Boston College Law Review

Volume 7 | Issue 2 Article 14

1-1-1966

Section 7 of the Clayton Act: The Private Plaintiff's Remedies

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STUDENT COMMENTS

SECTION 7 OF THE CLAYTON ACT: THE PRIVATE PLAINTIFF'S REMEDIES

The right of a private party, who is injured in his business or property by reason of a violation of federal antitrust law, to sue for treble damages is as old as federal antitrust law itself. The private antitrust action was created in 1890 as part of the Sherman Antitrust Act.[1] When the Clayton Act of 1914 expanded the scope of the proscribed activity, authority to maintain a private action for damages was similarly expanded to cover violations of the new law.[2] Section 7 of the Clayton Act prohibits corporate acquisition of stock or assets of another corporation where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country.[3] Under the clear language of the Clayton Act, a violation of section 7 which causes injury should create in the injured party a right to sue for treble damages. Yet courts have, for the most part, refused to adopt this syllogism and the clear mandate of section 4. We shall attempt to analyze the reasons for this refusal, and perhaps suggest a way out of this court-created quandary.

I. The Statutory Provisions

Section 4 of the Clayton Act provides simply:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.[4]

The Clayton Act is, by its own definition, an "antitrust law";[5] thus a person injured by any activity which is forbidden by the Clayton Act is authorized by section 4 to sue for treble damages. In addition, Section 16 of the Clayton Act specifically authorizes injunctive relief against damage resulting from a section 7 violation:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss

1 Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210.

2 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964). In 1955, the Sherman Act treble damage provision was repealed, having been superseded by the Clayton Act provision. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283.

3 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

4 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

5 38 Stat. 730 (1914), 15 U.S.C. § 12 (1964).

> or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title . . . .[6]

The burden of the section 7 plaintiff, as well as that of all other private antitrust plaintiffs,[7] is further lightened by Section 5(a) of the Clayton Act, which provides:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . , as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. . . .[8]

The difficulty arises, however, when it is sought to apply these remedial statutes to Section 7 of the Clayton Act. As amended in 1950, the statute was designed to supplement the antimonopoly provisions of the Sherman Act by arresting restraints on trade in their incipiency and prohibiting from the outset those combinations which are likely to result in full-fledged Sherman Act violations.[9] Section 7 provides, in relevant part, as follows:

> 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. (Emphasis supplied.)[10]

Congress, however, left to the Federal Trade Commission and the courts the difficult task of devising workable standards for determining whether a par-

[6] 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964). Section 18 "of this title" is § 7 of the Clayton Act.

[7] The other violations for which private relief is authorized are combinations or conspiracies in restraint of trade, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964); monopolies and attempts, combinations or conspiracies to monopolize, 26 Stat. 209 (1890), 15 U.S.C. § 2 (1964); price discriminations and related offenses, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964); exclusive dealing contracts, 49 Stat. 1528 (1936), 15 U.S.C. § 13(a) (1964); tying arrangements, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964); and interlocking directorates, 49 Stat. 717 (1936), 15 U.S.C. § 19 (1964).

[8] 69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1964). However, judgments not on the merits—consent judgments or decrees entered before any testimony has been taken—cannot be used as prima facie evidence in private actions. Ibid.

This section saves the private litigant the costly process of assembling the complex data usually required to prove a § 7 violation if the Government has already done so. Besides facilitating recovery by all private parties injured by antitrust violations, the section encourages suits by those who would not otherwise seek recovery because of inability to maintain a proceeding so cumbersome as one requiring proof ab initio of a § 7 violation

[9] For the legislative history of the amendment, see Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 233-38 (1960).

[10] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

ticular merger has the prohibited effects on competition. Their problems in formulating such standards and the soundness of their attempts, particularly from an economic point of view, have been widely discussed.[11] But private litigants encounter the most difficulty from the provision that has given the courts the least pause—the "may be" test.

Section 7 condemns acts which have a "reasonable *tendency to result* in violations of the Sherman Act."[12] It was directed at neither the bare possibility that anticompetitive effects might occur, nor the accomplished anticompetitive acts already covered by the Sherman Act. Thus the concept of probability was a necessary element in the definition of the forbidden acquisitions if the statute was to be effective in preventing those combinations which experience had indicated usually led to monopoly.[13]

> The statute is concerned with the reasonable probability of the lessening of competition or tendency toward monopoly as a result of the particular acquisition under scrutiny—a showing that such effects are reasonably likely to occur. This is what the words "may be" as used in the statute mean.[14]

The indicia of a "reasonable probability" that competition will be impaired necessarily vary from case to case. In the typical horizontal merger—one involving competitors in the same line of commerce—the fact that one of the competitors has been eliminated makes it relatively simple to find the probability that competition will be lessened.[15] In a vertical merger, between firms actually or potentially in a customer-supplier relationship, a firm's acquisition of a customer forecloses competition for that customer's business, and the probability of a substantial lessening of competition is thus established.[16] Where the parties to the merger are neither in a competitive nor in a buyer-seller relationship, a conglomerate merger results; these have been struck down on a variety of sometimes rather esoteric theories.

