"Preliminary Preliminary" Relief Against Anticompetitive Mergers

Confusion and inconsistency now characterize the law dealing with the granting of preliminary injunctions against mergers challenged as anticompetitive under Section 7 of the Clayton Act. The Act specifically authorizes district courts to issue such injunctions.[1] Although separate, differently-worded statutes (Sections 15 and 16 respectively) apply to government and private attempts to block mergers,[2] in practice courts apply to both types the "same conditions and principles" as courts of equity generally use.[3] An applicant for a preliminary injunction under either Section 15 or 16 must meet the Section 16 standards and show: (1) probability of success at trial, (2) irreparable harm to plaintiff pendente lite without the injunction; and (3) damage to the plaintiff pendente lite in the absence of preliminary relief greater than damage to the defendants should the injunction issue.[4] In applying these standards, courts have disagreed markedly, producing unpredictable and irreconcilable results. A different framework, one

1. *See* 15 U.S.C. §§ 25, 26 (1970). For the text of § 7 of the Clayton Act, see note 12 *infra*.

2. Section 16, applying to private party suits, says:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

15 U.S.C. § 26 (1970).

Section 15, which concerns government suits, provides:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act and . . . before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

15 U.S.C. § 25 (1970).

The statutory requirement of posting a bond has had no effect on litigation in this field. No movant has ever been denied relief for failure to comply with this requirement, and no bond that has been posted has ever been forfeited. This requirement has even, at times, been waived by the district courts. *E.g.*, Filtrol Corp. v. Slick Corp., 1970 Trade Cas. ¶ 73,035 (C.D. Cal.), *aff'd*, 428 F.2d 826 (9th Cir. 1970).

For a discussion of immediacy, see note 24 *infra*.

3. When deciding government motions, courts refuse to assert in conclusory fashion that preliminary relief was or was not "just in the premises"; they always attempt to apply some combination of the Section 16 standards. *See, e.g.*, United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

4. City of Louisville v. Louisville Home Telephone Co., 279 F. 949, 956 (6th Cir. 1922); O. Fiss, Injunctions 1-137 (1971).

that grants preliminary injunctions in all merger suits, could be employed more justifiably, with more rational and socially beneficial results.

I. Probability of Success at Trial

In the first reported action for preliminary relief under Section 16 against an alleged violation of Section 7, the Second Circuit imposed a light burden on plaintiff regarding probability of success at trial. According to *Hamilton Watch Co. v. Benrus Watch Co.,*[5] decided in 1953:

> 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 so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.[6]

Inasmuch as any merger raises "serious, substantial, difficult and doubtful" issues under Section 7,[7] the *Hamilton Watch* standard allows all plaintiffs to satisfy the requirement of showing probable success at trial.

Few courts—including the *Hamilton Watch* court—have applied that standard literally.[8] Most courts have paid lip service to the "serious issue" test, and then have proceeded to consider the substance of plain-

5. 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953) [hereinafter cited as *Hamilton Watch*].

6. 206 F.2d at 740.

7. *See* pp. 158-61 *infra.*

8. In *Hamilton Watch*, although the Court of Appeals held that actual violation need not be proved, it expressly referred to the trial court's findings as to their competition with each other—based upon detailed analysis of the market shares of the two companies and Benrus' defense that its purchase of Hamilton's stock was solely for investment—especially one finding that "the purchases [of stock] therefore violated Section 7." 206 F.2d at 740.

Only one court has ever actually applied the *Hamilton Watch* standard. In Vanadium Corporation of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962), the court noted the rule that plaintiff "must . . . show a reasonable probability of success upon final hearing," *id.* at 697, but then cited with approval the *Hamilton Watch* standard, applied it to the facts of the instant case, and granted the injunction.

> 2. The potential lurks where defendants *may have violated*, or are *threatening to violate*, § 7 of the Clayton Act . . . .
>
> * * * *
>
> 4. Whether or not defendants' acquisition of plaintiff's stock was solely for investment within the meaning of § 7 of the Clayton Act . . . presents a *serious question.*

Id. (Emphasis added.)

tiffs' allegations, issuing preliminary injunctions only when actual violations of Section 7 existed.[9] More recent cases no longer make any pretense of following the *Hamilton Watch* standard. They concede the presence of "serious, substantial, difficult and doubtful" questions, but deny preliminary relief because the plaintiff failed to prove that the merger had a "reasonable probability" of being illegal.[10] However, courts mistakenly equate this standard of "reasonable probability" of success at trial with the question of "whether it [is] likely that the acquisitions sought to be made . . . would substantially lessen competition."[11]

The problem with the prevailing standard is that it confuses preliminary and final injunctive relief. It equates probability of success at trial with probability of lessened competition, in effect requiring plaintiffs to prove their *final* case before preliminary relief issues. By the terms of Section 7, however, a demonstration of probability of lessened competition forms the basis for final injunctive relief, either against consummation or for divestiture. Thus, the current standard for preliminary relief demands proof of an actual violation of Section 7 rather than a reasonable probability of being able to prove such violation at trial.

