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A CHALLENGE TO CONGLOMERATES: PRIVATE TREBLE DAMAGES SUITS

by James C. Thomas*

I. INTRODUCTION

Section 7 of the Clayton Act¹ allows the United States Government to attack a proposed or completed merger which may potentially lead to violation of the policy of the antitrust statutes. The remedy for violation in the case of a completed merger is a divestiture order and such orders have been granted on the authority of Section 7.² One of the better known decisions requiring divestiture is *United States v. E. I. du Pont de Nemours & Co.*,³ wherein Du Pont was required to divest its shares of General Motors Corporation stock. Notwithstanding the success of the government in obtaining such orders private litigants have encountered difficulty in bringing a cause of action under Section 7.

In 1963, a federal district court in *Gottesman v. General Motors Corp.*⁴ noted that, "[t]here can be no claim for money damages for a violation of Section 7 [of the Clayton Act]."⁵ While the *Gottesman* words were dictum,⁶ they evidence a general judicial hostility toward treble damage suits brought by private litigants. These words were reiterated, again in dictum, by the Eighth Circuit in *Highland Supply Corp. v. Reynolds Metals Co.*,⁷ the court inferring that private litigants have no standing to attack an alleged violation of Section 7 of the Clayton Act.⁸

Since *Gottesman* and *Highland Supply*, two other courts have denied private litigants relief under Section 7. In *Bailey's Bakery, Ltd. v. Continental Baking Co.*,⁹ the Hawaii Federal District Court, in a decision

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¹ 15 U.S.C. § 18 (1964).

² See, e.g., *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969); *United States v. E.I. du Pont de Nemours Co.*, 353 U.S. 586 (1957).

³ 353 U.S. 586 (1957).

⁴ 221 F. Supp. 488 (S.D.N.Y. 1963), *cert. denied*, 379 U.S. 882 (1964).

⁵ *Id.* at 493.

⁶ This case involved a pre-trial evidentiary issue; it was not a final determination. For the District Court's holding on the merits see 279 F. Supp. 361 (S.D.N.Y. 1967).

⁷ 327 F.2d 725 (8th Cir. 1964).

⁸ *Id.* at 728 n.3.

⁹ 235 F. Supp. 705 (D. Hawaii 1964), *aff'd mem.* 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

affirmed by the Ninth Circuit,¹⁰ reasoned that treble damages must be denied because the injury was caused by practices subsequent to the acquisition and not by the acquisition itself.¹¹

Dairy Foods Inc. v. Farmers Co-Operative Creamery,¹² decided in April of 1969, is the latest case holding against private litigants in Section 7 cases on theories analogous to those of *Gottesman* and *Highland Supply*. In each of these cases the underlying reason for denying treble damages to private plaintiffs was that Section 7 of the Clayton Act is directed at *potential* rather than *actual* competitive injury. Since one is not permitted to recover damages for potential injury, a private litigant under this narrow interpretation of the statute, cannot sustain the burden of proving damages.

This position is not without logic. Section 7 of the Clayton Act prohibits only those acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."¹³ If emphasis is placed on the words "may be" and "tend", one can technically conclude that the statutory proscription is directed at potential rather than actual lessening of competition.¹⁴ If one accepts this conclusion it is logical to state that injury to a plaintiff resulting from a corporate acquisition is speculative and therefore not actionable.

The Second Circuit, considering *Gottesman* on appeal, thought differently.¹⁵ While agreeing with other courts and the trial court that, "a violation of Section 7 of the Clayton Act does not furnish a basis for a claim for money damages under the broad language of Section 4 of the Act,"¹⁶ the court did allow the plaintiff to show actual damage after a Section 7 violation had been established. Thus if a private litigant can show that an acquisition violated Section 7 and subsequent to that acquisition the potential damage became actual, a cause of action for treble damages lies under Section 4¹⁷ of the Act.

The Second Circuit's decision in *Gottesman* answers some of the criticism leveled at the concept that a private litigant cannot recover

¹⁰ 401 F.2d 182 (9th Cir. 1968) (per curium).

¹¹ 235 F. Supp. at 717.

¹² 298 F. Supp. 774 (D. Minn. 1969). See also *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, 1095-96 (D. Md. 1969), where the court by resorting to the Sherman Act avoided the issue.

¹³ 15 U.S.C. § 18 (1964).

¹⁴ See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁵ *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969).

¹⁶ *Id.* at 960-61.

¹⁷ 15 U.S.C. § 15 (1964).

damages under Section 7. This viewpoint makes as much sense as saying that one who gives another poison cannot be held for murder because, death does not come from the giving of poison, it's the after affects that kill. The logic of *Bailey's Bakery*, *Highland Supply*, and the federal district court in *Gottesman*, are reminiscent of the interpretive technique followed in the case where a defendant charged with leaving the scene of an accident, was released because the person struck by his automobile was killed instantly thereby leaving no one to receive his report.¹⁸

The "no standing" doctrine has been dismissed by some courts as an illogical interpretation of the statute.¹⁹ This rejection comes from the same court, but different judges, that handed down the decision in *Gottesman*. More recently the idea that private plaintiffs should be prohibited from recovering treble damages in cases involving Section 7 violations was rejected by the Fifth Circuit in *Dailey v. Quality School Plan, Inc.*²⁰

Without specifically discussing the question, the United States Supreme Court in *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*,²¹ apparently assumed that treble damages were available to plaintiffs injured by a corporate acquisition which violated Section 7. In *Minnesota Mining* the acquired company had, prior to 1956, been the primary distributor of New Jersey Wood Products.²² Subsequent to the acquisition, Minnesota Mining notified New Jersey Wood that the acquired company would no longer distribute its products.²³ Since the Federal Trade Commission attacked this acquisition, resulting in a consent order directing divestiture,²⁴ the only relief sought by New Jersey Wood was treble damages.

Although considering only whether the statute of limitations had run, the Court opined that the construction given to the statute involving treble damages should be construed in light of its legislative purpose. "Congress," observed the Court, "has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."²⁵ Furthermore, the judicial interpre-

¹⁸ *Kelley v. State*, 233 Ind. 294, 119 N.E.2d 322 (1954).

¹⁹ *Julius M. Ames Co. v. Bostitch Inc.*, 240 F. Supp. 521 (S.D.N.Y. 1965).

²⁰ 380 F.2d 484 (5th Cir. 1967).

²¹ 381 U.S. 311 (1965).

²² *Id.* at 315.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 318.

tation of the statutes should, "lend considerable impetus to that policy."²⁶

In effectuating this policy, the Fifth Circuit in *Dailey*, and the Second Circuit in *Gottesman*, held that Section 7 is included in the term "anti-trust laws" as that term is used in Section 4 of the Clayton Act.²⁷ The Second Circuit in *Gottesman*, goes on to hold, "if we had any real doubts on this issue, we would resolve them in favor of a broad, rather than a narrow, construction of Section 4."²⁸

The only difference between a private plaintiff and one of the official enforcement agencies rests with the amount of proof required. Under Section 7, the government satisfies its burden of proof when it shows that an acquisition "may be to substantially lessen competition". The Second Circuit makes the evidentiary requirements of a private litigant more onerous, postulating; "plaintiffs cannot rest on a showing of a violation of Section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation."²⁹

The requirement that a plaintiff offer proof of actual injury in order to recover treble damages, defendants argue, require him to rely on the Sherman Act. The defendants in *Bowl America, Inc. v. Fair Lanes Inc.*,³⁰ for example, urged that, "if a private party can show that a merger has already caused an unreasonable restraint of trade and that he has actually suffered damages as a direct result thereof, he can sue and recover in a treble damage action under Section 1 of the Sherman Act."³¹

The advantage to a defendant of requiring a plaintiff to plead under the Sherman Act, is that the plaintiff becomes forced to satisfy an almost impossible burden of proof. To establish a violation sufficient to support a private claim, the plaintiff would face precedent such as found in *United States v. United States Steel Corp.*,³² and in *United*

²⁶ *Id.* The only issue before the Court in this case was whether the statute of limitation [Clayton Act § 4(b), 15 U.S.C. § 15(b) (1964)] was tolled by authority of § 5(b) of the Clayton Act, 15 U.S.C. § 16(b) (1964), during the pending action of the F.T.C. The Court ruled, with Justices Harlan and Stewart not participating and Justices Black and Goldberg dissenting, that the F.T.C. proceeding did toll the statute.

