Loyola University Chicago Law Journal

Volume 1
Issue 2 *Spring 1970*

Article 7

1970

Treble Damage Actions for Violation of Section 7 of the Clayton Act: The View After *Gottesman v. General Motors*

Sherry R. Feinsmith

TREBLE DAMAGE ACTIONS FOR VIOLATION OF SECTION 7 OF THE CLAYTON ACT: THE VIEW AFTER GOTTESMAN V. GENERAL MOTORS

INTRODUCTION

During the past several years, the private treble damage antitrust action has gained considerable importance as an effective means of enforcing the antitrust laws. Most government-instituted actions simply do not cost large corporations enough to serve as an entirely effective bar to monopolistic practices. The relatively small fines which may be levied are of little consequence to the major corporate entities which are among the most common violators of the antitrust acts.[1]

However, the unpleasant prospect of a drove of plaintiffs' counsel bringing a plethora of private antitrust actions based upon a successful government action or, in certain circumstances, independent thereof, has caused justifiable consternation in the executive suite. The multi-hundred million dollar recoveries in several of the more notorious recent episodes[2] have served to provide a far more effective deterrent to conduct violative of the antitrust laws than the mere threat of government action.

---

1. Sherman Act § 1, 15 U.S.C. § 1 (1964), provides for the following penalties,
> Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

It should be noted that the criminal sanctions which are, at best, infrequently enforced, are available only for violations of sections 1 and 2 of the Sherman Act and that there are no criminal penalties for violations of the Clayton Act. *See Report of President Nixon's Task Force on Productivity and Competition, Cong. Record* (June 16, 1969 p. 56472), 5 CCH TRADE REG. REP. Par. 55250, at p. 55521. *See also* Lovinger—*Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958). The current administration has recently indicated a desire to increase the fines to a level which are still low. Speech by Attorney General John N. Mitchell, B.N.A.-A.T.R.R. 429:a-4 (Sept. 30, 1969). H.R. 14116 providing for fines of $500,000.00 has been passed by the House and is presently pending before the Senate.

2. Atlantic City Electric Co. v. General Electric Co., 207 F. Supp. 620 (S.D. N.Y. 1962). In Re Plumbing Fixtures, Philadelphia Housing Authority et als v. American Radiator and Standard Sanitary Corp. et als, 5 CCH TRADE REG. REP. Par. 73,013 (E.D. Pa. September 24, 1969). Philadelphia Electric Co. et als v. Anaconda American Brass Co. et als, 43 F.R.D. 452 (E.D. Pa. 1968) where defendants paid over $22 million in settlement. Minnesota v. U.S. Steel Corp. et als, 44 F.RD 559 (D. Minn. 1968); Trans World Airlines, Inc. v. Howard R. Hughes, 5 CCH Trade Reg. Rep., Par. 73,017 (S.D.N.Y. December 23, 1969) where an award of $137,611,435.95 was granted in a treble damage action; State of West Virginia v. Pfizer & Co. et al, 68 Civil 240 & related cases (S.D.N.Y. 1969) commented upon in A. Pomerantz, *New Developments in Class Actions—has the death knell been sounded?* 25 BUS. LAWYER 1259 (1970), and in the Wall Street Journal, April 17, 1970, at 4, column 2. This class action against several pharmaceutical companies resulted in settlements aggregating over $120 million. The beneficiaries were millions of overcharged consumers and the public at large.

The expenditure of legal time and the consequent cost to the corporate client (defendant) in large private antitrust actions is astronomical.[3] The disruption of the corporate files and the time spent by corporate officers in testifying at depositions and at trial is a cost of incalculable dimension to the firm involved.

Until recently, most private treble damage actions have been based upon violations of provisions of the Sherman Act, or provisions of the Clayton Act other than Section 7.[4] However, in recent years plaintiffs have attempted to bring these private actions based upon the anti-merger provisions of Section 7 of the Clayton Act where one need only prove a potential, rather than an actual, effect on competition.[5] To

3. *See* Philadelphia Electric Co. et als v. Anaconda American Brass Co. et als, (E.D. Pa. August 1, 1969) 1969 TRADE CASES Par. 72,892, where the 89 plaintiffs were required to pay 25% of their total recovery of $22,175,000 as attorneys fees; and TWA v. Toolco, — F. Supp. —, 1970 TRADE CASES Par. 73, 142 where attorneys fees of 7.5 million dollars were awarded. *See also* Farmington Dowel Products Co. v. Forster Mfg. Co., Inc., 297 F. Supp. 924 (D. Me. 1969), *remanded and modified* 5 CCH TRADE REG. REP. Par. 72994 (1st Cir. December 10, 1969), where the court engaged in an extensive discussion relative to the concept of reasonable attorneys fees in a treble damage action, and particularly, Appendix 1 thereof, at p. 92 entitled, "The Attorney's fee in relation to amount of single and trebled damages." These costs have been accentuated by the trend toward large class actions brought under RULE 23(b)(3), F.R.C.P.

4. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) (Sections 3 and 4 Clayton, Section 1 Sherman); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (Sections 4 and 16 Clayton, Sections 1, 2 and 7 Sherman).

5. Clayton Act § 7, 15 U.S.C. § 18 (1964)

> Sec. 7. That 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. [October 15, 1914, Chap. 323, Sec. 7, 38 Stat. 731; December 29, 1950, Chap. 1184, Sec. 1, 64 Stat. 1125; 15 U.S. Code, Sec. 18.]
>
> No corporation 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 one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly. [October 15, 1914, Chap. 323, Sec. 7, 38 Stat. 731; December 29, 1950, Chap. 1184, Sec. 1, 64 Stat. 1125; 15 U.S. Code, Sec. 18.]
>
> This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition. [October 15, 1914, Chap. 323, Sec. 7, 38 Stat. 731; December 29, 1950, Chap. 1184, Sec. 1, 64 Stat. 1125; 15 U.S. Code, Sec. 18.]
>
> Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construc-

date, treble damages have not been awarded in any such case based upon a violation of Section 7 of the Clayton Act.

In construing the Clayton Act, contrary to the hopes of the private plaintiffs, some courts have gone so far as to express doubts as to whether Section 7 thereof was even an "antitrust act," at least as that term is used in Section 4 of the Clayton Act. However, a recent decision by the Second Circuit Court of Appeals in *Gottesman v. General Motors Corp.*[6] seems to have resolved certain of the problems involved in favor of the application of Section 4(b) to private plaintiffs and to have recognized an important private antitrust remedy to be available for Section 7 violations. This article will discuss the primary issues raised by the collision of these two positions.

Section 4 of the Clayton Act provides, in pertinent part, that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and recover threefold the damages by him sustained . . .[7]

---

tion of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired. [October 15, 1914, Chap. 323, Sec. 7, 38 Stat. 731; December 29, 1950, Chap. 1184, Sec. 1, 64 Stat. 1125; 15 U.S. Code, Sec. 18.]

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided. [October 15, 1914, Chap. 323, Sec. 7, 38 Stat. 731; December 29, 1950, Chap. 1184, Sec. 1, 64 Stat. 1125; 15 U.S. Code, Sec. 18.]

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission[1] or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. [October 15, 1914, Chap. 323, Sec. 7, 38 Stat. 731; December 29, 1950, Chap. 1184, Sec. 1, 64 Stat. 1125; 15 U.S. Code, Sec. 18.]

See also S. Rep. No. 1775, 81st Cong. 2nd Sess. at 6; 51 Cong. Rec. 14464 (remarks of Senator Reed) as follows: "A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."

6. 414 F.2d 956 (2nd Cir. 1969).
7. Clayton Act § 4, 15 U.S.C. § 15 (1964).

By its own terms, the Clayton Act is an antitrust act.[8] Most recent authorities concur in this interpretation.[9] Nowhere in the Act itself does it appear that Section 7 is an exception to the rule that a treble damage action will lie for an antitrust violation. In fact, prior to the decision of the court in *Gottesman v. General Motors Corp.*[10] it had apparently been generally assumed that such an action would lie under Section 7.[11] However, the holding in *Gottesman* I altered that trend,[12] and it was not until the reversal of *Gottesman* I by the Second Circuit Court of Appeals in 1969[13] that a court unequivocally held that Section 7 would provide a private cause of action for treble damages.

Those courts which follow the rationale of *Gottesman* I have based their reluctance to provide a private treble damage remedy for Section 7 violations on the following three factors. First, the courts have referred to the statutory language itself, which provides that:

> No corporation . . . shall acquire . . . the stock . . . or any part of the assets of another corporation . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[14]

The Supreme Court in *Brown Shoe v. United States*[15] found the statute's purpose to be preventative, based on the "may be" language contained therein.[16] This so-called "incipiency" test, which will be discussed later

---

8. Section 1 of the Clayton Act, 15 U.S.C. § 12 (1964), defines antitrust laws as including "this act."

9. J. SCOTT AND E. ROCKEFELLER, B.N.A.'S ANTITRUST & TRADE REGULATION TODAY, 340 (1967); Julius M. Ames Co. v. Bostitch Inc., 240 F. Supp. 521, 523 (S.D.N.Y. 1965); Gottesman v. General Motors Corp., 414 F.2d 956, 961 (2d Cir. 1969).

