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## Antitrust Laws- Judicial Relief for Violations of Section Seven of the Clayton Act - Disenfranchisement in *United States v. E. I. du Pont de Nemours & Co.*

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## COMMENTS

ANTITRUST LAWS—JUDICIAL RELIEF FOR VIOLATIONS OF SECTION SEVEN OF THE CLAYTON ACT—DISENFRANCHISEMENT IN *United States v. E. I. du Pont de Nemours & Co.*—Government victory in establishing an antitrust violation brings economic victory only if the government can win the final battle for an effective relief decree. Yet this "most significant"<sup>1</sup> aspect of an antitrust case often receives comparatively little attention from the parties,<sup>2</sup> the courts<sup>3</sup> and legal writers.<sup>4</sup> The lack of judicial guides in a relief determination is especially keen with regard to corporate acquisitions of stock or assets which violate section 7 of the Clayton Act.<sup>5</sup> Because of this dearth of case authority, the recent district court decision in *United States v. E. I. du Pont de Nemours & Co.*<sup>6</sup> becomes extremely significant in indicating the problems that may arise in section 7 relief actions and the judicial process for their solution.

The court's discussion of remedies is particularly important at this time because of the current extensive use of amended<sup>7</sup> section 7 by both the Department of Justice and the Federal Trade Com-

<sup>1</sup> *United States v. United States Gypsum Co.*, 340 U.S. 76 at 89 (1950).

<sup>2</sup> See Adams, "Dissolution, Divorcement and Divestiture: The Pyrrhic Victories of Antitrust," 27 IND. L.J. 1 at 32 (1951).

<sup>3</sup> See Kilgore, "Antitrust Judgments and Their Enforcement," 5 A.B.A. REP., ANTITRUST SECTION, 102 (1954).

<sup>4</sup> On Sherman Act remedies, see REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 353-358 (1955); Adams, "Dissolution, Divorcement and Divestiture: The Pyrrhic Victories of Antitrust," 27 IND. L.J. 1 (1951); Oppenheim, Timberg and Van Cise, "Symposium—Divestiture as a Remedy Under the Federal Antitrust Laws," 19 GEO. WASH. L. REV. 119 (1950); and Marcus, "Patents, Antitrust Law and Antitrust Judgments Through Hartford-Empire," 34 GEO. L.J. 1 (1945).

<sup>5</sup> 38 Stat. 730 (1914), as amended by 64 Stat. 1125 (1950), 15 U.S.C. (1958) §18: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

<sup>6</sup> (N.D. Ill. 1959) 177 F. Supp. 1, probable jurisdiction noted, 28 U.S. LAW WEEK 3346 (1960) (hereafter referred to in the text as "du Pont" and in the footnotes as "principal case"). See also *United States v. E. I. du Pont de Nemours & Co.*, (N.D. Ill. 1954) 126 F. Supp. 235, holding that du Pont, General Motors, Christiana Securities Co. and Delaware Realty and Investment Co. had not violated §§1 and 2 of the Sherman Act and that du Pont had not violated §7 of the Clayton Act. But in 353 U.S. 586 (1957), the Supreme Court reversed the finding as to §7, holding that du Pont violated that section because its acquisition of General Motors stock tended to restrain trade and create a monopoly in the market for automotive fabrics and finishes; the Court remanded the case to the district court for determination of the appropriate relief. [The two preceding district and Supreme Court cases are hereafter referred to as *United States v. du Pont.*]

<sup>7</sup> See note 5 supra.

mission.<sup>8</sup> Although the commission and the courts do not consider themselves strictly bound by precedent in relief determinations,<sup>9</sup> they do need to establish general principles for their resolution of the peculiar factual problems of each section 7 case.

This comment will approach section 7 relief questions and solutions primarily in the light of *du Pont's* unique facts, which included a vertical stock acquisition made thirty years before the judicial proceeding<sup>10</sup> plus the complicating factors of vast financial interests,<sup>11</sup> numerous innocent investors<sup>12</sup> and several corporate interrelationships.<sup>13</sup> Thereby were posed complex problems regarding (1) parties to the relief determination, (2) interests to be affected by the decree and (3) the manner of affecting those interests.

## I. THE ALTERNATIVES AND THE COURT'S CHOICE: DISENFRANCHISEMENT

The government contended that complete divestiture of the General Motors stock illegally held by *du Pont* was mandatory under the Clayton Act and was necessary for effective relief. Its plan of divestiture included (a) distribution of the stock to *du Pont's* shareholders other than Delaware, Christiana and shareholders of Delaware<sup>14</sup> and (b) sale of both the stock allocable to

<sup>8</sup> For a summary of §7 developments since the 1950 amendment, see Handler, "Recent Developments in Antitrust Law: 1958-1959," 59 COL. L. REV. 843 (1959); Markham, "Merger Policy Under the New Section 7: A Six-Year Appraisal," 43 VA. L. REV. 489 (1957).

<sup>9</sup> See *United States v. National Lead Co.*, 332 U.S. 319 at 335 (1947); *United States v. Great Lakes Towing Co.*, (N.D. Ohio 1914) 217 F. 656 at 659.

<sup>10</sup> Most §7 complaints involve horizontal acquisitions and are heard by the FTC rather than the federal courts. See Markham, "Merger Policy Under the New Section 7: A Six-Year Appraisal," 43 VA. L. REV. 489 (1957). No prior case had involved more than a short time lapse between the acquisition and the complaint. See *United States v. du Pont*, 353 U.S. 586 at 589 (1957).

<sup>11</sup> *Du Pont* held 63,000,000 shares of General Motors with a market value of approximately \$3,500,000,000. See principal case at 13. Both corporations rank among the largest in the nation. FORTUNE DIRECTORY OF THE 500 LARGEST U.S. INDUSTRIAL CORPORATIONS, July 1956, p. 2

<sup>12</sup> No one of *du Pont's* 230,000 shareholders, General Motors' 700,000 shareholders and Christiana's 4,000 shareholders was found guilty of an antitrust violation. See principal case at 13.

<sup>13</sup> *Du Pont* owned 23% of the General Motors shares, constituting a majority vote at most General Motors meetings. Together Christiana and Delaware owned 30% of the *du Pont* common stock, giving them a majority vote at most *du Pont* meetings. Throughout the history of these four corporations, members of the *du Pont* family have served concurrently as officers and board members of several of the four. See *United States v. du Pont*, (N.D. Ill. 1954) 126 F. Supp. 235.

<sup>14</sup> Distribution was to be made through annual dividends of General Motors stock over a ten-year period, during which time a court-appointed trustee was to hold certificates representing the General Motors stock and to distribute proxies to non-restricted share-

the latter du Pont shareholders and that independently owned by Christiana.<sup>15</sup>

The alternative proposed by the defendants and the amici<sup>16</sup> called for partial divestiture<sup>17</sup>—du Pont retaining legal title to the General Motors stock but passing through all voting rights to its shareholders. Delaware and Christiana were in turn to pass through the voting rights to their shareholders.