This paradox stems from a plainly incorrect reading of the underlying statute. The unusual nature of Section 7 of the Clayton Act colors the type of preliminary relief it warrants. An incipiency statute, Section 7 tries to prevent evils before they develop. Thus, it makes illegal mergers that *may* have the effect of lessening competition or

9. In United States v. Brown Shoe Co., 1956 Trade Cas. ¶ 68,244 (E.D. Mo.), the first reported case under § 15, the court verbally accepted the "serious issue" test of *Hamilton Watch*, and then noted that the "complexity" of the case necessitated a full hearing. *Id.* at 71,115. This conclusion would seem to mandate issuing a preliminary injunction if the *Hamilton Watch* standard were applied, but the court also noted the "weakness of plaintiff's case" and the "fact" that, "If the case were submitted finally on the present record, judgment would have to be for the defendants." *Id.* at 71,117, 71,115. Therefore, the merger was allowed to proceed subject only to a hold-separate order. In effect, the court was requiring the government to prove its *final* case before *preliminary* relief would issue.

10. Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, 294 F. Supp. 1263 (D. Del.), *rev'd*, 414 F.2d 506 (3d Cir. 1969); American Smelting & Refining Co. v. Pennzoil, Inc., 295 F. Supp. 149 (D. Del. 1969); United States v. Aluminum Company of America, 247 F. Supp. 308 (E.D. Mo. 1964); United States v. Parents Magazine Enterprises, Inc., 1962 Trade Cas. ¶ 70,437 (N.D. Ill.); American Crystal Sugar Co. v. Cuban-American Sugar Co., 143 F. Supp. 100 (S.D.N.Y. 1956).

11. United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509, 523 (3d Cir. 1963). This is the only case where an appellate court ever reviewed the interlocutory order of a district court under § 15, and will probably be the last. *See* United States v. FMC Corp., 84 S. Ct. 4 (1963) (decision by Mr. Justice Goldberg in chambers). District courts have uniformly applied the rule of *Ingersoll-Rand* since 1963.

creating a monopoly.[12] Final relief under Section 7 therefore resembles preliminary relief under more typical statutes.[13]

Suppose, for example, a statute proscribed mergers that actually lessened competition or created a monopoly. Then, under the usual rules of equity, preliminary relief against consummation of a merger would issue upon proof of a reasonable probability that the result would be lessening of competition or monopoly.[14] The injunction would be vacated at trial upon proof that the merger's actual effect would not be in violation of the statute.

Section 7 goes beyond this hypothetical statute; it proscribes not only mergers that actually lessen competition or create monopoly, but also mergers that *may* have such a result. Thus, a plaintiff is entitled to final relief under Section 7 in a situation where not even preliminary relief would be available under the hypothetical statute. Just as normally the purpose of preliminary relief is to prevent the existence of the recognized evil, so Section 7 is the method chosen by Congress to avoid the evils of monopolization before they fully mature. Congress, in effect, institutionalized preliminary relief as the basic method for avoiding lessening of competition through merger.

Sections 15 and 16 of the Clayton Act enhance the incipiency character of Section 7. These provisions, nearly unique in type, provide for preliminary relief in advance of a final adjudication that is itself really preliminary in nature; they provide, in effect, "preliminary preliminary" relief. If the piggyback preliminary relief created by Sections 15 and 16 is equated with the essentially preliminary effect of Section 7 itself, and the former is issued only where the right to final relief under the latter is firmly established, as has been the practice of most courts, the provisions of Sections 15 and 16 authorizing preliminary relief become meaningless. In place of their two-fold incipiency standard has been substituted the usual test applied to motions for summary judgment.

In the sense that preliminary relief is "incipient," Sections 15 and

12. 15 U.S.C. § 18 (1970):

No corporation . . . 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.

13. As an incipiency statute, § 7 is not unique. The same is true of § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). However, courts considering preliminary relief against violations of these statutes have also failed to recognize the peculiar relationship between their incipient nature and the traditional standards for preliminary relief.

14. This assumes, of course, that plaintiff also satisfies the irreparable damage and balancing of hardships tests. More will be said of these *infra*.

16, as a matter of simple statutory interpretation, should properly be interpreted as providing a means for preventing incipient monopolization when it is first proposed, before it is consummated. Applying the usual rule of equity to the unusual wording of Section 7 would result in the grant of preliminary relief whenever the plaintiff demonstrates a "reasonable probability" that the proposed merger "may" result in the proscribed evil, which is lessening of competition or creation of monopoly, as defined by the statute and the courts.

Even on the assumption that not every merger actually violates Section 7, every merger could still present a reasonable probability of violation, as the legal standards applied to mergers show.