For example, the dangers of "reciprocity" were enunciated by the FTC and the Supreme Court in *FTC v. Consolidated Foods Corp.*[17] Consolidated, a diversified food processing and sales company, acquired Gentry, Inc., one of two major producers of dehydrated onion and garlic. The Supreme Court affirmed the FTC's determination that the acquisition violated section 7 because of Consolidated's ability to induce its suppliers to do business with Gentry, thereby strengthening Gentry's already firm position in the dehy-

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[11] See, e.g., Bok, supra note 9; Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313 (1965); Recent Developments in Antitrust Law: Section 7 of the Clayton Act and the Demise of the Conglomerate Merger, 6 B.C. Ind. & Com. L. Rev. 254 (1964).

[12] Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D.N.Y. 1963); see United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957).

[13] S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950), cited in American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 395 (S.D.N.Y. 1957).

[14] United States v. Continental Can Co., 217 F. Supp. 761, 767 (S.D.N.Y. 1963), rev'd on other grounds, 378 U.S. 441 (1964).

[15] See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[16] See, e.g., United States v. E.I. du Pont de Nemours Co., 353 U.S. 586 (1957).

[17] 380 U.S. 592 (1965).

drated onion and garlic market.[18] Such reciprocity in trading[19] points to the probability of a lessening of competition "where, as here, the acquisition is of a company that commands a substantial share of the market."[20] Although in this case evidence was presented that Consolidated had in fact actively solicited reciprocal arrangements in favor of Gentry, the Court adopted the FTC's conclusion that

> "merely as a result of its connection with Consolidated, and without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made."[21]

Another approach, the "deep-pocket" theory, emerged in *Reynolds Metals Co. v. FTC.*[22] Reynolds, a producer of aluminum foil, acquired Arrow Brands, Inc., which converted and decorated foil for resale to florists, enjoying about a third of the florist foil market. Although the court could have applied the principles relevant to vertical mergers, it chose instead to invalidate the acquisition on the theory that the financial backing of Reynolds gave Arrow a decisive advantage over its competitors.

> Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors. . . . The power of the "deep pocket" or "rich parent" . . . *might enable* Arrow to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition. (Emphasis supplied.)[23]

As in *Consolidated,* the court emphasized that the FTC was not required to show the occurrence of actual anticompetitive practices. To bring the acquisition within the prohibitions of section 7, it is sufficient that the acquisition "had the capacity or potentiality" to lessen competition.[24]

Moreover, it is not even necessary to a section 7 violation that either or both of the merged parties have been previously engaged in the affected line of commerce. In *United States v. El Paso Natural Gas Co.,*[25] the Supreme Court held that a conglomerate merger violated section 7 because it eliminated *potential* competition. El Paso, which sold half of all gas used in California,

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[18] The Supreme Court reversed the Seventh Circuit Court of Appeals, which had held that the FTC had failed to show a probability that the acquisition would substantially lessen competition. Consolidated Foods Corp. v. FTC, 329 F.2d 623 (7th Cir. 1964).

[19] "Reciprocal trading may ensue not from bludgeoning or coercion but from more subtle arrangements. A threatened withdrawal of orders if products of an affiliate cease being bought, or a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice." FTC v. Consolidated Foods Corp., supra note 17, at 1222.

[20] Id. at 1225.

[21] Id. at 1223.

[22] 309 F.2d 223 (D.C. Cir. 1962).

[23] Id. at 230.

[24] Ibid.

[25] 376 U.S. 651 (1964).

acquired Pacific Northwest Pipeline Corporation, a large western gas company which did not sell in the California market, although it had unsuccessfully tried to do so in the past. The merger created a reasonable probability that competition would be impaired, said the Court, because the California market was expanding and Pacific Northwest, before the merger, had possessed the resources, managerial skill and proximity to the market to attempt to enter the market on its own and was therefore a potential competitor which the merger had eliminated.[26]

United States v. Penn-Olin Chem. Co.[27] extended the potential competition rationale one step further. Pennsalt Chemicals Corporation and Olin Mathieson Company joined to form Penn-Olin to make and sell sodium chlorate in the southeastern United States. While in *El Paso* one of the parties to the merger had been competing in the market in question, here neither Pennsalt nor Olin had been a competitor in the relevant market. Both companies, however, had had a continuing interest in entering the market separately and had the resources to do so. The Supreme Court found a section 7 violation in that the formation of Penn-Olin eliminated the possibility that Pennsalt and Olin would ever enter the market separately. The Court felt that the threat of these companies "waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."[28]

Thus, a finding that section 7 has been violated need not be predicated on any demonstrable anticompetitive results: it may be based solely on an educated guess[29] that hypothetical harmful effects will probably materialize. This distinguishes a section 7 violation from the other types of antitrust violations for which private recovery is authorized: for section 7 is concerned not with the actual, but with the probable; not with the present, but with the future; not with market behavior which has produced injuries, but with market structure which is *likely* to produce injuries. A conviction for price discrimination necessarily implies the existence of someone who has been discriminated against. A conviction for price fixing implies that someone was forced to pay a higher price than he otherwise would have. But a conviction for a section 7 violation does not necessarily imply the existence of any injured party. It is this concept of probability inherent in section 7's preventive purpose that has precluded the majority of the concerned courts from reconciling section 7 with section 4, the treble damage section.

