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Comment

Divestiture as a Private Remedy

I. INTRODUCTION

The Supreme Court of the United States declared in 1961¹ that divestiture should be considered a primary remedy² for violations of section 7 of the Clayton Act.³ Though this statement arose in the context of a government-pursued lawsuit,⁴ a steady stream of legal commentary since that time has asserted that private parties should be extended the remedy of divestiture.⁵ The need for private divestiture and its beneficial attributes are

1. See *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 331 (1961).

2. Justice Brennan, speaking for the Court, stated:

It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7 The very words of § 7 suggest that an undoing of the acquisition is a natural remedy Divestiture has been called the most important of the antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found. *Id.* at 328-31.

3. 15 U.S.C. § 18 (1976). See *infra* notes 15-16 and accompanying text.

4. The action was filed by the government under section 15 of the Clayton Act, 15 U.S.C. § 25 (1976), which has been interpreted as empowering the government to seek divestiture. See *infra* notes 97-105 and accompanying text.

5. See Guerrini, *Equitable Remedies in the Private Enforcement of Section 7 of the Clayton Act: Do Divestiture and Rescission Create a Panacea or Open a Pandora's Box?*, 12 LOY U. CHI. L.J. 427, 438 (1981); Kintner & Wilberding, *Enforcement of the Merger Laws by Private Party Litigation*, 47 IND. L.J. 293, 294 (1972); Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 TEX. L. REV. 54, 83 (1969); Turner, Halverson & Berger, *Symposium: Private Enforcement of the Antimerger Laws*, 31 REC. A.B. CITY N.Y. 239, 254-57 (1976); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act-Revisited*, 42 BROOKLYN L. REV. 80, 108 (1975) [hereinafter cited as *Private Divestiture Revisited*]; Comment, *Private Divestiture: Antitrust's Latest Problem Child*, 41 FORDHAM L. REV. 569, 604 (1973); Note, *The Use of Divestiture in Private Antitrust Suits*, 43 GEO. WASH. L. REV. 261, 286-87 (1974) [hereinafter cited as *Use of Divestiture*]; Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267, 283 (1964) [hereinafter cited as *Private Divestiture*]; 89 HARV. L. REV. 1247, 1253 (1976).

widely affirmed,⁶ yet no court in the sixty-eight year history of the Clayton Act has compelled a divestiture at the instance of a private party.

A substantial level of continuing merger activity⁷ and recent questions regarding the willingness of the Reagan Administration to enforce the antimerger laws⁸ serve to sharpen the interest in private enforcement by divestiture. The purpose of this comment is to probe the dilemma presented by private divestiture. In so doing, an effort is made to present an unbiased analysis of reasoning which opposes as well as supports adoption of the remedy.⁹

II. THE STATUTES

Section 16 of the Clayton Act provides that a private party¹⁰ is entitled to "injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . under the same conditions . . . as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . ."¹¹Section 16 supplements section 4 of the Clayton Act,¹² which provides the

6. See *infra* notes 123-39 and accompanying text.

7. See *1981 Merger Activity Sets Record in Numbers, Aggregate Dollar Volume*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1048, at 154 (January 21, 1982) (239 merger announcements in 1981, up 27% over the level of 1980).

8. See *FTC's Budget Drops 11%, Justice's Budget is Stable*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1051, at 308 (February 11, 1982) (Reagan Administration proposed an 11% cut in the budget of the Federal Trade Commission for fiscal 1983); *Justice Will Shut Down Field Office in Los Angeles, Reduce Size of Others*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1041, at A-3 (November 26, 1981) (due to budget cuts, 30 to 100 field office attorneys of the Antitrust Division are to be transferred to other positions); *Baxter Denies Responsibility for Increase In Merger Activity at Subcommittee Hearing*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1029, at A-16 (August 27, 1981) (former Federal Trade Commissioner testifies at congressional hearing that current merger wave is fueled by the perception of business "that the merger laws are not going to be enforced" as they were in previous administrations).

9. In all the legal commentary on this subject to date, the writers have concluded that private parties should be permitted to seek divestiture. See *supra* note 5. In so concluding the writers have presented persuasively but one side of the multifaceted dilemma concerned. Although the effort herein is intended to be unbiased, greater emphasis has been placed on the reasoning opposing private divestiture given its absence from the literature heretofore.

10. As used herein a private party is "any person, firm, corporation, or association . . ." Clayton Act § 16, 15 U.S.C. § 26 (1976).

11. *Id.*

12. 15 U.S.C. § 15 (1976).

private party with an action for treble damages to recover for injury to "his business or property by reason of anything forbidden in the antitrust laws" ¹³ The antitrust laws whose violation may give rise to a private cause of action in the case of an actual or impending illegal merger are section 7 of the Clayton Act and sections 1 and 2 of the Sherman Act. ¹⁴

Section 7 of the Clayton Act forbids the acquisition by one corporation of the stock or assets of another corporation where the effect "may be substantially to lessen competition, or to tend to create a monopoly." ¹⁵ The emphasis in section 7 on the probable rather than the actual efforts of an acquisition makes it of primary interest to both government and private parties seeking to attack a merger. ¹⁶ Section 1 of the Sherman Act, ¹⁷ by comparison, requires for proof of a violation a showing of an *actual* substantial lessening of competition by reason of the merger. ¹⁸ Section 2 of the Sherman Act, ¹⁹ which prohibits monopolization, attempts to monopolize, and conspiracies to monopolize, requires a demonstration of monopoly power and its willful acquisition by the defendant. ²⁰ Clearly, section 7 of the Clayton Act represents the plaintiff's most favorable vehicle for attacking a merger.

Hence, to be entitled to a section 16 remedy, a private party must show a violation of section 7 which threatens the party with loss or damage and circumstances such that a court of equity would grant relief.

III. THE CASE LAW

The latter half of the nineteenth century hosted great changes to the economy of the United States. ²¹ Post Civil War industrialization was marked by a shift to the corporation as the major

13. *Id.*

14. E. W. KINTNER, AN ANTITRUST PRIMER 99-100 (2d ed. 1973).

15. 15 U.S.C. § 18 (1976). The substantive law of section 7 is beyond the scope of this humble comment.