²⁷ *Dailey v. Quality School Plan Inc.*, 380 F.2d 484 (5th Cir. 1967); *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2nd Cir. 1969).

²⁸ 414 F.2d at 961.

²⁹ *Id.*

³⁰ 299 F. Supp. 1080 (D. Md. 1969).

³¹ *Id.* at 1096.

³² 251 U.S. 417 (1920), the Court ruled that bigness alone was not enough to prove a violation of the Sherman Act.

*States v. Columbia Steel Co.*³³ Should the plaintiff be successful in satisfying the burden established by these cases, he is still faced with the numerous Sherman Act merger cases denying relief to private plaintiffs. Although there have been recoveries by private plaintiffs in Sherman Act cases,³⁴ in the majority relief has been denied.³⁵

The better view, and the view adopted by the Fifth Circuit in *Dailey*, and by the Second Circuit in *Gottesman*, is that private plaintiffs can recover damages under Section 7. Courts denying relief on the "no standing" rationale are apparently motivated by the rule of statutory construction, *expressio unius est exclusio alterius* (mention of one thing implies exclusion of another). In following this rule of strict construction, courts have reasoned that since Congress used the words "may be to substantially lessen competition", they meant to exclude actual injury to competition. A better interpretation of this language would be that "may be" is the lowest denominator used to measure the legality of mergers. The phrase is all encompassing, actual competitive injury would include potential competitive injury. Not only is this interpretation more rational but it is also consistent with the reasoning of the United States Supreme Court in *United States v. Philadelphia*

³³ 334 U.S. 495 (1948). This is the principle case that motivated Congress into passing the Celler-Kefauver amendment to § 7 of the Clayton Act.

³⁴ *Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.*, 160 F. 144 (S.D.N.Y. 1908), *rev'd*, 166 F. 254 (2d Cir. 1908). This was not an actual judicial recovery. In the case, a plaintiff, seeking damages in the amount of \$30 million, only won a procedural battle. Following this victory the parties settled for \$2 million. *Hearings on S. 2512 Before a Subcomm. on Antitrust Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 184 (1967). Damages were recovered in *Eastman Kodak Co. v. Southern Photo Material Co.*, 295 F. 98 (5th Cir. 1923), *aff'd*, 273 U.S. 359 (1927).

³⁵ Recovery denied: *Acquired corporation as plaintiff*: *Tilden v. Quaker Oats Co.*, 1 F.2d 160 (7th Cir. 1924); *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1 (3rd Cir. 1917), *appeal dismissed*, 248 U.S. 595 (1919); *Bishop v. American Preservers' Co.*, 105 F. 845 (N.D. Ill. 1900); *Bishop v. American Preservers' Co.*, 51 F. 272 (N.D. Ill. 1892). *Competitors as plaintiff*: *National League of Professional Baseball Clubs v. Federal Baseball Club Inc.*, 269 F. 681 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922); *Strout v. United Shoe Mach. Co.*, 224 F. 1016 (D. Mass. 1913), *aff'd*, 225 F. 1022 (1st Cir. 1915); *Cilley v. United Shoe Mach. Co.*, 152 F. 726 (D. Mass. 1907) (demurrer sustained); *Cilley v. United Shoe Mach. Co.*, 202 F. 598 (D. Mass. 1913) (demurrer overruled but case was dropped by plaintiff after *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918)—see Senate Report, *supra* note 34, at 182). *Stockholders as plaintiffs*: *Peterson v. Borden Co.*, 50 F.2d 644 (7th Cir. 1931) (filed under § 7 Clayton Act); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 223 F. 421 (2d Cir. 1915), *aff'd*, 244 U.S. 261 (1917) (suit filed by stockholders in name of corporation); *Fleitmann v. United Gas Improvement Co.*, 211 F. 103 (2d Cir. 1914), *aff'd sub nom.* 240 U.S. 27 (1916). *Employee as plaintiff*: *Corey v. Boston Ice Co.*, 207 F. 465 (D. Mass. 1913).

National Bank,³⁶ and *United States v. Penn-Olin Chemical Co.*³⁷ In both of these cases the Court looked upon the Celler-Kefauver Act³⁸ as a Congressional effort to close all loopholes through which merging corporations could escape prosecution.³⁹ The Second Circuit in *Gottesman* follows this rationale, the court holding that, "injury from a Section 7 violation, as distinct from the alleged Sherman Act claims, is ground for treble damages."⁴⁰

With the Second and Fifth Circuits allowing a cause of action under Section 7 and with the Eighth and Ninth Circuits apparently denying the same, only the Supreme Court can decide the issue. Should the Court accept the "no standing" doctrine it will open the widest of all loopholes in the Clayton Act. Without treble damages there is little if any deterrent to illegal corporate mergers. There are no criminal sanctions under the Clayton Act and thus merging corporations risk only federal civil prosecution.⁴¹ It is reasonable to assume that most mergers are entered into for profit and that the cost of future divestiture may be slight in comparison to prospective profits.⁴² It may well be good business to merge in violation of Section 7 since, freed from the possibility of a treble damage suit, the violator of Section 7 is permitted to retain all profits earned during the protracted period needed to achieve divestiture.⁴³

II. JUDICIAL HOSTILITY

Regardless of the decision of the United States Supreme Court on

³⁶ 374 U.S. 321, 342-43 (1963). This case did not involve a perfect asset or stock acquisition. Still there was a merger which the Court held to be within § 7.

³⁷ 378 U.S. 158, 167-68 (1964). Court held that § 7 applies to joint ventures.

³⁸ 15 U.S.C. §§ 18, 21 (1964), *amending* 15 U.S.C. §§ 18, 21 (1948).

³⁹ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 335-49 (1963); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964).

⁴⁰ *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969).

⁴¹ In a take-over bid (tender offer), a representative of an acquiring company remarked on the possibility that merger might violate the antitrust laws: "... business men should be prepared to take business risks." *Vanadium Corp. of America v. Susquehanna Corp.*, 203 F. Supp. 686, 693 (D. Del. 1962). See also *FORTUNE*, Aug. 1, 1969, at 94, where Ling of L.T.V. inferred that businessmen interested in merging should not seek advice of Justice Department. "Well, hell, if you ask them, Justice will always tell you they think they'll look at such a thing with alarm."

⁴² There is no reason why a private party should not be able to obtain divestiture relief as this would not prejudice the government's right to file its own charge. The threat of granting divestiture relief to private parties, whose economic interests are endangered, would act as an additional deterrent to unlawful mergers. *United States v. Borden Co.*, 347 U.S. 514 (1954).