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26 Id. at 658-62.

27 378 U.S. 158 (1964).

28 Id. at 174. A bird in the hand, it seems, is not worth two in the bush. The Court prefers two potential competitors to one actual competitor, and is left with the curious finding that the entry of an additional competitor will probably lessen competition.

29 A § 7 determination requires "a predictive economic judgment, a conclusion as to the probability of various possible economic consequences of a merger, and an assessment of the substantiality of those effects. Except in the most obvious cases, economic theory simply does not permit confident judgments on these issues even when all the economically relevant facts have been duly assembled." Turner, supra note 11, at 1318.

II. Attempts to Obtain Treble Damages for Section 7 Violations

Three elements must be alleged and proved in private antitrust treble damage actions: (1) Violation by defendant of an antitrust law, (2) an ascertainable injury to the plaintiff's business or property which is reducible to money damages, and (3) a causal connection between the violation and the injury.[30] It is under this third element that the logical difficulties of section 7 have arisen.

The strict application of the requirement that the plaintiff's damage be the result of the violation itself led, in *Gottesman v. General Motors Corp.*,[31] not only to a denial of recovery but also to the denial of the possibility of recovery for damages as a result of a section 7 violation. In 1957 the Supreme Court had found a section 7 violation in the purchase of General Motors (GM) stock by the Du Pont Company. The rationale was that Du Pont had achieved its position as GM's supplier of automotive finishes and fabrics because Du Pont's purchase of GM stock and the consequent intercompany relationship had insulated the GM market from free competition and created a likelihood of monopoly.[32] Relying on that decision, the plaintiffs, minority shareholders of GM, brought a derivative action for damages allegedly sustained as a result of the acquisition.

After restating the predictive nature of section 7, the *Gottesman* court denied recovery, declaring that "plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7."[33] Although there may have been a loss ultimately traceable to the acquisition, the court could find no causal relationship between the loss and the evil against which section 7 was directed—potential lessening of competition.

The same result was reached on similar grounds in *Bailey's Bakery, Ltd. v. Continental Baking Co.*[34] Bailey was in competition with a bakery which Continental acquired. Alleging that the acquisition violated section 7, Bailey asserted that he was no longer able to compete with the acquired bakery because of the extensive advertising and price cutting it had undertaken since its merger with Continental, and sued for treble damages. The court granted the defendant's motion to dismiss the complaint as to the section 7 charges for failure to state a claim upon which relief can be granted, holding that no private action accrues from a section 7 violation.[35]

The court characterized section 7 as "strictly an 'ounce of prevention' Act, based on a 'may be' monopoly situation."[36] Because of the statute's concern with the future tendencies of an acquisition,

> any damages claimed for future restraint of trade would be purely speculative, and a plaintiff cannot recover money damages for antici-

[30] Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86, 90 (9th Cir. 1961).
[31] Supra note 12.
[32] United States v. E.I. du Pont de Nemours & Co., supra note 16, passim.
[33] Gottesman v. General Motors Corp., supra note 12, at 493.
[34] 235 F. Supp. 705 (D. Hawaii 1964).
[35] Id. at 717.
[36] Id. at 716.

pated but unimplemented acts of restraint which may invade its interests.[37]

In this case, however, Bailey alleged not a future but a present restraint of trade. He alleged an injury resulting from exactly what section 7 was intended to prevent: a lessening of competition as the result of a corporate acquisition. Yet the court denied that section 7 provided relief. The purpose of the statute, said the court, was to supplement the Sherman Act; it was "intended primarily to *arrest* apprehended relationships *before* those relationships could work their evil,"[38] but it was not intended to cover anticompetitive practices occurring after, even if as a result of, the merger in question.

> The prohibitory sanctions of Clayton § 7 are triggered to explode by and at the moment of acquisition. That, *after* the moment of acquisition, subsequent practices do injure competitors in the market does not, because of those subsequent injurious acts, give rise to a claim for treble damages under Clayton § 7.[39]

The court thus felt that the statute protects competition by protecting that relationship of companies known as a competitive market, and not by condemning specific anticompetitive acts. Accordingly, section 7 operates only at the moment of acquisition and does not encompass any subsequent activity even if that activity happens to be anticompetitive.[40] Clearly, under this view, no private recovery is possible, for private plaintiffs are not injured by the very act of the merger itself; they are injured by some act which results from or is made possible by the merger.