The court's plan of relief adopted the basic idea in the defendants' proposal: disenfranchisement. The voting rights on the General Motors shares held by du Pont were passed through to its shareholders.<sup>18</sup> The court sterilized (1) votes passed-through to Christiana and Delaware, (2) votes on Christiana's independently-owned stock and (3) voting rights in any General Motors stock held by directors and officers of du Pont, Christiana or Delaware.<sup>19</sup> As ancillary relief the three corporations were prohibited from acquiring stock of General Motors and influencing its management,<sup>20</sup> and they and General Motors were enjoined from (a) having common directors, officers or employees, (b) making preferential business arrangements and (c) carrying on joint enterprises.<sup>21</sup>

## II. POWER TO AFFECT INTERESTS OF PARTIES AND NON-PARTIES

Section 15 of the Clayton Act<sup>22</sup> empowers the federal district courts to "prevent and restrain" section 7 violations. This general grant of power, identical to section 4 of the Sherman Act,<sup>23</sup> does not specify who are proper parties in the proceeding or what in-

holders of du Pont (those other than Delaware, Christiana and shareholders of Delaware). See principal case at 7-8.

<sup>15</sup> The court-appointed trustee was to sell the stock over a ten-year period for the account of these restricted du Pont shareholders, who were to have no voting rights in the stock during this period. Principal case at 7-8. The government claimed that this sale was necessary to prevent these shareholders from exerting control over General Motors to further du Pont's interests. *Id.* at 45.

<sup>16</sup> The court appointed amici curiae to represent the interests of du Pont and General Motors shareholders; their relief proposals corresponded to the du Pont plan except for more stringent injunctive provisions. See principal case at 6-9.

<sup>17</sup> "Partial divestiture" throughout this comment refers to a plan of disenfranchisement whereby legal title to the stock is retained by the violator but all voting rights on the stock are relinquished.

<sup>18</sup> See Final Judgment, (N.D. Ill.) Nov. 17, 1959, Provisions III, VI and VII.

<sup>19</sup> See Final Judgment, note 18 *supra*, Provisions III, VI, VII and X.

<sup>20</sup> See Final Judgment, note 18 *supra*, Provision III.

<sup>21</sup> See Final Judgment, note 18 *supra*, Provisions IV and V.

<sup>22</sup> 38 Stat. 736 (1914), 15 U.S.C. (1958) §25.

<sup>23</sup> 26 Stat. 209 (1890), 15 U.S.C. (1958) §4.

terests may be affected by the judgment. Although section 7 can be violated only by an acquiring corporation<sup>24</sup> and although the section's objective can ordinarily be accomplished by dealing only with that corporation, business affairs will not always present so simple a situation with a correspondingly simple solution—as *du Pont* has illustrated. An important question arises—can innocent persons be made parties to a section 7 proceeding and can their interests be affected by the court's decree?

### A. *Parties to a Relief Determination*

In *du Pont* three non-violators were parties to the relief proceeding: General Motors, the company whose stock was unlawfully held by *du Pont*, and Christiana and Delaware, influential shareholders of *du Pont*. The court's finding that these three corporations were at least proper parties to the relief determination<sup>25</sup> seems contemplated in the philosophy of the federal rules<sup>26</sup> and section 15,<sup>27</sup> and is consistent with the view in prior antitrust cases that those persons who have substantial interests which may be affected by the decree are proper parties to a relief proceeding.<sup>28</sup>

Assuming that the court deals directly with only the stock unlawfully held and the activities of the violator, its decision may have a substantial impact both on the acquired corporation and shareholders of the violator. The acquired corporation may be (1) limited in its contractual arrangements with the violator,<sup>29</sup> (2) restricted as to its directors,<sup>30</sup> (3) disabled from equity financing because of large volume sales of its stock<sup>31</sup> or (4) hindered in

<sup>24</sup> See note 5 *supra*.

<sup>25</sup> Although the district court did not directly face the question of whether these corporations could be retained as parties, since all three desired to remain before the court, it did assume the propriety of their being parties in considering the relief provisions affecting them. See principal case at 8. In denying the motion for dismissal of Christiana and Delaware, the Supreme Court squarely held that they should be retained as parties to the relief determination. *United States v. du Pont*, 353 U.S. 586 at 608 (1957).

<sup>26</sup> See Rule 20, Federal Rules of Civil Procedure, 28 U.S.C. (1958), permitting joinder as defendants of all persons against whom "there is asserted . . . any right to relief . . . arising out of . . . the same transaction. . . ."

<sup>27</sup> 38 Stat. 736 (1914), 15 U.S.C. (1958) §25.

<sup>28</sup> See, generally, *United States v. Columbia Gas Co.*, (D.C. Del. 1941) 36 F. Supp. 488; *Continental Ins. Co. v. United States*, 259 U.S. 156 (1922); *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922); *United States v. Reading Co.*, 226 U.S. 324 (1912); *United States v. Lake Shore & M.S. Ry. Co.*, (S.D. Ohio 1912) 203 F. 295.

<sup>29</sup> See *United States v. Imperial Chemical Industries*, (S.D. N.Y. 1952) 105 F. Supp. 215; *Continental Ins. Co. v. United States*, 259 U.S. 156 (1922).

<sup>30</sup> See *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

<sup>31</sup> See principal case at 51.

adopting corporate policies because of sterilization of votes on its stock.<sup>32</sup> Shareholders of the violator may lose the opportunity to buy stock disposed of by the violator<sup>33</sup> and may encounter adverse tax and market value experience on their stockholdings.<sup>34</sup> Thus, the shareholders and the acquired corporation have sufficient interests affected by the decree to be *proper* parties to a relief proceeding.

In addition, these non-violators are probably *necessary* parties in a complex relief determination like *du Pont*. Federal rule 19 (b)<sup>35</sup> requires joinder of persons "who ought to be parties if complete relief is to be accorded between those already parties." In *du Pont* the government's claim that special relief provisions against Christiana and Delaware, key shareholders of *du Pont*, were necessary to end the harmful effects of *du Pont*'s violation was approved by the court.<sup>36</sup> That these measures against non-parties could not be justified on a theory of representation of shareholder interests by the corporate violator was illustrated by the court's denial of special relief against *du Pont* shareholders who were also shareholders of Delaware;<sup>37</sup> this denial was properly based on the principle that a corporation does not adequately represent its shareholders when discriminatory treatment is sought against a class of shareholders.<sup>38</sup> Thus, when the government fears a perpetuation of anticompetitive pressures if illegally-acquired stock is distributed to key shareholders of the violator, these shareholders *must* be made parties to obtain that special relief against them necessary to effect complete relief in the case.

*Du Pont* also illustrates the necessity for making the acquired corporation a party to the relief proceeding. Where intricate restraints are to be placed on the voting rights of the violator, a provision requiring the acquired corporation to aid in effectuating

<sup>32</sup> See Final Judgment, (N.D. Ill.) Nov. 17, 1959, Provision VII, D, attempting to solve this problem in the *du Pont* case. See also *Northern Securities Co. v. United States*, 193 U.S. 197 (1904). Cf. *United States v. Crescent Amusement Co.*, 323 U.S. 173 at 190 (1944).

<sup>33</sup> *FTC v. Western Meat Co.*, 272 U.S. 554 (1926); *United States v. Union Pacific R. Co.*, 226 U.S. 470 (1912).