⁴³ *Id.* at 518.

the availability of Section 7 as a basis for a claim for treble damages, the inescapable conclusion is that a private litigant has never received treble damages for an alleged violation of that section.⁴⁴ If relief is not denied with the explicitness of the "no standing" doctrine, then it is denied because of a lack of directness or causal relation between injury and violation.⁴⁵ There are of course those courts that have upheld the right of private litigants to recover;⁴⁶ still there has yet to be an actual judgment in favor of a plaintiff.⁴⁷

With all the corporate mergers occurring since 1914 and more particularly since Section 7 was strengthened in 1950 by the Celler-Ke-

⁴⁴ See Pollock, *Standing To Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 A.B.A. ANTITRUST L.J. 5, 11 (1966); A.B.A., *ANTITRUST DEVELOPMENTS 1955-1968*, 304 (1968).

⁴⁵ See *Gorham & Johnson, Inc. v. Chrysler Corp.*, 308 F.2d 462 (5th Cir. 1962), *cert. denied*, 372 U.S. 912 (1963); *Blaski v. Inland Steel Co.*, 271 F.2d 853 (7th Cir. 1959); *New Grant-Patten Milk Co. v. Happy Valley Farms, Inc.*, 222 F. Supp. 319 (E.D. Tenn. 1963); *Goldsmith v. St. Louis-San Francisco Ry. Co.*, 201 F. Supp. 867 (W.D.N.C. 1962); *Bender v. Hearst Corp.*, 152 F. Supp. 569 (D. Conn. 1957), *aff'd*, 263 F.2d 360 (2d Cir. 1959) (there was a recovery of damages under theory of "tortious inducement of a breach of contract." But concerning § 7 there was a question of whether the acquired company was a corporation. Even if it had been, the circuit court stated that no private injury resulted from merger. *Id.* at 363.); *cf. Brownlee v. Malco Theatres*, 99 F. Supp. 312 (W.D. Ark. 1951) (This actually involved alleged violation of § 1 of the Sherman Act, but reasoning is similar to § 7 cases).

⁴⁶ See *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521 (S.D.N.Y. 1965); See also Day, *Private Actions Under Section 7 of The Clayton Act*, 29 A.B.A. ANTITRUST SECTION 155, 155-58 (1965); Recent Developments, *Private Party Denied Cause of Action For Treble Damages For Violation of Section 7 of Clayton Act*, 64 COLUM. L. REV. 597, 600-01 (1964).

⁴⁷ The closest thing to a recovery of damages under § 7 of the Clayton Act is found in *Williamson v. Columbia Gas & Elec. Corp.*, 27 F. Supp. 198 (D. Del.), *aff'd*, 110 F.2d 15 (3rd Cir. 1939), *cert. denied*, 310 U.S. 639 (1940). In this case, relief was denied because of the statute of limitation. Action was later renewed under an alleged Sherman Act violation. *Williamson v. Columbia Gas & Elec. Corp.*, 91 F. Supp. 874 (D. Del.), *aff'd*, 186 F.2d 464 (3rd Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (relief denied—*res judicata*). Plaintiffs obtained relief between these antitrust cases through bankruptcy proceedings on behalf of plaintiff's creditors. Columbia Gas & Electric, which had been charged with violating § 7 of the Clayton Act, sought to file claim against the acquired corporation which had been placed in receivership. The Sixth Circuit held that the total claims of Columbia must be rejected. *In re American Fuel & Power Co.*, 122 F.2d 223, 229 (6th Cir. 1941), the case was remanded and after the government was permitted to intervene to argue that claims be rejected the trial court ruled that Columbia's claims were "not provable or allowable in bankruptcy." *Columbia Gas & Elec. Corp. v. American Fuel & Power Co.*, 322 U.S. 379, 381 (1944) (appeal dismissed because Government, as intervenor, was not a party to the action). On appeal to the Sixth Circuit, the order was modified. Instead of rejection, the court ruled that "subordination of its [Columbia] claims to those of other creditors was a more appropriate remedy. . . ." *In re Inland Gas Corp.*, 187 F.2d 813, 815 (6th Cir. 1951).

fauver amendment, the question arises: Why hasn't there been a single judicial recovery for treble damages? An answer to this question requires one to face the possibility that there has been judicial hostility against private suits. Statistics indicate that since the enactment of federal antitrust law, few plaintiffs have met with success in the courts.⁴⁸

This hostility is most apparent in corporate merger cases. Even with the evident relaxation of the rules⁴⁹ in some cases—like price-fixing—courts have retained and applied strict rules in merger cases to bar private recovery of damages. One commentator explained this by observing that the degree of judicial strictness is dependent upon the, “degree of outrage which our society feels against the practice in question.”⁵⁰ It was suggested that while price-fixing might outrage the “sensibilities of most Americans . . . there appears to be no equivalent outrage over mergers—especially where the companies are not dominant or where the merger is conglomerate in nature.”⁵¹

The lower federal courts have, through the urging of legal scholars, economists, and businessmen, apparently viewed corporate mergers both positively and negatively. They have come to believe that if a merger serves some useful purpose then it is good. The legality of mergers in other words is tested in light of the public benefit expected to be accomplished. This value judgment method of merger analysis is particularly noticeable with conglomerate mergers which courts justify on the basis that they accomplish greater business stability.

A. Presence of Judicial Hostility

There is inferential and explicit evidence of the presence of a long and continued judicial hostility toward antitrust laws in general and treble damages in particular. Infused economic value judgments converted into judicial precedent attest to or are the source of this hostility.

It is the mandatory trebling of damages that has, according to Professor Clark, “generated a natural reluctance in the courts to impose

⁴⁸ During the first 50 years under the Sherman Act, private plaintiffs succeeded in only 13 out of 175 actions brought. 1955 ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 378. (Hereinafter cited ATT'Y GEN.'S REP.). The combined recoveries in these 13 cases amounted to \$1,270,000. Note, *Nolo Pleas In Antitrust Cases*, 79 HARV. L. REV. 1475, 1478 (1966). For a review of the results in all private cases filed between 1892 and 1963, see *Hearings on S.2512. Before a Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. at 180-319 (1967).

⁴⁹ Pollock, *supra* note 44, at 10. Relaxation of the passing-on decisions was noted in the *Electrical Cases*.

⁵⁰ *Id.*

⁵¹ *Id.* at 11.

prodigious damages upon violators of the act."⁵² To those seeking to vigorously compete in the business world, treble damage action are considered unfair threats. There is strong support for eliminating this mandatory feature of the law. The Attorney General's National Committee to Study the Antitrust Laws recommended that trial courts be given discretion to double or treble damage awards.⁵³ In rebuking this proposal, proponents of a strong antitrust law describe it as a "disingenuous attempt to get rid of treble damages altogether."⁵⁴

This judicial hostility toward treble damages is not limited to the pens of commentators. Nor is it always hidden behind some acceptable interpretation device, though such will be used to justify a desired result. Courts have not been so bold as to say that they don't agree with the law and therefore refuse to apply it as written.⁵⁵ Although judicially conceived obstacles are used to block private recoveries, the motivating hostility does at times surface.⁵⁶

The fact that the treble damage remedy is drastic,⁵⁷ or because it is considered punitive,⁵⁸ has caused the statute to be strictly construed. Applying this rule of strict construction, it is reasoned that recovery, "should be allowed only in the rarest of cases where the party bringing suit is a commercial enterpriser."⁵⁹ In addition, since treble damages are considered a windfall,⁶⁰ it is reasoned that proof of damage in an antitrust suit, "should be stronger than in an ordinary civil action."⁶¹

⁵² Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954).

⁵³ ATT'Y GEN.'S REP., *supra* note 48, at 378-79.

⁵⁴ Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 176 (1958); *see also* McConnell, *The Treble Damage Issue: A Strong Dissent*, 50 NW. U.L. REV. 342 (1955).

