

# ANTITRUST INJUNCTIONS: A FLEXIBLE PRIVATE REMEDY

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*The cost and time required by a treble damage action have traditionally acted as a strong brake to private antitrust enforcement. The author urges consideration by a potential litigant faced with this problem of the advantages of seeking injunctive relief, rather than treble damages; and he points out the special utility of the preliminary injunction. He also proposes some controversial and important possible uses of prior government action in preliminary injunction proceedings.*

SUPPLEMENTARY enforcement of antitrust law by private litigants is an integral part of the over-all antitrust scheme established by Congress. Despite this congressional encouragement, however, the private segment of antitrust policy was largely dormant until after World War II: in the half century from the Sherman Act's<sup>1</sup> passage until 1941, only 175 cases had been filed and of these only 13 had resulted in judgment for the plaintiff.<sup>2</sup> Thus, private suits were of comparatively little significance in the over-all antitrust scheme, especially when measured against the nation's large number of businessmen and the extent of corporate consolidations in the last fifty years. After World War II, however, the private antitrust litigant began to assume importance. Today, private enforcement is a widely-known and widely-used procedure, and most lawyers and businessmen are fully cognizant of its effectiveness. But even today, most private litigation involves an attempt to obtain treble damages, and private thinking seems to have become channeled along that line. This is unfortunate, for the availability of injunctive relief, either alone or combined with an action for treble damages, offers the private litigant a most flexible and valuable remedy against existing or threatened antitrust violations.

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<sup>1</sup> 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

<sup>2</sup> ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 378 (1955).

## I

## PROVISIONS IN THE LAW FOR INJUNCTIVE RELIEF

There are two independent sources of judicial power for granting injunctive relief in antitrust cases. One source is the specific jurisdiction given to the federal courts to prevent and restrain antitrust violations by section 4 of the Sherman Act<sup>3</sup> and section 15 of the Clayton Act.<sup>4</sup> These two sections also place an affirmative duty on the several district attorneys of the United States to institute proceedings in equity to enforce the acts. When the Government fulfills this duty by restraining antitrust violations, benefits naturally inure to injured third parties, and the relief granted in such situations is as effective as if granted in private litigation.

But the private party, whether he be a small businessman or a large one, also may seek an injunction to prevent or restrain antitrust violations,<sup>5</sup> either where the Government has failed to do so or where the relief obtained by the Government is insufficient to supply him with adequate protection. The right of a federal court to grant injunctive relief in a private antitrust action is derived from section 16 of the Clayton Act, which provides in part that

any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity . . .<sup>6</sup>

The granting of this injunctive power by the statutes, however, should not cloud the existence of a second and independent source of authority for injunctive relief: the general equity powers conferred on the federal courts by article III, section 2 of the Constitution. The discretionary power of a federal court sitting in equity to apply a specific remedy is derived from the equity powers which existed in the High Court of Chancery in England in 1789.<sup>7</sup>

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<sup>3</sup> 26 Stat. 209 (1890), as amended, 15 U.S.C., § 4 (1964).

<sup>4</sup> 38 Stat. 736 (1914), as amended, 15 U.S.C., § 25 (1964).

<sup>5</sup> See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958); *Bigelow v. RKO Radio Pictures, Inc.*, 162 F.2d 520 (7th Cir.), *cert. denied*, 332 U.S. 817 (1947); *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743 (E.D. Pa. 1964).

<sup>6</sup> 38 Stat. 737 (1914), as amended, 15 U.S.C. § 26 (1964).

<sup>7</sup> *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 927 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942). To determine equities and equitable rights, access must be had not only to congressional legislation but also to the principles of equity that exist independently of and prior to congressional legislation. *United States v. Detroit Lumber Co.*, 200 U.S. 321, 339 (1906).

Thus, even in the absence of specific provisions establishing equity jurisdiction,<sup>8</sup> federal courts may fashion an equitable decree if the situation warrants it.<sup>9</sup>

## II

### SPECIAL PROBLEMS OF PRELIMINARY INJUNCTIONS

Plaintiffs asking for relief under the antitrust laws can and sometimes do seek preliminary injunctions at the outset of the litigation. Such injunctions may be vitally needed to prevent further serious injury to the plaintiff *pendente lite*, especially since antitrust litigation often consumes many years. Since preliminary relief, given without a full adjudication of the dispute, is a serious remedy, the courts have required the plaintiff to meet a difficult but not insurmountable burden.<sup>10</sup> As Judge Jerome Frank stated in his often cited *Hamilton Watch Co.* opinion:

To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.<sup>11</sup>

The plaintiff must ordinarily show: (1) that the conduct to be enjoined is in furtherance of the alleged violations of the antitrust laws; (2) that there is a substantial likelihood the allegations of the complaint will be sustained at the trial of the cause; (3) that irreparable harm to the plaintiff will result if the injunction is denied; and (4) that the harm to the defendant likely to result if the relief is granted does not outweigh the harm to the plaintiff if the relief is denied.<sup>12</sup>

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<sup>8</sup> There are situations where the specific antitrust injunctive remedies are not available to the plaintiff. See text accompanying notes 51-53 *infra*.

<sup>9</sup> For cases granting preliminary injunctions where the antitrust provisions were not applicable, see text accompanying notes 54-66 *infra*.

<sup>10</sup> "The burden cast on plaintiffs . . . is a heavy one and the injunction should not be granted . . . except in a case clearly demanding it." *Hershel Cal. Fruit Prods. Co. v. Hunt Foods, Inc.*, 111 F. Supp. 732, 734 (N.D. Cal. 1953), *appeal dismissed*, 221 F.2d 797 (9th Cir. 1955). See generally *TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTI-TRUST ACTIONS* § 7 (1965).

<sup>11</sup> *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953).

<sup>12</sup> See *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743, 746 (E.D. Pa. 1964).