<sup>34</sup> See principal case at 51, and notes 73 and 74 *infra*.

<sup>35</sup> Fed. Rules Civ. Proc., 28 U.S.C. (1958). Compare *Fruit Growers Assn. v. FTC*, (7th Cir. 1921) 274 F. 205, finding a non-violator to be a necessary party, with *United Shoe Machinery Co. v. United States*, 258 U.S. 451 (1922), rejecting necessity of bringing in a non-violator.

<sup>36</sup> Principal case at 45. For the discussion of the court's power to decree these provisions against non-violators, see Section II-B of this comment.

<sup>37</sup> Principal case at 12.

<sup>38</sup> See *Baltimore, C. & A. Ry. v. Godeffroy*, (4th Cir. 1910) 182 F. 525.

these restraints will be highly desirable.<sup>39</sup> Since the decree requiring its ministerial aid will act directly upon the corporation it must be made a party to justify such a provision<sup>40</sup> and to achieve through it complete relief in the case.

In conclusion, this general proposition on party questions may be derived from the *du Pont* decision: where a section 7 case is too complex for the simple relief of direct disposition of illegally-held stock, persons other than the violator may be proper or even necessary parties to a section 15 relief proceeding.

### B. *Power To Affect Interests*

After deciding that four corporations were properly before it, the *du Pont* court faced the question of what interests of these parties could be affected by the decree and what interests of non-parties, if any, could be affected.

1. *Interests of Parties.* Clearly the court had power to order disposition of the stock illegally acquired<sup>41</sup> and to enjoin the violator from making further acquisitions.<sup>42</sup> It could also order the disposition to be made in such a way that no shareholder of the violator could obtain any shares being divested.<sup>43</sup> It could provide that the violator have no common director with the acquired corporation,<sup>44</sup> and it could direct the violator to modify its contractual arrangements with the acquired corporation as required to eliminate the anticompetitive effects of the acquisition.<sup>45</sup> As methods of policing the decree, the court could require the violator to submit compliance reports<sup>46</sup> and could grant visitorial rights to the government.<sup>47</sup>

As already indicated, remedial actions required of the violator would often affect the interests of innocent persons. Thus, the

<sup>39</sup> See *du Pont* Final Judgment, (N.D. Ill.) Nov. 17, 1959, Provision VI, for actions required of the acquired corporation. See also *Northern Securities Co. v. United States*, 193 U.S. 197 at 355 (1904).

<sup>40</sup> See *United States v. Lake Shore & M.S. Ry. Co.*, (S.D. Ohio 1912) 203 F. 295 at 318; *ICC v. Pennsylvania R. Co.*, 169 I.C.C. 618 at 642 (1934).

<sup>41</sup> *United States v. Union Pacific R. Co.*, 226 U.S. 470 (1912).

<sup>42</sup> See *Hartford-Empire Co. v. United States*, 323 U.S. 386 at 425 (1945); *Northern Securities Co. v. United States*, 193 U.S. 197 at 355 (1904).

<sup>43</sup> See cases cited note 33 *supra*.

<sup>44</sup> See *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *United States v. Columbia Gas Co.*, (D.C. Del. 1941) 36 F. Supp. 488.

<sup>45</sup> See cases cited note 29 *supra*.

<sup>46</sup> *Hartford-Empire Co. v. United States*, 323 U.S. 386 at 433 (1945); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

<sup>47</sup> *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

shareholders of the violator would lose the right to buy the stock disposed of, and the acquired corporation would lose the right to make certain types of contracts with the violator. But the federal courts have held that such indirect effects on non-violators are proper if the court finds them necessary to "prevent and restrain" an antitrust violation.<sup>48</sup>

In addition, however, the *du Pont* court granted many of the government's requests for *direct* relief against the three non-violators.<sup>49</sup> The court had little guidance for its decision since the Clayton Act is silent on whether the court can so affect non-violators,<sup>50</sup> and there are few cases with the complex facts which would raise this question.<sup>51</sup> In fact, in relatively few cases have the courts even granted substantial "indirect" relief against innocent persons.<sup>52</sup>

Congress has power under the commerce clause of the Constitution to affect interests of these persons.<sup>53</sup> Although it has not expressly exercised this power, the generality of section 15 by inference authorizes the courts to affect non-violators whenever necessary to protect the public from the harm of a Clayton Act violation.<sup>54</sup>

More specifically, it appears that the acquired corporation may be directly acted upon where a contract for sale of stock is executory;<sup>55</sup> and, even if the sale has been executed, it seems reasonable

<sup>48</sup> See *FTC v. Western Meat Co.*, 272 U.S. 554 (1926); *United States v. Union Pac. R. Co.*, 226 U.S. 470 (1912); and *United States v. Columbia Gas Co.*, (D.C. Del. 1941) 36 F. Supp. 488, affecting shareholders; *United Shoe Machinery Co. v. United States*, 258 U.S. 451 (1922), affecting lessees; *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), affecting acquired corporations.

<sup>49</sup> See section II of this comment *supra*. See also principal case at 47, where the court expressed doubt as to its power to grant such relief.

<sup>50</sup> 38 Stat. 736 (1914), 15 U.S.C. (1958) §25.

<sup>51</sup> See *United States v. Columbia Gas Co.*, (D.C. Del. 1941) 36 F. Supp. 488; *Continental Ins. Co. v. United States*, 259 U.S. 156 (1922); *United States v. Lake Shore & M.S. Ry. Co.*, (S.D. Ohio 1916) 281 F. 1007.

<sup>52</sup> See cases cited note 48 *supra*.

<sup>53</sup> See *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

<sup>54</sup> See cases cited note 51 *supra*. Cf. *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922); *United States v. Reading Co.*, 226 U.S. 324 (1912); *In re Consolidated Electric Co.*, (D.C. Del. 1944) 55 F. Supp. 211 at 216, where the court stated that "rights of security holders may be altered and adjusted to the extent necessary to effectuate the object and purposes of compliance with the antitrust laws."

The *du Pont* court held that §15 authorized relief against non-violating defendants "not because they have violated the statute but because the . . . relief is an appropriate and necessary exercise of the power of this court to . . . dissipate the consequences of the stock acquisition found to be unlawful." Principal case at 12.

<sup>55</sup> See *United States v. Bethlehem Steel Corp.*, (S.D. N.Y. 1958) 168 F. Supp. 576, and *United States v. Brown Shoe Co.*, (E.D. Mo. 1956) CCH Trade Cas. ¶68,244 (1956) and ¶69,532 (1959).



to require that corporation to help carry out a decree in a ministerial capacity. Perhaps since the court could indirectly regulate qualifications for its board of directors and limit its contractual relations with the violator,<sup>56</sup> the court should be able to do so directly if the corporation is before it. Finally, the acquiring corporation may have developed habits of cooperation with the management of the acquired corporation which are keystones of the competitive harm from the acquisition.<sup>57</sup> To eliminate this "community of interest" effectively, direct action against both corporations may be required.

