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Divestiture of Illegally Held Assets: Observations on its Scope, Objective, and Limitations

"Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure."[1] This observation was made with reference to an order requiring divestiture of illegally held stock. In the context of the divestiture of illegally held assets, however, the statement is an oversimplification of myriad complex problems. This Comment will examine the difficulties encountered in eliminating the anticompetitive effects of a fully consummated merger found to have violated section 7 of the Clayton Act.[2] No attempt will be made to assess the substantive doctrine upon which the violation in any instance was based, except insofar as it is necessary to correlate that doctrine with the problems involved in providing appropriate relief. Although the problems surrounding asset divestiture are difficult to discuss in the abstract, certain conclusions regarding the permissible scope, objectives, and practical limitations of the divestiture remedy should be drawn to provide a much-needed conceptual framework for each individual case.

I. The Remedial Agencies

The primary responsibility for the enforcement of section 7 has been reposed by Congress in both the Federal Trade Commission and the Antitrust Division of the Department of Justice.[3] The source of the FTC's power to issue orders enforcing the merger provision is section 11 of the Clayton Act,[4] which is the only specific

1. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961) (hereinafter cited as du Pont-General Motors II). The problem in this case had been considered by the Court before in United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (hereinafter cited as du Pont-General Motors I).

2. Celler-Kefauver Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914). Section 7 of the Clayton Act 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 . . . 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 tend to create a monopoly.

See generally Note, *Section 7 of the Clayton Act: A Legislative History*, 52 Colum. L. Rev. 766 (1952).

3. The functions of the Federal Trade Commission and the Antitrust Division of the Department of Justice, although originally quite different, are now very similar. Until the enactment of the Antitrust Civil Process Act §§ 1-6, 76 Stat. 548 (1962), 15 U.S.C. §§ 1311-14 (1964) and 18 U.S.C. § 1505 (1964), however, the Commission's ability to investigate possible violations of § 7 far exceeded that of the Department of Justice. See Zimmerman, *The Federal Trade Commission and Mergers*, 64 Colum. L. Rev. 500, 506-07 nn.33-36 (1964).

In addition to the Commission and the Antitrust Division there are about twenty other federal agencies with some degree of responsibility for the enforcement of the antitrust laws. See Massel, Competition and Monopoly; Legal and Economic Issues 320 (1962); Note, 39 Notre Dame Law. 581 (1964).

4. 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1964).

statutory reference to divestiture. It provides that the Commission shall issue an order requiring the respondent "to cease and desist from such violations, and divest itself of the stock, or other such capital, or assets, held . . . contrary to the provisions of sections 7 and 8 . . . in the manner and within the time fixed by said order." The Department of Justice, on the other hand, institutes proceedings under section 15 of the Clayton Act,[5] which invests district courts with "jurisdiction to prevent and restrain violations of" section 7 and directs United States attorneys "to institute proceedings in equity to prevent and restrain such violations."

A. *Remedial Powers of the Federal Courts*

The opinion of the United States Supreme Court in *du Pont-General Motors II*[6] established that district courts have reasonably broad power to formulate a remedy in a proceeding initiated by the Justice Department.[7] This interpretation of section 15 has enabled district courts to weigh the feasibility of measures in lieu of or ancillary to divestiture, such as a ban on future acquisitions in the relevant line of commerce.[8] Thus, the Justice Department can proceed against a merger with the knowledge that it may demand, and the court may order, any reasonably necessary remedial measures if a violation is found.[9]

B. *Remedial Powers of the FTC*

The difference in statutory language between section 15 and section 11 has caused uncertainty with respect to the scope of the remedial powers of the Federal Trade Commission under the latter section. It is not clear from the language of section 11 whether the Commission possesses powers as broad as those which can be exercised

5. 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1964).

6. 366 U.S. 316 (1961).

7. In response to a Government contention that upon finding a violation of § 7 the court was required to order complete divestiture, the Court stated that "Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent." *Id.* at 328 n.9.

8. On remand to the district court following *du Pont-General Motors II*, that court included in its decree several ancillary relief provisions that it found to be "necessary and appropriate" or "reasonably related" to the § 7 violation, including a ten-year prohibition on the ownership of stock instead of a perpetual ban, which had been held to be unnecessary and inappropriate. United States v. E. I. du Pont de Nemours & Co., 1962 Trade Cas. ¶ 75942 (N.D. Ill.).

9. Former Assistant Attorney General William H. Orrick, Jr., has stated that, "we believe that . . . when we challenge an already consummated merger . . . any divestiture order subsequently issued may and should require divestiture of sufficient cash to insure adequate working capital for the divested company plus such cash or assets as may be required to finance any needed capital improvements, or other modernization of the plants to be divested." N.Y. STATE BAR ASSOCIATION, 1965 ANTITRUST LAW SYMPOSIUM (TRADE REG. REP. ED.) 37-38.

by the courts in actions instituted by the Justice Department.[10] A series of decisions prior to 1950 established that the Commission's remedial powers under section 11 did not coincide with those of a court of equity.[11] In one case, the Supreme Court held that the Commission could not order divestiture of assets, even though the assets had been acquired as the result of an unlawful stock acquisition and for the express purpose of preventing the Commission from issuing an effective order divesting such stock.[12] This narrow construction was based on the view that the Commission's powers under section 11 were circumscribed by the literal terms of that section, which at that time specified stock divestiture but were silent with respect to asset divestiture.[13] Further contributing to a literal interpretation of the scope of the Commission's remedial power was a holding that section 5(b) of the Clayton Act,[14] which authorizes orders requiring respondents "to cease and desist using" methods of competition found unlawful under the act, did not authorize divestiture as a remedy.[15]

The uncertainty surrounding the extent of the Commission's remedial powers was manifested in factual situations which challenged the ability of the FTC to adapt its remedy to the substantive violation. A relatively frequent question involved the Commission's power to order divestiture of assets representing additions, replacements, or improvements added to the assets acquired at the time of

10. In du Pont-General Motors II, 366 U.S. at 328 n.9, the Court expressly declined to consider whether Congress had given the Federal Trade Commission powers under § 11 as broad as those reposed in the district courts by § 15.

11. Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934); Thatcher Mfg. Co. v. FTC, and Swift & Co. v. FTC, decided with FTC v. Western Meat Co., 272 U.S. 554 (1926); FTC v. Eastman Kodak Co., 274 U.S. 619 (1927).

12. Arrow-Hart & Hegeman Elec. Co. v. FTC, *supra* note 11. In Swift & Co. v. FTC, *supra* note 11, at 561, the Court said that § 7 of the Clayton Act "has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held." See generally MARTIN, MERGERS AND THE CLAYTON ACT 118 (1959).

13. One of the primary purposes of the 1950 amendments to § 7 of the Clayton Act was to close the obvious loophole created by the exclusion of asset acquisitions from its provisions. In Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962), this purpose and others are mentioned in a broad discussion of the legislative amendments. See generally Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961).

14. 52 Stat. 112 (1938), as amended, 15 U.S.C. § 45 (1964).

15. FTC v. Eastman Kodak Co., 274 U.S. 619 (1927). Despite its holding that § 5(b) of the Clayton Act did not authorize the use of divestiture, the Supreme Court has emphasized that the scope of the Commission's power is of necessity broad. FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). In Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946), the Court said: "[T]he Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude and judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 612-13.

the merger. Such assets frequently exist if any appreciable length of time has passed between the merger and the order to divest. The first case litigated after the 1950 amendments and requiring divestiture of a large acquired company directly posed this problem. In *Crown Zellerbach Corp.*,[16] the Commission began a pattern of uncertainty from which it has only recently departed. Crown had added to the acquired company new machinery and improvements valued at $14,300,817. In response to Crown's argument that the order of divestiture should not include any of these post-acquisition assets, the Commission stated:

> [C]learly the broad purpose of the statute cannot be thwarted merely because the respondent has commingled its own assets with those of the acquired firm. However, it is not believed that the order should necessarily require the divestiture of all such assets added to the property by the respondent if the divestment may be otherwise accomplished without destroying the operating condition and organization of the acquired mill, substantially as it existed at or around the time of the acquisition.[17]

This equivocation continued in *Pillsbury Mills, Inc.*,[18] where the Commission asserted its authority to restore an acquired firm as a "going concern," but concluded that no showing of the necessity of divesting after-acquired assets was there shown.[19] In *Reynolds Metals Co. v. FTC*,[20] the Court of Appeals for the District of Columbia Circuit gave credence to the Commission's reluctance to assert broad powers by intimating that the Commission lacked authority to order divestiture of a large plant constructed by Reynolds to house machinery of an acquired company which had, prior to its acquisition, rented similar facilities. The court was at least certain that no such power existed unless, at a minimum, a showing were made either of a relationship between continued possession of the property and the violation of section 7, or of the necessity of divestiture to "restore" the competitive status quo.[21]

16. 54 F.T.C. 769 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962).