In *Julius M. Ames Co. v. Bostitch, Inc.*,[41] however, the District Court for the Southern District of New York refused to accept the *Bailey* rationale. Ames, whose business was the distribution of fastening devices and equipment, was a distributor for Calnail, Inc., which manufactured an industrial nailing tool. Bostitch, the dominant producer of fastening equipment in the national market, acquired Calnail. In the same agreement in which the merger was consummated, Bostitch and Calnail agreed that Bostitch would take over the distribution of Calnail products and that the pre-existing arrangements for the distribution of Calnail products by Ames would be cancelled.

37 Id. at 717.

38 Id. at 716.

39 Id. at 716-17.

40 This approach, however, has been rejected in government prosecutions of § 7. In United States v. E.I. du Pont de Nemours & Co., supra note 16, the merger was already over 30 years old when the government action was commenced. The Court stated:

> The appellees argue that the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of the stock. This argument misconceives the objective toward which § 7 is directed. The Clayton Act was designed to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or at any time after the acquisition, depending upon the circumstances of the particular case.

Id. at 596-97.

41 240 F. Supp. 521 (S.D.N.Y. 1965).

Ames sued for treble damages, alleging that the merger of Bostitch and Calnail violated section 7 and that he had suffered consequent damage when his distributorship was terminated.[42] Bostitch conceded, for the purpose of the motion only, that its acquisition of Calnail had violated section 7, but sought to dismiss the treble damage action for failure to state a claim.

The court, although duly noting Bostitch's reliance on *Gottesman* and *Bailey* for their holdings that no private action can accrue from a section 7 violation, nevertheless thought the present situation distinguishable. Here the court saw a more direct relationship between the loss and the merger:

> Plaintiffs have lost their distributorships. They lost them, according to the complaint, substantially at the moment when defendant acquired Calnail. Since . . . the acquisition of Calnail was illegal, defendant's illegal act has caused plaintiffs immediate and present damage. I cannot escape the conclusion that plaintiffs are entitled to recover that damage.[43]

In denying defendant's motion for dismissal,[44] the court found significance in the fact that Congress made no exception for section 7 when it authorized private recovery for injuries resulting from "anything forbidden in the antitrust laws,"[45] but it obviously imparted more significance to the fact that the loss to the plaintiff occurred "at the moment" of the acquisition; that is, the loss of the distributorship and the acquisition both resulted from the same agreement.

The soundness of the *Ames* decision was commented upon by the court which has most recently spoken on the subject of private relief under section 7, the United States District Court for the Eastern District of Missouri. In *Highland Supply Corp. v. Reynolds Metals Co.*,[46] plaintiff alleged injuries resulting from the merger previously considered in *Reynolds Metals Co. v. FTC*;[47] plaintiff was one of Arrows' competitors in the florist foil market. The district court held[48] that the claim was barred by the four-year statute of limitations, which, the court said, was not suspended by the FTC proceeding against Reynolds in 1957. The Eighth Circuit Court of Appeals affirmed this holding[49] and included, in dictum, its opinion of private rights of action under section 7. In light of the circuit court's ruling, the section 7 claim was dismissed.[50]

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42 Ames also alleged a violation of § 1 of the Sherman Act in that Bostitch conspired with Calnail to refuse to deal with plaintiffs and other former Calnail distributors. Id. at 523.

43 Id. at 524.

44 Defendant's motion for summary judgment on the Sherman Act charge was also denied. Id. at 529. While refusing to dismiss the § 7 claim, the court did not guarantee its success. "Whether plaintiffs can prove . . . damages, or, for that matter, whether they can prove a violation, is, of course, something with which we are not concerned upon the present motion." Id. at 526.

45 Id. at 524

46 245 F. Supp. 510 (E.D. Mo. 1965).

47 309 F.2d 223 (D.C. Cir. 1962).

48 Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15 (E.D. Mo. 1963).

49 Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964).

50 238 F. Supp. 561 (E.D. Mo. 1965).

The present action was a motion by plaintiff for reconsideration of that dismissal in view of the Supreme Court's subsequent ruling that FTC proceedings do serve to suspend the running of the statute of limitations.[51] Reynolds opposed the motion, denying the possibility of private relief under section 7 and emphasizing the following dicta in the Eighth Circuit's previous opinion:

> We think that any effort to convert Section 7 of the Clayton Act into a per se violation of the anti-trust laws so as to give rise to a private right of action under the Clayton Act has been squarely checked by what is said by Mr. Chief Justice Warren in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510. As interpreted in that case, Section 7 of the Clayton Act does not condemn all mergers, but only those having demonstrable anti-competitive effects. The statute deals with clear-cut menaces to competition, not with accomplished monopolies, presently creating damage to a competitor, which is the sine qua non of a private right of action under Section 5 (sic) of the Clayton Act.[52]

The court recognized that the *Minnesota Mining* decision overturned the Eighth Circuit's ruling on the statute of limitations, but expressed no dissatisfaction with the Eighth Circuit's position on the possibility of private relief.

