when necessary to remedy section 7 violations. However, a straightforward reading of section 7 reveals that it addresses only the acquiring corporation in an acquisition and that only an acquiring corporation, therefore, is capable of violating the section.[33] Indeed, courts of equity are bound by such express statutory provisions, and as such, they are not allowed to ignore or rewrite these provisions through interpretation.[34] Despite the statutory language, the *Coca-Cola* court chose not to make a distinction between corporate buyers and corporate sellers.

The use of section 15 of the Clayton Act to increase the type and number of parties against whom relief can ultimately be imposed for violations of section 7 could have widespread ramifications in both determining and protecting against corporate liability in future antitrust litigation. A decree of rescission could compel a corporate seller to reacquire a business which it had no desire to operate. In reliance on the consummated sale of a particular business, the corporate seller may well have distributed large sums of the purchase price received by it to its shareholders or invested the funds in alternative business ventures. Moreover, the corporate seller may have liquidated any support operations or equipment necessary to ensure the viable operation of the previously relinquished business. In *United States v. Reed Roller Bit Co.*,[35] the district court was presented with a request for rescission of a transaction allegedly violative of section 7. The court noted some of the serious impracticalities of rescission as a means of restoring competition[36] following antitrust violations. These problems include, but are not limited to, restoration of the original corporate operation, separation or "unscrambling" of the merged businesses, locating transferred or terminated corporate executives and employees, and continuing via-

32. 575 F.2d at 228.

33. *See* note 2 *supra*. If such a construction of the statute is correct, then corporate sellers could be affected by the remedy only through joinder in the action under either Fed. R. Civ. P. 20, which allows party joinder if common questions of law or fact are present, or Fed. R. Civ. P. 19, which could require a seller's presence if his absence might result in sufficient harm to his interests.

34. *See, e.g.*, Matson Navigation Co. v. United States, 284 U.S. 352, 356 (1932) ("[Where] the words of [a statute] are plain, [the court may not] add to or alter them to effect a purpose which does not appear on its face or from its legislative history.").

35. 274 F. Supp. 573, 591-92 (W.D. Okla. 1967). The court ultimately found it unnecessary to rule on the remedy of rescission. *Id.* at 590.

36. It must be remembered that the antitrust laws were enacted for the protection of competition. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

ble operation in the face of the possibility that both the business community and the public are aware that the corporation had no desire to return to the market.

To avoid the potentially devastating effects of an order of rescission upon corporate sellers in future sales, a pre-sale screening by corporate sellers appears to be a necessity. As the corporate buyer surely screens the businesses which it seeks to acquire prior to entering negotiations for sale, corporate sellers should undertake a similar task. They should assess section 7 problems that might arise in the context of a sale to any of the corporate buyers negotiating for the purchase of the seller's business operations. Clearly, with respect to corporate acquisitions which may fall within the purview of section 7 of the Clayton Act, the doctrine of caveat emptor has been supplemented by caveat venditor in the Ninth Circuit.

B. The Legal Availability of Rescission

Section 15 of the Clayton Act imposes a duty on the Department of Justice to bring suits in equity to prevent and restrain violations of the Act. The government has instituted a wide variety of equitable actions under section 15 to enjoin acquisitions which it believed were in violation of section 7 of the Act.[37] Court-imposed equitable remedies for antitrust violations have included divestiture,[38] prohibition[39] and invalidation[40] of contracts, dissolution,[41] divorcement,[42] and an endless ar-

37. *See, e.g.*, United States v. Chrysler Corp., 232 F. Supp. 651, 659-60 (D.N.J. 1964) (injunction against consummation of agreement to purchase truck manufacturing business by competitor); *In re* Union Oil Co., 225 F. Supp. 486 (S.D. Cal. 1963) (court annulment of civil investigation of proposed acquisitions which, if consummated, might have violated Clayton Act); United States v. Aluminum Co. of America, 247 F. Supp. 308 (E.D. Mo. 1962), *final judgment*, 247 F. Supp. 316 (E.D. Mo. 1964) (injunction prohibiting acquisition of aluminum fabricator stock by large aluminum producer).

38. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961) (court-ordered divestiture of acquisition which violated § 7 of Clayton Act). *See* note 5 *supra.*

39. *See, e.g.*, United States v. Grinnell Corp., 236 F. Supp. 244, 257 (D.R.I. 1964) ("Injunction against continued adherence to the [contractual] patterns formed in violation of law is not merely appropriate but necessary to accomplish the declared objects of the antitrust laws.").

40. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947) (corporate contracts held violative per se of § 1 of Sherman Act and § 3 of Clayton Act).