16. KINTNER, *supra* note 14, at 100.

17. 15 U.S.C. § 1 (1976).

18. National Soc'y. of Professional Eng'rs. v. United States, 435 U.S. 679, 691 (1978).

19. 15 U.S.C. § 2 (1976).

20. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

21. 1 H.A. TOULMIN, JR., A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES 93 (1949).

form of business enterprise. Thriving in an unregulated, capitalistic economy and unchecked by government interference, the corporate form gradually produced giants of economic and social power.²²

The transition from sole proprietorship and partnership forms of business to the corporate form of business also defined a concentration of wealth and power in the hands of a few individuals. The railroad pools, trusts, and holding companies which arose during the late 1800's exemplify this point.²³ Arbitrary business practices of a few powerful individuals impacted adversely on society in general and gradually induced a great clamor for government regulation. The antimonopoly sentiment culminated in passage of the Sherman Act in 1890, significantly, with but a single dissenting vote.²⁴

Although enforcement of the Sherman Act in the years immediately following its passage was slow in developing,²⁵ the availability of divestiture, or dissolution,²⁶ as a government remedy²⁷ for violations of the Act was never really questioned.²⁸ The

22. KINTNER, *supra* note 14, at 4-6.

23. *Id.* at 7-9.

24. *Id.* at 11.

25. *Id.*

26. Attempts have been made by writers and courts to distinguish substantively between the remedies of divestiture and dissolution, especially for the purpose of discrediting legislative history, *see infra* notes 65-68 & 111-14 and accompanying text, adverse to the remedy of private divestiture. *See, e.g.*, Guerini, *supra* note 5, at 433. It seems clear, however, that for the purposes of section 16 of the Clayton Act no such distinction should be made. Congressional records, *see International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 921 (9th Cir. 1975) (citing *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Congress, 2d Sess. 261, 492, 649-50, 1372-73 (1914)), and early court cases, *see, e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 78 (1911), indicate that the remedy then deemed appropriate to break up illegal combinations was dissolution. Dissolution was carried out by directing the transfer of stock held by the defendant trust back to the original stockholders, effectively divesting the trust of the illegally acquired stock. 518 F.2d at 923-24. There is no essential difference between the remedy of dissolution, as it was envisioned by Congress at the time of passage of the Clayton Act and applied to trusts and holding companies, and the remedy of divestiture, as it is now applied to illegal acquisitions. *Accord Wise, Three D's of Antitrust Enforcement*, 3 HOFFMAN'S ANTITRUST LAW AND TECHNIQUES 407-08 (M. Hoffman & A. Winard ed. 1963); *Private Divestiture*, *supra* note 5, at 270 n.21 (citing *OPPENHEIM, CASES ON FEDERAL ANTI-TRUST LAWS* 885 (1948)). Divestiture will be used hereafter to refer to dissolution as well as divestiture.

27. Sherman Act § 4, 15 U.S.C. § 4 (1976).

28. *See United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). *See generally* Adams, *Dissolution*,

first judicial decree of divestiture was handed down in 1899.²⁹ A series of decisions by the Supreme Court of the United States shortly thereafter affirmed the viability of the remedy.³⁰ The Clayton Act, enacted in 1914 as a reaction to lax enforcement and judicial interpretation of the Sherman Act,³¹ broadened the scope of corporate vulnerability to attack.³² The Clayton Act declared illegal stock acquisitions which had a probable effect of lessening competition.³³

Private enforcement of the antitrust laws by divestiture has never been quite so well received as government divestiture. In 1904, the Supreme Court held that Congress did not intend that the antitrust laws should be enforced by private actions seeking to prevent violations.³⁴ The congressional answer to the Court's holding was embodied in section 16 of the Clayton Act, which unequivocally granted a private right to injunctive relief for violation of any of the antitrust laws.³⁵ In *Venner v. Pennsylvania Steel Co.*,³⁶ however, the Court excluded divestiture from the reaches of section 16, holding that a *consummated* acquisition was not "threatened conduct"³⁷ within the meaning of section 16.³⁸ This distinction frequently arises in the opinion of courts denying the availability of private divestiture.³⁹

The judicial history of private divestiture abounds in confusion.⁴⁰ While many courts have considered the issue, compara-

Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 IND. L.J. 1 (1951).

29. Comment, *supra* note 5, at 581.

30. See *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

31. See KINTNER, *supra* note 14, at 11-13; Comment, *supra* note 5, at 583.

32. See *supra* notes 15-20 and accompanying text. Section 15 of the Clayton Act, 15 U.S.C. § 25 (1976), empowers the government to seek for violations of the Clayton Act, the same remedies sought under section 4 of the Sherman Act, 15 U.S.C. § 4 (1976). See *infra* notes 101-04 and accompanying text.

33. See *supra* text accompanying note 15.

34. *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904).

35. 38 Stat. 737 (1914) (as amended 15 U.S.C. § 26 (1976)).

36. 250 F. 292 (C.C.D.N.J. 1918).

37. Clayton Act § 16 (1976).

38. 250 F. at 296.

39. See *infra* notes 106-10 and accompanying text.

40. The judicial history of private divestiture is treated cursorily in this comment, in view of the substantial histories detailed by other writers. See Peacock, *supra* note 5, at 66-77; Comment, *supra* note 5, at 579-97.

tively few have thoughtfully analyzed the question in any depth.⁴¹ Courts finding private divestiture available have presumed its availability,⁴² interpreted the language of section 16 to clearly include divestiture,⁴³ and cited cases which themselves provide no authority for the conclusion.⁴⁴ Often the assertion is dicta.⁴⁵ Courts concluding that the remedy is unavailable have typically been equally unpersuasive. They have presumed its unavailability,⁴⁶ in dicta,⁴⁷ without argument.⁴⁸ They have assumed that no one would argue for its availability.⁴⁹ They have interpreted the language clearly to exclude the remedy.⁵⁰ Courts which have found the remedy available have most often declared it useful in only a limited range of cases where no other remedy is appropriate and thereafter determined it inappropriate in the situation at hand.⁵¹

41. See *infra* notes 61-77 and accompanying text.

42. See *Bay Guardian Co. v. Chronicle Publishing Co.*, 340 F. Supp. 76, 81-82 (N.D. Cal. 1972); *American Crystal Sugar Co. v. Cuban-Am. Sugar Co.*, 152 F. Supp. 387, 400-01 (S.D.N.Y. 1957), *aff'd.*, 259 F.2d 524 (2d Cir. 1958).