⁵⁵ "There seems to be a developing trend in some of our trial courts of hostility toward the 'big' antitrust case and of discovering obstacles—going even back to matters of pleading and pre-trial . . ." *Eagle Lion Studios, Inc. v. Loew's, Inc.*, 248 F.2d 438, 451 (2d Cir. 1957) (dissenting opinion), *aff'd mem.*, 358 U.S. 100 (1958).

⁵⁶ *See* Loevinger, *supra* note 54, at 170-71; Pollock, *supra* note 44, at 9-10.

⁵⁷ *Image & Sound Serv. Corp. v. Altec Serv. Corp.*, 148 F. Supp. 237, 239 (D. Mass. 1956).

⁵⁸ *Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101, 105 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955).

⁵⁹ *Allgair v. Glenmore Distilleries Co.*, 91 F. Supp. 93, 97 (S.D.N.Y. 1950).

⁶⁰ *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956); *see also* Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231, 240 (1961).

⁶¹ *Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101, 105 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955).

Judicial hostility is not solely directed toward treble damage actions but is often directed at antitrust laws in general. Justice Holmes never hid his dislike for the Sherman Act. In expressing this dislike, Holmes characterized the Act as "a humbug based on economic ignorance and incompetency."⁶² The Holmes philosophy made an enduring imprint upon the Supreme Court up to at least 1964.⁶³ It was built upon an economic belief that monopolies and trusts might be very much in the public interest.⁶⁴ He once described the "great masters of combinations" as men of originality, courage and insight.⁶⁵ Holmes believed that survival should go to the strong⁶⁶ and considered the Sherman Act unfair because "[i]t won't let the strong man win the race."⁶⁷ Nonetheless, Holmes declared that he must follow the law as written.⁶⁸ Even if the Sherman Act is "damned nonsense . . . if my country wants to go to hell, I am here to help it."⁶⁹ This public declaration did not change the fact that he more often than not cast his judicial vote in favor of mergers⁷⁰ and against private antitrust prosecution.⁷¹

Though most writers cite *Northern Securities Co. v. United States*,⁷² as the judicial reflection of Holmes economic philosophy, there is only one case where Holmes personally expressed judicially what he so often said outside the Court. This is the often overlooked case of

⁶² 1 HOLMES-POLLOCK LETTERS 163 (M. Howe ed. 1941).

⁶³ The Supreme Court in the year 1964 turned away from the Holmes philosophy. To strike down a bank merger, it relied on the early railroad cases in which the Court had taken a strict stand against mergers. *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964).

⁶⁴ THE HOLMES-EINSTEIN LETTERS 38 (J. Peabody ed. 1964).

⁶⁵ 1 HOLMES-POLLOCK LETTERS, *supra* note 62, at 163.

⁶⁶ F. BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 8 (1961).

⁶⁷ C. BOWEN, YANKEE FROM OLYMPUS, JUSTICE HOLMES AND HIS FAMILY 360 (1944).

⁶⁸ 1 HOLMES-POLLOCK LETTERS, *supra* note 62, at 163.

⁶⁹ F. BIDDLE, *supra* note 66, at 9.

⁷⁰ *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (Holmes joined the dissent); *United States v. Winslow*, 227 U.S. 202 (1913) (Holmes wrote the opinion); *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918) (Holmes joined majority opinion which merely reflected what Holmes had said in *Winslow* case); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920) (Holmes joined majority).

⁷¹ *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) (Holmes wrote opinion); *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27 (1916) (Holmes wrote opinion). The Holmes influence was directly felt in *Cilley v. United Shoe Mach. Co.*, 202 F. 598 (D. Mass. 1913). After winning the early procedural rounds, the plaintiff dropped the case after the Government attack on *United Shoe* was unsuccessful. *Hearings on S.2512*, *supra* note 48 at 182.

⁷² 193 U.S. 197 (1904). See M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 217-22 (1943); C. BOWEN, *supra* note 67, at 366-71.

United States v. Winslow,⁷³ which involved the criminal prosecution of the United Shoe combination. In rejecting the criminal charge, Justice Holmes, writing for the majority of the Court said "[o]n the face of it the combination was simply an effort after greater efficiency."⁷⁴ Furthermore, Holmes saw nothing illegal in the tying arrangements entered into and constantly enforced by United Shoe. Of these tying arrangements, accomplished through leasing patented machines, Justice Holmes said "[t]he machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred"⁷⁵

Government met with no greater success when, seeking dissolution of the combination,⁷⁶ it filed civil charges against United Shoe.⁷⁷ Justice McKenna, writing for the Court, reiterated what Justice Holmes had said in *Winslow*. The Holmes philosophy was even more apparent in *United States v. United States Steel Corp.*⁷⁸ Writing once again for the majority, Justice McKenna almost paraphrased the views held and earlier expressed by Justice Holmes.

Catherine Bowen, a noted historian, expressing the views of Justice Holmes, stated: "mere bigness didn't make a merger illegal. How it behaved, what it did, determined its legality."⁷⁹ In *United States Steel*, Justice McKenna said that it was not the presence of power that would make the combination illegal; illegality must be based on the use of power.⁸⁰ A further comparison shows an even greater similarity of views. On August 1, 1908, Holmes, writing to Lewis Einstein, said: "If I had to bet, I should bet that monopolies on the whole . . . were very much for the public interest"⁸¹ In a letter dated August 10th of the same year, Holmes spoke of the "originality, the courage, the insight shown by the great masters of combinations."⁸² Justice McKenna said much the same thing in *United States Steel* as he viewed the combinations that made that company fully integrated, as necessary for "industrial progress".⁸³ With regard to the courage and in-

⁷³ 227 U.S. 202 (1913).

⁷⁴ *Id.* at 217.

⁷⁵ *Id.*

⁷⁶ After many judicial battles and after much Congressional debate, United Shoe was finally divided in Feb., 1969. Wall St. J., Feb. 21, 1969, at 14.

⁷⁷ *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918).

⁷⁸ 251 U.S. 417 (1920).

⁷⁹ C. BOWEN, *supra* note 67, at 360.

⁸⁰ 251 U.S. at 444.

⁸¹ THE HOLMES-EINSTEIN LETTERS, *supra* note 64, at 38.

⁸² 1 HOLMES-POLLOCK LETTERS, *supra* note 62, at 141.

⁸³ 251 U.S. at 442.

sight of the great combinations, Justice McKenna, quoting defendants counsel, described the combination as "a vision of great business".⁸⁴

The favoring of trusts and large business combinations would, on the surface, appear inconsistent with the purpose of the Sherman Act—to stop the economic trusts from gaining so much power that they would "at some not very distant day . . . crush out all small men, all small capitalists, all small enterprises."⁸⁵ Thus Justice Holmes, in judicially applying his economic philosophy, seems at odds with his declared intention to "enforce whatever constitutional laws Congress . . . sees fit to pass."⁸⁶

To maintain a sense of consistency—to enforce the law as written by Congress and still reduce the force of the law, Justice Holmes used long accepted techniques of statutory interpretation. These techniques are: 1) construing statutes in light of the common law, 2) strictly construing statutes in derogation of the common law and, 3) strictly construing penal statutes. All three techniques have been used by courts to justify a narrow reading of the antitrust statutes. The general language of the Sherman Act required, according to Justice Holmes, interpretation in light of the common law.⁸⁷ Max Lerner, in defense of Justice Holmes said: "It must be remembered that he was primarily a legal craftsman."⁸⁸ "The tradition, [of a common law craftsman] in construing a statute, is to give words their common law meaning, to demand that innovations be made explicit, to assume that Congress can still have recourse to redrafting the statute."⁸⁹

Holmes, viewing the Sherman Act in terms of the common law, denied that the history of the concept of "restraint of trade" could include combinations willingly entered into by two or more parties so long as others were not excluded.⁹⁰ Using this technique of legal reasoning, courts have conceived many obstacles to the treble damage actions and private enforcement of the antitrust laws has been relatively limited. Prior to the Supreme Court's recent liberalization of the area, lower federal courts equated the treble damage suit as purely private to the plaintiff involved. A private plaintiff was not the "vindicator" of the antitrust laws; he served merely as an aid to the government.⁹¹

⁸⁴ *Id.* at 443.