> Absent a controlling Supreme Court ruling, this Court is required to give great weight to the pronouncements of our Court of Appeals, even though they appear by way of dictum.[53]

The problem of causation was again examined[54] and the language of the *Bailey* case exempting post-merger activity from the coverage of section 7 was cited. This "grudging application of the requirement of causation,"[55] the court notes, was not followed in *Ames v. Bostitch,* but the *Ames* rationale is criticized. Furthermore, the circuit court's view of the causation issue must control. "It has chosen to apply a narrow concept of causation and this Court must defer thereto."[56]

With one exception, then, the courts have found a logical inconsistency in the statutory scheme, and have carved out a judicial exception to the all-inclusive language of Section 4 of the Clayton Act.

III. The Majority Approach

The "no recovery" approach of the *Gottesman, Bailey* and *Highland* courts, though no doubt motivated by an honest attempt to deal with the logical dilemmas of section 7, is nonetheless an undesirable solution in light

[51] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

[52] Highland Supply Corp. v. Reynolds Metals Co., supra note 49.

[53] Highland Supply Corp. v. Reynolds Metal Co., supra note 46, at 512.

[54] "The problem arises because a plaintiff cannot allege that he has been injured solely by a merger or acquisition which has potential prohibited effects." Id. at 512-13.

[55] Id. at 513.

[56] Id. at 514.

of the purpose of section 4. Clearly, section 4 represented an attempt by Congress to facilitate enforcement of the antitrust laws by making it worthwhile for the private plaintiff to prosecute antitrust violations which might otherwise escape detection.[57] The intent of section 7 is to prevent or arrest those concentrations of capital which are likely to decrease the vitality of the competitive market. This danger is as inherently inimical to competition as any other antitrust violation. Concurrent enforcement of section 7 by private parties is therefore as desirable and necessary as it is to the administration of any other antitrust law. Courts should not draw a line at section 7 and refuse to allow concurrent enforcement of that one law alone unless it is absolutely unavoidable to do so.

Is the logical difficulty so great as to necessitate a complete foreclosure of recovery, or has the line been unnecessarily drawn? The answer is indicated by an examination of the importance of the problem in other antitrust areas, the presence or absence of similar difficulties in granting injunctive relief under section 7, and the use of post-acquisition evidence to prove a section 7 violation.

A. *Private Relief in Other Antitrust Areas*

An antitrust plaintiff must prove that his injury resulted from something prohibited in the antitrust laws. Section 7, so the argument goes, condemns only mergers of a certain type; it does not forbid post-merger anticompetitive acts even though those acts result from or are made possible by the merger. Since the merger itself, which is the only thing the statute prohibits, can cause no present damage, treble damages cannot be awarded for a section 7 violation.

But the fact is, of course, that the strict causation requirement which has been applied to section 7 has not been applied to other antitrust areas, and the possibility of private relief in those areas is not questioned on logical grounds. For example, in *Atlantic Heel Co. v. Allied Heel Co.*,[58] specific anticompetitive acts (wrongful taking of trade secrets, false statements concerning plaintiff's financial condition, attempts to recruit plaintiff's key employees, interference with plaintiff's suppliers), even though not prohibited in Section 1 of the Sherman Act pertaining to conspiracies in restraint of trade, were the basis for private relief for violation of that section.

A better example of the judicial approach to the "causation" problem is

[57] "The grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore make them more effective." Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891, 893 (5th Cir. 1954). This purpose is facilitated by a four-year statute of limitations, 69 Stat. 283 (1955), 15 U.S.C. § 15(b) (1964), which is suspended while a government prosecution against the same defendant is pending or in progress and for one year thereafter. 69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1964). The Supreme Court has recently held that proceedings by the Federal Trade Commission as well as prosecution by the Department of Justice serve to suspend the running of the statute of limitations. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra note 51. See Rockefeller, The Supreme Court and the Private Antitrust Plaintiff, 7 B.C. Ind. & Com. L. Rev. 279 (1965).

[58] 284 F.2d 879 (1st Cir. 1960).

Osborn v. Sinclair Ref. Co.[59] In an earlier action, the Fourth Circuit had found that Sinclair had agreed with Goodyear to assist, on a commission basis, in selling Goodyear tires, batteries and accessories to Sinclair dealers; and that Sinclair required its dealer-lessees in Maryland, one of whom was Osborn, to buy Goodyear products as a condition of their leases.[60] Osborn, alleging that his dealership had been cancelled because he refused to cooperate in carrying Goodyear products, brought an action for treble damages based on a violation of Section 3 of the Clayton Act, which prohibits tying arrangements.