43. See *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *Alden-Rochelle, Inc. v. American Soc'y. of Composers, Authors and Publishers*, 80 F. Supp. 888, 898-99 (S.D.N.Y. 1948).

44. See *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780, 797 (S.D. Tex. 1971) (citing *Burkhead v. Phillips Petroleum Co.*, 308 F. Supp. 120 (N.D. Cal. 1970)); *Burkhead*, 308 F. Supp. at 126-127 (concurring with *Julius M. Ames Co.*); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 717 (D. Hawaii 1964) (citing *Am. Crystal Sugar Co.*), *aff'd. per curiam*, 401 F. 2d 182 (9th Cir. 1968).

45. See *Credit Bureau Reports, Inc.*, 358 F. Supp. at 797; *Bailey's Bakery, Ltd.*, 235 F. Supp. at 717; *American Crystal Sugar Co.*, 152 F. Supp. at 400-01.

46. See *Continental Sec. Co. v. Michigan Cent. R.R.*, 16 F.2d 378, 379-80 (6th Cir. 1926).

47. See *id.*

48. See *American Commercial Barge Line Co. v. Eastern Gas & Fuel Ass'n.*, 204 F. Supp. 451, 453 (S.D. Ohio 1962).

49. See *Graves v. Cambria Steel Co.*, 298 F. 761, 762 (C.C.S.D.N.Y. 1924).

50. See *Venner v. Pennsylvania Steel Co.*, 250 F. 292, 296 (C.C.D.N.J. 1918).

51. Only three courts have directed, at the instance of a private party, that a plan for divestiture be drawn. See *Treadway Cos. v. Brunswick Corp.*, 389 F. Supp. 996 (D.N.J. 1974), *rev'd and remanded sub. nom.* NBO Indus. Treadway Cos. v. Brunswick Corp., 523 F. 2d 262 (3d Cir. 1975); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 353 F. Supp. 1219 (C.D. Cal. 1973); *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 351 F. Supp. 1153 (D. Hawaii 1972), *rev'd. on this question*, 518 F.2d 913 (9th Cir. 1974). In three instances a district court actually ordered divestiture but later retracted. See *Calnetics Corp. v. Volkswagen of Am., Inc.*, 348 F. Supp. 606 (C.D. Cal. 1972); *American Crystal Sugar Co. v. Cuban-Am. Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y.), *aff'd.*, 259 F.2d 524 (2d Cir. 1958); *Alden-Rochelle, Inc. v. American Soc'y. of Composers, Authors and Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948). See generally *Private Divestiture—Revisited*, *supra* note 5, at 86-88.

In 1961, the Supreme Court rendered its decision in the case of *United States v. E. I. duPont de Nemours & Co.*,⁵² reversing the district court's determination that divestiture was not appropriate under the circumstances because of the severe economic detriment which would be forced upon duPont's stockholders.⁵³ The court characterized divestiture as the most important anti-trust remedy⁵⁴ and a remedy suggested by the language of section 7 of the Clayton Act.⁵⁵ The *duPont* case was a government-initiated lawsuit, but legal commentary⁵⁶ and courts alike⁵⁷ were quick to suggest the analogy to the private situation. The *duPont* Court's language lent some strength to the argument in favor of private divestiture. Encouraged by the steady stream of commentary that uniformly asserted the availability of private divestiture,⁵⁸ courts which considered the issue after *duPont* increasingly concluded that divestiture was available to private plaintiffs.⁵⁹ It seemed as though the confusion might finally give way to uniformity without need for guidance from the Supreme Court. Then came *ITT*.⁶⁰

In the most thoroughly considered judicial opinion to that date⁶¹ on the availability of private divestiture, the United States District Court for the District of Hawaii, in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp. (ITT)*,⁶² evaluated the precedent, the legislative history, and the policy and concluded not only that divestiture should be available to the private litigant, but also that it was appropriate in the present circumstances.⁶³ The court decreed that General Telephone & Electronics (GTE) should divest itself of certain subsidiaries. On appeal to the United States Court of Appeals for the Ninth Circuit, the decision of the district court

52. 366 U.S. 316 (1961).

53. *Id.* at 320-21.

54. *Id.* at 330-31.

55. *Id.* at 329.

56. See *Private Divestiture*, *supra* note 5, at 283.

57. See, e.g., *Burkhead v. Phillips Petroleum Co.*, 308 F. Supp. 120, 127 n.10, (N.D. Cal. 1970).

58. See *supra* note 5.

59. See 89 HARV. L. REV. 1247, 1249 & n.21 (1976).

60. *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913 (9th Cir. 1975).

61. 1972

62. 351 F. Supp. 1153 (D. Hawaii 1972).

63. *Id.* at 1211.

about the availability of divestiture was reversed.⁶⁴

Finding precedent unpersuasive and the statute's reference to "injunctive relief" ambiguous, the court of appeals referred to the legislative history of section 16 to interpret its meaning.⁶⁵ In hearings before the House Judiciary Committee, the court of appeals found colloquies among committee members and witnesses indicating that the term "injunctive relief" was not understood by the committee to encompass divestiture.⁶⁶ Although the court admitted that the intent of Congress on this matter was not clear,⁶⁷ the legislative history of section 16 embodied in the committee hearings was deemed sufficiently conclusive to support a holding that private parties were not entitled to the remedy of divestiture.⁶⁸ The court further concluded that the use of restrictive injunctions to achieve divestiture indirectly was equally repugnant to the statute.⁶⁹ The popular trend toward permitting private divestiture was thereby dealt an unexpected setback.⁷⁰

A response to the *ITT* decision was not long in coming. Four months after the *ITT* decision, the United States Court of Appeals for the Third Circuit, in *NBO Industries Treadway Cos. v. Brunswick Corp.*,⁷¹ criticized the approach of the *ITT* court in interpreting section 16. As in *ITT*, the lower court in *NBO* had ordered divestiture.⁷² Though the court of appeals ultimately found divestiture inappropriate in the present situation,⁷³ the court found it desirable to consider the reaches of section 16. An independent review by the *NBO* court of the legislative history

64. 518 F.2d at 920.