Horizontal mergers, which involve merging companies that produce competing goods and sell them in the same market area, are the most suspect. Courts have held such mergers illegal even when the market percentages involved were tiny and the industry unconcentrated.[15] Under established legal doctrine, every horizontal merger clearly has at least a reasonable probability of violating Section 7.

Vertical mergers, in which the merging companies have a purchaser-supplier relationship, face a similar peril. The Supreme Court has distinguished two economic contexts for vertical mergers: (1) where a non-integrated company is seeking to match its integrated competitors, and (2) where a non-integrated company seeks to introduce integration to the industry, or to extend the existing degree of integration. In both cases, the result has been the same. The Court has rejected as a defense for a proposed vertical merger[16] the fact that an industry is generally integrated, and has held illegal vertical integration through merger, whether involving small or large companies in a generally non-integrated industry.[17] Thus, all vertical mergers embrace a reasonable probability of illegality.

Conglomerate mergers, which include any merger which is neither

15. In Brown Shoe Co. v. United States, 370 U.S. 294 (1962), the Supreme Court held a merger achieving five per cent control to be illegal where the rest of the industry was composed of smaller companies. In United States v. Von's Grocery, 384 U.S. 270 (1966) and United States v. Pabst Brewing Co., 384 U.S. 546 (1966), the challenged mergers joined small companies in industries with moderate concentration. In both cases, the Supreme Court held the merger to be illegal. In United States v. Aluminum Company of America, 377 U.S. 271 (1964), the Court upheld the government's challenge to a merger between a large company and one of its small competitors in a moderately concentrated industry, although the merger added only 1.3% to Alcoa's relevant market share. Mergers between large companies in concentrated industries are presumptively illegal, not only under § 7 of the Clayton Act, but also under § 2 of the Sherman Act.

16. United States v. Ford Motor Co., 286 F. Supp. 407 (E.D. Mich. 1968), *aff'd*, 405 U.S. 562 (1972).

17. Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).

horizontal nor vertical and assume a large variety of forms, have been the subject of relatively little litigation. (1) Those predominantly conglomerate mergers with some direct horizontal or vertical effects are evaluated by the same standards as fully horizontal or vertical mergers unless the merging companies present the courts with some plan for avoiding these effects.[18] (2) Where the merging companies produce similar or complementary items and might otherwise some day have decided to compete (product-extension mergers); or sell the same item in different markets and, but for the merger, might in the future have decided to compete (market-extension mergers); the Supreme Court has indicated that it is unnecessary to prove actual present intent to extend, but rather just a reasonable probability of entrance into the new product line or market area.[19] (3) For a merger that creates the probability of reciprocal dealing,[20] de minimus market foreclosure, a standard antitrust threshold, is the only defense available.[21] (4) Finally, a conglomerate merger in which none of these effects are present to significant degree, but in which a larger entity is substituted for the previously existing one, faces federal opposition merely because of the size of the merging companies. Although no per se "deep pocket" prohibition exists, the government's successful judicial challenge to this type of merger certainly justifies the conclusion that it has a reasonable probability of violating Section 7.[22]

This case law interpretation of Section 7 of the Clayton Act offers no basis for devising a threshold of illegality for any of these types of mergers. No court has suggested any minimum market shares, market concentrations, or other factors that would act to create a dividing line between legal and illegal mergers. Rather, the courts have lowered the threshold of illegality, case by case, without ever suggesting that it could not be lowered further. Indeed, the Supreme Court has never upheld the legality of a merger since the 1950 amendment of Section 7. Based upon the absence of any minimum standards, and the willingness of the courts, especially the Supreme Court, to declare mergers illegal in the context of ever-reduced market shares and con-

18. United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969) (preliminary injunction issued); 472 BNA ATRR A-1 (July 28, 1970) (injunction vacated).

19. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (product-extension); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) (market extension); United States v. Continental Can Co., 378 U.S. 441 (1964).

20. "Reciprocal dealing" or "reciprocity" refers to the use of buying power to secure an advantage in the sale of one's products.

21. *See* FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

22. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).

centrations, it is appropriate to conclude that every merger presents at least a reasonable probability of being in violation of Section 7 of the Clayton Act as interpreted by the courts.[23]

II. Irreparable Harm

Having shown a reasonable probability of success at trial, a plaintiff seeking preliminary relief under Section 15 or 16 must also show irreparable harm.[24] Damage is not irreparable if it "can be adequately