⁸⁵ 21 CONG. REC. 2598 (1890) (remarks of Senator George).

⁸⁶ 1 HOLMES-POLLOCK LETTERS, *supra* note 62, at 163.

⁸⁷ M. LERNER, *supra* note 72, at 219.

⁸⁸ *Id.* at 222.

⁸⁹ *Id.*

⁹⁰ *Id.* at 220.

⁹¹ *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466, 475 (S.D. Cal. 1957).

Although private plaintiffs have been loosely described as "private Attorneys General",⁹² most commentators agree that the treble damage law was enacted to compensate the victim and not to create an army of bounty hunters.⁹³ Under this line of reasoning, the private plaintiff must show injury greater and different from that of the general public. The injury must be direct and, according to some defense oriented writers, the injury to "business or property" means an injury to "a commercial venture or enterprise."⁹⁴

In construing the treble damage statute under the common law, courts very early held that plaintiffs must allege and prove some causal connection between the injury and the alleged antitrust violation. Both Section 7 of the Sherman Act and Section 4 of the Clayton Act gave standing to any person "injured in his business or property by reason of anything forbidden in the antitrust laws."⁹⁵ What has caused so many plaintiffs consternation is the method used to determine when this causal relation is satisfied.

Emphasis was initially placed on the concept of directness. The degree of directness, however, has varied from the necessity of showing that the plaintiff was the actual target of the violator to a more flexible showing that the plaintiff was at least within the target area.⁹⁶ There simultaneously developed the concept of "derivative losses" for which there could be no recovery. The consequence of this doctrinal approach was the judicial categorization of plaintiffs.⁹⁷

Another device reducing the thrust of what was considered an unfair law involved proof of damages. Using the same reasoning used in common law disparagement cases—the requiring of an allocation and proof of special damages⁹⁸—the courts were able to dispose of many treble damage actions. The specificity of proof of injury has been so arduous that few plaintiffs satisfy the judicial standards for recovery.⁹⁹

A final manifestation of judicial hostility involves the clash between private contracts and public law. Though the Sherman Act, repre-

⁹² Pollock, *supra* note 44, at 5. But see Timberlake, *supra* note 60, at 232.

⁹³ Pollock, *supra* note 44, at 38.

⁹⁴ Timberlake, *supra* note 60, at 233.

⁹⁵ 15 U.S.C. §§ 15, 18 (1964).

⁹⁶ Timberlake, *supra* note 60, at 240-41; Pollock, *supra* note 44, at 17-19.

⁹⁷ Pollock, *supra* note 44, at 12-13, lists parties whose loss was considered derivative.

⁹⁸ Fowler v. Curtis Publishing Co., 182 F.2d 377 (D.C. Cir. 1950).

⁹⁹ See Baush Mach. Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935); Alberto-Culver Co. v. Andrea Dumon, Inc., 295 F. Supp. 1155 (N.D. Ill. 1969); McWhirter v. Monroe Calculating Mach. Co., 76 F. Supp. 456 (W.D. Mo. 1948); Clark, *supra* note 52, at 366-70.

senting public interests, makes illegal private contracts that restrain trade, courts have upheld those contracts in which a private party agrees to release from liability the violator of antitrust laws. In two early merger cases, the plaintiffs' execution of a release after an alleged forced sale of plaintiffs' business was held to bar recovery.¹⁰⁰

B. Perpetuation of Judicial Hostility

Although courts have not used the common law extensively to curtail the effectiveness of other public laws,¹⁰¹ they have relied on that precedent to curtail enforcement of the antitrust statutes. These common law rules of statutory construction as applied to the treble damages provisions have stifled their deterrent effect. To perpetuate this precedent the courts have turned to another device to reduce the effectiveness of the statutes. After repeated decisions¹⁰² or after sufficient time for positive action has transpired,¹⁰³ legislative inaction is construed as ratification of existing judicial precedent. This concept is somewhat unrealistic when the complexity of the legislative process is considered. Weight given to legislative inaction is simply another way to justify a strict interpretation of a statute.

This concept has been effectively used to perpetuate long existing judicial hostility toward enforcement of the antitrust treble damage statutes. Relying on legislative inaction, courts have found justification for refusing to relax the rule of directness of injury. In affirming the dismissal of a treble damage claim, the Tenth Circuit in 1967 noted that:

The directness rule has been criticized, but it appears to be through the years a practical application of the Clayton Act, and in view of the lapse of time, it must be assumed that it accords with the intention of Con-

¹⁰⁰ *Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc.*, 208 F.2d 316, 323 (10th Cir. 1953), *cert. denied*, 347 U.S. 935 (1954); *Suckow Borax Mines Consol. v. Borax Consol.*, 185 F.2d 196, 206 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951). *But see* *Novak v. General Electric Corp.*, 282 F. Supp. 1010 (E.D. Pa. 1967). Another case showing the influence of the common law involved the effect of a general release on other tortfeasors. *California Concrete Pipe Co. v. American Pipe & Constr. Co.*, 288 F. Supp. 823, 825 (C.D. Cal. 1968).

¹⁰¹ *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-128 (1944) (The Court rejected use of the common law in the interpretation of the National Labor Statutes); *Akers Motor Lines, Inc. v. United States*, 286 F. Supp. 213, 225 n.12 (W.D.N.C. 1968) ("A theory of pleading 'based on common law thinking has no place in administrative proceedings.'")

¹⁰² *McIver v. State Highway Comm'n*, 198 Kan. 678, 683, 426 P.2d 118, 123 (1967).

¹⁰³ *State v. Ayers*, 198 Kan. 467, 472, 426 P.2d 21, 25 (1967).

gress. . . . If the times have changed, and the needs of business have changed to bring about a need to extend the right of recovery to others, Congress would have so indicated.¹⁰⁴

Judge Wyzanski expressed similar sentiments in *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*¹⁰⁵ Recognizing that the treble damage section of the Clayton Act was phrased in broad language, he noted that a long line of decisions¹⁰⁶ denied recovery without a showing of directness between the antitrust violation and the injury.¹⁰⁷ In reaction to this body of precedent and attendant legislative silence, Judge Wyzanski stated:

Congress has failed to amend the anti-trust laws on this point in the face of repeated decisions. It seems to have been content for the judiciary to take a position narrower than that often applied in non-statutory tort cases and in cases where plaintiffs are not allowed a multiple recovery.¹⁰⁸

When the legislature re-enacts a statutory provision without making any changes, as in the case of private treble damage provisions, it is arguable that the judicial interpretation of the earlier Act has been approved by the legislature.¹⁰⁹ The right of a private person to recover treble damages was first placed in the Sherman Act in 1890.¹¹⁰ Between enactment of the Sherman Act and enactment of the Clayton Act in 1914, no less than 55 private cases were filed.¹¹¹ During these years the philosophy of strict statutory construction developed.