65. *Id.* at 921.

66. *Id.* at 922. The district court concluded that legislative material other than committee reports was inconclusive and, hence, disregarded the committee hearings, 351 F. Supp. at 1207 n.150.

67. 518 F.2d at 922.

68. *Id.*

69. 518 F.2d at 924. It is interesting to note that even though the court of appeals concluded that private parties could not seek divestiture, the court still felt compelled to show deference to Justice Brennan's oft-quoted remarks in *duPont*, see *supra* note 2 regarding the desirability of divestiture. *Id.* at 925.

70. One commentator concluded, prior to the court of appeals decision in *ITT*, that the case law trend had realized "its inevitable conclusion" with the granting of divestiture to private plaintiffs. Comment, *supra* note 5, at 597. Another speculated that "the authority to order divestiture under section 16 will ultimately be upheld." *Use of Divestiture*, *supra* note 5, at 268.

71. 523 F.2d 262 (3d Cir. 1975).

72. 389 F. Supp. at 1002.

73. 523 F.2d at 279. In other words, the court's discussion of divestiture was *dicta*.

of section 16 was found to be supportive of the conclusions of the *ITT* court.⁷⁴ The court of appeals in *NBO*, however, questioned the propriety of relying on legislative history dating to 1914 to control the contemporary interpretation of a statute setting forth fundamental economic policy.⁷⁵ Characterizing the antitrust laws as statements of general principle, the court suggested that the circumstances to which application of the statute is presently sought were dimly perceived at the time of its passage and that the antitrust laws should be given meaning on a case-by-case basis.⁷⁶ It should be noted, however, that the court declined to determine a rule about the availability of divestiture under section 16.⁷⁷

That same year, a United States District Court for the Southern District of New York, in *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*,⁷⁸ refused to dismiss a count of the plaintiff's complaint seeking divestiture.⁷⁹ After a brief review of the precedent and commentary, the court quoted extensively from the *NBO* opinion and characterized the hearings utilized by the *ITT* court to interpret section 16 as "inconclusive scraps of legislative history."⁸⁰ Emphasizing the traditional latitude given a court of equity in fashioning appropriate remedies and the merits of divestiture in an antitrust setting,⁸¹ the court concluded that divestiture was a potential remedy for private parties injured by violations of the Clayton Act.⁸² The United States Court of Appeals for the Second Circuit, in a subsequent decision,⁸³ reserved treatment of the issue for a future date.⁸⁴

74. *Id.* at 278.

75. *Id.*

76. *Id.*

77. *Id.* at 279. *NBO* is often misquoted as standing for the proposition that divestiture is available to private parties. See e.g., *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 402 F. Supp. 636, 638 (S.D.N.Y. 1975); Turner, Halverson & Berger, *supra* note 5, at 254.

78. 402 F. Supp. 636 (S.D.N.Y. 1975).

79. *Id.* at 640.

80. *Id.* at 639. The *Fuchs* court relied on the concurring opinion of Justice Jackson in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 396 (1951), to discredit the reliability of any legislative materials other than committee reports. *Id.*

81. The broad language of Justice Brennan in *duPont*, see *supra* note 2, was once again cited approvingly. 402 F. Supp. at 640.

82. 402 F. Supp. at 640.

83. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

84. *Id.* at 296 n.55 The district court recognized the divergence of opinion on the subject but concluded that divestiture was not appropriate in the pre-

The historical predilection⁸⁵ of the Southern District of New York for interpreting section 16 to include divestiture was again affirmed in *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*,⁸⁶ where the court refused to dismiss the plaintiff's claims under section 7 of the Clayton Act on the basis that divestiture is not available to a private party.⁸⁷ As in foregoing decisions on this issue, the court reviewed the decisions of other courts, particularly *ITT*, *NBO*, and *Fuchs*. Citing significant change in both the economy and the antitrust laws since the adoption of section 16, the court balanced the legislative history cited in *ITT* against "the effective realization of an important national policy" as embodied in the general purposes behind the antimerger law and concluded that divestiture should be available to private parties.⁸⁸

Hence, a certain momentum appears to be building in the courts toward permitting private divestiture despite the devastating blow dealt by the Ninth Circuit in 1975. Courts considering the issue since *ITT* and *NBO* have uniformly concluded, when a conclusion was necessary and sometimes when it was not, that a private party should be permitted the remedy of divestiture, or have recognized the dilemma and postponed the issue for future consideration.⁸⁹ Law review commentary on the issue has been scant since 1975.⁹⁰ It should be noted that no court of appeals has to date concluded that section 16 provides for divestiture. One should not be hasty in assuming the inevitability of this remedy.⁹¹

sent circumstances. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 428 (S.D.N.Y. 1978).

85. See *supra* notes 42, 43, 78 & 84 and accompanying text.

86. 467 F. Supp. 1016 (S.D.N.Y. 1979).

87. *Id.* at 1025.

88. *Id.*

89. The United States Court of Appeals for the Seventh Circuit, in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 1982-1 Trade Cases P64,507 (1/29/82), Nos. 81-1542, 81-1615, recognized the searching review of the legislative history made by the court of appeals in *ITT*, but declined to decide the issue in view of the inappropriateness of divestiture in the present case. *Id.* at P72,810. The United States Court of Appeals for the District of Columbia, in *Kansas Power & Light Co. v. Federal Power Comm'n.*, 554 F.2d 1178 (D.C. Cir. 1977), recognized the private divestiture issue as unsettled in that circuit, but chose not to resolve it. *Id.* at 1185 n.10.

90. See *supra* note 5.

91. See *supra* note 70.

IV. IS DIVESTITURE AVAILABLE UNDER SECTION 16?

A preliminary question in the analysis of this issue is whether section 16 includes the remedy of divestiture. This question is distinct from another question which is often addressed simultaneously without distinction, that is, whether divestiture *should be* available to private parties. The former question may be approached from two positions: first, whether the language of section 16 is amenable to the conclusion that divestiture is encompassed therein; and second, whether the legislative history of section 16 affords guidance in the interpretation of the statute.