On the other hand, the fact that the acquired corporation should be a party to protect its interests from indirect interference in the decree does not mean that direct measures against these interests are necessarily justified. While direct measures ensure greater likelihood of the desired result, they also may operate harshly on the acquired corporation by subjecting it to the business uncertainty which accompanies an injunction.<sup>58</sup>

Somewhat different is the problem of relief against certain important shareholders of the violating corporation, who, like the acquired corporation, are innocent parties. The courts have recognized that a substantial, or even controlling, shareholder is not necessarily a co-violator with the corporation<sup>59</sup> and that there may be no substantial danger in distributing the illegally-acquired stock to such shareholders.<sup>60</sup> However, the courts have also realized that a distribution to shareholders may not end the unlawful effects of the acquisition,<sup>61</sup> for a few large shareholders may exert continued pressure on the acquired corporation through the shares that they obtain.<sup>62</sup> This problem of shareholder pressure will arise only when sale of the stock allocable to key shareholders is not feasible, so that the stock must be distributed to them.<sup>63</sup>

<sup>56</sup> See cases cited notes 29 and 30 supra.

<sup>57</sup> See *United States v. Imperial Chemical Industries*, (S.D. N.Y. 1952) 105 F. Supp. 215 at 237; *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333 at 394.

<sup>58</sup> See Brown, "Injunctions and Divestiture," 5 A.B.A. REP., ANTITRUST SECTION, 129 (1954).

<sup>59</sup> See *United States v. Aluminum Co. of America*, (2d Cir. 1945) 148 F. (2d) 416 at 441.

<sup>60</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

<sup>61</sup> *United States v. Union Pacific R. Co.*, 226 U.S. 470 (1912).

<sup>62</sup> For the difficulty in establishing that a group of shareholders will act in concert and will have the power to control or influence a corporation, see principal case at 46; *United States v. du Pont*, (N.D. Ill. 1954) 126 F. Supp. 235 at 239; *United States v. Aluminum Co. of America*, (2d Cir. 1945) 148 F. (2d) 416.

<sup>63</sup> See principal case at 51.

The court should then place such restrictions as are necessary on the activities of these shareholders.<sup>64</sup> Voting restrictions on the distributed stock or restraints on the use by shareholders of their position to influence the acquired corporation would seem necessary. Prohibiting common directors might also be a reasonable limitation. However, limitations on rights in shareholders' independently-owned stock of the acquired corporation and regulations on their business relations with it are of doubtful reasonableness. Since a sale of the shares allocable to them would leave their own shares untouched, a distribution of stock to them with sufficient limitations should make restrictions on rights in their own stock unnecessary.

Yet in *du Pont* restrictions were placed on Christiana's independently-held shares of General Motors, although the distribution to it of votes on the *du Pont*-held shares was not only limited but actually nullified by a sterilization of these votes.<sup>65</sup> It therefore appears that the court was using a broader concept than reasonable limitations on a stock distribution to justify action against key shareholders of the violator.<sup>66</sup> In determining the necessary relief it saw *du Pont*, Christiana and Delaware as a single force—a corporation and its corporate shareholders united by a common design and common management.<sup>67</sup> It looked through *du Pont* as a separate corporate entity to the corporations controlling it, and through the latter to the individuals controlling them, and then directed its relief against the activities of this entire group.<sup>68</sup> Other courts have ignored the form of separate corporate entities and have taken substance into account in framing their antitrust decrees.<sup>69</sup> This realistic approach, necessary to ensure effective anti-

<sup>64</sup> Cf. *In re Consolidated Electric Co.*, (D.C. Del. 1944) 55 F. Supp. 211; *Continental Ins. Co. v. United States*, 259 U.S. 156 (1922).

<sup>65</sup> Final Judgment, Nov. 17, 1959, Provision VI, A. See principal case at 47, where the court granted the sterilization as "appropriate," while doubting its authority to do so. Since this measure was not found "necessary" to end the harm from *du Pont*'s stockholding, it seems improper.

<sup>66</sup> It found its §15 powers authorized any action against non-violators which was necessary and appropriate to eliminate the unlawful effects of the acquisition. See principal case at 12.

<sup>67</sup> Although the government had failed to establish that Christiana and Delaware would act in concert to control General Motors, certain relief measures against them were appropriate "because of their substantial stock interest in *du Pont*, and because of the long-standing close relationship between these two companies and the management of *du Pont*." Principal case at 45-46.

<sup>68</sup> See *du Pont* Final Judgment, (N.D. Ill.) Nov. 17, 1959, Provision VI, A, running against the management group in the three corporations, and note 67 *supra*.

<sup>69</sup> See *United States v. Aluminum Co. of America*, (2d Cir. 1945) 148 F. (2d) 416 at 441; *United States v. Union Pacific R. Co.*, 226 U.S. 470 (1912).

trust relief,<sup>70</sup> will generally be used whenever there is a probability<sup>71</sup> that shareholders of the violator will act to nullify the aim of the decree.

The *du Pont* decision has pushed the exercise of power over non-violators to its far limits. Although it is difficult to imagine that Congress contemplated this breadth in its grant of jurisdiction, it seems that a reasonable basis for power does exist in the generality of the section 15 grant of remedial power. Thus, under section 15 as it stands today, judicial power will be limited only by what is necessary to carry out the aims of the Clayton Act, thereby permitting the courts to affect interests of non-violators in the extraordinary cases like *du Pont*.

2. *Interests of Non-Parties.* As already indicated, the courts deem themselves empowered to affect indirectly certain interests of those not parties to a relief determination. For instance, sales of the divested stock by the violator to its shareholders may be enjoined. Similarly, the violator can be prevented from having as officers persons with key positions in other corporations. In these situations the courts consider the interests of the shareholders or officers as represented by the corporate violator.<sup>72</sup>

Even more indirect effects than these may be allowed when the corporation does not adequately represent the shareholder interests involved. For example, the manner of disposition of the illegally-held stock may have adverse tax effects<sup>73</sup> upon shareholders of the violator and may inflict market value losses<sup>74</sup> upon shareholders of both the acquiring and acquired corporations. Yet adequate representation on the disposition question by the corporations is unlikely since (1) these matters deal with *individual* interests of shareholders, related to their stockholdings but separate

<sup>70</sup> See government litigation against the Reading Co. in *United States v. Reading Co.*, 226 U.S. 324 (1912); *United States v. Reading Co.*, 253 U.S. 26 (1920); and *Continental Ins. Co. v. United States*, 259 U.S. 156 (1922), as an example.

<sup>71</sup> The courts have demanded stronger evidence of shareholder control over a corporation to establish a violation by shareholders than to authorize relief provisions against shareholders. See principal case; *United States v. du Pont*, (N.D. Ill. 1954) 126 F. Supp. 235; *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333; *United States v. Aluminum Co. of America*, (2d Cir. 1945) 148 F. (2d) 416. See also presumption for government on relief questions, *Local 167 v. United States*, 291 U.S. 293 at 299 (1934).

<sup>72</sup> See *United States v. Pullman Co.*, (E.D. Pa. 1943) 50 F. Supp. 123 at 136; *United States v. Columbia Gas Co.*, (D.C. Del. 1941) 36 F. Supp. 488 at 495; *United States v. Union Pacific R. Co.*, 226 U.S. 470 (1912).

<sup>73</sup> Principal case at 15-21 and 51.