In 1914, Congress re-enacted the treble damage provision of the Sherman Act with no significant change in the language.¹¹² Thus one could conclude that Congress had approved or ratified the existing judicial interpretation of the treble damage provision. In the years following, the judicial stand against treble damages continued. In 1955, Congress took action to repeal Section 7 of the Sherman Act in order to eliminate duplication with Section 4 of the Clayton Act.¹¹³ No

¹⁰⁴ *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925, 929 (10th Cir. 1967).

¹⁰⁵ 147 F. Supp. 907 (D. Mass. 1956).

¹⁰⁶ *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *John V. Carr & Son, Inc. v. United States*, 283 F. Supp. 935, 941 (Cust. Ct. 1968) (involving tariff acts).

¹¹⁰ Sherman Act of 1890, ch. 647, § 7, 26 Stat. 210.

¹¹¹ Hearings on S.2512, *supra* note 48, at 180-87.

¹¹² Clayton Act of 1914, ch. 323, § 4, 38 Stat. 731 [now 15 U.S.C. § 15 (1964)].

¹¹³ Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283 (amendment to Clayton Act).

change was made in the language of the statute authorizing treble damages.

III. TREBLE DAMAGES IN SECTION 7 CASES—A VALUE JUDGMENT

Should there be no claim for money damages for a violation of Section 7?¹¹⁴ This is not what the law says, but apparently it is what some want it to say. Professor Day, shortly after the district court rendered its decision in *Gottesman*, concluded that Section 7 does allow private treble damage suits.¹¹⁵ Although Professor Day reached this conclusion, he disagreed with this policy and stated: "It is my opinion that private section 7 actions must either be eliminated entirely, or precisely delimited."¹¹⁶ In a similar manner, Professors Kaysen and Turner urged that: "There should be no private right of action based on the acquisition of 'unreasonable market power.'"¹¹⁷ Kaysen and Turner reasoned that the magnitude of the enforcement task, caused by comprehensive investigations necessary to satisfy vague statutory standards, required that the major part of enforcement be placed in the Federal Trade Commission.¹¹⁸ Both Kayson and Turner believed the standards of Section 7 to be "vague and uncertain" and felt that: "It is unfair for private plaintiffs to collect treble damages for conduct the illegality of which cannot be readily determined in advance."¹¹⁹

Two reasons have surfaced for restricting private suits in merger litigation. First, it would be unfair to subject businessmen to treble damages if the statutory standards are "vague and uncertain".¹²⁰ However, any existing uncertainty is due principally to a failure to analyze the statute in light of its legislative purpose. The existing uncertainty stems from the propensity of writers and lower federal courts to take the general language of Section 7 and supply a meaning consistent with economic value judgments they deem desirable.

The second reason for restricting private suits in merger prosecution is that the removal of private suits from the enforcement scheme would permit official agencies to pursue a desirable regulatory policy in con-

¹¹⁴ *Gottesman v. General Motors Corp.*, 221 F. Supp. 488, 493 (S.D.N.Y. 1963), *cert. denied*, 379 U.S. 882 (1964).

¹¹⁵ Day, *supra* note 46, at 155-58.

¹¹⁶ *Id.* at 160.

¹¹⁷ C. KAYSEN & D. TURNER, *ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS* 258 (1959).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 257.

¹²⁰ See Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 *FORD. L. REV.* 461 (1968).

tradistinction to strict private enforcement.¹²¹ Professor Day describes the United States Supreme Court as supporting an almost *per se* rule against mergers. In Professor Day's opinion, governmental self-restraint in prosecution of mergers is preferable.¹²² The government, instead of operating under a strict enforcement policy where every big merger is attacked,¹²³ encourages public enforcement agencies to take a "relatively calm and rational approach".¹²⁴

To Professor Day, a private treble damage action is considered a threat to this "calm and rational" approach.¹²⁵ Private plaintiffs, motivated by self-interest, do not generally consider the public good of mergers. After sustaining injury to their business or property, private litigants care little how a merger equates with economic policy and seek blind adherence to the law. To effectuate a policy in favor of certain mergers, particularly conglomerate mergers, it is essential to remove the unreliable factor—the private plaintiff. Policy arguments, if they are to be used in deciding the legality of mergers, must come through discretionary enforcement by public agencies, for once prosecution begins in the courts, such arguments will, at least at the Supreme Court level, be given little or no weight.

Starting with *United States v. Philadelphia National Bank*,¹²⁶ the United States Supreme Court made it clear that policy arguments in Section 7 cases would not be accepted. The argument of the defendant that the merger would increase the bank's ability to compete in New York with New York banks was held immaterial. The Court ruled that the pro-competitive effects in one market cannot justify anti-competitive effects in another.¹²⁷ Without this limitation, the Court reasoned, there would be no limit on mergers except on the largest industry leader.

Justice Black emphatically rejected the subjective approach in *United States v. Pabst Brewing Co.*,¹²⁸ stating: "it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden . . ."¹²⁹ Justice Black

¹²¹ Day, *supra* note 46, at 161.

¹²² *Id.* at 160.

¹²³ For a discussion of big mergers, see Thomas, *supra* note 120, at 540-50.

¹²⁴ Day, *supra* note 46, at 160.

¹²⁵ Professor Day considers the potential antitrust plaintiff an "unknown quantity".
Id.

¹²⁶ 374 U.S. 321 (1963).

¹²⁷ *Id.* at 370.

¹²⁸ 384 U.S. 546 (1966).

¹²⁹ *Id.* at 552.

drawn critical fire from those actively engaged in engineering mergers.

Glen McDaniel, Senior Vice President of Litton Industries, offers a persuasive argument that mergers are inevitable.¹³⁴ He believes they are inevitable because of the "inexorable technological explosion in industry".¹³⁵ According to Mr. McDaniel, "the challenges and needs of consumers and society are undergoing changes, and this process will also require more corporate mergers."¹³⁶ In criticizing those who seek a simplified formula for judging mergers, Mr. McDaniel argued that the condemnation of a merger taking place in the present technological revolution merely because it contributes to that revolution, "is simply an attempt to maintain the status quo."¹³⁷

The leaders of the giant conglomerates, rather than seeking to maintain the status quo, desire to propel this nation into the 21st century. They have decided to achieve this goal, not through internal expansion, but rather, through combination of previously independent companies. The Gulf & Western Corporation, in a full page newspaper advertisement, describes itself as "The 21st Century Company".¹³⁸ Through such publicity¹³⁹ there is an effort to extoll the virtues of conglomerates and to attract sufficient public attention to slow or stop what Mr. Ling calls "business McCarthyism".

Yet with all the rhetoric about official enforcement, the fact remains, as Senator Hart observed, that enforcement of the antitrust laws against corporate mergers is being carried on in a low key.¹⁴⁰ Using the estimates of the Federal Trade Commission, Senator Hart expressed concern over the possibility that by 1975 the top 200 corporations would hold 75% of all manufacturing assets.¹⁴¹ The total number of manufacturing and mining mergers is spiraling so fast that this 75% estimate could occur before 1975. An analysis of the last two years discloses that the number of companies acquired jumped from 1,496 in 1967 to

¹³⁴ McDaniel, *Antitrust and the Status Quo in a Changing Society*, 1967 N.Y. STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 1, 3 (1967).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 5.

¹³⁸ Wall St. J., Aug. 12, 1969, at 15.

¹³⁹ Wall St. J., Aug. 11, 1969, at 16-17. For an even more ingenious ad extolling the virtues of conglomerates, see TIME, Aug. 29, 1969, at inside cover. The Signal Companies captioned a picture of a beautiful naked girl with, "Conglomerate, like naked, is not a dirty word."

¹⁴⁰ Hart, *Emerging Paradoxes In Antitrust*, 30 A.B.A. ANTITRUST SECTION 80 (1966).