A. *The Language of the Statute*

It is apparent that the language of section 16 has caused some confusion in the courts—whether justified or not.⁹² The first point for discussion is whether divestiture is a form of “injunctive relief . . . granted by courts of equity” within the meaning of section 16. It has been persuasively argued that “injunctive relief” is broad enough to encompass mandatory as well as prohibitive injunctions and that divestiture is merely a form of mandatory injunction.⁹³ The interpretation of “injunctive relief” as including divestiture is further strengthened by the historical development of the remedy, for divestiture has often been accomplished by a plurality of prohibitive injunctions.⁹⁴ The counter-interpretation arises from the failure of Congress to specify expressly in section 16 the remedy of divestiture. Divestiture and injunctive relief, in the ordinary usage of these terms, express distinct forms of relief.⁹⁵ Where divestiture is intended, it is most frequently stated in a form distinct from injunctive relief.⁹⁶

92. One may argue that the myriad of opinions regarding the language of section 16 results not from confusion about the language but rather an effort by some courts to rationalize their outcome determinative decision that divestiture should not be available to private parties. See Peacock, *supra* note 5, at 68.

93. See *Private Divestiture—Revisited*, *supra* note 5, at 86; *Private Divestiture*, *supra* note 5, at 278-79. See also Comment, *supra* note 5, at 588-90 (background on mandatory injunctions).

94. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. at 78.

95. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947) (“And so we assume that Congress uses common words in their popular meaning, as used in the common speech of men.”)

96. See, e.g., Kintner & Wilberding, *supra* note 5, at 299 (“The counterpart

However, section 15 of the Clayton Act,⁹⁷ the governmental counterpart to section 16, includes no reference to divestiture and yet has been interpreted to include the remedy.⁹⁸ Both courts⁹⁹ and commentators¹⁰⁰ have cited this anomaly and argued by analogy that the similar language of section 16 should be read impliedly to encompass divestiture. While the point made by this popular argument is well taken, other points are deserving of some consideration. First, the language of section 15 is identical, in all relevant aspects, with the language of section 4 of the Sherman Act.¹⁰¹ Because the Sherman Act was passed with an eye toward breaking up the large trusts,¹⁰² there was never any doubt that section 4 empowered the government to seek divestiture, despite the lack of specific reference to the remedy.¹⁰³ Sec-

to the equitable remedies of injunction and divestiture . . ."). *But see* United States v. Mrs. Smith's Pie Co., 378 F. Supp. 24, 24 (E.D. Pa. 1974) (speaking of divestiture, the court noted that "the only relief the government is seeking is an injunction.").

97. Section 15 states:

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

15 U.S.C. § 25 (1976).

98. *See* United States v. E. I. duPont de Nemours & Co., 366 U.S. 316 (1961).

99. *See, e.g.,* International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1204-05 (1972).

100. *See* Peacock, *supra* note 5, at 76; *Private Divestiture—Revisited*, *supra* note 5, at 85; Comment, *supra* note 5, at 583; *Private Divestiture*, *supra* note 5, at 277.

101. The only difference between the two sections is a service and summons sentence at the end of section 15 of the Clayton Act, 15 U.S.C. § 25 (1976).

102. *See* KINTNER, *supra* note 14, at 7-11.

103. *See* Standard Oil Co. v. United States, 221 U.S. at 30, 78.

tion 15 was drafted in the image of section 4 to extend the same governmental powers to the Clayton Act.¹⁰⁴ Second, the language of section 16 is not identical to the language of section 15. Where section 16 provides private parties with "injunctive relief", the Government, by section 15, is authorized to institute "proceedings in equity" by which violations of the Act may be "enjoined or otherwise prohibited." Recognizing that "proceedings in equity" is broader than "injunctive relief", one may wonder why, if Congress intended that private remedies should be coextensive with governmental remedies, the substantive language of section 4 was not employed in section 16 as it was in section 15. The interpretation of section 16 by analogy to section 15 is not as helpful as some have suggested.¹⁰⁵

The second point for discussion regarding the language of section 16 involves the consummated conduct rationale used by some courts to conclude that section 16 does not include the remedy of divestiture.¹⁰⁶ This rationale holds that because section 16 is directed to "relief . . . against *threatened* loss or damage" under the same conditions that a court of equity will grant "relief against *threatened conduct* that will cause loss or damage"¹⁰⁷ and because a completed merger between two corporations constitutes consummated conduct rather than threatened conduct, section 16 does not embody the remedy of divestiture. Many writers have argued vehemently that a completed (illegal) merger continues to threaten the plaintiff with loss or damage and that, hence, the consummate conduct rationale does not warrant the interpretation of section 16 to exclusive divestiture.¹⁰⁸ The issue is one of semantics, and although the statute is amenable to the interpretation suggested by past commentators, the intent of Congress to include divestiture as manifested by the statute on its face is not obvious. In common usage, "threatened loss or damage" and "threatened conduct that will cause loss or

104. Comment, *supra* note 5, at 583.

105. See *supra* note 100.

106. See, e.g., *Westor Theatres v. Warner Bros. Pictures*, 41 F. Supp. 757, 763 (D.N.J. 1941); *Graves v. Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924); *Venner v. Pennsylvania Steel Co.*, 250 F. 292, 296 (D.N.J. 1918).

107. Clayton Act § 16, 15 U.S.C. § 26 (1976) (emphasis added).

108. See Peacock, *supra* note 5, at 70-71; *Private Divestiture—Revisited*, *supra* note 5, at 85; Comment, *supra* note 5, at 590; *Private Divestiture*, *supra* note 5, at 279.

damage,"¹⁰⁹ taken together, refers to impending loss at a point in time prior to the onset of the loss.¹¹⁰ This language very plainly suggests a preliminary, prohibitive type of injunctive relief. The language of section 16 may well be interpreted to include divestiture, but an ordinary interpretation of the statute as a whole suggests otherwise. If section 16 cannot be said to be ambiguous on its face, neither can it be characterized as clear.