23. Economics, which courts themselves to some extent have relied upon in merger cases, *see, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562, 568-71 (1972), supplies an alternative or supplemental approach to analyzing probability of success at trial. Every merger of former competitors, *i.e.*, horizontal mergers, necessarily lessens competition because it reduces the degree of substitutability within the industry by eliminating one firm's independent production. As the degree of non-availability of substitutes increases, the producing firms' price patterns more closely approach the optimum monopoly level. Such a decrease of substitutability of production with its accompanying increase in market power and rise in the price level toward the monopoly structure is "lessening of competition." Potential benefits from a merger, especially potentially available cost reductions due to economies of scale, are irrelevant to consideration of preliminary relief under §§ 15 and 16. "A merger is not saved from illegality under § 7 . . . 'because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.' United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963)." Ford Motor Co. v. United States, *supra* at 570. Moreover, economists offer no trustworthy means for determining in advance of a merger what the ultimate reckoning will be. Since the burden of proof is upon the plaintiff to demonstrate the probability of a lessening of competition, it might be argued that where no conclusion can be reached this burden is not satisfied. But, by expanding through merger a firm has chosen, at least implicitly, not to expand through internal growth. The basic difference between these two forms of growth is that in the latter no increase in market power is guaranteed because the availability of substitute products is not necessarily diminished, while in the case of merger some increment in market power is inherently connected with the expansion.

Mergers between companies not previously competing, *i.e.*, vertical and conglomerate mergers, are said to be anticompetitive in that they foreclose markets or create greater wealth or size, which by itself supposedly confers some amount of market power upon a firm. Market foreclosure refers to the ability of a firm operating in two lines of commerce to guarantee to itself some share of one of those lines because it has some share of and market power in the second line. This foreclosure reduces the degree of substitutability within the particular industry. Thus, every consolidation of firms that results in a multi-level firm presents a probability of lessening competition. Size enhances market power because of inefficiencies in the capital markets that inure to the benefit of larger enterprises, giving them an absolute cost advantage over their smaller competitors that is unrelated to relative efficiencies or risks. Of course, the same counterarguments can be made to the asserted anticompetitive effects of mergers of non-competing firms. And they can be answered the same way. Therefore, every merger between non-competitors also presents a reasonable probability that it may lessen competition.

24. Proof of the immediacy of the danger of irreparable harm—explicitly required in private suits—is ordinarily a relatively simple matter. The critical point in time is reached when the acquiring company is about to secure the election of one or more of its choices for the board of directors of the target company. In *Hamilton Watch*, for instance, the court enjoined Benrus from voting its twenty-four per cent interest in Hamilton although in American Crystal Sugar Co. v. Cuban-American Sugar Co., 143 F. Supp. 100 (S.D.N.Y. 1956), defendant was allowed to vote its twenty-one per cent interest in the plaintiff because the court found no immediate danger. The dif-

compensated for by monetary damages."[25] This rule necessarily relegates consideration of irreparable damage to discussion of vague, intangible items, not susceptible to precise measurement because tangible, measurable factors could be compensated for by monetary damages. Among the factors considered by trial courts have been disruption of management;[26] unsettling of relations with employees and others;[27] fear of loss of competitive information to the acquiring company;[28] unrest and uncertainty among customers, distributors and suppliers of the target company;[29] loss of morale among employees;[30] damage to the target company's goodwill;[31] and access to the target company's plans, programs and confidential information.[32] In all mergers, a private party plaintiff can demonstrate irreparable harm of at least one of such types.[33]

The Supreme Court has indicated that irreparable injury to the public also is relevant in private suits:

> [T]he purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. Section 16 should be construed and applied with this purpose in mind. . . . Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect."[34]

ference was that Hamilton used cumulative voting for elections of its directors, which guaranteed Benrus participation on the Hamilton Board, whereas American Crystal Sugar Company did not have such voting, thus assuring that management could elect its full slate of nominees for the board of directors through its control of sixty-two per cent of the outstanding stock. A plaintiff cannot afford to wait too long, however, without inviting chastisement for coming to court at the last possible moment and thereby forcing a "frustratingly short proceeding." Lunkenheimer Co. v. Condec Corp., 268 F. Supp. 667, 672 (S.D.N.Y. 1967). (Plaintiff had three months' notice of defendant's tender offer, but waited until eight days before its expiration to seek preliminary relief so that it might merge with a third party instead. The injunction was denied.) *See also* Kohn v. American Metal Climax, Inc., 313 F. Supp. 1251 (E.D. Pa. 1970).

Section 15 does not explicitly mandate any similar finding of immediacy in government suits, but in practice the Department of Justice only brings these actions when the target companies are on the verge of consummating their plans. Anticipatory suits would probably be dismissed for want of jurisdiction under the "cases and controversies" provision of Article III of the Constitution.

25. Fein v. Security Banknote Co., 157 F. Supp. 146, 148 (S.D.N.Y. 1957).
26. Metro-Goldwyn-Mayer Inc. v. Transamerica Corp., 303 F. Supp. 1344, 1352 (S.D.N.Y. 1969).
27. *Id.*
28. *Id.*
29. Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 694 (D. Del. 1962).
30. *Id.*
31. *Id.*
32. *Id.*
33. Election of members of plaintiff's board of directors is generally accepted as causing irreparable injury. Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953). Filtrol Corp. v. Slick Corp., 1970 Trade Cas. ¶ 73,035 (C.D. Cal.), *aff'd*, 428 F.2d 826 (9th Cir. 1970).
34. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969).