17. *Id.* at 807.

18. 57 F.T.C. 1274 (1960).

19. *Id.* at 1412. It is arguable that the Commission intended only to indicate that the staff had failed to put forth any satisfactory justification for broader relief. Duke, *Scope of Relief Under Section 7 of the Clayton Act*, 63 COLUM. L. REV. 1192, 1201 n.57 (1963).

20. 309 F.2d 223 (D.C. Cir. 1962).

21. "After-acquired properties are not relevant, except in the case where they represent reinvestment of capital realized from the sale of property included in a forbidden acquisition and replacement of that property . . . . If ever after-acquired property may be subject to a government order to sell, an even greater necessity, totally absent on the present record, must be shown. Inasmuch as there is a failure on this record to demonstrate (1) any nexus between continued possession of after-acquired property . . . and the violation of Section 7, and (2) that restoration of the competitive status

A related, although less frequently litigated, challenge to the scope of the Commission's discretion has arisen where the acquisition of a company was found to have violated section 7 in less than all of the lines of commerce in which the acquired company had been engaged before the acquisition. Whether the Commission could order divestiture of assets utilized in more than the offending line of commerce was raised in *Brillo Mfg. Co.*,[22] but was left unanswered. Prior to its acquisition by Brillo, the Williams Company had manufactured both industrial and household steel wool. The Commission held that the acquisition violated section 7 only in the industrial steel wool market. The initial order entered by the hearing examiner would have required Brillo to divest all the acquired assets, since the facilities could be used interchangeably to produce both types of steel wool.[23] The Commission, however, modified this result considerably. The final order allowed Brillo to retain all the assets acquired, provided that they were not used in the production of industrial steel wool, and provided that Brillo not compete with the restored Williams Company for five years in that market.[24]

Reluctance to go beyond the literal wording of section 11 has been evident in the Commission's hesitancy to utilize remedial measures ancillary to divestiture in litigated cases.[25] This is in marked contrast to many consent decrees containing numerous involved provisions dealing with ancillary matters,[26] most notably an almost

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quo compels divestiture of such property, that part of the Commission's order requiring divestiture of property built or acquired after the 1956 acquisition . . . cannot be sustained." *Id.* at 231.

22. Brillo Mfg. Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15772 (Feb. 28, 1962).

23. *Ibid.*

24. Brillo Mfg. Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16746, at 21672 (Jan. 17, 1964).

25. *Compare* Pillsbury Mills Inc., 57 F.T.C. 1274 (1960), *and* A. G. Spaulding & Bros., Inc., 56 F.T.C. 1125 (1960), *aff'd*, 301 F.2d 585 (3d Cir. 1962), *and* Crown Zellerbach Corp., 54 F.T.C. 769 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962), *with* Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398 (Dec. 10, 1965), *and* Brillo Mfg. Co., *supra* note 24.

26. The simplicity of litigated orders as opposed to the detailed and complicated provisions contained in the usual consent decree is partly due to the FTC's practice of ordering the respondent to submit a plan of compliance in litigated areas. The plan provides an opportunity for the respondent to fill in the details of the order, which is usually intentionally abbreviated so as to facilitate the administrative process by removing time-consuming details from the formal litigation process. For example, in Georgia-Pacific Corp., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16929 (June 4, 1964), the Commission approved a consent order that required Georgia-Pacific to refrain from acquiring any company engaged in (1) the coarse paper or coarse paper converting industries and (2) the containerboard or containerboard converting industries, for a period of ten and seven years respectively, without prior Commission approval. The order also required the respondent to sell or make available to independent jobbers and converters for a period of five years, at least 100,000 tons of coarse paper per year, and, for a succeeding period of five years, 75,000 tons per year from that produced in a designated plant. These measures were adopted in lieu of divestiture. See also Union Bag-Camp Paper Corp., TRADE REG. REP. (Transfer Binder,

automatic ban on future acquisitions in the relevant line of commerce without prior Commission approval.[27]

Recently, however, the Commission appears to have discarded its conservative attitude toward the scope of its authority to dispense relief under section 11. In accord with a broadening view of the remedial powers available to it under section 5 of the Clayton Act after *United States v. Philadelphia Nat'l Bank*,[28] the Commission has taken the position that it has broad equitable powers under section 11.[29] It has recognized that meaningful relief under section 11 may require more than a prohibition of the particular acts or practices found to be unlawful, and more than an unravelling of the particular unlawful transactions that have been consummated.[30] Thus, the FTC now regards its own powers as not restricted to an

1963-65) ¶ 17200 (Feb. 12, 1965); Simpson Timber Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15664 (Jan. 4, 1962); Gulf Oil Corp., 56 F.T.C. 688 (1960); International Paper Co., 53 F.T.C. 1192 (1957). In du Pont-General Motors II, 366 U.S. at 330 n.12, the Court indicated that "the circumstances surrounding . . . negotiated [consent] decrees are so different that they cannot be persuasively cited in a litigation context."

27. The recent practice has been to adopt a provision conditioning future acquisitions upon prior Federal Trade Commission approval. *E.g.*, Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398 (Dec. 10, 1965); Martin-Marietta Corp., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 16335 (March 15, 1963) (seven-year prohibition against acquisitions of cement companies in an area covering most of the United States, and a ten-year ban on acquisitions (without the FTC's prior approval) of concrete pipe companies in a more limited region). See also National Dairy Products Corp., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 16282 (Jan. 30, 1963). Occasionally the FTC has coupled a requirement that the respondent make certain of its products available to the divested company with a flat prohibition on future acquisitions. *E.g.*, Automatic Canteen Co. of America, 54 F.T.C. 1831, 1842 (1958); Vendo Co., 54 F.T.C. 253, 258-59 (1957).

28. 374 U.S. 321, 323 (1963). The Court indicated that the 1950 amendments to §§ 7 and 11 were intended to overrule Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934), discussed in text accompanying note 12 *supra*. "Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions . . . ." *Id.* at 348.

29. Fruehauf Trailer Co., 3 TRADE REG. REP. ¶ 17292 (July 19, 1965); Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879, at 21905 n.10 (April 21, 1964): "This is not to say that the Commission is, in all respects, a 'court of equity.' One difference between the Commission's powers under section 11 and the powers of the Federal District Courts under Section 15 may be that the courts, by virtue of their express authority 'to prevent and restrain' violations of the Clayton Act, but not the Commission, can enjoin a merger in advance of the consummation." Regarding the latter contention, however, it should be noted, that the Seventh Circuit holding in FTC v. Dean Foods Co., 5 TRADE REG. REP. (1966 Trade Cas.) ¶ 71655 (7th Cir. Jan. 19, 1966) has been granted a review by the Supreme Court. 5 TRADE REG. REP. (1966 Trade Cas.) ¶ 71660 (Jan. 24, 1966). The Seventh Circuit there held that the Commission's pursuit of an injunction in the court of appeals via the All-Writs Statute, 62 Stat. 944 (1948), as amended, 28 U.S.C. § 1651(a) (1964), did not give the court authority to enjoin the consummation of a merger pending resolution of a complaint challenging the merger under § 7 of the Clayton Act. If this holding is reversed, the Commission's powers will be more nearly equivalent to those of the Justice Department in this respect. See notes 34-36 *infra* and accompanying text.

30. Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879, at 21905 (April 21, 1964).

order divesting the precise assets acquired in an unlawful merger. The Commission has chosen to reject any contention that a narrow remedial power might be inferred from the *Reynolds Metals* case, and has elected to treat that case as an exercise of discretion. Likewise, neither a ban on future acquisitions[31] nor a decree which would require divestiture of assets used in more than the offending line of commerce[32] is now considered beyond the scope of the FTC's discretion.