¹⁴¹ *Id.*

noted that many believe the assumption of Congress "that the disappearance of small businesses with a correlative concentration of business in the hands of a few is bound to occur whether mergers are prohibited or not," is wrong.¹³⁰

Professor Turner believes that the disappearance of some small business is inevitable. He suggests that where large diversified firms supplant small single product companies, their loss is due to the increased efficiency and the force of competition.¹³¹ Professor Turner's philosophy, as it relates to conglomerate mergers, closely resembles that of Justice Holmes who looked upon combinations of capital through mergers as inevitable and desirable.¹³² As a Supreme Court Justice, Holmes, during a period of antitrust judicial hostility, successfully converted his notion of bigness into legal precedent. Turner, on the other hand, as the Chief Antitrust Lawyer for the Justice Department, faced a Court that had a history of striking down every merger presented on the basis of the 1950 Celler-Kefauver Act. Nonetheless, Turner was able to activate his philosophy, perhaps even more effectively than Holmes, by formulating an enforcement policy that favored conglomerates.

The economic diversification achieved by conglomerate mergers, with resulting business efficiencies, was considered by Turner to be in the public interest. Under Turner's leadership, guidelines were adopted by the Justice Department which for the most part manifested his economic philosophy.¹³³ Other plans for official merger guidance, regulatory in nature, subsequently came from the Federal Trade Commission—the most significant being the announced policy of pre-merger clearance.

The policy of discretionary enforcement, based on value judgments, can be effective only if private suits are eliminated—an event contemplated by the "no standing" doctrine. Between the trial court's decision in *Gottesman* in 1963, and the Second Circuit's reversal in 1969, corporations with active acquisition programs have shown little concern over the deterrent force of treble damage suits. What little enforcement of Section 7 remains, comes from the public agencies—which though following the "calm and rational approach", have still

¹³⁰ *Id.*

¹³¹ Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1352-53 (1965).

¹³² M. LERNER, *supra* note 72, at 219.

¹³³ *Dept. of Justice, Merger Guidelines* (released May 30, 1968), in A.B.A., ANTI-TRUST DEVELOPMENTS 1955-1968 (1968).

2,442 in 1968.¹⁴² The acquisition of large firms (defined as companies with assets of \$10,000,000 or more) is even more startling—especially if measured in terms of acquired assets. In 1967 the number of large firms acquired was 169, in 1968 the total was 193. These 193 firms represented assets totaling approximately thirteen billion dollars.¹⁴³

A comparison of the number of mergers and the number of mergers challenged (Graphs 1 and 2 Pgs. 314 & 315), reflect the notion that official antitrust enforcement policy has been at a low key. Professor Turner, while head of the antitrust division of the Justice Department, defended his policy of discretionary enforcement by saying “that antitrust is far too important an instrument of economic policy to be turned into a children’s crusade.”¹⁴⁴ It seems likely that the number of mergers will continue to increase so long as economic value judgments are allowed to over-shadow the congressional policy against any further increases in the concentration of economic power.

As mentioned in the introduction, without the treble damage suit there is no deterrent to corporate mergers that appear profitable. Freed from the threat of private suits, businessmen will engage in vigorous acquisition programs. Businessmen fail to realize the ultimate consequence of an unrestrained acquisition program. If, as Glen McDaniel suggests, the technological revolution compels mergers and a centralized economy, we will not have something akin to Galbraith’s “Planned Society or New Industrial State”.¹⁴⁵ When Congress concludes that business combinations are inevitable, that mergers cannot or should not be stopped, then we will have a centralized economy with government control.¹⁴⁶ If the trend toward economic concentration is allowed to continue, capitalism will be replaced by statism.¹⁴⁷

Congressional desire for a decentralized economic system was not based on any final notion that this would achieve the greatest degree of efficiency. It was instead considered to be the most desirable method

¹⁴² BUREAU OF ECONOMICS, FEDERAL TRADE COMM., STATISTICAL REPORT No. 3 at 9 (Mar. 1969).

¹⁴³ BUREAU OF ECONOMICS, FEDERAL TRADE COMM., STATISTICAL REPORT No. 4 at 6 (Apr. 1969).

¹⁴⁴ *An Interview With The Honorable Donald F. Turner*, 30 A.B.A. ANTITRUST SECTION 100, 102 (1966).

¹⁴⁵ J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967).

¹⁴⁶ TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, S. Doc. No. 35, 77th Cong., 1st Sess. 8 (1941) [hereinafter cited TNEC]; 95 CONG. REC. 11498 (1949) (remarks of Congressman Patman); 95 CONG. REC. 11486 (1949) (remarks of Congressman Celler). Thomas, *supra* note 120, at 540-44.

¹⁴⁷ Thomas, *supra* note 120, at 543.

of maintaining social and political balance. Reliance was placed on the forces of free competition to defuse the wealth of the nation among all its people—to eliminate economic deprivation of some and social suppression of others. Congress, while considering the Clayton Act, was warned that unless the “brazen defiance of the spirit of the laws made to protect the public” are stopped, there is the danger that “the masses of the people will forget their patient endurance of injustice and long suffering submission to wrong on the part of exploiting combinations and start a conflagration against which fire insurance will offer no protection.”¹⁴⁸

Unless, through vigorous enforcement of the Celler-Kefauver Act, we achieve that level of economic decentralization sought by Congress, government controls will become a necessity. What form these controls will take will necessarily depend on the same goals that Congress wished to achieve through economic decentralization. Opposition to increases in economic concentration was based on a desire to insure the independence of local communities and local sovereignties, thereby insuring the greatest protection against unemployment. It was observed in the economic studies preceding the passage of the Celler-Kefauver Act that because economic centralization has caused production facilities to be removed from certain geographical areas, “[m]ayors of great cities, and Governors of great states have beaten a path to Washington begging the Federal Government to undertake Federal enterprises in the local communities to solve local problems of unemployment.”¹⁴⁹

Thus if mergers persist, Congress will, as we are already seeing, be faced with the the problem of creating Federal jobs, or, as an alternative, set employment quotas for each of the giant corporations. Because corporate mergers are causing business units to be removed from some geographical areas, certain states are becoming economically subservient to the more powerful economic forces. If allowed to continue, Congress will be faced with the choice of dictating plant locations for the giant corporations or to equalize the economic base of all states by pumping federal money into economically depressed areas. Some believe that decentralization would provide the greatest protection to consumers in the form of lower prices, etc. This protection has been lost in the vast corporate merger movement which has been linked to the problems currently associated with inflation.¹⁵⁰ One might thus expect,

¹⁴⁸ 51 CONG. REC. 9087 (1914) (remarks of Congressman Kelly).

¹⁴⁹ TNEC, *supra* note 146, at 6.

¹⁵⁰ *Hearings pursuant to S. Res. 191 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 5, at 1863 (1966).

if mergers are inevitable, tight government controls to regulate the inflationary movement even to the extent of the eventual regulation of consumer prices charged by industrial empires.

Unfortunately, analysis of the anti-merger statutes has been left almost entirely to the economists. As Senator Hart observed, "liberals have turned their attention elsewhere and—one gets the feeling—treat antitrust as an old race horse who should be retired to pasture."¹⁵¹ Consequently, while demanding protection against political abuses, the so-called liberals, ignorant of the antitrust laws, are losing their liberty to economic combines. We are reaching the point when independent businesses can exist only at the will of the industrial giants—particularly the conglomerates which have effectively used the "tender offer" in their take over bids. Official enforcement has failed, and if free competition is desirable, private treble damage suits must be elevated as the primary enforcement vehicle.