After full or partial consummation of a merger, the necessarily concomitant damage to the competitive situation can never be reversed. If the private plaintiff is the target of the acquisition, as it usually is, it suffers irreparable loss of its identity, and if the plaintiff is a competitor, supplier, or customer of the merging companies, it suffers the irreparable anticompetitive effect of the merger.

Courts have sharply disagreed about whether the government must plead and prove irreparable damage to the public. In one case, for example, a court reasoned that the incipiency nature of Section 7 made it unnecessary for the government to prove hardship or injury to the public.[35] Another court, however, denied preliminary relief partly because the complaint did not

> clearly show by specific facts that the plaintiff United States will suffer immediate, and irreparable injury, loss, or damage if the drastic remedy of temporary restraint of the proposed acquisition . . . is not invoked.[36]

This disagreement has never been resolved and, in view of the absence of appellate review in this field,[37] it is unlikely that one position will soon be universally accepted.

Although courts often have denied preliminary injunctions on the ground that divestiture upon final adjudication sufficiently protects the public interest, typically they have done so by simply asserting their belief and without bothering to make any effort to substantiate it.[38] On

35. United States v. Brown Shoe Co., Inc., 1956 Trade Cas. ¶ 68,244 at 71,114 (E.D. Mo.).

36. United States v. Continental Can Co., 1956 Trade Cas. ¶ 68,479 at 72,004 (S.D.N.Y.). The one court of appeals to consider the issue agreed with *Brown Shoe*.

> A private plaintiff must show that hardship will result to it, but where the United States is the plaintiff, as here, the United States is not required to prove public detriment from a merger which would violate the provisions of Section 7 . . . . The court below was not required to demonstrate the precise way in which violations of the law might result in injury to the public interest.

United States v. Ingersoll-Rand Co., 320 F.2d 509, 524 (3d Cir. 1963). However, some courts in other circuits have refused to follow the Third Circuit's rule. In United States v. Third National Bank in Nashville, 1964 Trade Cas. ¶ 71,209 (M.D. Tenn. 1964), the court placed a burden on the government

> to establish . . . that a denial of the injunction will result in a substantial injury to the general public for which there is no adequate means of redress.

Id. at 79,826. A majority of the cases follow *Brown Shoe* and *Ingersoll-Rand*. *See, e.g.*, United States v. Wilson Sporting Goods, 288 F. Supp. 543 (N.D. Ill. 1968); United States v. Aluminium Ltd., 1965 Trade Cas. ¶ 71,366 (D.N.J.); United States v. Pennzoil Co., 252 F. Supp. 962 (W.D. Pa. 1965); United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964). However, the minority view suffers no shortage of support. *See, e.g.*, United States v. Wachovia Corp., 313 F. Supp. 632 (W.D.N.C. 1970); United States v. Gimbel Bros., Inc., 202 F. Supp. 779 (E.D. Wis. 1962); United States v. Von's Grocery Co., 1960 Trade Cas. ¶ 69,698 (S.D. Cal.).

37. *See* note 11 *supra*.

38. *See, e.g.*, United States v. Aluminium Ltd., 1965 Trade Cas. ¶ 71,366 (D.N.J.). *But see* FTC v. Dean Foods Co., 384 U.S. 597, 621 (1966) (Fortas, J., dissenting).

the other hand, whenever a court has attempted to analyze the dynamics of merger and divestiture it has invariably concluded that divestiture is an insufficient remedy to restore the pre-merger market conditions.[39] In the context of bank mergers, Congress too has recently rejected the adequacy of divestiture to protect the public interest. The Bank Merger Act of 1966 mandates the enjoining of a proposed bank merger as soon as the government sues to challenge it under the Sherman or Clayton Acts.[40] As both the courts and Congress thus realize, permitting acquisitions, even temporarily, would undoubtedly result in passing records, trade secrets and other confidential matters. "Displacement and dislocation of management personnel, assets and records of the acquired companies, together with all other matters concerning the preservation of competitive vigor, should be delayed until a decision is rendered at a final hearing."[41]

A compromise commonly accepted by the courts allows consummation of the merger subject to a "hold-separate order." These orders generally require the parent to operate the newly acquired company as an independent subsidiary.[42] Although courts issuing full prelimi-

39. *E.g.*, Crane Co. v. Briggs Manufacturing Co., 280 F.2d 747 (2d Cir. 1960); United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963); *see* FTC v. Dean Foods Co., 384 U.S. 597, 606 n.5 (1966); United States v. Crescent Amusement Co., 323 U.S. 173, 186 (1944).