<sup>74</sup> Principal case at 42 and 51.

from corporate affairs<sup>75</sup> and (2) there will be a wide variation in tax effects on different types of shareholders.<sup>76</sup>

Although the courts have felt that these collateral effects of a decree do not call for direct representation, they have tried to take such non-party interests into account in determining what mode of relief is most advisable,<sup>77</sup> as for example in *du Pont* by the appointment of two amici curiae<sup>78</sup> to inform the court of the effects that proposed relief might have on General Motors and *du Pont* shareholders. Such a device is helpful by providing for full consideration of shareholder interests without the problems of organizing shareholder representatives, of having disproportionate representation of certain shareholder classes,<sup>79</sup> and of arousing the prejudice against intervening parties in antitrust cases.<sup>80</sup> Although probably unnecessary in the ordinary section 7 case, this device is advisable in the complex case where there will be serious repercussions on innocent persons from any plan of relief adopted.

Another method for dealing with non-party interests was employed in *du Pont* to sterilize the voting power of certain individuals not before the court. The decree provided that all persons "who are directors or officers of *du Pont*, *Christiana* or *Delaware*, and the members of the family of any such director or officer who reside in the same household" are enjoined from voting any General Motors stock.<sup>81</sup> The court avoided the question of its power to affect so directly voting rights of non-parties inadequately represented by any party<sup>82</sup> by requiring the corporate parties to obtain written consents to the decree from the non-parties affected.<sup>83</sup> By using the corporate parties as the means of obtaining consents to

<sup>75</sup> See principal case at 12.

<sup>76</sup> See different impact from stock distribution upon individual, corporate and tax-exempt *du Pont* shareholders, principal case at 51.

<sup>77</sup> *United States v. American Tobacco*, 221 U.S. 106 at 185 (1911).

<sup>78</sup> Principal case at 6. See also *United States v. Columbia Gas Co.*, (D.C. Del. 1941) 36 F. Supp. 488 at 492, utilizing this same method.

<sup>79</sup> On these shareholder representation problems, see Fennell, "The Representation of Security Holders' Interests Under Section 77," 7 LAW AND CONTEMP. PROB. 474 (1940).

<sup>80</sup> The courts have been reluctant to allow intervention of private parties in antitrust cases under rule 24. See HALE AND HALE, MARKET POWER—SIZE AND SHAPE UNDER THE SHERMAN ACT 381 (1958); *United States v. Bendix Home Appliances*, (S.D. N.Y. 1949) 10 F.R.D. 73 at 75-77; *United States v. Paramount Pictures*, 354 U.S. 131 at 177-178 (1948).

<sup>81</sup> Final Judgment, (N.D. Ill.) Nov. 17, 1959, Provision VI, A.

<sup>82</sup> The corporate parties did not adequately represent these corporate officials on questions relating to their individual voting rights as General Motors shareholders, as distinct from their official actions for the corporations. See principal case at 12.

<sup>83</sup> Final Judgment, note 81 supra, Provision X, enjoined *du Pont*, *Christiana* and *Delaware* from having as an officer or director any person who did not file the consents of himself and his family to be bound by the voting provisions of the decree.

necessary restrictions on the management group, the court can achieve the relief necessary for the public economic welfare in a complex section 7 situation without facing the section 15 power question<sup>84</sup> and without the inconvenience of bringing in numerous additional parties.

### III. GENERAL PRINCIPLES CONCERNING THE MODE OF RELIEF

In the usual section 7 case an order that the violator sell the shares or distribute them to its shareholders removes the harmful effect of an acquisition. But *du Pont* illustrates a case where this simple solution will have serious disadvantages—a case where the court must directly face the question whether complete disposal of the stock is the proper, or even required, mode of relief.

#### A. Complete Divestiture as a Mandatory Remedy

There are three general types of judicial measures affording antitrust relief: (1) the simple prohibitory injunction, (2) the regulatory injunction and (3) dissolution, divorcement or divestiture.<sup>85</sup> Before determining which of these measures were appropriate in the light of the *du Pont* facts, the court had to dispose of the government's contention that the third type—divestiture—was mandatory in section 7 cases.<sup>86</sup> The government argued that (1) divestiture is mandatory in relief granted by regulatory commissions under section 11 of the act<sup>87</sup> and (2) the courts acting under section 15 are bound by section 11 requirements.

1. *Divestiture by Regulatory Commissions Under Section 11.* Several factors support the government contention that complete divestiture is mandatory under section 11: (a) use in the section of the impliedly mandatory verb "shall";<sup>88</sup> (b) the commissions' practice of ordering complete divestiture;<sup>89</sup> and (c) pre-enactment

<sup>84</sup> See the denial of relief against unrepresented *du Pont* shareholders, principal case at 12. And see rule 19(b), Fed. Rules Civ. Proc., 28 U.S.C. (1958).

<sup>85</sup> See Brown, "Injunctions and Divestiture," 5 A.B.A. REP., ANTITRUST SECTION, 129 (1954).

<sup>86</sup> The court held that federal courts are not compelled to order complete divestiture under §15, and declined to decide whether §11 requires an agency order of divestiture. Principal case at 15-16.

<sup>87</sup> 38 Stat. 734 (1914), 15 U.S.C. (1958) §21.

<sup>88</sup> Section 11 provides that upon finding a section 7 violation "the Commission . . . shall issue . . . an order requiring such person to cease and desist from such violations, and divest itself of the stock. . . ."

<sup>89</sup> See Vanadium-Alloys Steel Co., 18 F.T.C. 194 (1934); *FTC v. Western Meat Co., Swift & Co. v. FTC, Thatcher Mfg. Co. v. FTC*, 272 U.S. 554 (1926); *Aluminum Co. of America v. FTC*, (3d Cir. 1922) 284 F. 401.

statements by senators in terms of taking the stock away from the violator.<sup>90</sup>

These factors do not necessarily establish a congressional intent to *require* an order of divestiture. Neither congressional debates<sup>91</sup> nor administrative practice<sup>92</sup> are conclusive as to the proper interpretation of a statute. Furthermore, the regulatory agencies have in several cases attempted to effect relief with a flexibility beyond the usual direct sale,<sup>93</sup> and the FTC has consented to such flexible decrees.<sup>94</sup> Finally, the word "shall" itself is not determinative of whether a provision is mandatory.<sup>95</sup>

Congress may well have specified divestiture as an agency remedy merely to make clear that this relief measure is within the agencies' *permissive delegated powers*.<sup>96</sup> The fact that Congress provided for the FTC to act as a master to recommend a decree to the courts in section 7 cases<sup>97</sup> clearly indicates that Congress considered the FTC competent to work out the flexible decrees authorized under the courts' equitable powers. And the authority to use a similar flexibility in its own orders may be impliedly granted in the phrase of section 11 providing for divestiture "in the manner" the commission fixes in its order.<sup>98</sup> Therefore, the proposition that regulatory agencies have no power to order a mode of partial divestiture in the complex situation like *du Pont* is of doubtful validity.

2. *Divestiture by the Federal Courts Under Section 15.* Even if the federal regulatory agencies must order complete divestiture, it does not necessarily follow that the courts, authorized to remedy section 7 violations under the broad language of section 15,<sup>99</sup> are bound by the limitations on these agencies. This section is identical to section 4 of the Sherman Act, which has been interpreted to

<sup>90</sup> 51 CONG. REC. 14328 (1914).