### A. *Conduct in Furtherance of Alleged Violations*

Requirement (1) offers little difficulty. Except in unusual circumstances, the preliminary relief which the plaintiff desires is to restrain the defendant from doing the very acts which are alleged to be antitrust violations.<sup>13</sup> A preliminary injunction used to sequester property as a guarantee of payment of a possible judgment against the defendant would apparently be improper.<sup>14</sup>

### B. *Substantial Likelihood of Plaintiff's Success*

Requirement (2) involves a difficult judgment by the court on the plaintiff's chances of success in his suit on the merits. Judge Frank's words quoted above are particularly apropos to this problem, and accentuate the difficulty involved.<sup>15</sup> "The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief."<sup>16</sup> And a preliminary injunction was granted even where the court stated that "we cannot determine at this juncture . . . whether or not . . . [plaintiff] is entitled to the ultimate relief which it seeks."<sup>17</sup> It should not be assumed, however, that the plaintiff's burden is light in this respect. It is often necessary for the court to make a fairly detailed analysis of the complex economic factors typical of antitrust cases in order to determine the probability of a violation,<sup>18</sup> and the plaintiff must supply sufficient information for the court to do so.

The plaintiff's burden of proof under a motion for preliminary injunction generally can be satisfied by a "prima facie" showing of an antitrust violation. In *United States v. Schine Chain Theatres, Inc.*,<sup>19</sup> for example, the defendants contended that a preliminary injunction could be granted only if the "court is convinced with

<sup>13</sup> *E.g.*, *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953) (defendant's stock purchases in plaintiff alleged to be in violation of Clayton Act § 7; preliminary injunction sought to restrain such purchases); *cf.* *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962) (preliminary injunction compelling defendant to continue to deal with plaintiff granted, since failure to grant would further defendant's alleged monopoly).

<sup>14</sup> *Cf.* *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945).

<sup>15</sup> See text accompanying note 11 *supra*.

<sup>16</sup> *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 727 (3d Cir. 1962); *accord*, *Burton v. Matanuska Valley Lines, Inc.*, 244 F.2d 647, 650-51 (9th Cir. 1957).

<sup>17</sup> *Muskegon Piston Ring Co. v. Gulf & Western Indus., Inc.*, 328 F.2d 830, 831 (6th Cir. 1964).

<sup>18</sup> *E.g.*, *Briggs Mfg. Co. v. Crane Co.*, 185 F. Supp. 177 (E.D. Mich.), *aff'd*, 280 F.2d 747 (6th Cir. 1960).

<sup>19</sup> 31 F. Supp. 270 (W.D.N.Y. 1940).

*reasonable certainty* that the government will prevail.”<sup>20</sup> However, the court upheld the government’s position that only a “prima facie showing of the violation”<sup>21</sup> was necessary.

The “prima facie” idea is actually only a shorthand statement of the rule that the plaintiff must show that he has a reasonable chance of ultimately prevailing on the merits. This interrelationship can be seen in a recent declaration by the Tenth Circuit that the plaintiff must make out a “prima facie case showing a reasonable probability” of success.<sup>22</sup> Nevertheless, the concept serves a useful purpose. Most lawyers have a feeling for what constitutes a prima facie case, and certainly if the plaintiff is able to marshal sufficient proof to meet this standard, he has adequately satisfied the “reasonable probability” burden.

Statements to the effect that a preliminary injunction “does not issue where the moving papers disclose the parties are in serious dispute on conflicting questions of the fact and law”<sup>23</sup> can frequently be found in the cases. It should be noted immediately that this “rule” appears to be in conflict with Judge Frank’s statement quoted above: If the plaintiff simply “has raised . . . serious, substantial, difficult and doubtful”<sup>24</sup> questions on the merits, an injunction may issue. The true relevance of this “disputed questions” concept is merely that such a dispute *bears* on the issue of whether the plaintiff has shown a reasonable probability of success. As the reality of dispute increases, the plaintiff’s showing of such a probability decreases. This distinction was clearly seen by Judge Smith when he stated:

Although applications for preliminary injunctions are frequently refused where the right is doubtful because of disputed questions of fact or law, it is noted that even if there is such a conflict, if plaintiff shows an irreparable injury will be suffered prior to the final hearing, that there is a reasonable probability that the facts will be established as he alleges and that the injunction will not

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<sup>20</sup> *Id.* at 272. (Emphasis added.)

<sup>21</sup> *Ibid.* See *Ring v. Spina*, 148 F.2d 647, 654 (2d Cir. 1945).

<sup>22</sup> *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781 (10th Cir. 1964).

<sup>23</sup> *Reynolds Int’l Pen Co. v. Eversharp, Inc.*, 63 F. Supp. 423, 425 (D. Del. 1945); *accord*, *Makel Textiles, Inc. v. Pellon Corp.*, 1964 Trade Cas. ¶ 71241, at 79971 (S.D.N.Y. 1964); *Graham v. Triangle Publications, Inc.*, 1964 Trade Cas. ¶ 71232, at 79923-24 (E.D. Pa. 1964) (opinion by Higginbotham, J.), *aff’d*, 344 F.2d 775 (3d Cir. 1965); *Dallas v. Atlantic Ref. Co.*, 189 F. Supp. 815, 817 (D. Del. 1960).

<sup>24</sup> See note 11 *supra* and accompanying text.

cause great injury to the defendant, a preliminary injunction may issue.<sup>26</sup>

A literal application of the "disputed questions" concept would substantially destroy the efficacy of preliminary injunctions, for antitrust litigation teaches us that defendants rarely fail to raise substantial factual and legal issues. The concept therefore has no validity as an *independent* determinant of whether an injunction should issue. While many courts nevertheless have stated the "disputed facts" concept as an unequivocal standard,<sup>26</sup> a careful reading of the cases will show that it is usually accompanied by a more specific finding that irreparable damages probably will not be suffered by the plaintiff, or that the plaintiff has not sufficiently shown that he has a reasonable chance of success in the pending litigation.<sup>27</sup>

### C. Irreparable Harm

Requirement (3) obligates the plaintiff to show that irreparable injury will result if the preliminary injunction is not issued. This is largely a question of fact to be decided in each case.<sup>28</sup>

For irreparable injury to exist, many courts have stated that it is necessary for the plaintiff to establish that the loss or damage is

<sup>26</sup> *Revere Copper & Brass, Inc. v. Economy Sales Co.*, 127 F. Supp. 739, 741 (D. Conn. 1954).