The Commission's disposition of *Fruehauf Trailer Co.*[33] reflects a broadened outlook toward the scope of relief available to it under section 11. Fruehauf, the largest manufacturer of truck trailers in the United States, was held to have violated section 7 by its acquisition of the Hobbs Manufacturing Company and a subsidiary in 1955, and the Strick Company and a subsidiary in 1956. The passage of almost ten years between the date of acquisition and the order of divestiture posed practical problems that brought into question the power of the Commission to restore the acquired concerns in some competitive form. No longer hindered by restrictive doubts about its power, the Commission declared its purpose to be that of restoring, as far as practicable and equitable, the state of competition in the relevant market as it would have been but for the acquisition.[34] Counsel on both sides agreed that this could not be accomplished by an order requiring Fruehauf to divest the precise assets acquired in 1955 and 1956. Rejecting more limited proposals,[35] the Commission stated "if the . . . order is to be effective respondent must divest sufficient assets, including assets acquired after the acquisition, to reconstruct them as going concerns."[36]

In *Beatrice Foods Co.* [37] the Commission reaffirmed its position that its relief powers under section 7 are equivalent to those available

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31. *Ibid.*

32. *Ibid.*

33. 3 TRADE REG. REP. ¶ 17292 (July 19, 1965).

34. *Id.* at 22410.

35. The Commission rejected a plan, proposed by Fruehauf's counsel, that would have required Fruehauf to divest the assets actually acquired from Strick, together with sufficient additional assets to restore Strick to the same relative competitive standing it had at the time of the acquisition. While this seems broad enough to encompass the order actually given—to restore Strick to approximately the competitive standing it would have had but for the acquisition—the requested order was so vague as to be virtually meaningless. *Id.* at 22412.

36. Fruehalf Trailer Co., 3 TRADE REG. REP. ¶ 17292, at 22411 (July 19, 1965). It might be inferred that the FTC's broadened outlook toward its remedial powers has been rejected in consent decrees as well. In Mead Corp., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 17201 (Feb. 12, 1965) (consent decree), the FTC required the respondent to divest seven corrugated box converting plants it had acquired since 1956, to install at its Grand Rapids, Michigan plant, a corrugator capable of converting approximately eighteen thousand tons of containerboard into corrugated products, and to sell the expanded plant.

37. Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398 (Dec. 10, 1965).

to it under section 5.[38] Thus, it did not hesitate to impose a ten-year ban on acquisitions in the relevant line of commerce in addition to an order to divest.[39] These cases leave little doubt that the Commission now considers itself the possessor of remedial powers adequate to alleviate whatever violation it confronts.

C. *The FTC and the Preliminary Injunction*

The Commission's recent liberal attitude toward the scope of its powers under section 11 conflicts with the historical tendency of the courts to delimit the powers of the Commission within the precise language of the Clayton Act.[40] However, the Supreme Court's recent decision in *FTC v. Dean Foods Co.*,[41] that the Commission has standing to resort to the courts for a preliminary injunction in a section 7 case, is a break with that tendency and would seem to indicate a more favorable judicial attitude toward the Commission's powers to attack mergers. There are strong arguments to support the Commission's position that its remedial powers under section 11 should be construed broadly.

The unraveling of corporate acquisitions requires considerable imagination and flexibility if the ill effects of an unlawful merger are to be eliminated. The variety of remedial measures adopted by the district courts in proceedings instituted by the Justice Department indicates that proper and reasoned exercise of remedial discretion demands a wide range of alternatives within which the many relevant factors which influence a decision can find adequate expression. In addition, it is difficult to perceive how the Clayton Act could be uniformly or fairly administered if the district courts under section 15 have broader remedial latitude than does the Federal Trade Commission under section 11. Consider, for example, whether assets added after the merger to the originally acquired assets can be within the scope of a divestiture decree. If this issue is decided affirmatively with respect to Justice Department proceedings but negatively as to Federal Trade Commission actions, the initial informal allocation of cases between the two enforcement agencies could possibly have greater economic effect upon a defendant than any other decision in the process of resolving a section 7 violation. If such were to be the case, then the propriety of leaving the allocation of cases to the unrestricted discretion of the agencies would be questionable. Likewise, if the Commission's powers are to be literally construed, it

38. Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17244, at 22335 (April 26, 1965).

39. Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398, at 22606 (Dec. 10, 1965).

40. See Duke, *supra* note 19, at 1195-1205.

41. 34 U.S.L. WEEK 4494 (U.S. June 14, 1966). Because the *Dean Foods* case was decided while this Comment was in page proof, a more extensive discussion of the ramifications of this important decision is impossible.

may be inconsistent to allow it to bargain for what would be ultra vires conditions in the consent decrees entered. Finally, the expertise of the Commission[42] is of little use without the power to utilize it effectively. If an industry has expanded in the interim between the merger and the order to divest, restoration of the original assets is not likely to restore the competitive level existing prior to the merger. If the Commission is to be subjected to a more restrictive standard than that applied to the Justice Department, it may be rendered impotent, so that effective relief would be difficult without resort to the theoretically less adept courts.

The Supreme Court has yet to confirm or deny the Commission's interpretation of section 11. It is not unreasonable to expect, however, that the Court will adopt a position analogous to its views in *Philadelphia Bank*[43] and interpret section 11 as giving to the Commission the remedial power necessary to effectuate the policies of the statute which the Commission has been given a mandate to enforce.

II. The Objective of Divestiture

Reasoned exercise of discretion requires a consideration of the objective of divestiture as a remedial device. It is generally acknowledged that divestiture is intended to remove the anticompetitive effects of an unlawful acquisition by restoring the competitive status quo, not merely to punish the offending company.[44] The typical divestiture order is phrased in terms designed to illuminate the phrase, "restoring competition," as it applies in the particular case; details of compliance with these directives are then the subject of later negotiation between the parties.[45] The Borden Company, for

42. There is by no means a universal agreement that the Federal Trade Commission possesses unique expertise. *Compare* Stokes, *A Few Irreverent Comments About Antitrust, Agency Regulation, and Primary Jurisdiction*, 33 Geo. Wash. L. Rev. 529 (1964), *with* Simon, *The Case Against the Federal Trade Commission*, 19 U. Chi. L. Rev. 297 (1952) *and* Kintner, *Federal Trade Commission in 1960, apologia pro vita nostra*, in N.Y. State Bar Ass'n, 1961 Anti-trust Law Symposium, Sales and Pricing Policies Under the Anti-Trust Laws 21 (1961).

43. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 323 (1963).

44. Att'y Gen. Nat'l Comm. To Study the Antitrust Laws, Report 353 (1955): "'In an equity suit,' the Supreme Court has observed, 'the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.' Applying this general policy over the 60 odd years of Sherman Act history, courts have in only 24 litigated cases entered decrees requiring divorcement, divestiture, or dissolution.

"Such 'judicial restraint' reflects the Supreme Court's view that, since 'divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available.'"

45. Section 3.24 of the FTC's Rules of Practice provides: "In those cases where the Commission has found a violation of law but believes that it should have further

example, was ordered to divest assets sufficient to restore the acquired company "as a going concern capable of competing effectively in the line of commerce involved."[46] Pillsbury Mills was to draft a plan that would recreate Ballard & Ballard as a "going concern."[47] Lone Star Cement was ordered to divest all assets necessary to establish the purchasers as "effective competitors."[48] Vague directives such as these provide little or no insight into the competitive status to which the divested company is to be restored. This creates problems which demonstrate a need for more precise requirements in such orders.[49]

A. *Definition of the Standard*

Several considerations indicate a need for divestiture orders that are far more specific than those heretofore utilized. First, the competitive status to which the divested company is to be restored is the key standard by which the success of antitrust enforcement in implementing substantive doctrine can be measured. It is impossible at present to measure the effectiveness of divestiture in eliminating the anticompetitive effects of illegal acquisitions. There is a lack of statistical data upon which to base any conclusion, a condition that can be corrected only as the passage of time provides a basis for study. Even if such data were available, however, it would be impossible, in light of the elusiveness of the standard—"restoring competition"—to which the results are now typically expected to conform, to draw meaningful conclusions. A more precisely defined objective would make success in antitrust enforcement a more measurable, and therefore meaningful, goal.

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information or additional views of the parties as to the form and content of the order to be issued, the Commission, in its discretion, may withhold final action pending the receipt of such additional information or views." 16 C.F.R. § 3.24(c) (Supp. 1965). The provisions relating to proceedings before FTC hearing examiners do not authorize a hearing on relief following entry of the initial decision; instead, that decision must include an "appropriate order." FTC Rules of Practice § 3.21, 16 C.F.R. § 3.21(b) (Supp. 1965). The procedure described in § 3.24 was followed in Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398 (Dec. 10, 1965); Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879 (April 21, 1964); Brillo Mfg. Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16746 (Jan. 17, 1964). The groundwork for the adoption of this rule was laid in Pillsbury Mills, Inc., 57 F.T.C. 1274 (1960), in which the Commission commented upon the inadequacies of a procedure requiring the submission of an order which must include the details of a method of compliance in addition to a determination of the legal issues.