<sup>91</sup> See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

<sup>92</sup> *United States v. du Pont*, 353 U.S. 586 at 611 (1957).

<sup>93</sup> See *ICC v. Baltimore & Ohio R. Co.*, 183 I.C.C. 165 (1932); *N.Y., Chicago & St. Louis R. Co.*, I.C.C. Finance Docket No. 17883 (order of Aug. 26, 1958).

<sup>94</sup> See *In re Vendo Co.*, CCH Trade Reg. Rep. ¶26,724 (1958); *Union Bag & Paper Co.*, CCH Trade Reg. Rep. ¶25,999 (1957); *International Paper Co.*, CCH Trade Reg. Rep. ¶25,560 (1957); *Scoville Mfg. Co.*, CCH Trade Reg. Rep. ¶26,606 (1956).

<sup>95</sup> *Hecht Co. v. Bowles*, 321 U.S. 321 (1944).

<sup>96</sup> The necessity for specifically granting permissive powers to the FTC is illustrated in *Thatcher Mfg. Co. v. FTC*, 272 U.S. 554 (1926).

<sup>97</sup> 38 Stat. 717 (1914), 15 U.S.C. (1958) §47. Cf. *United States v. International Salt Co.*, 332 U.S. 392 at 400, n. 10 (1948).

<sup>98</sup> 38 Stat. 734 (1914), 15 U.S.C. (1958) §21.

<sup>99</sup> 38 Stat. 736 (1914), 15 U.S.C. (1958) §25.

grant full equitable power to fit the relief to the peculiar circumstances of each case.<sup>100</sup> It appears that if Congress had intended to deny the courts a similar flexibility under section 15, it would have expressly provided for a substantial change in powers by using language different from that in the Sherman Act in the grant of remedial jurisdiction.<sup>101</sup>

While a few courts have ordered divestiture in section 7 cases as a matter of course,<sup>102</sup> there is no indication that these courts deemed themselves bound to decree complete divestiture if the circumstances were to make such relief neither fair nor feasible. Moreover, the courts have refused to order divestiture in section 7 cases,<sup>103</sup> and the government has recently consented to several decrees of limited divestiture.<sup>104</sup> Although most Sherman Act decisions involving an unlawful stockholding have ordered divestiture,<sup>105</sup> the courts have consistently recognized their power to fashion a different remedy when divestiture is impractical or unnecessary to achieve effective relief.<sup>106</sup>

The most recent divestiture decree under section 4 was upheld in the *International Boxing Club* decision,<sup>107</sup> apparently on the basis that the trial court acted within its discretion in ordering divestiture since it found this measure necessary to eliminate the unlawful effects of the stockholding. This decision, together with

<sup>100</sup> *International Salt Co. v. United States*, 332 U.S. 392 at 400-401 (1947); *United States v. National Lead Co.*, 332 U.S. 319 at 355 (1948).

<sup>101</sup> See *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). See also S. Rep. 698, 63d Cong., 2d sess., pp. 49-50 (1914); H. Rep. 627, 63d Cong., 2d sess., p. 21 (1914), indicating congressional intent to mold §15 after §4 jurisdiction.

<sup>102</sup> See *United States v. Maryland and Virginia Milk Producers Assn., Inc.*, (D.C. D.C. 1958) 167 F. Supp. 799, *affd.* on divestiture issue, 80 S.Ct. 847 (1960); *United States v. New England Fish Exchange*, (D.C. Mass. 1919) 258 F. 732; *id.*, (D.C. Mass. 1923) 292 F. 511.

<sup>103</sup> See *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, (S.D. N.Y. 1957) 152 F. Supp. 387, *affd.* (2d Cir. 1958) 259 F. (2d) 524. But see reluctance of courts to decree divestiture at suit of private party. *HALE AND HALE, MARKET POWER—SIZE AND SHAPE UNDER THE SHERMAN ACT* 370 (1958).

<sup>104</sup> See *United States v. Anheuser-Busch*, (S.D. Fla. 1960) CCH Trade Cas. ¶69,599; *United States v. Lucky Lager Brewing Co.*, (D.C. Utah 1958) CCH Trade Cas. ¶69,160; *United States v. Schenley Industries*, (D.C. Del. 1957) CCH Trade Cas. ¶68,664; *United States v. General Shoe Corp.*, (D.C. Tenn. 1956) CCH Trade Cas. ¶68,271; *United States v. Hilton Hotels Corp.*, (N.D. Ill. 1956) CCH Trade Cas. ¶68,253.

<sup>105</sup> See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 354 (1955), listing twenty cases in which unlawful stock combinations have been subjected to divestiture decrees. See also *International Boxing Club v. United States*, 358 U.S. 242 (1959).

<sup>106</sup> *United States v. General Electric Co.*, (D.C. N.J. 1953) 115 F. Supp. 835; *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Minnesota Mining & Mfg. Co.*, (D.C. Mass. 1951) 96 F. Supp. 356.

<sup>107</sup> *International Boxing Club v. United States*, 358 U.S. 242 (1959).

the movie theater cases,<sup>108</sup> shows the trend of the courts to find divestiture a necessary remedy more readily than they did in the past; but it does not establish the proposition that complete divestiture must be ordered regardless of the peculiar circumstances of a case.

Furthermore, the language of the Supreme Court in remanding the *du Pont* case to the district court for relief strongly suggests that a trial court should exercise its traditionally broad equity powers in fashioning its decree:

"The judgment must therefore be . . . remanded to the District Court for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co. v. United States*, 332 U.S. 392, 400, 401."<sup>109</sup>

This language indicates in several ways that complete divestiture of the illegally-held stock is not mandatory under section 15. The Court speaks of an *equitable* decree and defines the proper relief as that *necessary and appropriate* in the public interest to *eliminate the unlawful effects* of the acquisition. The Court recognized that the holding of the stock itself is not necessarily the evil to be remedied—the evil is the harmful effect on competition caused by voting rights or financial ties arising from the stockholding.<sup>110</sup> If these causes of the harmful effect can be eliminated by a mode of relief other than complete divestiture, the courts should have the power under section 15 to refuse to decree divestiture.

### B. *Divestiture as a "Necessary and Appropriate" Remedy*

While the federal courts have power to require divestiture of stock under their section 4 and 15 authority to "prevent and restrain" violations of the antitrust laws,<sup>111</sup> there is no certainty as

<sup>108</sup> *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

<sup>109</sup> *United States v. du Pont*, 353 U.S. 586 at 607 (1957).

<sup>110</sup> See *United States v. du Pont*, 353 U.S. 586 at 597 (1957); *Aluminum Co. of America v. FTC*, (3d Cir. 1922) 284 F. 401 at 405. See also the §7 proviso that "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about . . . the substantial lessening of competition. . . ." 38 Stat. 731 (1914), 15 U.S.C. (1958) §18.

<sup>111</sup> *HALE AND HALE, MARKET POWER — SIZE AND SHAPE UNDER THE SHERMAN ACT 370-371* (1958).



to when the courts should exercise this power. Since section 7 has not been extensively utilized until recently, most cases dealing with divestiture involve Sherman Act violations. The general principles developed in these decisions provide useful guidance in formulating an approach to Clayton Act relief.