10. 221 F. Supp. 448 (S.D.N.Y. 1963); *leave to appeal denied* (2d Cir. Jan. 31, 1964); *cert. den.* 379 U.S. 882 (1964) where the court held that a violation of Section 7 of the Clayton Act cannot support a private cause of action for money damages. For the purposes of clarity and convenience, Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D.N.Y. 1963), will be referred to herein as *Gottesman I* and Gottesman v. General Motors Corp., 414 F.2d 956 (2nd Cir. 1969), will be referred to as *Gottesman II.*

11. SCOTT AND ROCKEFELLER, *supra* note 9. *See also* Rayco Manufacturing Company v. Dunn, 234 F. Supp. 593 (N.D. Ill. 1964) where the court granted summary judgment dismissing a Clayton Act cause of action only because the plaintiff was unable to show injury, proximately caused, and Blaski v. Inland Steel Company, 271 F.2d 853 (7th Cir. 1959) where the court found the proof offered to be insufficient to recover for a violation of Section 7.

12. *See* 64 COLUM. L. REV. 597 (1964) where the following language appears:
> The availability of the treble damage remedy in a private suit for violation of Section 7 seems never to have been specifically questioned prior to the instant case (Gottesman I), although the courts have upheld such complaints against motions to dismiss.

13. Gottesman v. General Motors Corp., 414 F.2d 956 (2nd Cir. 1969), *rev'g* 249 F. Supp. 361 (S.D.N.Y. 1967).

14. Clayton Act § 7, 15 U.S.C. § 18 (1964).

15. 370 U.S. 294 (1962).

16. In *Brown Shoe, Id.* at 323 the court stated, ". . . Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties."

in the article, has been the rationale for several decisions.[17]

A second factor set forth by a few courts as a reason for their refusal to provide for treble damages has been the allegedly speculative nature of the damages. For example, the district court in *Bailey's Bakery Ltd. v. Continental Baking Co.*[18] held:

> Since Clayton § 7 is concerned with the future monopolistic and restraining tendencies of corporate acquisition . . . any damages claimed for prospective restraint of trade would be purely speculative, and a plaintiff cannot recover money damages for anticipated but unimplemented acts of restraint which may invade its interests.[19]

Lastly, it has been suggested that Section 4 of the Clayton Act should be strictly construed by the courts in view of the severity of the nature of the treble damage remedy.[20] Under such a narrow view, the remedy would have no possible application to a section 7 violation,[21] since Section 7 merely directs itself to potential, rather than actual injury.

History of the Litigation in the Gottesman Case

In the original government antitrust proceeding against Dupont,[22] the Supreme Court held that DuPont's commanding position as a supplier of automotive finishes and fabrics to General Motors rendered its acquisition of a substantial portion of General Motors stock violative of Section 7.[23] DuPont owned 23% of the common stock of General Motors. The Court reasoned that by virtue of the controlling ownership of DuPont and its commanding sales position the acquisition of the stock violated the Act because it raised a reasonable probability that a monopoly would be created.[24] Subsequently, after the case had wound its way through the lower courts again, the Supreme Court held that the only proper remedy would be complete divestiture by DuPont

17. Bailey's Bakery Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), *aff'd*, 401 F.2d 182 (9th Cir. 1968); Highland Supply Corporation v. Reynolds Motor Company, 245 F. Supp. 510 (S.D. Mo. 1965); Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D.N.Y. 1963).

18. *See* note 17, *supra.*

19. *Id.* at 717.

20. Highland Supply Corporation v. Reynolds Metal Company, 245 F. Supp. 510, 514 (E.D. Mo. 1965); Twin Ports Oil Co. v. Pure Oil Co., 119 F.2d 747, 751 (8th Cir. 1941).

21. 221 F. Supp. at 493.

22. United States v. DuPont, 353 U.S. 586 (1957).

23. During the years covered by the government litigation, DuPont supplied 67 and 68% of General Motors' requirements for finishes and 52.3 and 38.5% of its fabric requirements.

It should be noted that the litigation here involved section 7 as it existed prior to the 1950 amendments. In the context of this article, however, the amendments are not significant.

24. 353 U.S. at p. 607.

of its General Motors common stock holdings.[25]

In 1957, soon after the original Supreme Court decision, a stockholders' derivative action was brought against DuPont and General Motors by certain General Motors minority stockholders.[26] Plaintiffs' contention was that DuPont had utilized its stock control to insure its position as primary supplier of automotive fabrics and finishes to General Motors. Plaintiffs further contended that this tactic had prevented competition from other potential suppliers of such goods, which enabled DuPont to sell the products to General Motors at excessive prices. General Motors (and the stockholders) would thus have been injured in the amount of the overcharges which resulted from the position DuPont enjoyed by virtue of its improper stock ownership. The district court held, on a pretrial motion to dismiss the Section 7 count, that a violation of Section 7 of the Clayton Act did not constitute a cause of action for money damages.[27] The court based its decision primarily on the theory that "the test of a Section 7 violation is whether there is a reasonable probability that the acquisition is likely to result in the condemned restraint,"[28] and that as the plaintiff could not be damaged by a potential restraint of trade, there could be no recovery.