<sup>26</sup> *E.g.*, *Reynolds Int'l Pen Co. v. Eversharp, Inc.*, 63 F. Supp. 423, 425 (D. Del. 1945): "It is the rule of this circuit and district that a preliminary injunction *does not issue* where . . . the parties are in serious dispute . . ." (Emphasis added.)

<sup>27</sup> *Young v. Motion Picture Ass'n of America*, 299 F.2d 119 (D.C. Cir.), *cert. denied*, 370 U.S. 922 (1962): "The issues . . . are not susceptible of resolution at this preliminary stage and . . . a trial must be had . . ." 299 F.2d at 121. "The plaintiffs have an adequate remedy at law. . . . The plaintiffs have failed to establish irreparable injury . . . . The plaintiffs are barred by their laches . . ." *Ibid.*

*Graham v. Triangle Publications, Inc.*, 1964 Trade Cas. ¶ 71232 (E.D. Pa. 1964), *aff'd*, 344 F.2d 775 (3d Cir. 1965): "Thus ' . . . [w]here difficult questions of law and fact are in dispute it is established law . . . that a preliminary injunction will not issue . . . ' " 1964 Trade Cas. at 79924. "[T]he failure of plaintiffs to prove irreparable harm combined with the novel and intricate legal questions . . . lead me to refrain from granting plaintiffs' motion for preliminary injunction." *Id.* at 79927.

*Dallas v. Atlantic Ref. Co.*, 189 F. Supp. 815 (D. Del. 1960): "The law of this jurisdiction is where the paper record shows a serious dispute as to the facts the preliminary injunction must be denied." *Id.* at 817. "For injunction process to issue irreparable injury is essential." *Ibid.*

*Reynolds Int'l Pen Co. v. Eversharp, Inc.*, *supra* note 26: "It is the rule . . . that a preliminary injunction does not issue where . . . the parties are in serious dispute on conflicting questions of fact and law." *Id.* at 425. "[I]t would not appear that the refusal to grant the preliminary injunction will cause plaintiff irremediable injury." *Ibid.*

<sup>28</sup> For example, "delay in filing and prosecuting the suit or delay in seeking the injunction are factors which may be relied upon as showing lack of irreparable injury." *TIMBERLAKE, op. cit. supra* note 10, at 85.

not capable of definite measurement; if the loss is clearly measurable in money, it cannot be irreparable, and no injunction is needed.<sup>29</sup>

The extent of this principle is difficult to determine. At one extreme is the situation where injury will be suffered on a fixed-term, fixed-profit contract, and all courts would presumably apply the principle and deny preliminary relief. At the other extreme is the situation where some indeterminate and valuable portion of the plaintiff's business will be seriously injured or destroyed, and here again it would seem that all courts would apply the principle, with the opposite result. But what of the situation where the plaintiff will clearly be injured to some considerable extent, and yet the loss will be capable of fairly accurate measurement? The courts have not given a uniform answer.<sup>30</sup> Surely no court would deny an otherwise valid preliminary injunction in a case where the plaintiff is in danger of being completely forced out of business no matter how accurately the net worth and future profits of that business could be calculated.<sup>31</sup> To do so would run counter to the over-all

<sup>29</sup> *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743, 750 (E.D. Pa. 1964); *Triangle Publications, Inc. v. Graham*, 1964 Trade Cas. ¶ 71232, at 79927 (E.D. Pa. 1964), *aff'd*, 344 F.2d 775 (3d Cir. 1965); *Fein v. Security Banknote Co.*, 157 F. Supp. 146, 148 (S.D.N.Y. 1957); *Hershel Cal. Fruit Prods. Co. v. Hunt Foods, Inc.*, 111 F. Supp. 732, 735 (N.D. Cal. 1953), *appeal dismissed*, 221 F.2d 797 (9th Cir. 1955).

<sup>30</sup> A preliminary injunction was granted where the plaintiff bus line alleged the defendant bus line was unlawfully duplicating some of its routes. *Burton v. Matanuska Valley Lines, Inc.*, 244 F.2d 647 (9th Cir. 1957). Where plaintiff was the producer of a play, with a fixed investment therein, and the defendants unlawfully forced it to close down, a preliminary injunction was granted. *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945).

But where plaintiff actors alleged defendant studios had unlawfully black-listed them, the court said there was no proof money damages would be inadequate. *Young v. Motion Picture Ass'n of America, Inc.*, 299 F.2d 119 (D.C. Cir.), *cert. denied*, 370 U.S. 922 (1962). And since a witness had estimated the maximum loss which would be suffered by diversion of sales to a competitor (even though the loss apparently might be permanent, and hence difficult to estimate), the court invoked the "measurable in money" principle. *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, *supra* note 29, at 750.

*Cf. Graham v. Triangle Publications, Inc.*, 344 F.2d 775, 776 (3d Cir. 1965): "This is not a case of the claimed destruction of a business enterprise containing such speculative elements that they are not susceptible to ready ascertainment in damages." Does this indicate that destruction of a business is incapable of being measured in damages? Or does it indicate that only destructions having speculative elements will result in unascertainable damages? *Cf. Revere Copper & Brass, Inc. v. Economy Sales Co.*, 127 F. Supp. 739, 742 (D. Conn. 1954): "Whether damages are to be viewed by a court of equity as 'irreparable' or not depends more upon the nature of the right which is injuriously affected than upon the pecuniary measure of the loss suffered."

<sup>31</sup> "To make the remedy provided by the statute effective in accomplishing what is meant to be accomplished, we think that the [plaintiff] . . . needs equity help in keep-

policies of the antitrust laws.

In theory, the principle places the burden on the plaintiff to show that a dollar value cannot be placed on the injury. Yet many courts have granted preliminary injunctions with no mention of the principle even though the facts show that a monetary value might be placed on the injury and the plaintiff has provided no evidence to the contrary.<sup>32</sup> This would seem to indicate that here again the principle is only a facet of the more general standard that the plaintiff must suffer irreparable harm for the injunction to issue. If a dollar value bears on whether or not the plaintiff will be irreparably injured, that fact will be considered, but it is not determinative in itself.