46. The Borden Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16869 (April 17, 1964).

47. Pillsbury Mills, Inc., 57 F.T.C. 1274 (1960).

48. Lone Star Cement Corp., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 17183 (Jan. 19, 1965).

49. See Brown Shoe Co. v. United States, 370 U.S. 294, 357-65 (1962) (dissenting opinion), where Mr. Justice Harlan objected to an appeal being based upon what he considered to be an order so lacking in detail as to render the appellate debate premature. See also Consolidated Foods Corp., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 16182, at 20982 (Nov. 15, 1962).

Second, identification of the divested company's desired competitive potential has a crucial bearing on the quantum of assets to be severed. Vaguely worded directives only delay the inevitable confrontation with this critical issue, prolong the task of those who depend upon the order as a base from which to draw a conforming plan of divestiture[50] and remove the resolution of this important question from the proper forum to an informal negotiating table.

Third, divestiture should be inextricably bound to the substantive doctrine that called forth the need for relief. An inevitable side effect of imprecise divestiture orders is the widening of the gulf between remedy and substantive doctrine. Section 7 cases often appear to entail two separate adversary proceedings: the first in the courts to resolve substantive issues, and the second at the bargaining table where the details of remedial measures are negotiated. Periodic breakdowns in antitrust enforcement due to remedial measures which appear to disregard their substantive context have been the subject of recurring criticism directed at the enforcement agencies.[51] The order to divest, entered by a court or the Commission, provides an opportunity to recognize this relationship and to relate remedial policy properly to the anticompetitive state of affairs found to exist. In *Brown Shoe Co. v. United States*,[52] although the substantive violation partially resulted from Brown's own economic resources, characterized as a "deep pocket," divestiture resulted in an eventual purchase of the acquired company by the equally affluent F. W. Woolworth Company.[53] Had the remedial order in *Brown Shoe* been

50. It seems inevitable that resolution of § 7 cases must remain a two-step process, and complexities are bound to arise in attempting to apply an order of divestiture to the assets involved. Respondents, because of their superior acquaintance with the status of those assets, are customarily required to draft a plan of compliance containing the manner in which they propose to comply with the directive embodied in the order to divest. Normal self-interest will lead to a host of interpretative difficulties if the plan is required only to create an "effective competitor." A less vague objective, while it cannot remove all possible interpretative issues, can provide a starting point for eventual agreement, and can minimize to some extent the initial impulse generated by self-interest to magnify the complexity of the practical problems involved. See First Security Nat'l Bank & Trust Co. v. United States, 382 U.S. 34 (1965).

51. Zimmerman, *The Federal Trade Commission and Mergers*, 64 COLUM. L. REV. 500, 519 (1964): "There is as yet little in the Commission's decisions that indicates an awareness of its special abilities to consider the interplay of remedial and substantive problems." See also Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951); Oppenheim, Timburg & Van Cise, *Divestiture as a Remedy Under the Federal Antitrust Laws*, 19 GEO. WASH. L. REV. 119 (1950).

52. 370 U.S. 294 (1962).

53. Professor Zimmerman raises an interesting question of the relationship of remedy to substantive doctrine in the context of Reynolds Metals Co., 56 F.T.C. 743 (1960), *aff'd*, 309 F.2d 223 (D.C. Cir. 1962). If the Commission cannot prohibit the entry of a company into a line of commerce by way of internal expansion, is it an economical use of resources to attempt to preserve that industry as a small-company industry by prohibiting entry via acquisition? See Zimmerman, *supra* note 51, at 520.

framed with reference to the substantive conclusion, the ultimate disposition of the divested assets might have followed a different course.

The contrasting results of two instances in which the Federal Trade Commission elucidated upon the meaning of "restoring competition" are indicative of the varying meanings it has given to that term. In *Crown Zellerbach Corp.*,[54] the professed aim of the Commission's decree was to restore the acquired company to the operating condition and organization that "existed at or around the time of the acquisition."[55] In light of the demand for innovation, improvement, and expansion generated by a growing economy, such an entity is not likely to be as significant a competitive force in terms of present market potential as was the acquired company prior to its acquisition. This is especially true if any appreciable amount of time has elapsed in the interim.

The Commission's more recent order in *Fruehauf Trailer Co.*,[56] on the other hand, called for a plan of divestiture that would recreate the acquired companies with approximately the competitive strength and standing they would have enjoyed at the time of divestiture but for the illegal acquisition.[57] In contrast to the *Crown Zellerbach* approach, such an objective involves an attempt to project the competitive impact of the acquired company in the market structure existing at the time of the merger into the market structure existing at the time of the decree, thereby taking into consideration changes within the industry during the interim. This concern with interim changes in the competitive structure of the relevant market is clearly justified, since the impact of an acquisition illegal under section 7 lies not only in the elimination of a competitor but also in the resulting disruption of competitive conditions within a given line of commerce. Divestiture, to be effective, must eliminate both of these adverse effects as far as possible. A recognition of the dual function served by divestiture has led to a reluctance to allow a decree which would allow piecemeal sale of illegally held assets. Such a sale neither recreates the acquired enterprise nor restores pre-merger competitive conditions within the relevant market.[58]

This suggests that practicality of remedy should in certain circumstances be considered as a factor in the formulation of substantive doctrine.

54. 54 F.T.C. 769 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962).

55. *Id.* at 807. This limited objective may have been the product of a literal interpretation of Commission power to bring after-acquired assets within the range of their order. See text accompanying notes 10-21 *supra*.

56. 3 TRADE REG. REP. ¶ 17292 (July 19, 1965).

57. *Id.* at 22410.

58. Piecemeal sale of illegally-held assets is generally not resorted to as an alternative to divestiture without some compelling reason. *E.g.*, Erie Sand & Gravel Co., TRADE REG. REP. (Transfer Binder, 1959-60) ¶ 28358 (Oct. 26, 1959) ("To permit piecemeal sale of the property could not correct the harm that has been rendered to com-

However, the *Fruehauf* method of projecting the former competitive impact of the acquired company into the existing market structure is unrealistic. This "but for" analysis entails an assessment based upon a projection of factors that are so unpredictable as to render the conclusion largely a matter of conjecture. For example, the acquired company's performance in the interim would be largely dependent upon the unmeasurable qualities of human ability and performance under varying conditions. It is hard to see how the Commission could adapt such an objective to such a case as *Ekco Products Co.*,[59] where the hearing examiner noted that one of the acquired companies had poor future prospects at the time of the merger, although it could not be categorized as a failing company.[60]

The *Fruehauf* objective appears to be hampered by the same overemphasis that rendered the *Crown Zellerbach* objective ineffective. Each stresses re-creation of the acquired enterprise, rather than focusing upon restructuring the former competitive situation within the present relevant market. It would be conceptually helpful if divestiture were regarded not as re-creating the acquired company, but as laying the foundation for the creation of a *new* company capable of eliminating the effects of an unlawful acquisition.[61] To do so, the new firm must have a competitive impact—best defined simply as "share of the relevant market"—approximately equal to that which the acquired company had prior to the merger. This approach would focus attention upon projecting the competitive picture at the time of merger into the competitive situation at the date of the decree, and would thus avoid the conjecture involved in attempting to predict how the acquired company itself would have fared in the interim. Futhermore, projecting the competitive structure would have the advantage of taking into consideration the changes within the line of commerce in the intervening time span. The desired market potential of the divested enterprise could be adjusted when

petition."); Crown Zellerbach Corp., 54 F.T.C. 769 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962). At least one court, however, included a provision which allowed piecemeal sale if sale of the entire company could not be otherwise effectuated within a twelve-month period. United States v. Diebold, Inc., 1963 Trade Cas. ¶ 70738 (S.D. Ohio).

59. Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879 (April 21, 1964).

60. *Id.* at 21908.