The plaintiffs' claim under Section 7 was dismissed and was certified for appeal to the United States Court of Appeals for the Second Circuit. The court of appeals denied leave to appeal[29] and the Supreme Court denied certiorari.[30] After extensive pretrial and discovery proceedings, the remaining claims were tried in 1966 and 1967 and final judgment against the plaintiffs was entered on March 29, 1968. The court of appeals denied defendants' motion to dismiss plaintiffs' appeal.[31]

The plaintiffs' successful appeal attacked the district court's original dismissal of their Clayton Act cause of action in his pretrial opinion of September 18, 1963. Thus, *thirteen* years after the commencement of the action, the parties were back in their original positions.

Case Development Subsequent To Gottesman I

Highland Supply Corp. v. Reynolds Metals Co.[32] was the first opinion to rely on *Gottesman* I. This private antitrust action involved a large

25. United States v. DuPont, 366 U.S. 316 (1961).
26. Gottesman v. General Motors, 221 F. Supp. 488 (S.D.N.Y. 1963).
27. *Id.* at 493—"There can be no claim for money damages for a violation of Section 7."
28. *Id.*
29. Leave to appeal den. (2nd Cir. Jan. 31, 1964).
30. 379 U.S. 882 (1964).
31. 401 F.2d 510 (2nd Cir. 1968).
32. 327 F.2d 725 (8th Cir. 1964).

aluminum producer which had acquired a leading florist's foil manufacturer, and was based on alleged violations of Section 7 of the Clayton Act and Section 2 of the Sherman Act. The Eighth Circuit Court of Appeals reversed the district court's dismissal of both causes of action on other grounds,[33] but noted in a footnote:[34]

> We think that any effort to convert Section 7 of the Clayton Act into a *per se* violation of the antitrust laws so as to give rise to a private cause of action under the Clayton Act has been squarely checked . . . *no private cause of action accrues from such a violation.* (emphasis supplied).

On remand, the Section 7 cause of action was dismissed by the District Court for the Eastern District of Missouri, which relied on the footnote quoted above. The court said:

> The crucial matter remains that the prohibited acquisition, standing alone, caused no present, compensable injury. If the policy of causation in treble damage actions is to encompass injuries resulting from acts made possible by a violation of Section 7, the horizon would not be restricted simply to acts and injuries nearly simultaneous with the prohibited acquisition.[35]

Further, the court cited with approval the decision of the court of appeals to apply a narrow concept of causation in an action for treble damages.

In *Bailey's Bakery Ltd. v. Continental Baking Co.*[36] a complaint was filed by a Hawaiian Bakery Corporation against a Hawaiian subsidiary of a mainland corporation, for both Sherman and Clayton Act violations. The District Court for the District of Hawaii, dismissed the count based on Section 7 of the Clayton Act for failure to state a cause of action, employing the following concept in reaching its decision:

> The prohibitory sanctions of Clayton Section 7 are triggered to explode by and at the moment of acquisition. That, after the moment of acquisition, subsequent business practices do injure competitors in the market does not, because of those subsequent injurious acts, give rise to a claim for treble damages under Clayton Section 7.[37]

A subsequent case, *Julius M. Ames v. Bostitch, Inc.* [38] seems to have

33. 221 F. Supp. 15 (E.D. Mo. 1963). The court based its reversal of the lower court's decision on the decision of the Supreme Court in *Minnesota Mining*, 381 U.S. 311 (1965), to the effect that an FTC proceeding tolls the running of the § 4b statute of limitations. (The case had originally been dismissed as being barred by the running of the statutes of limitations).
34. 327 F.2d, at 728 n.3.
35. Highland Supply Corp. v. Reynolds Metals Co., 245 F. Supp. 510, 513 (E.D. Mo. 1965).
36. 235 F. Supp. 705 (D. Hawaii 1964).
37. *Id.* at 716.
38. 240 F. Supp. 521 (S.D.NY 1965).

employed a similar line of reasoning, carving out a narrow exception to the rule set down in *Gottesman* I. In this private antitrust action, plaintiffs were the sole distributors of certain metal fastener devices produced by Calwire. Calwire was acquired by defendant, the existing distributorships were cancelled and distribution was taken over by the defendant. The court held that a private action for money damages might, in fact, be maintained under Section 7, if the injury occurred substantially at the moment of the allegedly illegal acquisition of stock. The court distinguished the earlier cases (*i.e., Gottesman I, Highland* and *Bailey's Bakery*) reasoning that in those cases no actual injury had occurred and damages, if any, were purely speculative. In the *Ames* case, however, the court found immediate and present damage.[39] It would appear then, that the decision in *Ames* stands for the proposition that a treble damage action may be brought on a Section 7 violation only in those instances where the injury immediately follows the statutory violation.[40] The court in *Ames* seems to have focused primarily on the time at which the injury occurred, rather than the somewhat broader concept of proximate causation. This approach has moved one commentator, in analyzing the *Ames* decision, to remark:

> The relevant consideration in each case is not the time at which the damage occurred but whether plaintiff's damage occurred 'by reason of the illegal action.'[41]

In spite of the limitations of the time-oriented approach utilized by the court in *Ames*, certain other aspects of the court's decision seem to lay the foundation for possible future treble damage recoveries based upon a Section 7 violation. First, the court declares firmly that the Clayton Act is unquestionably an antitrust law.[42] Second, it held that Section 4, in providing for a private treble damage remedy, is *not* to be narrowly construed.[43]

Two years after the decision in *Ames*, the Fifth Circuit decided the case of *Dailey v. Quality School Plan, Inc.*[44] *Dailey* was, at least prior to the court of appeal's decision in *Gottesman* II, the clearest expression of the view that a violation of Section 7 would support a claim for treble damages.

---

39. *Id.* at 524.
40. Stein, *Sec. 7 of the Clayton Act—As a basis for the treble damage action: When may the private litigant bring his suit?*, 56 CALIF. L. REV. 968 (1968).
41. 79 HARV. L. REV. 445, 446 (1965). *See also* 42 S. CAL. L. REV. 460 (1969) which criticizes the time-oriented approach employed by the court in *Ames*.
42. 240 F. Supp. at 523 where the court states that "The Clayton Act is an antitrust law."
43. "It is also settled that Section 4 is not to be narrowly construed. The provision is basic to the effective enforcement of the antitrust laws." 240 F. Supp. at 525.
44. 380 F.2d 484 (5th Cir. 1967).

Unlike the decisions in *Bailey's Bakery* and *Ames,* however, the court focused primarily on the issue of proximate causation. It indicated that:

> If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under Section 4.[45]

In rejecting the defendant's motion to dismiss, the court stressed that the pivotal issue concerning which the plaintiff had pleaded sufficient facts was "[W]hether the defendant's asserted conduct was the proximate cause of the plaintiff's asserted injury."[46] In so deciding the court seemed to implicitly reject the time oriented approach used in *Ames.*[47]

Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.[48] is the only United States Supreme Court case which has any direct bearing on the issue of the applicability of a treble damage remedy for a Clayton 7 violation. That case involved a private treble

---

45. *Id.* at 487 (quoting South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966) a Sherman Act Case). The court in *Dailey* also held that a Section 7 violation did, in fact, come within the purview of Section 4 of the Act, citing, *i.e.,* Ames v. Bostitch, *supra* note 38.

46. The injury alleged by plaintiff (the termination of his employment) did not occur until some five months after the merger was consummated. 380 F.2d at 485. For a recent decision which appears to follow the rationale enunciated in *Dailey,* but enlarges its inquiry to determine whether the allegedly illegal acquisition was actually or merely potentially anti-competitive, *see* Sam S. Goldstein Industries, Inc. v. Botany Industries, Inc., 301 F. Supp. 728 (S.D.N.Y. 1969). This was an action for trademark infringement, *inter alia,* wherein plaintiff alleged violations of Sherman 2 and Clayton 7. The court dismissed the case based primarily on plaintiff's failure to make sufficient allegations regarding damages. The court did state that an individual might bring a private action for damages based upon a Section 7 violation (301 F. Supp. at 735), distinguishing *Gottesman* I on the following theory.

> Its reasoning (Gottesman I) is inapplicable to this case in that plaintiff here alleges that the 1956 acquisition was unlawful because it in fact restrained competition, not merely because it had that potential. If plaintiff can prove actual restraint, its damages, if proven to result proximately from the actual restraint, would not be speculative. (301 F. Supp. at 735).

But see Isidor Weinstein Investment Co. v. Hearst Corp., 303 F. Supp. 646 (N.D. Calif. 1969) a treble damage action brought by a retail store owner which was dismissed by the court on a motion to dismiss where defendant's contention was sustained that treble damages could not be recovered for violation of Section 7, relying heavily on *Gottesman* I as a basis for the decision.

47. There is another line of cases which has indicated the possible existence of a private treble damage action under Section 7, but in each of which the respective court has determined that there had not been a sufficient showing of proximate injury. *See, e.g.,* Rayco Manufacturing Co. v. Dunn, 234 F. Supp. 593, 597 (N.D. Ill. 1964), where the court indicated that: "Under Section 7 of the Clayton Act, a civil suit may lie upon a showing that 1) the acquisition did or reasonably might substantially lessen competition or create a monopoly, and 2) the complainant suffered some special damage to his business as a direct and proximate result of the acquisition." *See also* Blaski v. Inland Steel Company, 271 F.2d 853 (7th Cir. 1959); Bender v. Hearst Corporation, 263 F.2d 360 (2nd Cir. 1959), and Kogan v. Schenley Industries, Inc., 20 F.R.D. 4 (D. Del. 1956). None of these cases reached the ultimate decision as to the existence of a Section 7 private treble damage remedy.