The district court applied the same rationale as the *Gottesman, Bailey,* and *Highland* courts have applied to a section 7 action. The court recognized the illegality of the tying arrangement and found that Sinclair's termination of Osborn's lease was in furtherance of that arrangement, but denied that the termination could be the basis for damages because it was not a "per se" violation of the antitrust laws.[61]

> Although the tying arrangement may be illegal per se, and give rise to criminal or civil action by the government or to private claims for damages . . . , the termination of a dealership in furtherance of such a plan or arrangement is not per se a violation of the antitrust laws; such a termination will not give rise to a claim for treble damages unless it amounts to an unreasonable restraint of trade.[62]

The district court's denial of relief on the grounds that the termination was an act not prohibited by the antitrust laws was rejected by the Fourth Circuit as inconsistent with the language and purpose of section 4. The lower court's position, said the court of appeals, "is in direct conflict with the statutorily declared right to treble damages for injury to one's business caused by a violation of the antitrust laws."[63] The purpose of the treble damage provision is concurrent enforcement of the antitrust laws, but the lower court's limitation on section 4 "would in large measure frustrate this salutary purpose."[64] In many, if not most, antitrust actions, says the court, the damage alleged is loss of profits through refusal to deal, and if a seller can implement illegal tying arrangements by refusing to deal without having to answer for damages, the effectiveness of section 4 as an enforcement measure would be greatly diminished.[65]

The court did not feel compelled to deal at length with the causation argument. Osborn lost his dealership because he refused to cooperate with the illegal arrangement; his injury was therefore undeniably " 'by reason of' something forbidden in the antitrust laws."[66]

There appears to be no reason why section 7 should be treated any

[59] 324 F.2d 566 (4th Cir. 1963).

[60] Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), cert denied, 366 U.S. 963 (1961).

[61] Osborn v. Sinclair Ref. Co., 207 F. Supp. 856, 861 (D. Md. 1962).

[62] Ibid.

[63] Osborn v. Sinclair Ref. Co., supra note 59, at 571

[64] Id. at 572.

[65] Ibid.

[66] Id. at 571.

differently. Why should courts feel more constrained to compensate those damaged as the result of an illegal merger than those whose injury was the result of a prohibited tying arrangement? Tying agreements, in the abstract, are as harmless as illegal mergers; it is only when the tying agreement or the merger is consummated and the effect on the competitive market appears that the undesired evils occur. It was to prevent the occurrence of these evils that Congress decided to prevent the formation of their causes. And it was to compensate those who are injured by virtue of the evils that tying agreements and illegal mergers spawn that the Congress passed section 4.

B. *Injunctive Relief*

Section 16 of the Clayton Act specifically names section 7 as one of the antitrust laws whose violation will be the basis for granting injunctive relief if loss or damage is threatened. Despite the narrow view of causation taken by the courts in private treble damage suits based on section 7 violations, courts have not felt bound to apply a similarly strict standard to suits for injunctive relief, and pre- or post-acquisition activity has been enjoined.

Hamilton Watch Co. v. Benrus Watch Co.[67] is an illustration. Benrus bought 24% of Hamilton's outstanding stock as part of a plan to gain control of Hamilton. Hamilton alleged a section 7 violation and sought a preliminary injunction to prevent Benrus from voting its stock at the Hamilton shareholders' meeting. The court found a violation because the acquisition was part of a plan to gain control of Hamilton, which plan was reasonably probable to succeed, and, if successful, would probably substantially lessen competition. Benrus was enjoined from voting its newly-acquired stock. The threatened damage which Hamilton successfully alleged was the probability that Benrus would vote its stock to gain representation on Hamilton's board of directors and use its representation to "persuade or to compel a relaxation of the full vigor of Hamilton's competitive effort. . . ."[68]

Note, of course, that the damage alleged by Hamilton, even had it already been accomplished, would not meet the treble-damage causation requirement, for the damage would have resulted not from the acquisition itself, but from voting the stock to gain representation to induce a lessening of competition—all of which are post-acquisition acts.

The Second Circuit affirmed,[69] citing the need for prompt action to prevent anticompetitive practices once the plaintiff satisfies the court that section 7 has been violated. "Interference at an early stage, if possible, seems the paramount aim."[70] "[T]he private harm to plaintiff required as a condition of granting injunctive relief under Section 16 need not be at all the same as the public harm condemned by Section 7."[71]

Other cases have followed a similar pattern. In *American Crystal Sugar Co. v. Cuban-American Sugar Co.*,[72] plaintiff successfully sought to enjoin

67 114 F. Supp. 307 (D. Conn. 1953).
68 Id. at 317.
69 206 F.2d 738 (2d Cir. 1953).
70 Id. at 742
71 Id. at 743
72 152 F. Supp. 387 (S.D.N.Y. 1957).

defendant from voting his newly-acquired stock in plaintiff's company. A section 7 violation was found on the same grounds as in *Hamilton*, but here plaintiff alleged additional threatened damage. If the acquisition of plaintiff's stock by defendant continued and a merger resulted which violated the antitrust laws, prosecution, plaintiff asserted, might well result in loss and expense to him. Furthermore, claimed the plaintiff, if defendant gained representation on plaintiff's board of directors, a damaging disclosure of the plaintiff's future business plans would result.

Plaintiffs in these cases were parties to the acquisition, seeking to enjoin their own absorption through a merger made possible by the acquisition. Injunctive relief has been granted, perhaps largely because of the great damage which would be suffered by the plaintiff and the market should the merger take place and later be dissolved by a section 7 divestiture order. Competition is not protected if one of the parties to a condemned merger cannot reactivate itself as a competitive entity because it has lost its customers and trade secrets.