1. *Divestiture Under the Sherman Act.* Sherman Act decisions have developed the following general principles in relief determinations: (a) the objective of the decree is to *remedy* a harmful economic condition, not to punish a violator of the statute;<sup>112</sup> (b) the trial court has wide *discretion* to fit the decree to the needs of a particular case;<sup>113</sup> (c) the decree must *effectively* eliminate the competitive harm;<sup>114</sup> and (d) the plan of relief must be *feasible*<sup>115</sup> and *fair* to the public, the violators, and persons interested in them.<sup>116</sup>

The judicial approach resulting from these principles is to grant that relief which is "necessary and appropriate" to end the harmful effects of an antitrust violation. What measures are "necessary" will depend upon the type of violation and its effects on competition,<sup>117</sup> the attitude of the violator<sup>118</sup> and the peculiar circumstances of the violation. What relief is "appropriate" will depend on what is fair and feasible under these same circumstances.<sup>119</sup>

The next question is how divestiture fits into this general ap-

<sup>112</sup> *United States v. National Lead Co.*, 332 U.S. 319 at 338 (1947); *Hartford-Empire Co. v. United States*, 323 U.S. 386 at 409 (1945); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>113</sup> See cases cited note 100 supra.

<sup>114</sup> See *United States v. National Lead Co.*, 332 U.S. 319 at 334 (1947); *United States v. Great Lakes Towing Co.*, (N.D. Ohio 1914) 217 F. 656; *United States v. Union Pacific R. Co.*, 226 U.S. 470 at 476 (1912).

<sup>115</sup> *United States v. General Electric Co.*, (D.C. N.J. 1953) 115 F. Supp. 835 at 871; *United States v. United Shoe Machinery Corp.*, (D.C. Mass. 1953) 110 F. Supp. 295 at 348; *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333 at 417; *United States v. National Lead Co.*, 332 U.S. 319 (1947).

<sup>116</sup> See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 211 U.S. 1 (1911).

<sup>117</sup> See *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333 at 345, indicating greater feasibility and likelihood of divestiture of stock than of a business unit. *Standard Oil Co. v. United States*, 221 U.S. 1 at 77 (1911), indicating greater need for divestiture where violation is an accomplished monopolization.

<sup>118</sup> Compare *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) and *United States v. American Can Co.*, (D.C. Md. 1916) 234 F. 1019, with *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333 at 347, and *United States v. Crescent Amusement Co.*, 323 U.S. 173 at 186 (1944).

<sup>119</sup> See *United States v. National Lead Co.*, 332 U.S. 319 at 338 and 352 (1947). But see principal case at 42-47; and *Local 167 v. United States*, 291 U.S. 293 at 301, apparently using "appropriateness" as an alternative to "necessity" as justification for relief measures.

proach to remedies. The most recent answers have appeared in the movie theater cases<sup>120</sup> and the *International Boxing Club* decision.<sup>121</sup> The Supreme Court has outlined the functions of divestiture as three:

“(1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act.”<sup>122</sup>

Although language in several decisions hints that divestiture is required whenever it can serve one of these three functions,<sup>123</sup> it does not seem that the courts have really substituted these specific criteria for the “necessary and appropriate” test.<sup>124</sup> Rather it seems that these are the objectives which divestiture *may* be necessary and appropriate to achieve. The cases do not say that measures other than divestiture cannot be used if they would effectively achieve the same results.

The trend is clear—the courts are more ready to find divestiture necessary than in prior years.<sup>125</sup> Perhaps this trend results from judicial acceptance of the government’s argument that injunctions are ineffective because of the impossibility of adequately policing them.<sup>126</sup> Or perhaps it is the result of stronger government evidence to show that measures short of divestiture will not be effective in a particular case.<sup>127</sup>

<sup>120</sup> See cases cited note 108 supra.

<sup>121</sup> See *International Boxing Club v. United States*, 358 U.S. 242 (1959).

<sup>122</sup> *Schine Chain Theatres v. United States*, 334 U.S. 110 at 128-129 (1948).

<sup>123</sup> *International Boxing Club v. United States*, 358 U.S. 242 at 256 (1959); *United States v. Paramount Pictures*, 334 U.S. 131 at 152 (1948); *Schine Chain Theatres v. United States*, 334 U.S. 110 at 128 (1948).

<sup>124</sup> “. . . there is no specific requirement of any anti-trust statute, or, indeed, of any case familiar to the Court, that dissolution and divestiture must always occur. The Court may withhold its hand in connection with dissolution in those cases where the anti-trust advantages are not sufficiently compelling to outweigh other disadvantages.” *United States v. Minnesota Mining & Mfg. Co.*, (D.C. Mass. 1951) 96 F. Supp. 356 at 358. See *United States v. General Electric Co.*, (D.C. N.J. 1953) 115 F. Supp. 835; *United States v. Imperial Chemical Industries*, (S.D. N.Y. 1952) 105 F. Supp. 215 at 241; *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333. See also the propensity of the defendants for unlawful conduct stressed in the cases cited note 123 supra.

<sup>125</sup> See note, 13 S.W. L. J. 263 (1959); HALE AND HALE, *MARKET POWER—SIZE AND SHAPE UNDER THE SHERMAN ACT* 370-380 (1958); *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333 at 342-343.

<sup>126</sup> See Berge, “Some Problems in the Enforcement of the Antitrust Laws,” 38 MICH. L. REV. 462 at 469 (1940); *Schine Chain Theatres v. United States*, 334 U.S. 110 at 128 (1948). But see *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 at 604 (1951).

<sup>127</sup> See Adams, “Dissolution, Divorcement and Divestiture: The Pyrrhic Victories of Antitrust,” 27 IND. L. J. 1 at 32-34 (1951).

Therefore, the Sherman Act cases offer this guide for determining whether a decree of divestiture is required: if other measures can effectively neutralize the unlawful effects of the violation, divestiture will not be necessary. Since these measures will be less harsh than divestiture, they will be appropriate as well as necessary.

2. *Divestiture of Stock Under the Clayton Act.* The *du Pont* court recognized that the basic purpose of relief in a section 7 case is the same as that in a Sherman Act decision—to dissipate the harmful effects of the violation and to restore competition to the industry. Therefore, it found that the general approach to relief should be the same in both types of cases. In other words, a court dealing with an unlawful stock acquisition would order divestiture when “necessary and appropriate” to eliminate the reasonable probability of lessened competition or monopolization.<sup>128</sup>

To make the Sherman-Clayton analogy complete it is necessary to translate into Clayton Act terms the three specific objectives of relief formulated by the Supreme Court in the *Schine* decision.<sup>129</sup> The first of these objectives—ending the combination that violates the Sherman Act—compares to ending the stockholding that violates section 7. The stockholding, like the combination, is illegal only when its *effect* is to lessen competition; therefore, the unlawful stockholding may be ended by eliminating either the holding itself or only its harmful effect. The second objective—depriving the defendant of the fruits of its violation—calls for depriving the violator of section 7 of the benefit of its unlawful acquisition. This benefit would appear to be the unfair competitive advantage gained through the stock, not the stock itself.<sup>130</sup> The final objective—ending the monopoly power that violates the Sherman Act—requires in section 7 cases dissipation of the incipient monopoly power obtained through the stock.