48. 381 U.S. 311 (1965).

damage action based on both Sherman and Clayton Act violations resulting from a previous Federal Trade Commission proceeding to enforce Section 7 of the Clayton Act. The primary question before the Court was whether or not an F.T.C. proceeding was a suit by the United States, within the terms of Section 5(b) of the Clayton Act, which tolls the running of the statute of limitations for a civil antitrust proceeding during pendency of a suit by the United States.[49] The Court, in affirming the district court's refusal to dismiss for failure to state a cause of action, did not specifically discuss the question of whether a private antitrust treble damage action might be based on a Section 7 violation. However, its silence has been interpreted as indicating that such an action might properly be brought.[50]

GOTTESMAN II ON APPEAL

Finally, we come to the recent holding in *Gottesman v. General Motors Corp.*[51] where the Second Circuit Court of Appeals reversed the district court[52] which had held that no private action for treble damages would lie for a violation of Section 7 of the Clayton Act. It indicated that:

> [A] violation of Section 7 of the Clayton Act does furnish a basis for a claim for money damages under the broad language of Section 4 of the Act . . . the basis of the pretrial ruling (in Gottesman II) was that a Section 7 violation can cause no damage because it establishes only that the harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages.[53]

As a part of the basis for its decision in *Gottesman* II, the court of appeals relied on the two points previously referred to with respect to the decision in *Ames*, to wit: that Section 7 of the Clayton Act is an antitrust act and that Section 4 of that act, affording treble damage relief to private parties, should not be narrowly construed. The court's approach seems to parallel the causative analysis of *Dailey* rather than the time-oriented approach of *Ames* in connecting the plaintiff's injury to the defendant's violation. By applying the broader theory of causation the *Gottesman* II court thus focused on the question of "why" the

49. 15 U.S.C. § 16(b) (1964).
50. Gottesman v. General Motors, 414 F.2d, at 960, ". . . although the issue was not discussed, the Court evinced no qualms about dealing with a Section 7 money damage claim."
51. 414 F.2d 956 (2nd Cir. 1969), *rev'g* 279 F. Supp. 361 (S.D.N.Y. 1967) for background of litigation, *See* p. 298 *et seq., supra.*
52. 221 F. Supp. 488 (S.D.N.Y. 1963).
53. 414 F.2d, at 961.

injury occurred rather than that of "when" it occurred.[54]

In order to analyze adequately the appellate court's decision in *Gottesman* II, it is necessary to look to the legislative history of the Clayton Act. Initially Section 4 of the Clayton Act (which superceded Section 7 of the Sherman Act) created a new damage remedy available to private parties.[55] It clearly appears that the purpose of Section 4 in providing for a private treble damage remedy was threefold:

1. to aid in self enforcement of the antitrust laws,
2. to create the deterrent effect of incurring possible treble damage liability, and
3. to compensate persons actually injured as a direct result of the alleged antitrust violations.[56]

Nowhere in the history of the act is there found any indication that any of these purposes would be served by excepting Section 7 violations from the scope of the Section 4 remedy.

The history of the act fails to lend any support to the proposition that the incipiency test is the sole basis for establishing a violation of Section 7.[57] While the intention of Section 7 was originally to reach effects "beyond those prohibited by the Sherman Act, extending to the reduction of the competition which had previously existed between the acquiring and acquired companies,"[58] the legislative history of the 1950 amendment to the act makes it clear that the primary purposes of the amendment were: 1) to assure a broader construction of the fundamental provisions of the act[59]; and 2) to "plug any loopholes"

---

54. Two recent district court cases relying on *Gottesman* II determined on motions that a violation of Section 7 of the Clayton Act furnishes a basis for a claim for money damages under Sec. 4 of the Act. *See* Metric Hosiery Co. v. Spartans Industries, 5 CCH TRADE REG. REP. 73, 119 (S.D.N.Y. March 1970); Western Geophysical Co. of America v. Bolt Associates, Inc., 305 F. Supp. 1251 (D. Conn. 1969). Both cases are still pending as of the date this article was written

55. 38 Stat. 731 (1914); 15 U.S.C. § 15 (1958). Section 7 of the Sherman Act was repealed in 1955, Ch. 283, Sec. 3, 69 Stat. 283 (1955).

56. *Standing to sue for treble damages under Section 4 of the Clayton Act,* 64 COLUM. L. REV. 570, 571 (1964) which also states that:

> They (the courts) repeatedly emphasize that the treble damage action was intended not merely to redress a personal injury, but to aid in achieving the broader purposes of the antitrust laws.