In suits for injunctive relief under section 7, then, courts seem to have taken the position that post-acquisition acts which are of the type the statute is generally aimed at preventing are enjoinable, even though they are not specifically prohibited in the statute, and have thus not equated standing to sue for treble damages with standing to sue for injunctive relief. This disparity in treatment may not be unreasonable. Section 4 authorizes treble damages for injury "by reason of anything forbidden in the antitrust laws," while section 16 authorizes injunctive relief "against threatened loss or damage by a violation of the antitrust laws." The difference in wording of the two statutes arguably permits a greater range of acts to be enjoined than may be the basis for treble damages, because it may, in reality, be easier to show the threat of harm than the reality of harm. But perhaps a more significant reason is that the nature of injunctive relief is more akin to the statutory scheme of section 7. While a court may be naturally reluctant to award treble damages based on violation of a statute which implies no present injury, similar compunctions might not be felt about granting injunctive relief, where the natures both of the statute and of the relief sought are preventive. And while in a suit for damages an ascertainable monetary loss is essential, injunctive relief is intended to function when no present damages are ascertainable.

But despite the differences between injunctive relief and treble damages, the fact that courts have applied a less strict causation requirement when dealing with injunctive relief may shed some light upon the validity of the strict causation requirement applied in treble damage actions. Why should a plaintiff be under a lesser duty to connect the injury with the prohibitions of the statute when the relief he seeks—prevention or divestiture of the merger—is even more drastic than treble damages? And why should he be able to employ section 7 to enjoin post-acquisition acts, yet be denied recovery should he be injured by the very same acts, on the ground that section 7 does not prohibit these acts? These questions deserve some judicial consideration before section 7 treble damage relief is foreclosed entirely.

C. *Post-Acquisition Evidence*

Another reason against denying treble damages for post-acquisition acts is based on the Government's ability to use evidence of such acts to prove a section 7 violation. In *Consolidated Foods,* for example, the FTC presented evidence that the defendant had in fact attempted to solicit reciprocal agreements. The violation was based not on those agreements alone, but on the probability that Consolidated would increase its efforts in that direction and thereby seriously impede competition. Nevertheless, the Supreme Court, although emphasizing that section 7 requires only the probability of anticompetitive effects,[73] still approved the use as evidence of actual post-acquisition effects.

> The Court of Appeals was not in error in considering the post-acquisition evidence in this case. . . . If the post-acquisition evidence were given conclusive weight or was allowed to override all probabilities, then acquisitions would go forward willy-nilly, the parties biding their time until reciprocity was allowed fully to bloom. It is, of course, true that post-acquisition conduct may amount to a violation of § 7 even though there is no evidence to establish probability *in limine.*[74]

Is it not, then, inconsistent to allow the Government to help prove a violation by pointing to a particular anticompetitive act as the kind of practice section 7 was intended to prevent, but at the same time deny that section 4—whose purpose is to provide supplementary enforcement of the antitrust laws—authorizes the awarding of treble damages to a person injured by those same acts? This is not to say that post-acquisition anticompetitive acts must necessarily be proven in a prior government action before a private plaintiff may recover. Rather, the use of such evidence indicates that the anticompetitive effects themselves, and not the merger per se, are the evils against which section 7 is aimed, and those for which section 4 recovery should be allowed.

Perhaps even more significantly, the use of such evidence should allay judicial misgivings about relaxing the strict causation requirement lest damages be awarded for harm which did not result essentially from the

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[73] FTC v. Consolidated Foods Corp., supra note 17, at 1224:

> But the force of § 7 is still in probabilities, not in what later transpired. That must necessarily be the case, for once the two companies are united noone knows what the fate of the acquired company and its competitors would have been but for the merger.

[74] Ibid. Mr. Justice Harlan, in his concurring opinion, offered a defense for the use of post-acquisition evidence.

> To determine that probability [that competition will be lessened], the courts and the Commissions should rely on the best information available, whether it is an examination of the market structure before the merger has taken place, or facts concerning the changes in the market after the merger has been consummated. For that reason, I differ with the Court in its assessment of the weight to be accorded post-acquisition evidence. That evidence is the best evidence available to determine whether the merger will distort market forces in the . . . industry.

Id. at 1228.

merger. If a federal court hearing a government suit is qualified to decide which post-acquisition acts were caused by the merger and therefore admissible to help prove the violation, the same court would seem to be equally qualified to decide which acts were caused by the merger and therefore grounds for treble damage actions.

IV. The Ames Approach

The foregoing discussion points up the undesirability and needlessness of completely denying the possibility of relief. The *Ames* decision admits the possibility of relief and, for that reason alone, has a great deal to recommend it. But while the *Ames* court does not deny relief, neither does it realistically limit it.

According to *Ames*, the plaintiff could recover because he lost his distributorship "substantially at the same time" as the consummation of the merger. This reliance on the simultaneity of the violation and the loss clearly creates a false issue, for the test is one of causation, not one of temporal proximity. The *Highland* court, recognizing this shortcoming of *Ames*, expressed the fear that the granting of relief for injury due to any act made possible by a violation of section 7 would create a limitless flow of lawsuits.