41. *See, e.g.*, Hughes v. United States, 342 U.S. 353 (1952). Dissolution is one of the basic and most frequently used remedies in monopolization suits. The term generally refers to situations involving the dissolving of an illegal combination or association. The Supreme Court has stated that dissolution helps put an end to the violative conspiracy, deprives the antitrust defendants of the benefits of the conspiracy, and renders impotent the monopoly which violated the Act. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29 (1948).

ray of equitable means to meet the end of restraining antitrust violations.[43] Additionally, courts have not hesitated to order all ancillary equitable relief which is deemed reasonably necessary to remedy antitrust violations.[44] The equitable powers of the federal courts have been declared to be as comprehensive as the condition to be rectified requires.[45] In a leading antitrust case, *Ford Motor Co. v. United States*,[46] the Supreme Court declared that in remedying violations of section 7, the extent of relief to be provided should be such as to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance."[47] To this end, the Supreme Court has consistently granted the federal courts a broad scope in shaping relief remedies.[48]

While rescission has traditionally been one of the remedies utilized by courts of equity, the availability of rescission in the enforcement of section 7 of the Clayton Act had never, prior to *Coca-Cola*, been determined to be appropriate.[49] The Supreme Court, however, has stated that "[t]hose who violate the Act may not reap the benefit of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."[50] Moreover, the equitable powers invoked by the federal courts have been particularly broad and expansive when public, rather than private, interests are involved.[51]

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42. *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). Divorcement is a form of divestiture designed to secure relief from integrated ownership or control. *See generally* Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951).

43. Equitable remedies developed as a supplement to the law, providing relief where legal remedies were inadequate. *See generally* 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 1-42a (5th ed. 1941); Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965).

44. *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562 (1972) (judicial imposition of elaborate purchase requirements in conjunction with order of divestiture deemed necessary to effectively restore competition); Ekco Prods. Co. v. F.T.C., 347 F.2d 745 (7th Cir. 1965) (housewares manufacturer directed to furnish such technical and marketing information as may be reasonably requested by purchaser in addition to other equitable relief).

45. Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972).

46. *Id.*

47. *Id.* at 575 (quoting United States v. U.S. Gypsum Co., 340 U.S. 76, 78 (1950)).

48. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (affirming power of federal courts to grant all necessary remedial relief for violations of Securities Exchange Act); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) (affirming power of district court to order reimbursement of wages as part of remedy for violations of Fair Labor Standards Act).

49. According to the *Coca-Cola* court, "The availability of rescission of an acquisition [allegedly] violative of § 7 of the Clayton Act [was] a matter of first impression in the federal circuit courts. . . ." 575 F.2d at 227.

50. United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944).

51. *See, e.g.*, United States v. First Nat'l City Bank, 379 U.S. 378, 383 (1965) (quoting Virginia Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937)) ("Courts of equity may, and

The *Coca-Cola* court had considerable support for its conclusion that rescission is to be included in a court's arsenal of equitable remedies in the enforcement of section 7 of the Clayton Act. It is an established principle in equity jurisprudence that courts may order the rescission of illegal and unenforceable contracts where that remedy will be in the furtherance of justice and sound public policy.[52] In the antitrust field, case law indicates that "once the government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."[53] Illustrative of this broad remedial power are cases holding that federal courts, with all their traditional equity powers, may even prohibit lawful conduct where necessary to remedy antitrust violations.[54]

Furthermore, the Ninth Circuit's affirmation of rescission as an available antitrust remedy did not occur in the absence of prior judicial consideration of the use of rescission. The remedy of rescission under section 7 had previously been considered by several federal district courts which eventually decided on other more appropriate forms of relief.[55] Rescission has been approved and ordered by the Supreme Court, albeit in the context of securities regulation.[56] The Supreme Court has justified the use of the remedy of rescission as an exercise of a court's equitable powers.[57] In a leading case in the antitrust field which addressed remedial relief, *United States v. E.I. du Pont de Nemours & Co.*,[58] the Supreme Court ruled that in acquisitions which

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frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.").

52. *See* 2 J. POMEROY, EQUITY JURISPRUDENCE §§ 941-42 (5th ed. 1941).

53. *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961).

54. *See, e.g.*, United States v. U. S. Gypsum Co., 340 U.S. 76, 88-89 (1950) (in affording relief from violation of Sherman Act, trial court may prohibit acts which are entirely proper when viewed in isolation); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944) (decree cancelling a distributor's license agreements and enjoining the execution of any similar contract) ("Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole.").

55. *See* United States v. Reed Roller Bit Co., 274 F. Supp. 573, 585-92 (W.D. Okla. 1967) (court declined to determine whether rescission is generally available as it would not have been an effective form of relief on the facts of the case); United States v. Phillips Petroleum Co., [1966] CCH TRADE CASES ¶ 71,872 (S.D. Cal. 1966) (court declined to grant rescission of acquisition as a form of preliminary relief, but did not rule that rescission was not available as a matter of law).

56. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433-35 (1964). *Borak* involved a violation of a securities exchange act which resulted in rescission of a fraudulently obtained merger. Though the case involved a different statute and arguably involved no non-violating parties, it is relevant in showing that rescission is a workable and appropriate form of equitable relief in the protection of the public interest as determined by the Supreme Court.

57. *Id.* at 433.

58. 366 U.S. 316 (1961).

violate section 7, "[t]he very words of § 7 suggest that an undoing of the acquisition is a natural remedy."[59]

Clearly, due to the early stage of the proceedings in *Coca-Cola*,[60] the relief which will ultimately be deemed necessary may be determined and fashioned by a wide variety of factors that only a trial on the merits will bring forward. The Ninth Circuit noted the possible culpability of Aqua Media as one such potential factor.[61] For example, if Aqua Media had been aware, prior to the consummation of the proposed acquisition, that such acquisition would be violative of section 7, then a decree of rescission which would force Aqua Media to reacquire the business would be particularly appropriate.

Moreover, the validity of the acquisition involved could be challenged under other antitrust statutes which might then be controlling in determining appropriate relief.[62] Such antitrust statutes may be applied either instead of or in addition to section 7.[63] An amended complaint would then be possible if further violations were charged or discovered.[64] These and other developments may arise during a trial on the merits; thus, whether rescission, rather than another equitable remedy, should be granted cannot be adequately decided at the stage in the proceedings at which the interlocutory appeal in *Coca-Cola* occurred. Nevertheless, rescission may have inherent advantages as a form of relief assuming that it is available.[65]

The ability of district courts to control illegal acquisitions has been strengthened by the Ninth Circuit's recognition of rescission as a possible remedy under the Clayton Act. This is consistent with past judicial practice; courts have long been free to devise effective decrees to accommodate the necessity of complete relief with a minimum of economic hardships.[66] Furthermore, the Supreme Court has specifically

59. *Id.* at 329.

60. *See* note 10 *supra*.

61. 575 F.2d at 231-32.

62. Chief among such other statutes are: 1) § 1 of the Sherman Act which prohibits unreasonable restraints of trade; 2) § 2 of the Sherman Act which proscribes monopolization and attempts to monopolize; and 3) § 5(a)(1) of the Federal Trade Commission Act which prohibits unfair methods of competition.

63. The Department of Justice states that although acquisitions may also be challenged under the Sherman Act, the challenge will generally be made under § 7 of the Clayton Act. JUSTICE DEPT. MERGER GUIDELINES § 1 (1968).

64. *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (complaints are not to be dismissed unless no set of facts in support of claim will entitle plaintiff to relief).

65. Rescission ensures the availability of a purchaser and restores the assets to a party who has a thorough knowledge of the business. Furthermore, it is expedient as negotiations need not occur. *See generally* H. BLACK, *supra* note 5.

66. *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562, 576-77 (1972), in which the

held that economic considerations should only influence the choice as among two or more effective antitrust remedies, as the public interest in antitrust relief must remain paramount to private interests.[67] Surely, if the final decree accomplishes less than complete antitrust relief, "the Government has won a lawsuit and lost a cause."[68]

IV. CONCLUSION

Federal courts have carefully and consistently avoided utilizing their extensive equitable powers indiscriminately in fashioning antitrust relief. This judicial restraint has provided for a balance to the wide degree of discretion possessed by the judiciary under the historical principles of equity. In the antitrust field, courts have maintained all of their traditional equitable powers. The rationale and holding of the *Coca-Cola* case is demonstrative of the continued vitality of these equitable powers in providing for effective antitrust relief.

The ruling that federal district courts, in remedying Clayton Act violations, may order rescission of acquisitions even though a "technically" non-violating seller will be affected is a "first" in the federal circuit courts. However, it appears to have been an inescapable conclusion in light of the broad development and flexible history of equity jurisdiction. The Ninth Circuit's ease in overcoming strained statutory arguments is further indicative of this comprehensive power. In the antitrust field, the inherent power of a court of equity to design flexible decrees sufficient to restore competition continues to be of utmost importance. The Ninth Circuit's recognition of rescission as an equitable power available to the federal district courts in redressing violations of the Clayton Act can only strengthen the court's ability to restore competition and, at the same time, afford effective protection to the public and all parties to antitrust litigation.

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Supreme Court held that it was proper to require an auto manufacturer to submit to extensive remedies to reestablish the acquired firm as a factor in the market.

67. *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326-27 (1961).

68. International Salt Co. v. United States, 332 U.S. 392, 401 (1947).

* The author wishes to thank Dale E. Fredericks of Sedgwick, Detert, Moran & Arnold, San Francisco, California and Catherine G. O'Sullivan of the United States Department of Justice, Appellate Section, Antitrust Division, Washington, D.C. for providing materials helpful in the preparation of this article.