40. P.L. 89-356, 80 Stat. 7, 89th Cong., 2d Sess. (1960); 16 U.S.C. § 1828(c)(7)(A) (1970). Non-judicial commentators have universally agreed that divestiture, no matter how carefully planned, is incapable of restoring the pre-merger economic situation in the relevant markets. *See* Note, *Preliminary Injunctions for the FTC in Merger Cases*, 52 CORNELL L.Q. 461 (1967); Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 HARV. L. REV. 391, 392 (1965); Comment, *The FTC's Power to Seek Preliminary Injunctions in Anti-Merger Cases*, 66 MICH. L. REV. 142, 143; Comment, *Divestiture in Light of the* El Paso *Experience*, 48 TEX. L. REV. 792 (1970); Comment, *The Power of the FTC to Obtain Preliminary Injunctions from Circuit Courts to Bar Proposed Mergers Under Section 7 of the Clayton Act*, 1966 U. ILL. L.F. 1105, 1111-13.

41. United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 542-43 (W.D. Pa. 1963).

42. For example, in United States v. Northwest Industries, 301 F. Supp. 1066 (N.D. Ill. 1968), the government sought to enjoin defendant's acquisition of the B.F. Goodrich Company. Judge Will denied the motion for a preliminary injunction, but held that

> [S]ince it is our ultimate obligation to preserve the status quo to the maximum extent possible pending a full hearing, a comprehensive hold separate and status quo order will be entered requiring Northwest (1) to take all steps necessary to maintain Goodrich as a separate, viable, going concern; (2) take no action which might impair its ability to comply with any future order of divestiture; (3) preserve and protect all assets of Goodrich; (4) take no action which will substantially diminish the operations of Goodrich or dispose of any assets of Goodrich, except in the ordinary course of business, without further order of this Court; (5) refrain from using the name Goodrich or identifying the relationship between Goodrich and Northwest in any advertising, sales or promotional activities pertaining to the business of either corporation; (6) refrain from engaging in any reciprocity practices in either Goodrich or Northwest and take appropriate steps to insure compliance with this prohibition; (7) refrain from issuing any additional securities of Goodrich or incurring any additional indebtedness of Goodrich other than in the ordinary course of business without further order of this Court; (8) retain unencumbered all shares of Goodrich which it may own subject to further order of this Court, and (9) take

nary injunctions first must have rejected at least implicitly the possibility of merely issuing a hold-separate order, no court has ever thoroughly analyzed this type of relief. Unfortunately, the supposed advantages of hold-separate orders are largely ephemeral. Divestiture of independent subsidiaries has proven to be as difficult and unsuccessful as divestiture of fully integrated operations. For example, in *United States v. Brown Shoe Co., Inc.*, a district court denied a preliminary injunction but issued a hold-separate order.[43] When divestiture was finally ordered,[44] the former assets were sold to another large corporation. This was the closest the court could come to restoring the pre-merger market situation, but it was very far from a full restoration.

Parallel situations have produced similar results, showing that hold-separate orders cannot restore the pre-merger market situation.[45]

III. Balance of Hardships

Finally, a trial court considering a motion for a preliminary injunction against a merger must "balance [against the damage to plaintiff or the public] the harm to defendant likely to result if the relief is granted."[46] Thus, a court must weigh the irreparable harm caused by the merger against the injury suffered by the acquiring company. The company that seeks the merger will always suffer some losses if consummation is enjoined. The value of its stock will decline; it will lose the anticipated benefit of the acquisition; and it will lose the value of the resources (time and money) invested in the effort to arrange the merger.[47] In addition, defendants often assert that a preliminary injunction will permanently preclude consummation because of the vagaries of the economy. No established standards exist for measuring these types of injuries, just as no method exists for quantifying injuries to plaintiffs. Each court exercises its equitable discretion in deciding the weights to be applied to the parties' damages, and "the weight must prevail in favor of the moving party before the injunction is granted."[48]

such other action or refrain from such other action as the Court, after hearing, may deem necessary to achieve maximum preservation of the status quo consistent with the effective day-to-day operation of Goodrich. *Id.* at 1097.

43. 1956 Trade Cas. ¶ 68,244 (E.D. Mo.).

44. 370 U.S. 294 (1962).

45. *See* Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 HARV. L. REV. 391 (1965). *Contra*, Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 ANTITRUST BULL. 1 (1972).

46. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 (2d Cir. 1953).

47. *See* United States v. FMC Corp., 218 F. Supp. 817 (N.D. Cal. 1963).