#### D. *Balancing the Harm to Plaintiff and Defendant*

Requirement (4) necessarily involves a weighing by the court of the inconveniences to both parties. Since the plaintiff must also have shown that he will suffer irreparable injury if the injunction is not granted, there must be serious hardship to the defendant for the balance to be struck on his side. Where the plaintiff's action is based on a *change* in the conduct of the defendant, restoration of the former situation generally cannot cause great harm to the defendant.<sup>33</sup> Similarly, where injunctive relief will only *delay* a course of conduct of the defendant which is allegedly unlawful, the defendant's side of the balance will be light.<sup>34</sup> On the other hand, as the size and economic stability of the plaintiff increases, the balance may tend to shift more easily to the defendant. Thus, when the Government brings the suit, a defendant who can show that he will be seriously handicapped may be able to prevent the issuance of preliminary relief.<sup>35</sup>

In *Ross-Whitney Corp. v. Smith, Kline & French Labs.*,<sup>36</sup> the

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ing his business going while his legal claim is being tested. A judgment for damages acquired years after his franchise has been taken away and his business obliterated is small consolation . . . ." *Bateman v. Ford Motor Co.*, 302 F.2d 63, 66 (3d Cir. 1962).

<sup>32</sup> See cases cited in first paragraph of note 30 *supra*.

<sup>33</sup> *E.g.*, *Airfix Corp. of America v. Aurora Plastics Corp.*, 222 F. Supp. 703 (E.D. Pa. 1963) (defendant, by corraling support from its competitors, accomplished a boycott of plaintiff's products).

<sup>34</sup> *E.g.*, *Briggs Mfg. Co. v. Crane Co.*, 185 F. Supp. 177 (E.D. Mich.), *aff'd*, 280 F.2d 747 (1960) (defendant preliminarily enjoined from making additional purchases of plaintiff's stock pending outcome of FTC proceedings against defendant for Clayton Act § 7 violation).

<sup>35</sup> *United States v. Schine Chain Theatres, Inc.*, 31 F. Supp. 270 (W.D.N.Y. 1940).

<sup>36</sup> 207 F.2d 190 (9th Cir. 1953).



plaintiff was a large and well-established firm and the defendant was a newcomer in the field with a minimal share of the market. Plaintiff, alleging a trademark infringement, sought a preliminary injunction to prevent the defendant from selling its imitation product. The *defendant* alleged that such an injunction would force *it* out of business, and asked that it at least be allowed to continue sales to its present customers. The court was aware that it was faced with a difficult balancing problem, but decided that the balance tipped toward the plaintiff because of the additional security given to the defendant by a court-imposed bond which the plaintiff was compelled to post.

Requiring a bond is authorized by section 16 of the Clayton Act.<sup>37</sup> In difficult situations such as the one above, use of a bond may often solve the court's balancing dilemma.<sup>38</sup>

#### E. Effect of Prior Government Proceedings

If the private plaintiff's action was preceded by government antitrust proceedings, the burdens of demonstrating the alleged violations of law and of showing substantial likelihood of success in proving the case are considerably lightened. To utilize prior government action, a plaintiff need not rely upon section 5 (a) of the Clayton Act.<sup>39</sup> That section provides, in substance, that a final judgment in an antitrust case brought by the government, establishing that a defendant has violated the antitrust laws, shall be *prima facie* evidence of a violation in a subsequent suit by a private party against the defendant. Section 5 (a) would be pertinent if the proceeding were a trial on the merits and if plaintiff were seeking to obtain a *final* judgment—damages or a permanent injunction. However, the

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<sup>37</sup> 38 Stat. 737 (1914), as amended, 15 U.S.C. § 26 (1964).

<sup>38</sup> Requiring a bond will not be a panacea, however. Where X Corporation is buying shares of Y Corporation in order to gain control, and a Y shareholder sues X, alleging that such control will violate the Sherman or Clayton Acts and asking that further purchases be enjoined, any bond which approaches the amount of potential loss to X may be far in excess of what the shareholder will be able to underwrite.

The problems inherent in deciding how large a bond is required can be illustrated by *Muskegon Piston Ring Co. v. Gulf & Western Indus., Inc.*, 328 F.2d 830 (6th Cir. 1964). There the plaintiff corporation was granted a preliminary injunction against further purchases of its stock by the defendant *pendente lite*. Defendant had already acquired a 30% interest in the plaintiff, valued at \$3.5 million. Yet the bond required of the plaintiff was set at only \$10,000. Assuming that the defendant desired to acquire only 50% of the stock and was improperly deprived of an opportunity to do so *pendente lite*, the \$10,000 would cover only a .43% rise in the market price of the stock.

<sup>39</sup> 69 Stat. 283 (1955), 15 U.S.C. § 16 (a) (1964).

issue is presented in a much narrower compass; it involves the use of a prior government decision simply as a basis for a finding by the courts in a preliminary injunction proceeding that there is a substantial issue and a reasonable chance of success by the plaintiff. Thus, regardless of the ultimate resolution of the current issue of the admissibility of Federal Trade Commission proceedings as prima facie evidence, where only a request for a preliminary injunction is involved, the court may make full use of proceedings by the Federal Trade Commission as well as by the Department of Justice, even though those proceedings have not yet been finally adjudicated.<sup>40</sup>

There is no doubt whatever that a court can properly take judicial notice of Federal Trade Commission opinions and findings. The cases are legion in which the courts have taken judicial notice of administrative orders, records, and decisions. For example, in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*<sup>41</sup> the court took judicial notice in a private antitrust action of the issuance of an FTC cease and desist order which branded the defendant's business practices as a violation of the Clayton Act.<sup>42</sup>

It is not merely *permissible* for a court to take judicial notice of prior FTC proceedings; indeed, it is *unthinkable* that a court of equity, in considering an application for temporary equitable relief in an antitrust suit, should ignore a decision of a quasi-judicial administrative agency of the federal government rendered in an adjudicatory proceeding.<sup>43</sup> The only question open to debate is the weight to be assigned by courts to the Federal Trade Commis-

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<sup>40</sup> *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743, 747-48 (E.D. Pa. 1964).