Again, however, precedent in the other antitrust areas needs to be considered; the fear of the *Highland* court could have been allayed by a consideration of the limitations embodied in the "target area" approach. This is simply an elaboration of the traditional tort recovery requirement that the plaintiff must be injured, not merely by some wrong resulting from the violation of a statute, but by a wrong of the type the statute was designed to prevent. For example, where the statute is one designed to preserve competition, the plaintiff

> must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured "by reason" of anything forbidden in the antitrust laws.[75]

In this way, the target area doctrine confines the windfall of treble damages and denies standing to sue to those harmed only incidentally.[76] Accordingly, one whose loss results from diminution or interruption of a profitable business relationship with a party directly affected by the violation, where such diminution is merely incidental to the violation, may not recover. The target area doctrine, then, merely represents the judicial interpretation of Congress' expressed intent that the treble damage seeker must have incurred his damages "by reason of" the antitrust violation.

The usefulness of these limitations can be exemplified by comparing *Ames* with the case of *Robinson v. Stanley Home Prods., Inc.*[77] In the latter case, the plaintiff sold Plura Plastics' products (plastic cups) on commission.

[75] Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951).

[76] See Timberlake, The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws, 30 Geo. Wash. L. Rev. 231, 236 (1961).

[77] 178 F. Supp. 230 (D. Mass.), aff'd, 272 F.2d 601 (1st Cir. 1959).

After plaintiff had obtained orders for Plura's products from Stanley, Plura and Stanley began dealing directly with each other and Plura terminated its agreement with plaintiff. In a suit for three times the amount of commission he lost on those direct sales, plaintiff alleged a violation of the Robinson-Patman Act,[78] which prohibits price discriminations, alleging that Plura was selling to Stanley at reduced prices which discriminated against Plura's other customers.

The court denied recovery, holding that no relationship of proximate cause existed between the price discrimination and plaintiff's loss of commission. If plaintiff had suffered a wrong he would have to seek his remedy by an action for breach of contract or wrongful interference with a contractual relationship,[79] but he could not recover treble damages merely because the harm happened to be preceded by an antitrust violation.

When this decision is compared with the *Ames* case, it becomes apparent that the *Ames* court, while it alone admitted the possibility of treble damage relief under section 7, probably went too far. The injury upon which Ames predicated his claim was the loss of his distributorship, which he claimed was a result of the merger between his former employer and Bostitch. Even though a causal relationship between the merger and the termination of Ames' distributorship might be shown, it seems clear that Ames was not within the target area of section 7. His loss did not result from a lessening of competition. In fact, his loss had no connection whatever with the legality of the merger, for his distributorship might have been terminated as the result of a perfectly legal merger. Ames, like Robinson, may have a remedy somewhere, but his recovery should not be tripled because his loss was preceded by an antitrust violation.

By way of contrast, the plaintiff in *Osborn v. Sinclair*[80] was within the target area of the anti-tying arrangement statute. Not only did he lose his lease as the direct and proximate cause of the tying arrangement (i.e., because of his failure to acquiesce in the arrangement), but also, since he was the intended victim of a tying arrangement, he was the sort of person the statute was intended to protect.

V. Conclusion

While denial of recovery on logical grounds needlessly eviscerates the enforcement provisions of section 4, the severity of the treble damage remedy and the unfairness of undeserved windfalls require that this remedy be limited to those within the target area of section 7. Since the target area of section 7 is competition, standing to sue should probably be limited to those competing in the market affected by the acquisition. Only a competitor can be injured as a direct result of violation of a statute intended to prevent the lessening of competition. Although post-violation activity can admittedly injure noncompetitors, as in the *Ames* case, such injury is at best incidental to the fact of a section 7 violation.

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78 49 Stat. 1528 (1936), 15 U.S.C. § 13(a) (1964).

79 Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230, 233 (D. Mass.), aff'd, 272 F.2d 601 (1st Cir. 1959).

80 Supra note 59.

Thus a competitor who is injured[81] by anticompetitive acts which result from a section 7 violation ought to recover treble damages. There is no logical difficulty in allowing private recovery under a statute which predicts harm if, in fact, the predicted harm has already become a reality. Relief in such cases can be granted by applying the same standards as are operative in other private antitrust actions and should be granted in the interests of a realistic compliance with the statutory scheme of antitrust law enforcement.

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[81] The Supreme Court has stated that in private antitrust actions, damages may be awarded based on a just and reasonable estimate. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946).

In § 7 actions, such an estimate can be made by employing the same techniques used in other antitrust areas. For example, Timberlake lists three basic ways to measure loss of profits: (1) The "before and after" method, which compares profits preceding and following the violations; (2) the "yardstick" method, which compares the plaintiff's profits with those of a competitor; and (3) expert testimony, most commonly used in connection with one of the first two methods. Timberlake, supra note 76, at 261-77.