61. Several recent decrees appear to support this concept. In United States v. El Paso Natural Gas Co., BNA ANTITRUST & TRADE REG. REP. 207, A-11 (D. Utah June 29, 1965), the Federal District Court in Utah approved a consent decree that called for the creation of Northwest Pipeline Company to take over the assets acquired from the Pacific Northwest Pipeline Corp. in 1957. The new company will have assets of $243 million and will operate 1500 miles of pipeline. In National Sugar Ref. Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15708 (Feb. 1, 1962) the sale was to be made to Godchaux Sugar Ref. Co., a corporation formed expressly to acquire these assets. See also United States v. Aluminum Co. of America, 91 F. Supp. 333 (S.D.N.Y. 1950).

there have been new entries into the market, as well as when the market shares have fluctuated among the companies previously engaged in the industry, thereby enabling the desired "share of the market" to represent a figure which would give the divested company an overall competitive impact proportionate to that of the acquired enterprise at the time of the merger.

B. *Utilization of the Standard*

So defined, the objective can become the focal point from which crucial questions concerning the scope of divestiture can be resolved. For instance, whether assets added after the acquisition are to be divested need not be decided as an isolated abstraction of proprietary right nor strictly as a statutory issue of remedial power. Rather, the analysis would initially turn to whether such assets were deemed requisite to the divested company's capacity to achieve the desired market potential. So viewed, fluctuations in total sales and productive capacity within the relevant line of commerce in the interim between merger and divestiture would affect the quantum of assets to be divested. If production and sales in the industry had risen in the interim, it would normally take additional assets for the divested company to capture an equal market share of the increased volume; similarly, fewer assets would have to be divested if sales and production had declined. The offending company would not retain unjustified benefits as a result of an unlawful merger. If the acquisition enabled it to capture a share of the total market in excess of the combined shares held by the acquiring and acquired concerns prior to the merger, the prospective market share necessary to give the divested company a competitive impact comparable to its pre-merger position would also increase, thereby requiring divestiture of additional assets to achieve this potential.

Where a company has acquired an integrated organization involved in several lines of commerce, but the acquisition has been found to have violated section 7 in only a single line, a method of analysis which views the divested enterprise as a "new entity"[62] would result in a more practical solution than do present methods. In that instance, the "but for" analysis would seem to require divestiture of assets involved in non-offending lines of commerce as a matter of course, because it is likely that the acquired company depended on its diversity to facilitate maintenance of its market share in the relevant line of commerce. Once the objective is defined as restoration of competitive impact in the offending line of commerce by

62. It is regrettable that simplistic labels must be affixed to what is essentially a rule of thumb. To serve convenience, however, the analysis which first focuses on the creation of a new entity as opposed to one which emphasizes the reincarnation of a dead enterprise will be referred to as the "new entity" approach.

creating a new entity, however, such a result does not necessarily follow. If the offending company submits a plan of divestiture that demonstrates that the desired market share can be attained by a new enterprise engaged in only the line of commerce in which the violation occurred, the offending company should be able to retain assets utilized in other lines of commerce. The public interest is fully protected by restoration of competitive conditions within the line of commerce relevant to the section 7 offense. Similarly, if it appears that diversification of the new entity is a prerequisite to its capture and maintenance of the desired market share, an order divesting assets used in other lines of commerce is justified. In either event, the issue is resolved with a specific objective in mind rather than by abstractions or statutory interpretation devoid of practical considerations.

There is of course no guarantee that a divested company will be able to realize the desired competitive potential, even with adequate capitalization. The chances of failure, however, can be minimized by including in the order provisions which recognize that realization of market potential demands the possession of data concerning the manufacture and distribution of the product, personnel with the ability to utilize such knowledge, and a reasonable probability of locating sources of raw materials and markets for the product.[63] Various consent decrees have recognized these problems. Both the Minnesota Mining and Manufacturing Company[64] and the Hooker

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63. Data relating to the manufacture and distribution of the product, as well as the technical capacity to utilize such information productively, are usually embraced within the term "know-how." In Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879 (S.D. Fla. April 21, 1964), the Commission, in remanding the case to the hearing examiner, commented that a provision requiring the provision of technical assistance to the divested company might be considered in his formulation of an effective order. The examiner's final order, however, omitted mention of any such device.

Only occasionally has the purchaser been provided with technical assistance. See Minnesota Mining & Mfg. Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15360 (Aug. 25, 1961); Hooker Chem. Corp., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15369 (Aug. 31, 1961). Furthermore, the purchaser has only infrequently been given access to the records of the acquiring company as a means of acquiring information that would facilitate its capture of a desired market share. In United States v. Anheuser-Busch, Inc., 1960 Trade Cas. ¶ 65955 (S.D. Fla.) (Part V. of Decree), it was provided that "defendant Anheuser shall furnish the prospective purchasers of the Miami Brewery of American [the divested company] information regarding the Miami Brewery of American, and to permit them to have such access to, and to make such inspection of, the Miami Brewery of American's plant and records as are reasonably necessary." Although the needs of a purchaser may vary from case to case, it is surprising that this type of provision is not included more often.

64. Minnesota Mining & Mfg. Co., *supra* note 63, resulted in an order stipulating that for a period of five years following divestiture the company must make available to the purchaser all of its electrical insulation products at the same prices and on the same terms offered other electrical insulation distributors. See also Leslie Salt Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15595 (Dec. 8, 1961).

Chemical Corporation[65] were ordered to make certain products essential to the manufacturing process of the acquired company available to the purchaser at a fair price for a specified time following the order to divest. Hooker was also ordered to provide purchasers with both customer lists and engineering assistance,[66] and Minnesota Mining and Manufacturing was also ordered to transfer certain sales employees to the purchaser.[67] In another case, Hertz was required to aid the buyer in selecting appropriate locations to facilitate rapid re-establishment of brand-name identity.[68]

If the objective of divestiture is framed in terms of market potential, considerable flexibility is achieved in the attempt to create an acceptable enterprise at the least possible cost to the parties involved. It allows a court or the Commission to consider qualitative as well as quantitative factors in determining what types of assets should be divested. For example, a need to reduce the cost of divestiture to the offending company can be satisfied by reducing the *quantity* of assets includable in the decree while increasing the *quality* of the assets to be divested. A more productive machine, better qualified personnel, or a better location may result in the successful capture of the desired market share at a lower cost to all parties. Although details of compliance with the decree would of necessity remain largely a product of negotiation, this approach would direct the attention of the parties to the specific goal to be attained, and can thus provide a focal point for the exercise of imagination in accomplishing the optimum result at the least possible cost.

III. Practical Limitations on the Divestiture Remedy

Identification of the objective to be achieved by divestiture must be undertaken in the light of the practical problems that inevitably confront courts and the Commission in an attempt to restructure competition in the relevant line of commerce.[69] The dollar cost to the respondent of reshuffling personnel, restoring assets that

65. Hooker Chem. Corp., Trade Reg. Rep. (Transfer Binder, 1961-63) ¶ 15369 (Aug. 31, 1961).

66. *Ibid.* Hooker was ordered to provide the purchaser with engineering assistance in setting up test equipment and devising testing methods; the assistance was designed to assure that the chemical compounds produced by the new company would meet the quality specifications previously maintained by Hooker.

67. Minnesota Mining & Mfg. Co., Trade Reg. Rep. (Transfer Binder, 1961-63) ¶ 15360 (Aug. 25, 1961).

68. United States v. Hertz Corp., 1960 Trade Cas. ¶ 69762 (S.D.N.Y.).

69. Reliance on Rule 3.24, *supra* note 45, in Beatrice Foods Co., 3 Trade Reg. Rep. ¶ 17244 (April 26, 1965), was based upon "the difficult practical problems encountered in attempting divestiture of dairy concerns which may have been acquired many years ago." *Id.* at 22339. See generally *Divestiture Problems in Merger Cases*, BNA Antitrust & Trade Reg. Rep. 196, B-1 (April 13, 1965). See also United States v. Chrysler Corp. & Mack Trucks, Inc., 1964 Trade Cas. ¶ 71207 (D. N.J.).

either have simply disappeared,[70] lost their separate identity through absorption into prior manufacturing operations,[71] or are being used concurrently in lines of commerce other than that in which the violation occurred,[72] sometimes serves as apparent justification for an order requiring less than complete divestiture.[73] Such cost factors are the outer limits to the scope of an order of divestiture; to what extent private economic interests do and should influence the scope of a divestiture decree is perhaps the most perplexing problem in the use of divestiture.

An order to divest inevitably affects many people who are in no way responsible for the violation. The Supreme Court long ago acknowledged the practical necessity of a

> [P]roper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition . . . of stock . . . or . . . interests in the . . . combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs . . . .[74]

Although the Court did not in that case face the problem of divesting assets,[75] its reasoning would seem appropriate in such a case. Stockholders of the combined enterprise usually serve no management function. The diminution in the capital value of their investment, sometimes reflected by a more than proportionate decline in the market value of their holdings,[76] cannot be totally disregarded unless it is believed that their rubber-stamp approval of the merger should render them accountable for the section 7 viola-

70. Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879 (April 21, 1964).