<sup>41</sup> 150 F.2d 988, 991, 994-95 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

<sup>42</sup> See also *Simpson v. South Western R.R.*, 231 F.2d 59, 62 (5th Cir.), *cert. denied*, 352 U.S. 828 (1956); *Colonial Airlines, Inc. v. Janas*, 202 F.2d 914, 919 n.1 (2d Cir. 1953); *Kirby v. Pennsylvania R.R.*, 188 F.2d 793, 795-96 (3d Cir. 1951); *United States v. Rice*, 176 F.2d 373, 374 n.3 (3d Cir. 1949); *United States v. Bradford*, 160 F.2d 729, 731 (2d Cir.), *cert. denied*, 331 U.S. 829 (1947); *Fletcher v. Jones*, 105 F.2d 58, 61-62 (D.C. Cir.), *cert. denied*, 308 U.S. 555 (1939); *Berg v. Cincinnati, N. & C. Ry.*, 56 F. Supp. 842, 847 (E.D. Ky. 1944).

It has been held that decisions of administrative agencies in quasi-judicial proceedings are res judicata and their findings are entitled to collateral estoppel effect in subsequent judicial proceedings. *Sayger v. FCC*, 312 F.2d 352, 356 (D.C. Cir. 1962); *Tomab-Mauston Broadcasting Co. v. FCC*, 306 F.2d 811, 813 (D.C. Cir. 1962); *Seatrain Lines, Inc. v. Pennsylvania R.R.*, 207 F.2d 255, 259 (3d Cir. 1953); *United States v. Willard Tablet Co.*, 141 F.2d 141, 143 (7th Cir. 1944).

<sup>43</sup> See *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743, 747-48 (E.D. Pa. 1964).

sion's opinions and findings in connection with a decision on preliminary relief.

It is settled that a preliminary injunction may issue solely on affidavits in a proper case.<sup>44</sup> A fortiori, the findings of a quasi-judicial administrative agency charged with enforcing the antitrust laws, made after lengthy contest and after thorough consideration of the evidence, should completely satisfy the burden imposed upon a plaintiff in connection with a motion for provisional relief.<sup>45</sup>

Similarly, the courts should take judicial notice in preliminary injunction proceedings of prior court proceedings brought by the Justice Department. In a proper case, a court should be willing to take judicial notice even of a consent decree entered into between the Government and a party to the present litigation. While it is true that consent decrees often do not conclusively establish an antitrust violation by the defendant, they may nevertheless shed a great deal of light on the propriety of the defendant's actions.<sup>46</sup> Generally, however, a consent decree would not in itself completely satisfy the preliminary injunction requirement that the plaintiff show a reasonable probability of success in his suit on the merits.

### III

#### SITUATIONS WHERE INJUNCTIVE RELIEF MAY BE APROPOS

Frequently the attempt to obtain injunctive relief is ancillary to a claim for treble damages. Nevertheless, there are situations where the treble damage remedy is either ineffective or inapplicable, and here injunctive relief may afford the plaintiff the only possibility of protection. It is well established, of course, that an injunction may issue even though the plaintiff has not yet suffered an injury for which damages can be awarded.<sup>47</sup>

A plaintiff injured by an existing or a threatened merger in violation of section 7 of the amended Clayton Act may be unwilling to sue for treble damages alleging such violations, when no plaintiff

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<sup>44</sup> See *Ross-Whitney Corp. v. Smith, Kline & French Labs.*, 207 F.2d 190, 198 (9th Cir. 1953); *Hunter v. Atchison, T. & S.F. Ry.*, 188 F.2d 294, 298 (7th Cir. 1951); 7 MOORE, FEDERAL PRACTICE § 65.04 (3), at 1639-40.

<sup>45</sup> *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743, 747-48 (E.D. Pa. 1964).

<sup>46</sup> See *National Screen Serv. Corp. v. Poster Exch., Inc.*, 305 F.2d 647 (5th Cir. 1962), where the court did note the existence of a consent decree and considered its bearing on the possibility of an antitrust violation by the defendant.

<sup>47</sup> *E.g.*, *Mid-West Theatres Co. v. Co-Operative Theatres, Inc.*, 43 F. Supp. 216, 224-25 (E.D. Mich. 1941).

has yet succeeded in similar actions.<sup>48</sup> A small businessman in danger of being acquired or otherwise injured may have a more effective remedy through use of the injunctive power. Preliminary injunctions have been granted to restrain the solicitation of proxies and the voting of stock alleged to have been acquired in violation of section 7.<sup>49</sup> An injunction may also be granted to prevent further acquisition of a plaintiff's stock pending a full hearing on the alleged violation.<sup>50</sup>

Situations also exist where the specific remedies given to private plaintiffs by the antitrust laws are inapplicable. For example, where injury is caused by a competitor's unreasonably low prices in possible violation of section 3 of the Robinson-Patman Act,<sup>51</sup> private plaintiffs cannot avail themselves of the protection of either section 4 or section 16 of the Clayton Act.<sup>52</sup> Even in such a case, however, a federal court should be able to use its broad general equity powers to permanently enjoin the defendant's activities, and, upon a proper showing of irreparable injury, to grant preliminary relief.<sup>53</sup>

Thus, in *Bateman v. Ford Motor Co.*<sup>54</sup> the plaintiff, a car dealer, sued for damages and an injunction under the "Dealer's Day in Court Act."<sup>55</sup> He also asked for a preliminary injunction. The district court denied the preliminary relief, finding that the statute's provision for damages is exclusive, and hence injunctions are not

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<sup>48</sup> In *Gottesman v. General Motors Corp.*, 221 F. Supp. 488 (S.D.N.Y. 1963), cert. denied, 379 U.S. 882 (1964), the court held that plaintiffs could not use § 5 (a) of the Clayton Act to establish a prima facie case for damages since the § 7 violation showed only a *tendency* to monopolize. See *Treble Damages Under Section 7 of the Clayton Act*, BNA ANTITRUST & TRADE REG. REP., Dec. 17, 1963, p. B-1. As pointed out in part II E of this article, the court proceedings could be used to obtain a preliminary injunction.