48. Fein v. Security Banknote Co., 157 F. Supp. 146, 149 (S.D.N.Y. 1957).

In government suits, varying approaches have been taken to the peculiar nature of the public interest. Some courts have held that the public interest is always paramount, making weighting of relative hardships unnecessary.[49] But most courts insist upon balancing the equities by canvassing the relative adequacy of the various available forms of relief. Thus, the common question posed by courts in their concern over the relative hardships to the public as against the private defendant is essentially the same question posed by consideration of irreparable harm, that is, "whether a subsequent divestiture would or would not adequately protect the public interest."[50]

The only new factor is the effect of preliminary relief upon consummation of the merger if the trial court finds no violation of Section 7. Many courts seem to accept defendants' claims that a preliminary injunction will permanently eliminate the possibility of merger because of the uncertainties of the financial markets.[51] According to the usual argument, a merger agreement depends upon the status of the financial markets as of the time of the agreement, and delay will be accompanied by changes in those markets, thereby destroying the agreement. This argument implies that the most compelling reason for the merger is the favorable conjunction of the markets for the two companies' securities. Such a reason should not be the basis for allowing immediate consummation of a merger in the face of countervailing market-competition considerations. The Clayton Act focuses only on competitive effects, without regard for the status of the parties' securities on the financial markets. A merger violates Section 7 unless it is justified by the competitive situation, irrespective of such financial implications. The impetus for a legal merger must come from its potential pro-competitive effects. If at one point in time this potential is sufficient to justify the merger, then it will still be sufficient several years later unless one of four events intervenes.

(1) *One of the parties may merge with a third party.* In this case, society has not suffered because the gains will be realized with less risk of realizing the anticompetitive effects.

(2) *One or both of the parties may have achieved the anticipated economies through its own internal efforts.* In such a case, society has

49. United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964); United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969); United States v. White Consolidated Industries, Inc., 323 F. Supp. 1397 (N.D. Ohio 1971).

50. United States v. Ingersoll-Rand Co., 320 F.2d 509, 523 (3d Cir. 1963).

51. *E.g.*, Maryland Casualty Co. v. American General Insurance Co., 232 F. Supp. 620 (D.D.C. 1964); *see also* FTC v. Dean Foods Co., 384 U.S. 597, 621-22, 631-32 (1966) (Fortas, J., dissenting). *Contra*, United States v. White Consolidated Industries, Inc., 323 F. Supp. 1397 (N.D. Ohio 1971).

clearly received all the benefits that might have resulted from the merger without the potential drawbacks.

(3) *The nature of the relevant lines of commerce may have changed so that the originally expected economies are no longer available.* In this type of situation, society has benefited from the preliminary injunction because if the merger had been allowed to proceed, within a short period of time its benefits would have disappeared, but its negative effects would have persisted.

(4) *The cost of litigating the preliminary injunction and renegotiating the merger may be greater than the potential benefits to the companies involved.* These potential benefits to the companies include those that result from factors beneficial to society and those that are detrimental. As substantial as the costs of litigation and renegotiation may be, if they are not substantially less than the anticipated value of the merger, cost-reduction and monopolistic aspects of the merger are likely to be so marginal as to preclude weighing. Therefore, it is as likely that an anticompetitive merger was avoided as that improved competition was forestalled.

Thus, if a merger is truly oriented toward increased efficiency rather than enhanced market power, it will remain so for the period of time necessary for a district court to consider fully the legal questions involved, no matter how long that time may last. If after such full consideration it is held that the proposed merger would be legal, the same impetus to join would exist and the merger would be consummated.

Accordingly, any balancing of hardships must favor a grant of a preliminary injunction. If the public loss is considered—which it must be in government suits by definition and in private suits by direction of the Supreme Court[52]—the balance necessarily tips in favor of the injunction. If the merger is not enjoined, the public suffers forever some inevitable and irreversible anticompetitive effect. By contrast, if the merger is enjoined, the maximum potential loss to the merger partners is the benefits of the merger for the period of the litigation. If upon final adjudication a permanent injunction issues, these companies would have lost nothing to which they had a legal right and therefore they would have suffered no hardship that the district court should have considered before issuing the preliminary injunction. Similarly, the abandonment of plans for the merger (after issuance of a preliminary injunction) is evidence that the merger was certainly undesirable and illegal, and again the defendants would have lost nothing to which

52. *See* p. 162 *supra.*

they were entitled. The only possible loss they might suffer would be the benefits of the merger pendente lite in the event the preliminary injunction is vacated upon final adjudication. Thus, the possible loss of a few years' extra profits must be balanced against the permanent irreparable harm which the public may suffer. If the private plaintiff's damage is considered, the same result is inevitable. Again, the maximum possible loss to the defendant is of a temporary nature. Once the injury to the plaintiff is allowed to be perfected by consummation of the merger, however, it is at least partially permanent, irreversible and irreparable.