71. *E.g.*, Brillo Mfg. Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15772 (Feb. 28, 1962).

72. *E.g.*, Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879 (April 21, 1964).

73. *E.g.*, National Tea Co., 3 TRADE REG. REP. ¶ 17463 (March 4, 1966). There the Commission found § 7 violations in twenty-four of National's twenty-six acquisitions between 1951 and 1958, but divestiture was not deemed appropriate. "While there is evidence . . . that existing competition has to some extent already been lessened in a number of these markets, we believe the various dynamic features of the industry itself—particularly the relative ease of entry into it—will in time, if no further acquisitions are permitted, effectively dissipate those not yet insuperable restraints. At least we think it appropriate, in the circumstances of this case, to give those natural forces of competition a chance to correct the imbalances in those markets before turning to the more stringent remedy of divestiture." *Id.* at 22702.

74. United States v. American Tobacco Co., 221 U.S. 106, 185 (1911).

75. The remedy in United States v. American Tobacco Co., *supra* note 74, entailed the divesting of stock holdings acquired in violation of §§ 1 and 2 of the Sherman Act.

76. In United States v. Ling-Temco Electronics, Inc., 1961 Trade Cas. ¶ 70160 (N.D. Tex.), the market price of Ling-Temco stock dropped from 38 at the time the combination was approved by the stockholders of both the defendants, to approximately 34 after the stockholders were informed that the Commission was considering action, and to 30½ after the suit was actually commenced. *Id.* at 78643.

tion. Employees of both companies, as well as potential employees of the entity to be created, have job security, pensions, and related benefits that deserve protection. Third parties who have dealt with the combined enterprise in reliance on its then existing capacity are directly involved. Potential creditors of the restored enterprise will depend upon its structure for the ultimate source of their security.

In *du Pont-General Motors II*[77] the Court elaborated upon the concept of a "proper regard" for private economic interests. Since courts are required to decree relief adequate to redress a violation, private interests can affect choice only as between two effective alternatives. If complete divestiture is the only remedy which will effectively eliminate the anticompetitive effects of an illegal acquisition, economic hardship, however severe, cannot serve as a basis for denying the Government that relief.[78] Subject to this broad guideline, the immediate and predictable impact of divestiture upon private economic interests is a discernible influence on the scope of the divestiture decree in the particular case. The courts and the Commission have adopted many measures intended to ease the pain of parting to the respondent. It is frequently stipulated that the divestiture is contingent on the receipt of an adequate price for the divested company,[79] and that a security interest is to be retained by the respondent.[80] Occasionally a tribunal has taken cognizance of what is probably the paramount "practical problem"—the difficulty in locating a buyer.[81] Also, the practical difficulties involved in a

77. 336 U.S. 316 (1961).

78. *Id.* at 327.

79. *E.g.*, United States v. American Radiator & Standard Sanitary Corp., 1960 Trade Cas. ¶ 69810 (W.D. Pa.) (consent decree) (divested assets were to be sold at a price and upon terms which were reasonable under all the circumstances); Leslie Salt Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15595 (Dec. 8, 1961) (consent decree) (for six months the properties were to be offered at a price that would net the seller not less than $600,000; if at the end of that time the sale was not made at that price, the properties were to be offered at a price that would net at least $450,000). Some decrees, however, are not quite so protective. *E.g.*, United States v. Anheuser Busch, Inc., 1960 Trade Cas. ¶ 69599 (S.D. Fla.) (consent decree) ("The sale shall be at a price and upon terms which are acceptable to this Court, having due regard, among other things, for the reasonable market value of the Miami Brewery of American and the necessity of effectuating a sale.").

80. Consent decrees negotiated by the Justice Department typically allow the seller to retain a security interest in the divested properties. *E.g.*, United States v. Hertz Corp., 1960 Trade Cas. ¶ 69762 (S.D.N.Y.); United States v. Hilton Hotels Corp., 1956 Trade Cas. ¶ 68253 (N.D. Ill.); United States v. Minute Maid Corp., 1955 Trade Cas. ¶ 68131 (S.D. Fla.).

81. In Leslie Salt Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15595 (Dec. 8, 1961), the consent order provided that the respondent would be relieved of the requirement of divestiture if, after a good faith effort to sell, the sale could not be made within five years. See also United States v. American Radiator & Standard Sanitary Corp., 1960 Trade Cas. ¶ 69810 (W.D. Pa.); United States v. Anheuser-Busch, Inc., 1960 Trade Cas. ¶ 69599 (S.D. Fla.); United States v. Lucky Lager Brewing Co., 1958 Trade Cas. ¶ 69160 (D. Utah).

In Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398 (Dec. 10, 1965), the Commission

particular case may exert a silent influence on whether divestiture is to be decreed in the first instance.[82] Other private interests, such

denied a request to modify an order to divest on the basis of possible difficulties in locating an acceptable purchaser. The Commission did, however, indicate that such problems could be raised in the event that the respondent's diligent and good faith effort to effectuate a sale to a satisfactory purchaser should prove unavailing.

The difficulty in locating purchasers may at times have induced the Government to agree to a sale that itself constitutes a horizontal or vertical merger with a questionable impact upon competition. The divestiture eventually resulting from United States v. Continental Can Co., 378 U.S. 441 (1964), was a sale of the Hazel Atlas glass-container producing plants to Brockway Glass Co., a competitor of Hazel Atlas. A similar result occurred in Crown Zellerbach Corp., 54 F.T.C. 769 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962), where a sale of the stock and assets of St. Helen's Pulp & Paper Co. to another West Coast paper producer was approved.

Orders entered by the Commission and the courts usually designate certain purchasers to whom the sale of the divested company is not to be made. Most often these are persons or companies controlled by the offending company. *E.g.*, Pillsbury Mills, Inc., 57 F.T.C. 1274 (1960); Diamond Crystal Salt Co., TRADE REG. REP. (Transfer Binder, 1959-60) ¶ 28559 (Feb. 23, 1960). The order in the latter case also provided that certain salt producers engaged in the offending line of commerce were not to be considered as purchasers. Normally, however, specific purchasers are not mentioned. They are instead intended to be eliminated by requiring approval of the proposed buyer by the Commission or the court prior to confirmation of the sale. *E.g.*, United States v. American Radiator & Standard Sanitary Corp., 1960 Trade Cas. ¶ 69810 (D.C. Pa.); United States v. Anheuser-Busch, Inc., 1960 Trade Cas. ¶ 69599 (S.D. Fla.).

82. It is impossible to measure the impact of private economic interests upon an enforcement agency's initial decision of whether to institute a proceeding. It appears that in at least one instance the potential impact of divestiture upon the parties involved influenced a conclusion that § 7 had not been violated. The complexities of that case, United States v. Ling-Temco Electronics, Inc., 1961 Trade Cas. ¶ 70160 (N.D. Tex.), were imposing, but illustrative of the situations often confronted in trying to apply § 7 to an already consummated merger. The Board of Directors and officers of the integrated enterprise represented a coalition of individuals drawn from both the acquired and acquiring companies. Organization of the new company resulted in six functional divisions and the creation of a subsidiary known as the new Chance-Vought Corporation, which employed 10,520 persons, 2,699 of whom were former Ling-Temco employees. Virtually all of the management, administrative, production, and technical functions of the two companies were integrated for utilization of personnel, plant, equipment, and procedures; all projects and functions were assigned to the new corporation and its subsidiary. The production facilities of the Tempco Aircraft and Missiles Division of the former Ling-Temco Electronics, Inc., were integrated with the Astronautics Division of former Chance-Vought Corporation, which previously had no production facility of its own, but had a design and development capability. In each newly created division, as well as in the subsidiary, there was a mutual exchange of proprietary information regarding technical projects, research and development, bidding activities, costs, and rates. Ling-Temco-Vought, Inc., had relocated its executive offices, as well as executive, accounting, and administrative personnel. A plant that had been jointly occupied but separately operated by the former Ling-Temco Electronics, Inc. and the now dissolved Chance-Vought Corporation was rearranged to combine the productive facilities in a single operation by integrating production lines, office space, and engineering space. Ling-Temco-Vought, Inc., spent $335,000 to accomplish this task. It also secured a $6[illegible].000,000 loan on the basis of the combined assets, sales, and earning power of the two companies. At a time when three fourths of the new debentures had been delivered in exchange for the old Chance Vought Corporation stock, the Antitrust Division initiated a § 7 proceeding seeking divestiture. The court's conclusion that there was no violation of § 7 was undoubtedly viewed with relief by those responsible for the drafting of a plan of divestiture.

as the rights of employees[83] and parties in a contractual relation to the merged entity,[84] have also been recognized in decrees.