<sup>49</sup> *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953); *Roberts v. Fuquay-Varina Tobacco Bd. of Trade, Inc.*, 220 F. Supp. 608 (E.D.N.C. 1963) *aff'd in part and remanded*, 332 F.2d 521 (4th Cir. 1964); *Briggs Mfg. Co. v. Crane Co.*, 185 F. Supp. 177 (E.D. Mich.), *aff'd*, 280 F.2d 747 (6th Cir. 1960).

<sup>50</sup> *Muskegon Piston Ring Co. v. Gulf & Western Indus., Inc.*, 328 F.2d 830 (6th Cir. 1964).

<sup>51</sup> 49 Stat. 1526 (1936), 15 U.S.C. § 13 (a) (1964).

<sup>52</sup> In a 5 to 4 decision, the Supreme Court held that § 3 was not one of the "antitrust laws" covered by the language of §§ 4 and 16. *Nashville Milk Co. v. Caruation Co.*, 355 U.S. 373 (1958). The Senate Antitrust Subcommittee of the Committee on the Judiciary last year considered testimony on S. 995, 89th Cong., 1st Sess. (1965), to make § 3 of the Robinson-Patman Act part of the antitrust laws. BNA ANTITRUST & TRADE REG. REP., June 1, 1965, p. A-14.

<sup>53</sup> The source of this power is discussed in text accompanying notes 7-9 *supra*.

<sup>54</sup> 302 F.2d 63 (3d Cir. 1962).

<sup>55</sup> 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-25 (1964).

authorized.<sup>56</sup> On appeal, the plaintiff argued two grounds for allowance of an injunction. First, he contended that the statute is a supplement to the antitrust laws, and that section 16 of the Clayton Act therefore carries over to the Dealer's Act. The court rejected this argument, stating that the subject matter of the Clayton Act is so different from the Dealer's Act that

it would be highly artificial to carry over the injunctive provision of the older act to this new statute. This is exactly what the Supreme Court held in *Nashville Milk Co. v. Carnation Co.* . . . . [A]ppellant has no right to an injunction based on section 16 of the Clayton Act.<sup>57</sup>

The second ground for an injunction argued by plaintiff was that the court should exercise its general equity powers to make more effective the relief provided in the statute. The court found that it did have such powers and that an injunction should issue under the circumstances. The court stated:

This general equitable power of the court to give injunctive relief to make more effective a remedy provided by law is long established and well known. . . .

. . . In any event, the bare fact that Congress by statute has provided a right at law without express provision for injunctive relief does not preclude the exercise of the general powers of a court of equity.<sup>58</sup>

The existence of equity power outside the scope of section 16 has been utilized by antitrust plaintiffs to obtain injunctions requiring defendants to continue to deal with the plaintiffs during

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<sup>56</sup> *Bateman v. Ford Motor Co.*, 202 F. Supp. 595 (E.D. Pa.), *rev'd*, 302 F.2d 63 (3d Cir. 1962).

<sup>57</sup> 302 F.2d at 65.

<sup>58</sup> *Id.* at 66.

"It may be conceded that the legislative history gives no indication that the subject of supplemental equitable relief was considered. That fact, to our minds, does not advance the ball in either direction. We know that the judicial power of the United States applies to all cases 'in Law and Equity.' Article III, section 2 of the Constitution so says. From the very beginning of equity one of the bases of action by the chancellor was to make effective the rights which the law gave a party. The purpose of the statute here in question, as its title says, was to balance the power 'now heavily weighted in favor of automobile manufacturers.' To make the remedy provided by the statute effective in accomplishing what is meant to be accomplished, we think that the dealer needs equity help in keeping his business going while his legal claim is being tested. A judgment for damages acquired years after his franchise has been taken away and his business obliterated is small consolation to one who, as here, has had a Ford franchise since 1933." *Ibid.* (Footnotes omitted.)

the pendency of litigation.<sup>59</sup> In two virtually indistinguishable recent cases, the Third Circuit granted and the Second Circuit denied preliminary injunctions in refusal-to-deal situations.<sup>60</sup> But in both cases "the reviewing court acknowledged that federal courts possess inherent equitable power to compel continuation of business dealings while private antitrust litigation is pending."<sup>61</sup>

In the *Bergen Drug* and *House of Materials* cases,<sup>62</sup> plaintiffs initiated private actions for treble damages. The defendant in each case then notified the plaintiffs that defendant would henceforth refuse to deal with them. Plaintiffs in each instance moved for preliminary injunctions restraining defendants from these refusals to deal. The plaintiffs contended they would suffer irreparable injury and that the refusal to deal was solely a punitive measure against them for pursuing their legal rights, and was part of a plan to deter others from bringing similar actions.<sup>63</sup>

Here again is a situation which does not seem to be within the scope of section 16. Both courts apparently thought the defendants' simple refusal to deal was not in violation of any antitrust law.<sup>64</sup> However, the Third Circuit in *Bergen Drug* found that the refusal to deal was calculated to frustrate the litigation and that therefore the court should exercise its *general* equity power to prevent interference with the operation of the antitrust laws. Without an injunction, the court stated, the main action could not successfully be prosecuted since plaintiff "will be unable to secure the cooperation of other wholesalers and of retailers to be witnesses because they fear the same sort of retaliatory action that plaintiff has experienced."<sup>65</sup> The court noted the relative burdens of the

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<sup>59</sup> E.g., *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743 (E.D. Pa. 1964).

<sup>60</sup> *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962), *reversing* 1961 Trade Cas. ¶ 70151 (D.N.J. 1961) (oral opinion); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962), *reversing* *P. W. Husserl, Inc. v. Simplicity Pattern Co.*, 191 F. Supp. 55 (S.D.N.Y. 1961).

<sup>61</sup> Farber, *The Antitrust Treble Damage Defendant's Duty to Continue Business Dealings with the Plaintiff Pendente Lite—A Two Case Study*, 8 ANTITRUST BULL. 883, 893 (1963); see *Bergen Drug Co. v. Parke, Davis & Co.*, *supra* note 60, at 728; *House of Materials, Inc. v. Simplicity Pattern Co.*, *supra* note 60, at 872.