IV. Dangers of Abuse

In view of this reconsideration of the requirements of Sections 15 and 16, courts should issue a preliminary injunction in every merger case, government as well as private. True, there is a danger that perfunctory granting of preliminary injunctions might well produce abuses, but this danger can be easily and effectively avoided. Liberal use of preliminary injunctions might increase the possibility of strike suits designed solely to blackmail the defendant into settling the suit in order to avoid the disruptive effect of litigation. Such suits are unlikely under Section 16 because money damages are not available under that statute. The statute itself, however, provides the best possible preventive medicine: the requirement that the plaintiff post a bond against the damage from an injunction improvidently granted. This tool, generally ignored by the courts in Section 16 actions,[53] has proved to be an effective device for restraining strike suits in other contexts[54] and should have the same effect in Section 16 proceedings. Furthermore, the district court may simply refuse to dismiss the action even if the original plaintiff seeks to do so, and invite new parties, such as the Department of Justice or a state attorney-general, to prosecute the action.[55]

Another possible abuse might arise if a company's management sought to use a preliminary injunction to forestall merger with one suitor in order to merge with another.[56] In such a situation plaintiff's management objects not to merger per se, but rather simply seeks the

53. Note 2 *supra*.
54. *See* Note, *Security for Expenses Legislation—Summary, Analysis, and Critique*, 52 COLUM. L. REV. 267 (1952).
55. *Cf.* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).
56. *Compare* Lunkenheimer Co. v. Condec Corp., 268 F. Supp. 667 (S.D.N.Y. 1967).

merger most beneficial to its own interests, not necessarily identical to the interests of society protected by Section 7. Denying the preliminary injunction and allowing the challenged tender offer to proceed is one method to avoid this type of abuse, but it is unsatisfactory. The impure motives of plaintiff's management should not prevent the court from taking into full consideration the substantive legal issues they raise. The "unclean hands" condition of the plaintiff is not a valid defense against an allegation of violation of the antitrust laws.[57] Granting the injunction, together with requiring that plaintiff post a substantial bond, would sufficiently bar this abuse.

In the context of government suits, objections to pro forma preliminary injunctions will take two forms. First, the rule may be feared for its possible chilling effect upon contemplated mergers, a seriously adverse effect for the business community. But such fears are entitled to little attention because Congress itself sought this effect:

> The purpose of the proposed bill [Section 7 of the Clayton Act as amended in 1950], is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions.
>
> While there exist many differences of opinion on other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high.
>
> The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.[58]

The second objection to making the grant of preliminary injunctions virtually automatic will be that it would leave no check on the power of the Department of Justice to block a merger for reasons not based in law and economics, especially political grudges. This objection, too, is unconvincing. Actually, the proposal represents no significant change in the Department's power. Presently, over 90% of all mergers are submitted to pre-review clearance, and only rarely do parties proceed in the face of a contrary Justice Department position.[59] Also, although there have been charges that the government has failed to challenge alleged antitrust violations for political reasons, it has never been claimed that specific targets have been chosen because of their political status. More importantly, the existence of political mo-

57. Kiefer-Stewart v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).
58. S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).
59. *Hearings on S. 1698 Before the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency*, 89th Cong., 1st Sess., pt. 1, at 197 (1965).

tives for a merger challenge is hardly a good reason for the courts to allow the merger to proceed despite its illegality. Thus, more rational and consistent enforcement of Section 7 of the Clayton Act will result from a general pro forma rule of granting government motions for preliminary injunctions against mergers.

V. Conclusion

Absent any genuine potential for abuse, issuing a preliminary injunction should become pro forma in every action challenging a proposed merger as violating Section 7 of the Clayton Act. Every merger presents at least a reasonable probability of violating Section 7. And every merger results in irreparable harm to the public and to private parties that is not outweighed by the short-term losses suffered by the acquiring party in the event of an injunction.

Preliminary relief is designed to prevent some statutory violation in its incipiency. Other antitrust statutes, like Section 7 of the Clayton Act, are designed to prevent incipient evils. Section 3 of the Clayton Act tracks the language of Section 7 and prohibits tying and exclusive dealing arrangements whose effect "may be to substantially lessen competition or tend to create a monopoly."[60] Section 5 of the Federal Trade Commission Act, which outlaws "unfair methods of competition,"[61] also reaches incipient anticompetitive conduct.[62] A similar rule might be considered for the granting of preliminary injunctions under such statutes, with considerations to be balanced. Under Section 7 of the Clayton Act, however, the balance is clear: the routine issuance of preliminary injunctions against mergers—in effect, incipient relief against an incipient lessening of competition—is the only effective method for avoiding the mergers condemned by the Act. "[A]fter the saber thrust, the wound is still there," one court has said.[63] "The purpose of the injunction is to prevent the wound if it is at all possible to do so."[64]

60. 15 U.S.C. § 14 (1970). For a discussion of § 3's incipiency nature, see Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949).
61. 15 U.S.C. § 45(a)(1) (1970).
62. FTC v. Sperry & Hutchinson, 405 U.S. 233 (1972); FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953).
63. Crane Co. v. Briggs Manufacturing Co., 280 F.2d 747, 750 (6th Cir. 1960).
64. *Id.*