B. *The Legislative History*

The legislative history of section 16 presents a curious dilemma in the interpretation of the statute.¹¹¹ The controversy centers around the propriety of interpreting section 16 based on indications of the understanding of House Judiciary Committee members as found in hearing transcripts¹¹² of that committee. Committee reports accompanying the Clayton Act are devoid of any mention of the availability of private divestiture.¹¹³ Independent investigations of the hearings record have led to the conclusion that members of the House Judiciary Committee interpreted section 16 to exclude the remedy of divestiture.¹¹⁴ The United States Court of Appeals for the Ninth Circuit, in *ITT*,¹¹⁵ found this to be persuasive and conclusive evidence of congressional intent and excluded divestiture from the reaches of section 16.¹¹⁶ The United States Court of Appeals for the Third Circuit, in *Brunswick*,¹¹⁷ questioned the propriety of relying on the hearings cited in *ITT* to determine important national policy.¹¹⁸ The apparent conclusive nature of the committee hearings is

109. Clayton Act § 16, 15 U.S.C. § 26 (1976).

110. See *Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.) ("there is no canon [of statutory construction] against using common sense in construing laws as saying what they obviously mean.").

111. The commentary set forth here was derived from an analysis of the literature rather than an independent review of the legislative history.

112. *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. (1914).

113. *Use of Divestiture*, *supra* note 5, at 267 n.58; 89 HARV. L. REV. 1247, 1249.

114. See *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d at 920-22; *NBO Indus. Treadway Cos. v. Brunswick Corp.*, 523 F.2d at 278.

115. See *supra* notes 64-70 and accompanying text.

116. *Id.*

117. See *supra* notes 71-77 and accompanying text.

118. *Id.*

entitled to consideration and should not be cast aside as suggested by the *Brunswick* court.¹¹⁹ The problem arises in determining how much weight to accord that evidence. The absence of discussion of the issue in the committee report accompanying the bill¹²⁰ diminishes the persuasiveness of the hearings record and prevents the thoughts of the Judiciary Committee from being conclusively imputed to Congress. While one may quibble over the authority to be accorded a committee hearings record *vis-a-vis* a committee report,¹²¹ the legislative history of section 16, like the language of the statute,¹²² does not satisfactorily portray the scope of the statute. The inquiry must continue.

V. SHOULD DIVESTITURE BE AVAILABLE TO PRIVATE PARTIES?

Because the statute and its legislative history fail to solve the problem, the decision about whether divestiture should be granted under section 16 must ultimately be based on other factors. Before deciding how a judge should rule on the issue, it is instructive to reflect on the need for private divestiture within the framework of the antitrust laws and the policy considerations inherent in permitting private parties to seek divestiture.

A. *The Need for Private Divestiture*

According to the several legal commentators¹²³ who have considered the question, the present system of antitrust laws has certain inadequacies on which private divestiture will have a favorable impact.¹²⁴ These inadequacies may be distilled into four considerations. First, several writers have urged that government divestiture alone is inadequate to protect private parties because of limited governmental resources¹²⁵ and because the

119. See Turner, Halverson & Berger, *supra* note 5, at 258.

120. H.R.REP NO. 627, 63d Cong., 2d Sess. (1914).

121. See *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d at 921 (the district court and the court of appeals disagreed on the weight to be accorded the committee hearings).

122. See *supra* text accompanying note 11.

123. See *supra* note 5.

124. Inadequacies are to be distinguished from disadvantages. Inadequacies, as used herein, form the basis for a strong rationale for changing the status quo, while disadvantages and advantages may be used for comparatively distinguishing between two or more choices.

125. See *Use of Divestiture*, *supra* note 5, at 263; *Private Divestiture*, *supra* note 5, at 275.

government may choose not to act, despite the illegality, for reasons of its own.¹²⁶ Although private parties may file a complaint with the government, they have no inherent right to demand government action.¹²⁷ Hence, the private remedy of divestiture is deemed necessary to enable private parties to protect themselves. The assertion that resource limitations hinder government enforcement has been disputed by former government officials of the Antitrust Division and the Federal Trade Commission.¹²⁸ Furthermore, the complexities and finality associated with the remedy of divestiture may indicate that a government decision to forego prosecution should not be overruled by a private party having comparatively narrow interests. On the whole, the adequacy of governmental enforcement seems ill-suited for judicial evaluative procedures.

The second consideration suggested as an inadequacy in the status quo is the ineffectiveness of repressive injunctions as a substitute for divestiture.¹²⁹ One alternative to the use of divestiture is to restrict the voting rights in the acquired stock.¹³⁰ It has been suggested that while this limits the influence which an acquiring corporation may exert on the acquired corporation, it fails to diminish the desire to influence.¹³¹ Moreover, the acquired corporation's continued interest in the ultimate disposition of its stock may be a source of leverage for the acquiring corporation to achieve anti-competitive effects.¹³² The cumbersome enforcement procedure for injunctions has also been cited as an inade-

126. See Peacock, *supra* note 5, at 80-81; *Use of Divestiture*, *supra* note 5, at 263.

127. *Private Divestiture*, *supra* note 5, at 274.

128. See Turner, Halverson & Berger, *supra* note 5, at 241, 243 (statements of Donald F. Turner, Former Assistant Attorney General in charge of the Antitrust Division and James T. Halverson, Former Director, Bureau of Competition, Federal Trade Commission), *But see Private Divestiture—Revisited*, *supra* note 5, at 91 (quoting statement of Miles W. Kirkpatrick, Former Chairman of the Federal Trade Commission that the government has insufficient manpower "to deal with every competitive defect existing in every industry throughout the economy").

129. See Peacock, *supra* note 5, at 82; *Private Divestiture—Revisited*, *supra* note 5, at 96; *Use of Divestiture*, *supra* note 5, at 281.

130. It should be noted that voting restrictions are useful only in the case of stock acquisitions, not asset acquisitions. See *infra* notes 146-50 and accompanying text.

131. See Peacock, *supra* note 5, at 82.

132. *Id.*

quacy of that remedy.¹³³ The plaintiff must discover and prove each individual violation before a contempt order may issue, necessitating, in effect, a new trial for each alleged violation.¹³⁴ The shortcomings of injunctive relief other than divestiture approach the level of a rationale for adopting divestiture, apart from considerations of the effect of divestiture, only when the injunctive relief fails to adequately curtail the illegal activity to which it was directed. That injunctive relief may be more difficult to administer or less effective in general than divestiture is not disputed. These problems do not, in themselves, however, warrant adoption of private divestiture, but instead should be balanced against opposing considerations regarding divestiture.