See also U.S. v. Bordon Co., 347 U.S. 514, 518 (1954)

> The private injunction action, like the private treble damage action under § 4 of the Act, supplements government enforcement of the antitrust laws. . . .

and *see* Lawlor v. National Screen Service Corp. et al, 349 U.S. 322, 329 (1955) where the court speaks of ". . . the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action."

57. That is, an acquisition which is actually, rather than only potentially, anticompetitive should be viewed as violative of § 7. If the converse were true, *i.e.* all violations of § 7 were, by definition, only potentially, and never actually restraints of trade, the argument that Section 7 could never support a private recovery would be greatly strengthened.

58. 1950, U.S. CODE AND CONG. RECORD, 4295.

59. *Id.* at 4296.

which may have existed.[60] Though the history does speak of incipiency, nowhere is it indicated that Section 7 might not, in fact, be violated by an actual and not a potential monopoly; nor is there any logical reason why such a negative inference must be drawn from the language of the act. In this regard, one commentator has noted:

> One plausible interpretation of Clayton 7 . . . is that while in principle the section was meant to apply more to probable than to actual restraints in trade, any hypothesis that the sole test for violation is probability goes further than Congress intended. It could be argued that Clayton 7 is meant to cover the whole range of 'restraints' from a probable lessening in competition in the future to just short of a Sherman Act violation.[61]

It would seem that there are two possible bases for holding that a violation of Section 7 could support a judgment for money damages under Section 4: 1) that there was, in fact, an actual lessening of competition as a result of the illegal acquisition; and 2) though the lessening of competition remained potential and speculative, that certain parties suffered actual and determinable damages as a result of that acquisition.[62]

Determination of Damages

Assuming, *arguendo*, that a cause of action under Section 4 of the Clayton Act will lie for a Section 7 violation, there remains the problem of the measure of damages in such an action. Thus, though there appears to be no reason, at least theoretically, why a Section 7 violation cannot contain all the elements necessary to the maintenance of a treble damage action,[63] establishing those elements to the satisfaction of the courts may prove more difficult.[64]

The requisite elements of a treble damage action are generally considered to be: 1) a violation of an antitrust law by the defendant; 2) an injury to the plaintiff's business or property;[65] 3) such injury must

60. D. Martin, Mergers and the Clayton Act, 235 (1959), quoting Senator Kefauver,

> The bill is not complicated. It proposes simply to plug the loophole in Sections 7 and 11 of the Clayton Act.

(See further H. R. Report #515, 80th Congress, 1st Session, at 4). *See also* Brown Shoe v. United States, *supra* note 15 ". . . there is no doubt that Congress did wish to "plug the loophole' and to include within the coverage of the act the acquisition of assets no less than the acquisition of stock."

61. 42 S. Cal. L. Rev. 460, 469 (1969).

62. Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 523 (S.D.N.Y. 1965).

63. *See generally* for the elements which must be alleged and provided in private actions, Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86 (9th Cir. 1961).

64. Gottesman v. General Motors, 5 CCH Trade Reg. Rep. Par. 73,127 (S.D.N.Y. March 30, 1970).

65. "Business" includes not only a commercial or industrial enterprise or estab-

be different from that sustained by the public generally;[66] and 4) the plaintiff's loss must appear to have been proximately caused by reason of the defendant's illegal acts.[67]

Most plaintiffs in well pleaded cases will probably be able to establish the first two elements of the cause of action. The latter two, however, may present a critical barrier which must be crossed.[68] Two recent cases illustrate the difficulties involved. In *Dole Valve Co. v. Perfection Bar Equipment*[69] the defendant in a patent infringement suit filed a counterclaim based upon an alleged violation of Section 7 of the Clayton Act. The defendant maintained that as a result of the merger which had occurred, competition in the beverage dispensing equipment market had been substantially impaired, and alleged further that it had lost eight specifically enumerated sales to the competing firm. The court held that there was no "evidence that the acquisition was in any way responsible for those lost sales." The court further indicated that in order to recover treble damages a plaintiff must not only establish that he "suffered some special damages to his business as a direct and proximate result of the acquisition," but that "the injury must result from the lessened competition or monopoly itself."[70]

The second recent decision dealing with the problem was rendered in the remanded case of *Gottesman v. General Motors.*[71] The court held that the plaintiffs had failed to prove that DuPont's stock interest

---

lishment, but also the employment or occupation by which a person earns a living." 64 COLUM. L. REV. 570, 577 (1964).

66. Timberlake, *The Legal Injury Requirements in Treble Damage Actions Under the Antitrust Laws,* 30 GEO. WASH. L. REV. 231 (1961); Clune v. Publishers' Association of New York City, 214 F. Supp. 520, 525 (S.D.N.Y. 1963).