These objectives merge into one basic aim in a section 7 case: to eliminate the tendency of the stockholding to lessen competition or create a monopoly. Certainly complete divestiture of the stock would be a simple method—and a very effective one—for achieving this basic aim. The fact that this method requires less court supervision than numerous regulatory injunctions would make it appear not only effective but also desirable under Sherman Act

<sup>128</sup> Principal case at 50.

<sup>129</sup> 334 U.S. 110 at 128-129 (1948). See text at note 122 *supra*.

<sup>130</sup> Cf. *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333 at 346; *Northern Securities Co. v. United States*, 193 U.S. 197 at 358 (1904).

principles.<sup>131</sup> However, divestiture is a harsh remedy, resembling punishment more than relief when it is not "necessary" to eliminate the harm from the violation.<sup>132</sup> It is for this reason that Sherman Act decisions have refused to use it when there are other effective means for achieving the same result.<sup>133</sup> It is for this same reason that the *du Pont* court rejected it.<sup>134</sup>

A rejection of divestiture is proper only if other regulatory measures can *effectively* eliminate the harm to competition from the stockholding. At least where there is a vertical acquisition of stock by a seller corporation, the harmful effect is the preference gained over other sellers, resulting from use of the stock to influence the buying corporation's management and business decisions.<sup>135</sup> With voting power on the stock neutralized, the chief means of using the stock to influence the buyer is ended.<sup>136</sup> The remaining financial interest of the seller in the buyer probably affords little opportunity for the former to influence buying decisions of the latter.<sup>137</sup> Thus partial divestiture by disenfranchisement may so effectively eliminate both the cause of the harmful effect and the effect itself that complete divestiture will be unnecessary.

If either divestiture or disenfranchisement is "necessary" to end the danger to competition from a section 7 violation, the latter measure should be selected as the "appropriate" relief when it is more feasible or fair than complete divestiture. In *du Pont* the court found it more feasible in view of grave doubts as to the

<sup>131</sup> See *United States v. Pullman Co.*, (E.D. Pa. 1943) 50 F. Supp. 123 at 136.

<sup>132</sup> There is no "sharp line which can be drawn between punishment or dissipation." *Hartford-Empire Co. v. United States*, 323 U.S. 386 at 440 (1945).

<sup>133</sup> See *United States v. General Electric Co.*, *United States v. Imperial Chemical Industries*, *United States v. Minnesota Mining & Mfg. Co.*, and *Timken Roller Bearing Co. v. United States*, note 124 *supra*; *United States v. American Can Co.*, (D. C. Md. 1916) 234 F. 1019; *United States v. Terminal R.R. Assn.*, 224 U.S. 383 (1912).

<sup>134</sup> "To redress a violation of law in this case is fairly simple, but to do it without punishing innocent people is the big problem here." Principal case at 13.

<sup>135</sup> See note 110 *supra*.

<sup>136</sup> "It is well recognized that the normal and indeed the only way in which the holder of a substantial block of stock can influence the practices and the policies of the corporation is through the exercise or threatened exercise of voting rights or by representation on the Board of Directors." Principal case at 40-41. See also emphasis on voting rights and their elimination in *International Boxing Club v. United States*, 358 U.S. 242 at 256 (1959); *Hughes v. United States*, 342 U. S. 353 (1952); *United States v. Columbia Gas Co.*, (D.C. Del. 1941) 36 F. Supp. 488.

<sup>137</sup> "In this case, however, the buying decision must be made by General Motors. It has no financial interest in *du Pont* and the Court is aware of no incentive which would operate to influence a General Motors employee to favor *du Pont* in any way." Principal case at 48. Cf. *Hartford-Empire Co. v. United States*, 323 U.S. 386 at 424-425 (1945). But see limitations on security interests in *Continental Ins. Co. v. United States*, 259 U.S. 156 (1922); *United States v. Lake Shore & M.S. Ry. Co.*, (S.D. Ohio 1916) 281 F. 1007.

marketability of the large volume of General Motors stock.<sup>138</sup> Furthermore, it found disenfranchisement fairer because of the tax and market value losses that a stock distribution or sale might cause to numerous innocent investors in *du Pont* and General Motors.<sup>139</sup> The courts have recognized that private property rights of even the violators of the antitrust laws are not to be injured unless the injury cannot be avoided,<sup>140</sup> and they have generally shown even greater concern for the interests of innocent investors in the violating corporations.<sup>141</sup> Therefore, the *du Pont* court properly considered the possible harm to shareholders in rejecting divestiture of the stock as inappropriate.

The government has appealed the district court's relief decision to the Supreme Court, claiming in the alternative that the court either (1) had no discretionary power to grant disenfranchisement rather than complete divestiture or (2) if it had discretionary power, it erroneously utilized that power in rejecting divestiture as unnecessary and inappropriate.<sup>142</sup>

It appears, however, that the district courts are granted full equitable discretionary powers by section 15 of the Clayton Act and that in light of the "peculiar circumstances" of the *du Pont* case the district court properly invoked these powers to formulate a fair and effective decree. It also seems that the court has significantly added to antitrust relief development by its crystallization of a "Rule of Reason" approach for section 7 relief, comparable to that in the *Alcoa*<sup>143</sup> decision for Sherman Act remedies. Although the court's application of general principles cannot be separated from

<sup>138</sup> Principal case at 42 and 51.

<sup>139</sup> Principal case at 51. See also *United States v. Minnesota Mining & Mfg. Co.*, (D.C. Mass. 1959) 96 F. Supp. 356 on tax losses. In the principal case, at 52, Judge LaBuy indicated that a change in the tax consequences of the stock distribution might make such distribution an appropriate remedy. Although as yet neither S. 200 nor H. R. 8126, 86th Cong., 1st sess., recent proposals for tax relief on court-ordered stock distributions, has been passed, the House bill has been favorably reported out of committee. See H. Rep. 1128, 86th Cong., 1st sess. (1959).

<sup>140</sup> See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Pullman Co.*, (E.D. Pa. 1944) 53 F. Supp. 908; *United States v. American Can Co.*, (D.C. Md. 1916) 234 F. 1019; *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). But injury to the defendants will not prevent use of a necessary relief measure: *United States v. National Lead Co.*, 332 U.S. 319 at 366 (1947); *United States v. E. I. du Pont de Nemours & Co.*, (D.C. Del. 1911) 188 F. 127 at 153.

<sup>141</sup> See *United States v. United States Steel Corp.*, 251 U.S. 417 at 452-453 (1920); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). But see *United States v. Corn Products Refining Co.*, (2d Cir. 1916) 234 F. 964 at 1017; *United States v. Union Pacific R. Co.*, 226 U.S. 470 at 476 (1912).

<sup>142</sup> Probable jurisdiction noted, 28 U.S. LAW WEEK 3346 (1960).

<sup>143</sup> *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333.

the facts of the *du Pont* case so as to furnish specific guides to courts facing different section 7 factual situations, its approach in determining the proper relief will offer valuable assistance to these other courts.

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