A similar analysis applies to the third inadequacy cited in commentary—the failure of treble-damage awards to provide private parties with an adequate remedy. It has been suggested that treble-damage awards are rarely obtained, due to the cost to the plaintiff of conducting the litigation, the complexities of proving violation of the antimerger laws, and reliance on prior government successes.¹³⁵ In addition, the treble-damage action does not terminate a violation of section 7 of the Clayton Act, requiring additional litigation to fully compensate the aggrieved party.¹³⁶ To the extent that a treble-damage action does not provide an adequate remedy, the arguments are well taken. Treble-damage actions ordinarily are not appropriate in the case of unlawful mergers, but their inadequacy is not a singular rationale for change given the potential success of other remedies and procedures.

The final consideration regarding inadequacies in the present system of enforcement is that divestiture may be the only appropriate remedy under the circumstances.¹³⁷ This is perhaps the most compelling argument for permitting private divestiture. Section 7 of the Clayton Act is violated when the acquisition of one corporation by another may substantially lessen competition.

133. See *Use of Divestiture*, *supra* note 5, at 281.

134. *Id.*

135. See *Private Divestiture—Revisited*, *supra* note 5, at 95; *Private Divestiture*, *supra* note 5, at 273.

136. See *Private Divestiture—Revisited*, *supra* note 5, at 95.

137. See Turner, Halverson & Berger, *supra* note 5, at 254, 257; Comment, *supra* note 5, at 598; *Use of Divestiture*, *supra* note 5, at 279-80.

As Justice Brennan pointed out for the United States Supreme Court in *duPont*,¹³⁸ it seems quite natural to respond to this illegal act by severing the acquisition. In the case of stock acquisitions that are attacked with relative dispatch after the illegal act, it is difficult to quarrel with this assessment.¹³⁹ Where the acquisition involves comingled assets, or substantial delay by the plaintiff, the equities may shift in favor of the defendant. Even conceding that circumstances will arise where divestiture is the sole effective remedy, private divestiture may still be unwarranted. The country has amassed more than six decades under the Clayton Act without a single divestiture at the instance of a private party.

VI. FAVORABLE ASPECTS OF PRIVATE DIVESTITURE

Probably the most frequently cited benefit accorded private divestiture is the premise that private litigants, by supplanting government enforcement actions, may serve the public interest as well as their own.¹⁴⁰ The history and significance of these private attorneys general in the enforcement of the antitrust laws is well documented.¹⁴¹ Where the public interest is coextensive with the private interest, the public is well served by the private prosecutor whose divestiture action, although motivated by pecuniary gain, inures to the public good. Where there is not a one-to-one correspondence between public and private interests, the risk that the private prosecutor and likewise the court will overlook aspects of the divestiture which are detrimental to the public is increased.¹⁴²

A second favorable aspect accruing from private divestiture would be its deterrent effect on the consummation of mergers which border on illegality.¹⁴³ This is deemed especially significant

138. See *supra* note 2.

139. See Turner, Halverson & Berger, *supra* note 5, at 255-56 (suggesting a strict time limitation in terms of days for instituting a private divestiture action).

140. See *Private Divestiture—Revisited*, *supra* note 5, at 91; Comment, *supra* note 5, at 598; *Use of Divestiture*, *supra* note 5, at 263; *Private Divestiture*, *supra* note 5, at 272.

141. See *Private Divestiture*, *supra* note 5, at 272 n.35.

142. See *infra* notes 154-56 and accompanying text.

143. See Turner, Halverson & Berger, *supra* note 5, at 243; Comment, *supra* note 5, at 598.

with regard to smaller, less extensive businesses which might otherwise escape notice by the government.¹⁴⁴ The presence of a multitude of enforcers in every line of commerce in every section of the country may well serve to curtail some illegal activity.¹⁴⁵

A third point cited often in approval of private divestiture is the relative ease with which the remedy may be applied in the case of a takeover by stock acquisition.¹⁴⁶ The ease of application to stock acquisitions arises by contrast to the difficulties associated with divestiture of asset acquisitions. While both stock and asset acquisitions are covered by section 7 of the Clayton Act, asset divestitures are exceedingly difficult to implement.¹⁴⁷ Illegally acquired assets may be difficult or impossible to differentiate from assets not wrongfully acquired. Because a court is powerless to affect the latter type of asset, divestiture of an asset acquisition may not be feasible.¹⁴⁸ A stock acquisition, on the other hand, when attacked within a reasonable period of time after the takeover, seems particularly well-suited for private divestiture.¹⁴⁹ Because the acquisition is recently consummated, public and private interests are essentially coextensive.¹⁵⁰ With potential harm to the public negated and a violation of the antitrust laws proven, there is no sound reason in these circumstances for denying to a private party the remedy of divestiture.

Several favorable "side-effects" have occasionally been cited with regard to private divestiture. For one, the remedy deprives the defendant of the ill-gotten gains of its action.¹⁵¹ For another, divestiture, while never being a required remedy for any situa-

144. See Comment, *supra* note 5, at 598.

145. One might argue the enhanced significance of this factor given the indications by the Reagan Administration that enforcement of the antitrust laws is not a high priority. See *supra* note 8 and accompanying text.

146. See Peacock, *supra* note 5, at 79-80; *Private Divestiture—Revisited*, *supra* note 5, at 98.

147. See *Private Divestiture—Revisited*, *supra* note 5, at 98.

148. *Id.*

149. *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. at 328. See *supra* note 3.