67. Peterson v. Bordon Co., 50 F.2d 644 (7th Cir. 1931).

68. While the plaintiff must prove that the injury to him was distinct from one sustained by the general public, he no longer need prove injury to the public as well as to himself. Radovich v. National Football League, 352 U.S. 445 (1957). He need only prove that defendant's illegal acts were a substantial factor in his injury and not that they were the sole cause of such injury. 64 COLUM. L. REV. 570 (1964). Nor is he required to prove the amount of damages with any degree of exactness; Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251 (1946); Eastman Kodak Co. of New York & Southern Photo Materials Co., 273 U.S. 359, 379 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931); the proof offered need only be sufficient to take the ascertainment of damages out of the range of mere guesswork or speculation.

69. 5 CCH TRADE REG. REP. Par. 73,129 (N.D. Ill. April 3, 1970).

70. *Id.* at p. 88438. This language of the court seems to indicate a repudiation of the second of the two damage theories posited as possible bases for Section 7 treble damage actions. *See* p. 309, *supra.* The court's position seems sound only if it may be assumed that Congress in enacting Section 7 as amended intended to protect only those private parties who were injured as a result of actual restraints of trade, and that the "incipiency" standard of the statute was only a preventive measure taken to protect the public in general. It is less than completely clear that this was the case.

71. 5 CCH TRADE REG. REP. Par. 73,127 (S.D.N.Y. March 30, 1970). This decision followed the remand of the case by the court of appeals in *Gottesman* II previously noted. It was rendered by the same judge, Judge Metzner, who has tried the case in the district court since its inception.

in General Motors caused General Motors to purchase its automotive finishes and fabrics from DuPont; and further, that plaintiffs had failed to prove injury to General Motors (monetary loss) in that they had not shown that General Motors could have purchased materials of like quality from other sources at lower prices.[72]

These cases may be a reasonable indication of the problem plaintiff's counsel may be confronted with in establishing the existence of damages in Section 7 treble damage actions.

CONCLUSION

The trend evidenced by the decisions of the court of appeals in *Dailey* and *Gottesman* II, that Section 7 is an "antitrust" act within the purview of Section 4 (*i.e.* one, for the violation of which, a treble damage action may lie) is a sound course.

It seems likely that the courts will encounter certain problems in determining the extent of recovery, if any, to which plaintiffs will be entitled as a result of defendants' violations of Section 7.[73] These problems seems to be capable of resolution however. The courts have shown little difficulty in awarding treble damages to private litigants in actions based upon violations of Sections 2[74] and 3[75] of the Clayton Act, both of which sections contain the same "may be" language as Section 7.[76]

It should be noted, however, that Section 2, which deals with price discrimination, and Section 3, which proscribes tying arrangements and

---

72. *Id.* at p. 88,432.

73. *I.e.* Proof of the fact of actual injury, Karseal Corp. v. Richfield Oil Co., 221 F.2d 358 (9th Cir. 1955); Proof of private injury, Utah Gas Pipe Lines Corp. v. El Paso Natural Gas, 223 F. Supp. 955 (D. Utah 1964); Proof of the amount of damages, Bigelow, 327 U.S. 251 (1946); Keogh v. Chicago & Northwestern Railway Company, 260 U.S. 156 (1922). The plaintiff may recover for (1) lost profits which could have been earned if the market were freely competitive, (2) increased costs of business actually transacted, (3) the decrease in value of investment in tangible or intangible property. Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damages Actions under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231 (1961).

74. 15 U.S.C. § 13(a) (1964) "It shall be unlawful for any person engaged in commerce . . . to discriminate in price . . . where the effect of such discrimination *may be substantially to lessen competition or to tend to create a monopoly.*" (emphasis supplied)

75. 15 U.S.C. § 14 (1964), "It shall be unlawful for any person engaged in commerce . . . to lease or make a sale . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding *may be to substantially lessen competition or tend to create a monopoly*" (emphasis supplied).

76. *See, e.g.* Hartley and Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962); and Kidd v. Esso Standard Oil Co., 295 F.2d 497 (6th Cir. 1961); Edward H. Levi, *The DuPont Case and Sec. 7 of the Clayton Act*, in II HOFFMAN'S ANTITRUST LAW AND TECHNIQUES, 381 (1963); *See also* 29 OHIO ST. L. REV. 756 (1968) which states that Section 3 contains the same incipiency test as Section 7.

exclusive dealing contracts, are concerned with practices which are, by their nature, more likely to cause competitive injury than the acquisitions with which Section 7 deals. Consequently, establishing a causal connection between the statutory violation and the injury to the plaintiff's business or property is likely to be somewhat more difficult in Section 7 cases. Nevertheless, it appears likely that the potential existence of treble damage actions brought under Section 4 will provide an increasingly strong deterrent to future mergers which might be violative of Section 7.

SHERRY R. FEINSMITH