<sup>62</sup> *Bergen Drug Co. v. Parke, Davis & Co.*, *supra* note 60; *House of Materials, Inc. v. Simplicity Pattern Co.*, *supra* note 60.

<sup>63</sup> *Bergen Drug Co. v. Parke, Davis & Co.*, *supra* note 60, at 726; *House of Materials, Inc. v. Simplicity Pattern Co.*, *supra* note 60, at 868-69.

<sup>64</sup> *Bergen Drug Co. v. Parke, Davis & Co.*, *supra* note 60, at 728, Comment, 42 NEB. L. REV. 825, 846 (1963); *House of Materials, Inc. v. Simplicity Pattern Co.*, *supra* note 60, at 870, 871-72.

<sup>65</sup> *Bergen Drug Co. v. Parke, Davis & Co.*, *supra* note 60, at 728.

parties and found little inconvenience to the defendant and irreparable harm to the plaintiff.<sup>66</sup>

This is clearly a sound result. The injunction is not of a permanent nature, and the defendant can always show justification for the refusal to deal. Thus, a preliminary injunction compelling a defendant to deal until the economic motive of deterring private treble damage actions is gone, should be allowed upon a showing that (1) the sole purpose of the refusal was to prevent legal action,<sup>67</sup> (2) irreparable damage will occur to the plaintiff, and (3) there is a lack of substantial damage to the defendant.<sup>68</sup>

#### IV

##### SCOPE OF INJUNCTIONS

In addition to the application of injunctive relief to areas of antitrust or related injury where the treble damage remedy would be insufficient or inapplicable, the flexibility and breadth of a court's injunction may offer further advantages to an aggrieved party.<sup>69</sup> A court may tailor its preliminary or permanent injunction to meet a wide variety of competitive conditions.

##### A. Preliminary Injunctions

It is generally stated that a preliminary injunction "will not issue except to prevent a change or threatened change in the status quo pending determination on the merits."<sup>70</sup> Where, for example, the plaintiff was attacking a merger which had already taken place,

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<sup>66</sup> *Ibid.*

<sup>67</sup> The plaintiff can, of course, satisfy this burden by inferential proof. For example, in *Bergen*, plaintiff showed it had dealt in substantial quantities with defendant for a number of years, and that defendant had not refused to sell to other wholesalers. *Ibid.*

<sup>68</sup> No showing that plaintiff has a reasonable chance of success in the suit on the merits should be required here. That issue is largely irrelevant to this *collateral* move by the defendant to coerce cessation of the suit. In *Bergen*, no mention was made of the plaintiff's chance of success.

<sup>69</sup> See generally Comment, 78 HARV. L. REV. 994 (1965). "The decision to grant or deny relief is only one aspect of equitable discretion. The court need not decide the case entirely for the plaintiff or entirely for the defendant; within broad limits, it is free to accommodate the interests of the plaintiff, the defendant, and the public by devising an individually tailored remedy." *Id.* at 1063.

*Cf.* Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639 (1962).

<sup>70</sup> TIMBERLAKE, *op. cit. supra* note 10, at 85. The court's power to issue a preliminary injunction which "'compels the defendant in order to obey it, to take affirmative action should be sparingly exercised.'" *Lipp v. National Screen Serv. Corp.*, 188 F. Supp. 245 (E.D. Pa.), *aff'd*, 290 F.2d 321 (3d Cir.), *cert. denied*, 368 U.S. 835 (1961), quoting *Bancroft & Sons v. Shelly Knitting Mills, Inc.*, 268 F.2d 569, 574 (3d Cir. 1959).

preliminary relief was denied, since what the plaintiff desired was not preservation of the *status quo*, but a restoration of prior conditions.<sup>71</sup> It has been pointed out, however, that:

The concept *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning. The better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to either party at the conclusion of the trial.<sup>72</sup>

Thus, "preservation of the *status quo*" is not an absolute limitation on the scope of permissible injunctive relief. At least one court has recently expressly recognized this fact. The court brushed aside the defendant's contention that the preliminary injunction which had been granted was unduly broad with the statement that it was nevertheless "eminently fair to both litigants."<sup>73</sup>

Of course the courts show reluctance to grant *drastic* preliminary injunctive relief, especially where there may be possible adverse effects on third parties.<sup>74</sup> However, as has been pointed out above, it is firmly established that a court of equity at least has inherent power to require a supplier to continue to deal with a distributor on customary terms and conditions until the merits of a dispute can finally be adjudicated.<sup>75</sup>

Generally the courts will also be reluctant to order any sort of affirmative relief in a preliminary proceeding. If, however, alleged violations took place after institution of the suit, a court has mandatory injunctive power to order affirmative restoration of the prior situation.<sup>76</sup> And, where warranted, a court can order affirmative action to protect the interests of the parties and public even where that involves altering the situation existing before suit was brought.

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<sup>71</sup> *Fein v. Security Banknote Co.*, 157 F. Supp. 146 (S.D.N.Y. 1957).

<sup>72</sup> Comment, 78 HARV. L. REV. 994, 1058 (1965).

<sup>73</sup> *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 783 (10th Cir. 1964).

<sup>74</sup> *Graves v. Cambria Steel Co.*, 298 Fed. 761 (S.D.N.Y. 1924) (refusal to order dissolution of monopoly). "[I]t has come to be generally recognized that considerations of policy are against decreeing divestiture or the complete destruction of a nationwide business at the suit of an individual in a private action . . . particular [*sic*] where that would have a far-reaching and possibly adverse effect upon interests not proved to have participated." *Schrader v. National Screen Serv. Corp.*, 1955 Trade Cas. ¶ 68217 (E.D. Pa. 1955) (refusal to order divestiture).

<sup>75</sup> *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *National Screen Serv. Corp. v. Poster Exch.*, 305 F.2d 647 (5th Cir. 1962); *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743 (E.D. Pa. 1964); *Airfix Corp. v. Aurora Plastics Corp.*, 222 F. Supp. 703 (E.D. Pa. 1963); *Greenspun v. McCarran*, 105 F. Supp. 662 (D. Nev. 1952).

<sup>76</sup> *Ramsburg v. American Inv. Co.*, 231 F.2d 333 (7th Cir. 1956).