150. Peacock, *supra* note 5, at 81.

151. See Peacock, *supra* note 5, at 82; *Private Divestiture—Revisited*, *supra* note 5, at 100. One might well query whether depriving the defendant of its illegal gain is not penal in nature and thus an improper consideration in the context of whether this civil remedy should be permitted.

tion, provides the court with flexibility in working out decrees aimed at restoring competition.¹⁵² Finally, in the case of a violation of section 2 of the Sherman Act, divestiture breaks up the defendant's monopoly power, restoring competition to the relevant market.¹⁵³

VII. PROBLEMS WITH PRIVATE DIVESTITURE

The policy considerations weighing against permitting private parties to seek divestiture, at least those considerations having the greatest merit, arise in one way or another from the absence of government participation in the litigation. Foremost among these is the potential conflict between private profit-seeking and preservation of the public interest.¹⁵⁴ The antitrust laws are a form of governmental regulation designed ideally to achieve and to maintain competitive conditions in the regulated market. Only incidentally do they recompense or reinstate an aggrieved competitor.¹⁵⁵ The public's interest in a competitive market is not necessarily well served by the decision of a business entity to seek divestiture in an action against a competitor. While the plaintiff in such a suit is necessarily a representative for all competitive entities within the particular market as well as the customers of that market,¹⁵⁶ it is unlikely that the plaintiff will represent before the court the point of view of all parties having an interest in the result. The absence of the government may well increase the volume of enforcement actions seeking divestiture at the expense of public interest.

Just as private divestiture may conflict with the public interest, so may it conflict with special interests of the government as well. One commentator cites as an example the potential conflict between government consent decrees and subsequent di-

152. See Turner, Halverson & Berger, *supra* note 5, at 243; Comment, *supra* note 5, at 600.

153. See *Private Divestiture—Revisited*, *supra* note 5, at 100.

154. See Peacock, *supra* note 5, at 78; Turner, Halverson & Berger, *supra* note 5, at 242-43; Comment, *supra* note 5, at 603; *Use of Divestiture*, *supra* note 5, at 283.

155. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for 'the production of competition, not competitors'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

156. See Comment, *supra* note 5, at 603.

vestiture actions by private parties.¹⁵⁷ Obvious disruptions in current antitrust procedures and policies may result from indiscriminate treatment of agreements between the government and business.¹⁵⁸ The potential frustration of a government policy to maintain high concentration in a vital industry has also been cited as a problem.¹⁵⁹ Again, the nature of the antitrust laws as a system of governmental regulation should prevent other private interests.¹⁶⁰ This is not to say that the particular problems cited above cannot be resolved in favor of permitting private divestiture; the point is that the divergence of interests creates a potential myriad of problems which may require greater attention than is available in the judicial forum.

A third problem which arises from the absence of government participation in the enforcement process is the loss of impartiality and discretion offered by the government as a neutral enforcer.¹⁶¹ The antimerger law is a broad statement of policy which the judiciary, through the guidance of the government, has interpreted in a series of simple and yet arbitrary rules.¹⁶² The acceptability and success of these rules depends upon the use of common sense in their enforcement. The government, by exercising prosecutorial discretion, may opt not to attack a borderline, but unlawful merger for reasons which it deems in the public interest.¹⁶³ In a private action a court would be forced to rely on its own procedures to guarantee the impartiality lost with the government. In an action seeking divestiture, often characterized as a harsh and drastic remedy,¹⁶⁴ the court may be ill-equipped to guarantee the neutrality of an impartial prosecutor. In addition, the government has developed very careful evaluative procedures involving legal and economic experts for determining when to proceed against a merger.¹⁶⁵

157. See *id.* at 602.

158. See *id.*

159. See Use of Divestiture, *supra* note 5, at 283.

160. See *supra* text accompanying notes 154-55.

161. See Turner, Halverson & Berger, *supra* note 5, at 241, 243; Comment, *supra* note 5, at 601-02.

162. Turner, Halverson & Berger, *supra* note 5, at 241.

163. *Id.*

164. See Peacock, *supra* note 5, at 77-78.

165. Turner, Halverson & Berger, *supra* note 5, at 243.

A final problem¹⁶⁶ regarding private divestiture is its potential interference with the development of the antimerger law.¹⁶⁷ Because private parties are uniformly interested in their own recovery, the arguments and policies which they urge on the courts in favor of their cause may lack the consistency of the government's approach in seeking to develop the law along certain lines. The government's approach is paramount inasmuch as the antitrust laws are fundamentally regulatory of the economy.¹⁶⁸ Furthermore, the absence of the government in a private divestiture action may promote judicial conservatism and thereby result in base case law.¹⁶⁹

VIII. CONCLUSION

Neither the language of the statute nor its legislative history indicates conclusively whether divestiture is a remedy provided to private parties by section 16 of the Clayton Act. Inadequacies in the government's mechanism for enforcing section 16 have been exposed by many writers and yet the lack of even a single private divestiture to date speaks strongly against the asserted needs. Powerful and complex issues of public policy, economics and law provide strong arguments for those who favor the remedy as well as those who oppose it.

Even recognizing the breadth of latitude traditionally given courts in determining antitrust policy,¹⁷⁰ the dilemma of private divestiture is not a matter for judicial interpretation; it is a matter of policy properly settled by the legislature. The legislature must determine the adequacy of government enforcement techni-

166. Problems cited in the commentary but deemed to be of little or no consequence include the harassment potential of a private divestiture action, *see* Peacock, *supra* note 5, at 81; Turner, Halverson & Berger, *supra* note 5, at 243; *Private Divestiture—Revisited*, *supra* note 5, at 93; Comment, *supra* note 5, at 602, the potential for a flood of litigation, *see* *Private Divestiture—Revisited*, *supra* note 5, at 93; Comment, *supra* note 5, at 602; *Private Divestiture*, *supra* note 5, at 281, and the inability of a court of equity to issue a mandatory injunction, *see* Peacock, *supra* note 5, at 72.

167. *See* Turner, Halverson & Berger, *supra* note 5, at 243.

168. *See supra* notes 154-55 and accompanying text.

169. Turner, Halverson & Berger, *supra* note 5, at 243.

170. *See* *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd. per curiam*, 347 U.S. 521 (1954) ("In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. . .").

ques and the effectiveness of alternative remedies. Only the legislature can properly balance the need for private attorneys general having the power to seek divestiture against the problems inherent in a divestiture action devoid of government support. The legislature is the proper body to limit private divestiture to the case of stock acquisitions, or to place a time limitation on the initiation of such an action, or to require that private divestiture actions be brought in the form of class actions. The issue of private divestiture is a question of policy which falls outside the province of the courts. Courts should decline to permit private parties to seek divestiture and patiently await a legislative response.

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