Ekco Products Co.[85] provides a recent example of the role played by private interests in anti-merger litigation. Ekco had acquired the McClintock Mfg. Company and certain assets of the Blackman Stamping & Mfg. Company; each acquisition violated section 7 in the commercial meat-handling equipment industry. The Blackman assets had been transferred to a Canadian subsidiary of the respondent and, after being used for a short time, were scrapped. The plant in which McClintock's manufacturing facilities had been located at the time of the acquisition had since been sublet to third parties; the operations were then carried out in a portion of one of Ekco's plants. The Commission asserted its power to cure the ill effects of the acquisition by ordering the respondent to restore assets that had disappeared, even if that disappearance were a result of bona fide business conduct, but also acknowledged the practical financial problems which such an order would cause for the respondent. The final order made no reference to the Blackman assets and excluded the McClintock assets to the extent that they were used in, but not peculiar to, the manufacture or distribution of commercial meat handling equipment. There was some indication that the Blackman assets were not ordered restored because the creation of a company in this single line of commerce[86] would be a hazard to the prospective investors, employees, and creditors of an enterprise with such limited chances of success.[87] In such a case the

83. In United States v. Hertz Corp., 1960 Trade Cas. ¶ 69762 (S.D.N.Y.), a consent decree required Hertz to release employees of the acquired concern at the time of acquisition from employment contracts and covenants not to compete, if the employee so desired.

84. In High Voltage Eng'r Corp., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 16361 (March 26, 1963), the decree stipulated that for one year H.V.E.C. could effectuate divestiture upon the condition that the buyer complete all H.V.E.C.'s existing contracts and accept responsibility for warranties and servicing contracted by H.V.E.C. prior to divestiture. If the buyer would not accept this, it was required to sell to H.V.E.C. parts and supplies at reasonable prices to enable H.V.E.C. to meet these obligations. In Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398 (Dec. 10, 1965), the respondent contended that divestiture of certain assets located in Hawaii would inflict a hardship upon it and would not be in the public interest because the Hawaii operations were part of respondent's commitment to the Department of Defense to furnish dairy products to American armed forces in the Far East. The FTC did not feel that divestiture would interfere with these interests, since Beatrice had not contended that its military commitments could not be fulfilled if divestiture were ordered.

85. TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879 (April 21, 1964).

86. Where a company has acquired assets used by the seller in only a single line of commerce, divestiture of such a limited product line may pose a financial hazard to the divested enterprise. In such a case, divestiture may not be required at all. *E.g.*, Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879 (April 21, 1964).

87. *Ibid.* In choosing to use Rule 3.24, discussed *supra* note 45, the Commission noted the possibility that "the cost of establishing a completely new company as a viable competitor in such a small industry as commercial meat-handling equipment

public interest must yield to the private interests involved. There was no similar indication, however, of the justification for limiting the scope of divestiture with regard to the McClintock assets. Undoubtedly, the respondent gained this concession through private informal negotiations, the more typical manner in which private interests achieve recognition.[88] As a result, the impact of private economic interests is haphazard and usually finds no reflection in published opinions, whether the case is litigated or terminated by a consent order. This is an unfortunate method of analysis in view of the usual inadequacy of partial divestiture, as contrasted with complete divestiture, in restoring the desired competitive state within an industry.

A hearing examiner once held that divestiture was mandatory upon a finding that section 7 had been violated.[89] Such a holding, which has since been retracted,[90] could have been rendered impotent merely by negotiating a consent decree or by dropping the issue at a point when it appeared that divestiture would be impracticable, as was done in *Ekco*. Nevertheless, that holding emphasized that every acquisition which violates section 7 results in the disruption of competitive conditions within an industry by the elimination of a competitor. As indicated by the preceding discussion, the Commission and the courts should ascertain the market share which must be attained by the divested company if the pre-merger competitive situation is to be affected as little as possible by the attempted merger. When the divested company is deliberately given assets that are quantitatively or qualitatively inadequate to meet the objective of full divestiture, the public interest in the restoration of competition usually remains unfulfilled. However, economic hardship, typically proportionate to the length of time between merger and decree, often forces a modification of the objective. If partial divestiture is to be decreed because of such factors,[91] it should be

might be undue, and the prospects for the survival of such a company might be remote." *Id.* at 21909.

88. For example, the original order in Fruehauf Trailer Co., 3 TRADE REG. REP. ¶ 17292 (July 19, 1965), required divestiture of two companies. This order was later modified without explanation, and only a single company was ordered divested. 3 TRADE REG. REP. ¶ 17446 (Feb. 11, 1966). See also Brillo Mfg. Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16746 (Jan. 17, 1964); Diamond Crystal Salt Co., TRADE REG. REP. (Transfer Binder, 1959-60) ¶ 28559 (Feb. 23, 1960) (consent order requiring divestiture of assets not mentioned in the complaint).

89. Warner Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15950 (June 13, 1962), *complaint dismissed, id.* ¶ 16405 (May 15, 1963).

90. For example, in Ekco Products Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16879, at 21909 (April 21, 1964), the Commission stated that "since divestiture may not, in the particular circumstances of this case, be an appropriate remedy, it is particularly important that the parties give consideration to other remedies . . . ."

91. Partial divestiture is not always defined with reference to the desired objective of the decree. In du Pont-General Motors II, 366 U.S. 316 (1961), partial divestiture described the degree of stock ownership to be divested. "Partial" divestiture of asset

rationalized by the court or the Commission[92] and a more limited market objective should be identified as a substitute.[93] This method of analysis does not deny that factors unrelated to the substantive violation limit both the existence and scope of divestiture; rather, it compels consideration and clarification of the competing forces. It would be helpful to all involved if such considerations were also spelled out in consent decrees. Eventually, increased understanding of the role of economic interests could contribute to a more uniform antitrust policy, as well as providing an element of foresight in the initial decision of whether to pursue a given case by issuing a complaint.

It is impossible to generalize concerning the proper recognition to be given private economic interests, beyond an acknowledgement of their demonstrated role. Certain observations, however, can be made. A compromise solution should be reached only after a consideration of *all* private interests. If, for example, particular assets are excluded from the order to ease the cost to a respondent, it should be recognized that the interests of potential employees, creditors, and investors in the divested concern may be infringed.[94] Not only may the proposed package of assets prove unsalable;[95]

acquisitions has usually been considered to be the divestment of less than all the assets acquired by the offending company. *Divestiture Problems in Merger Cases*, B.N.A. ANTITRUST & TRADE REG. REP. 196, B-1 (April 13, 1965). If "partial" divestiture is defined as the divestment of assets sufficient only to enable the divested company to attain a competitive position of less stature than that of the acquired company prior to the merger, this is not necessarily true. See text accompanying notes 53-54 *supra*.

92. One of the few cases in which a remedy of less than complete divestiture was explicitly discussed and justified was United States v. Continental Can Co., 1964 Trade Cas. ¶ 71264 (S.D.N.Y.). The court allowed Continental to retain two of the eleven plants originally divested, because of the potentially disastrous results of the sale of these plants upon the job security and related benefits of employees in the already distressed economic area.

93. See, *e.g.*, United States v. Lucky Lager Brewing Co., 1958 Trade Cas. ¶ 69160 (D. Utah), in which the consent decree provided that if the seller was unable to divest the illegally held assets, a provision would be substituted, setting a maximum percentage of the relevant market that could be captured by the offending company. Thirty-nine per cent of the beer consumed in Utah was the maximum amount that could be sold by the respondent, its affiliates, and its subsidiaries. See also Martin-Marietta Corp., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 16335 (March 12, 1963); Simpson Timber Co., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 15664 (Jan. 4, 1962). The ancillary measures discussed in note 26 *supra*, most notably the ban on future acquisitions in the relevant line of commerce, may well be the maximum remedy possible if the practical difficulties of unravelling a complex corporate structure prove insuperable.