For example, a large oil refiner can be compelled to raise its service station gasoline prices and maintain them at least two cents above the prices of independent brand service stations.<sup>77</sup> And where local merchants have conspired with a newspaper to cancel advertising in the plaintiff's competing newspaper, they may be compelled to reinstate such advertising.<sup>78</sup>

### B. *Permanent Injunctions*

Where a court, after a full hearing on the case, determines to issue a permanent injunction against the defendant, it may exercise its discretion in enjoining a wide variety of future, as well as past, violations.<sup>79</sup> This may include various forms of affirmative action. Perhaps the most graphic example is found in a 1955 district court case where the defendant movie projectionists union was found to have unlawfully refused to exhibit a certain film. Against the defendants' contention that injunctive relief in effect forced them to work, the court pointed out that the injunction was directed against the doing of an unlawful act, and that it was only the *effect* of this order which produced the result complained of.<sup>80</sup>

Other examples of broad and particularized injunctions include an order to discharge a certain employee if he engaged in specified conduct;<sup>81</sup> an injunction against cross-licensing even where the ef-

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<sup>77</sup> The court stated that it appeared that Continental was discriminating in price by selling its "Conoco" branded gasoline at one cent above (and in some instances at the same price or below) the price of gasoline sold under independent brands, "while recognizing and maintaining in other areas the standard two cents differential." The court stated that it further appeared that Continental was conspiring with its dealers by granting discounts and rebates to price Continental's brand at the same price as at company-owned stations. The court noted that gasoline prices were fluctuating wildly in three Utah counties, and that plaintiff might suffer irreparable injury if Continental's alleged price discriminations were not curtailed.

In addition to the price discrimination prohibition, Continental was forbidden to urge its dealers to price the company's gasoline at the same level for which it is sold by Continental through its own service stations. The company was also forbidden to agree with its dealers, "by discounting, rebating, or subsidizing the purchase price of 'Conoco' brand gasoline or by other similar device, to fix the price of 'Conoco' brand gasoline sold by such dealers at the same price for which similar brand gasoline is sold by defendants through its own service stations." *Frontier Ref. Co. v. Continental Oil Co.*, BNA ANTITRUST & TRADE REG. REP., Aug. 25, 1964, pp. A-13-14; *id.*, Sept. 15, 1964, p. A-1 (D. Utah 1964).

<sup>78</sup> *Greenspun v. McCarran*, 105 F. Supp. 662 (D. Nev. 1952).

<sup>79</sup> For examples of broad permanent injunctions prohibiting Robinson-Patman violations, see ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 154 n.174o (Supp. 1964).

<sup>80</sup> *I.P.C. Distribs., Inc. v. Chicago Moving Picture Mach. Operators Union*, 132 F. Supp. 294, 299-300 (N.D. Ill. 1955).

<sup>81</sup> *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125,

fect was to "make it disadvantageous for the defendants . . . to continue to hold their properties," thus in effect becoming a divestiture order;<sup>82</sup> a mandate to furnish to the plaintiff yearly certified public accountant reports on the use of a certain fund and to charge specified rates for certain services;<sup>83</sup> and an order not to undercut plaintiff's prices within a 200-mile radius of the latter's location.<sup>84</sup>

If these cases allowing broad, affirmative, mandatory relief affecting both parties indicate a trend toward greater judicial flexibility in injunctive proceedings, then it is a welcome trend. It is unnecessary to stress that antitrust situations involve complex factors and few black-and-white solutions. Effective and judicious use of injunctive orders can further the policies of our antitrust laws immeasurably, and provide the maximum safeguards for the public interest.

#### CONCLUSION

The foregoing pages demonstrate that there are many situations where injunctive relief is a valuable tool in the hands of the plaintiff. This tool can alleviate adverse effects on the plaintiff of antitrust litigation as well as prevent future damages before their occurrence.

A small businessman injured seriously enough to institute a complex and costly treble damage action frequently does not have the financial resources to withstand continuing illegal price wars, boycotts or other antitrust violations. It would be small consolation for such a plaintiff to receive a treble damage award many months after he has been forced to discontinue his business. Where the violations alleged in the complaint are likely to continue during the pendency of the suit, a preliminary injunction may be the only practical way to prevent further injury. The plaintiff may also utilize injunctive relief to protect his witnesses or himself from retaliation by the defendant.

Injunctions in antitrust cases can also serve the usual preventive functions. There may be situations where, at the time the complaint is filed, money damages suffered are slight. The purpose of a pre-

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145-47 (D. Mass.), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

<sup>82</sup> *William Goldman Theatres, Inc. v. Loew's, Inc.*, 1950-1951 Trade Cas. ¶ 62543, at 63597 (E.D. Pa. 1949).

<sup>83</sup> *A. O. Novander, Inc. v. Chapel Hill Gardens, Inc.*, 1959 Trade Cas. ¶ 69540, at 76170-71 (N.D. Ill. 1959).

<sup>84</sup> *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 667 & n.8 (6th Cir. 1965).

liminary injunction here is to prevent injury that is *threatened* and likely to occur to the moving party during the pendency of the litigation.<sup>85</sup> The fact that the moving party may be able to show only slight monetary loss at the time the motion is heard is irrelevant, for it is the nature of the threatened loss that controls.<sup>86</sup> Indeed, an injunction may be granted where the plaintiff has not suffered *any* injury giving rise to provable damages if there is a clear threat of irreparable future injury.<sup>87</sup>

It can be concluded, therefore, that despite the many attending difficulties, in a variety of instances injunctive relief offers an anti-trust plaintiff the most immediate, flexible, and effective remedy.

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<sup>85</sup> Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953).

<sup>86</sup> Revere Copper & Brass, Inc. v. Economy Sales Co., 127 F. Supp. 739 (D. Conn. 1954).

<sup>87</sup> Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers, 80 F. Supp. 888 (S.D.N.Y. 1948). A court may also grant an injunction to protect the public interest even though the party bringing the action is *denied* damages. Mid-West Theatres Co. v. Co-Operative Theatres, Inc., 43 F. Supp. 216, 224-25 (E.D. Mich. 1941).