94. Allied Stores Corp., 3 TRADE REG. REP. ¶ 17342 (Oct. 13, 1965), is an interesting example of the potential impact of divestiture upon innocent third parties. The order required divestiture of a property located in, and apparently the center of, a large shopping center. "[D]ivestiture shall duly take into account the interest of North Star Mall Inc., and of the other merchants in the . . . Center in the maintenance of the drawing power of the store and the effective operation of the shopping center as an integrated merchandising unit." *Id.* at 22500.

95. See note 69 *supra*. It should be recognized that provisions in the decree meant

purchase of those assets may be financially disastrous to the purchaser. Likewise, the economic impact of a compromise upon other competitors in the industry should be balanced against the cost of restoration to the acquiring company. An industry-wide attack upon growth through acquisition, as has recently occurred in the cement[96] and dairy[97] industries, makes such an overall comparison especially imperative. For example, Foremost Dairies was ordered to divest a fluid milk processing plant located in Abilene, Texas, because of the advantage its acquisition gave to the integrated operation over the smaller local dairies which had to ship their milk into Abilene from outlying areas.[98] The Borden Company, also in Abilene via acquisition, was the only competing dairy in a similarly advantageous position. The Commission proceeded against Borden separately, alleging that the acquisition of the Abilene plant was a violation of section 7. The consent decree that terminated the case did not require divestiture of that facility.[99] Thus, instead of two large dairies with cost advantages over local producers, Abilene was left with only one. This result not only raises questions concerning the propriety of individual adjudicative proceedings as a means of implementing a public interest with industry-wide significance,[100] but also emphasizes the need to consider all private interests involved before compromising the individual case.[101]

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to ensure that the restored company would be able to capture the desired market share—know-how, supply, and market provisions, *supra* note 54—also create a more salable entity, thereby decreasing the possibility that the public interest will be defeated because of the offending company's inability to sell the assets.

96. See Permanente Cement Co. & Glacier Sand & Gravel Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16885 (April 24, 1964), for a discussion of the situation in the cement industry.

97. Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17398 (Dec. 10, 1965); Borden Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16869 (April 15, 1964); Foremost Dairies, Inc., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16435 (May 23, 1963); National Dairy Prods. Corp., TRADE REG. REP. (Transfer Binder, 1961-63) ¶ 16282 (Jan. 30, 1963).

98. Foremost Dairies, Inc., *supra* note 97.

99. Borden Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16869 (April 15, 1964).

100. In Permanente Cement Co. & Glacier Sand & Gravel Co., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16885, at 21924 (April 24, 1964), the Commission stated that "in recognition that the problem of vertical integration in the cement industry through merger is of growing importance and urgency and has apparently assumed industry-wide dimensions," it would institute a Trade Regulation Rule proceeding under § 1.63 of the Commission's Procedures and Rules of Practice (effective August 1, 1963). This rule is based on a recognition that "where a problem involves an entire industry made up of a large number of firms, it may be uneconomical, inefficient, and inequitable to proceed exclusively on the basis of individual adjudicative proceedings. Industry-wide problems require, so far as is practicable, industry-wide solutions. . . . Such a proceeding affords a better forum than do adjudicative proceedings against individual companies for organizing and appraising the general economic facts involving industry and market structure that are so important under Section 7." *Ibid.* See also the dissent by Commissioner Elman in National Tea Co., 3 TRADE REG. REP. ¶ 17463, at 22702 (March 4, 1966).

101. The order originally entered in Foremost Dairies, Inc., TRADE REG. REP.

The justifiable cost impact of divestiture upon an offending company sometimes involves a delicate weighing of equities, some of seemingly dubious relevance. It has been intimated, for example, that a company which effectuates a merger after the Justice Department refuses to approve it, or after the company successfully resists a temporary injunction, will be given less favorable treatment than a more acquiescent respondent.[102] The propriety of this procedure is subject to question, especially with reference to the latter situation. It is difficult to perceive the relevance of the respondent's initial decision as to the legality of its acquisition to the determination of either the existence of the violation or the proper remedy. On the other hand, a long interval between purchase and prosecution would appear to be a relevant factor in defining the scope of the divestiture. Section 7 has no statute of limitations, but if the economic hardship visited upon a respondent is traceable to a delay in initiating proceedings, equitable considerations dictate accommodation of private interests to a somewhat greater extent by more readily resorting to alternatives to total divestiture.[103] Again, it would be helpful if such considerations were enumerated in both litigated orders and consent decrees.

IV. CONCLUSION

The time interval between a merger of two or more corporate entities and the entering of an order to divest the acquired concern provides both the source and the aggravation of the practical problems which inhibit effective enforcement of section 7. A mandatory pre-merger approval procedure would eliminate these problems; however, the impracticability of this solution has prevented its adoption. A milder alternative is a preliminary injunction[104] which, if granted, either blocks the merger pending disposition on the merits or allows it to be consummated on the condition that the acquired company be maintained as a separate business unit.[105] In either form, the

(Transfer Binder, 1963-65) ¶ 16435 (May 23, 1963), did not contain a ban on future acquisitions as did all other orders entered in suits brought against companies in that industry. However, the order in *Foremost* was later modified to include such a ban. TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 17217 (March 5, 1965). See generally *Industry-Wide Enforcement by the FTC*, B.N.A. ANTITRUST & TRADE REG. REP. 231, B-1 (Dec. 14, 1965).

102. See *Divestiture Problems in Merger Cases*, B.N.A. ANTITRUST & TRADE REG. REP. 196, B-1 (April 13, 1965).

103. *Cf.* ABC Vending Corp., TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16880 (April 15, 1964).

104. Section 15 of the Clayton Act vests the district courts with jurisdiction to prevent and restrain violations of the act at the suit of the Government, and provides that "before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1964).

105. The first success of preliminary relief was in United States v. Brown Shoe Co.,

granting of preliminary relief facilitates divestiture if that is ultimately deemed necessary. Because of doubts concerning its ability to seek preliminary relief, the FTC has not utilized this remedy;[106] the result has been that the Commission has been confronted with the troublesome issues of asset divestiture more frequently than has the Department of Justice. The foregoing discussion of the practical problems incidental to divestiture indicates that the unavailability of preliminary relief has not been an insuperable obstacle to effective enforcement of section 7 by the Commission, although intervening equities of private interests have sometimes dictated less than full relief.

Most of the questions surrounding the nature of the basic objective of asset divestiture and the identification of the practical limitations upon its use are unresolved, not because they seldom arise but because they are seldom discussed. This is unfortunate in view of the increasing use of divestiture and its importance in eliminating the anticompetitive effects of unlawful acquisitions. The courts and the Commission cannot, as a practical matter, detail the form of divestiture at the time the substantive doctrine to be applied in each case is formulated. This separation in time, however, should not serve as a rationalization for the present failure to confront the crucial issues directly and to provide needed guidance to those involved in the process of divesting unlawfully acquired assets. If the courts and Commission would define the objective of divestiture in terms of the creation of a new entity with a market potential adequate to restructure the competitive state of an industry in approximately its pre-merger condition, the critical issues concerning the qualitative and quantitative nature of the precise assets to be included in the decree could be resolved without losing sight of the substantive ills that divestiture is designed to eliminate. If this rule of thumb is to be modified in light of the peculiar facts of an individual case, the alteration should be explained in detail, whether the proceeding culminates in an order or a consent decree. Such a method of analysis would contribute to a uniform and fair administration of section 7, and would provide a basis for statistical study from which the success of the methods adopted could be measured

1956 Trade Cas. ¶ 68244 (E.D. Mo.), in which the district court declined to prohibit the acquisition but did grant a preliminary order imposing a number of conditions on the merger designed to maintain the separation and identity of the merging enterprises. The Justice Department makes frequent use of preliminary relief. *E.g.*, United States v. Pittsburgh Brewing Co., B.N.A. ANTITRUST & TRADE REG. REP. 234, A-2 (Jan. 4, 1966); United States v. Richfield Oil Corp., B.N.A. ANTITRUST & TRADE REG. REP. 234, A-5 (Jan. 4, 1966); United States v. Herff Jones Co., B.N.A. ANTITRUST & TRADE REG. REP. 231, A-20 (Dec. 14, 1965).

106. The doubts concerning the Commission's ability to seek preliminary relief were recently resolved by the Supreme Court. See text accompanying note 41 *supra*.

and analyzed. The varied practical problems that inevitably arise in anti-merger litigation would undoubtedly continue to limit the scope of divestiture in the individual case, but consideration and clarification of the roles played by the competing forces would be encouraged.

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