IV. TREBLE DAMAGES IN SECTION 7 CASES—CONGRESSIONAL POLICY

One student writer, after a comprehensive study of the issue of standing to sue for treble damages under the antitrust laws, summed up by saying:

The evident purposes of Section 4 are the self-enforcement of the antitrust laws, the deterrent effect of possible treble liability, and the compensation of persons injured by violations. Its purpose is so broad and its mandate so clear that any person who can show damage *prima facie* should be within the protected class. . . . In view of the section's broad language and purpose, the presumption should be in favor of the plaintiff's right of action, absent a showing that to allow his claim would be contrary to congressional intent.¹⁵²

This concept of standing drew strong criticism from one member of the Bar who replied: "Those who speak glibly of what Congress 'intended' are frequently telling us more of their own views and predilections, rather than those of Congress."¹⁵³ In raising this criticism, the writer was taking the statute and its accompanying legislative history too lightly.

Roscoe Pound, as early as 1908, recognized that statutes were taken too lightly, that they were being considered by many writers as second-

¹⁵¹ Hart, *supra* note 140, at 80.

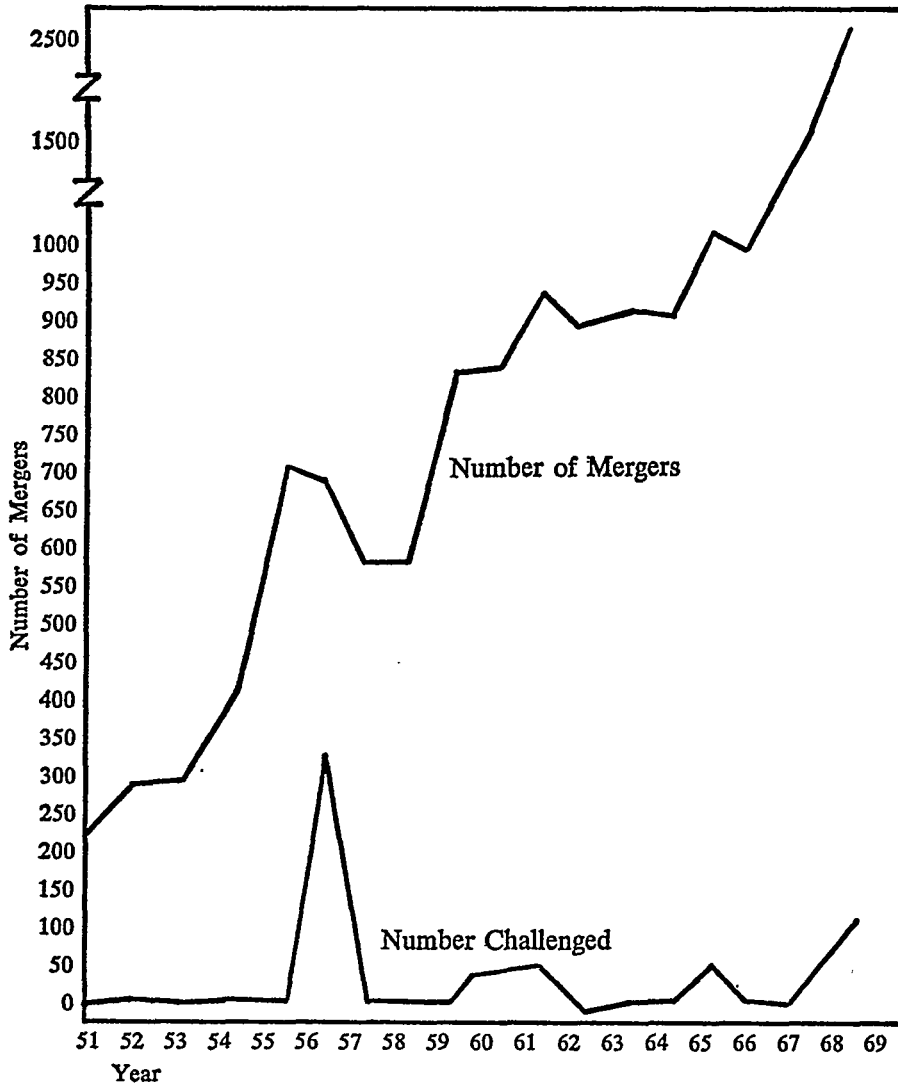
¹⁵² Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 587 (1964).

¹⁵³ Pollock, *supra* note 44, at 8-9.

GRAPH I

Manufacturing & Mining

Total Number of Mergers Compared with Total Challenged—1951-1968.

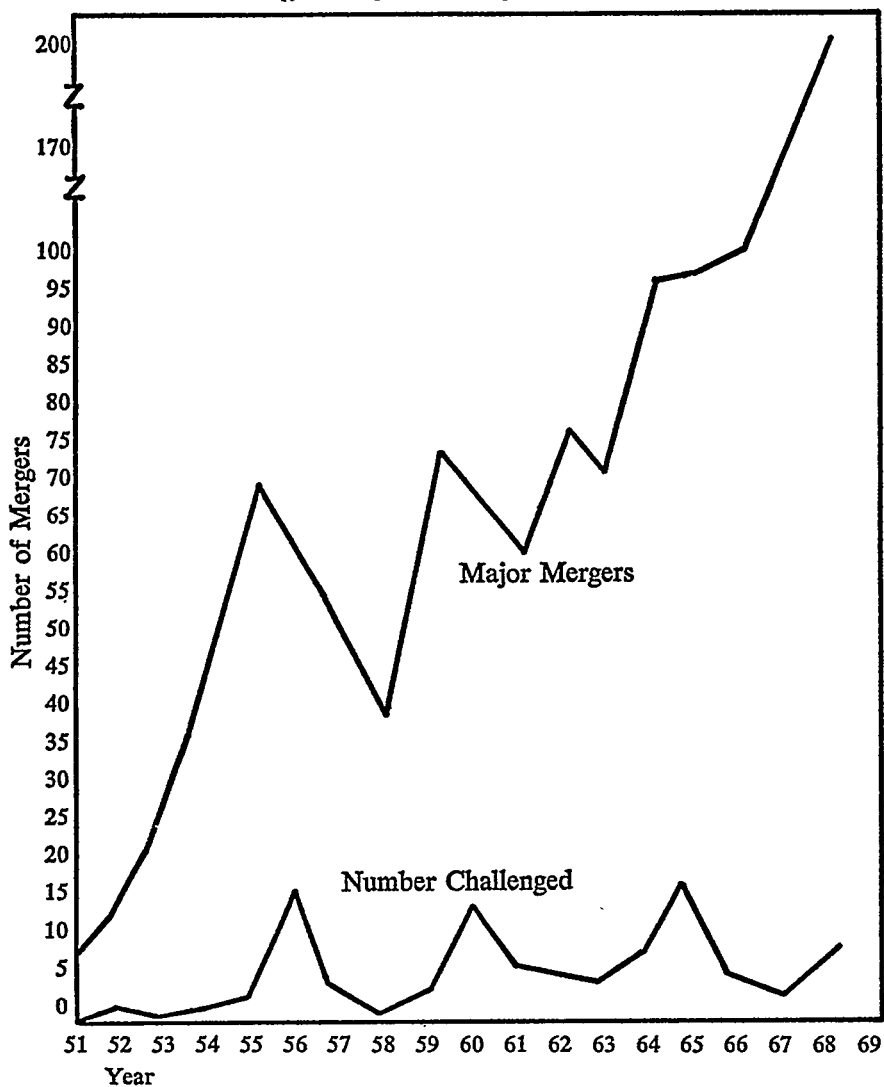


Source: Staff of House Comm. on the Judiciary, 90th Cong., 1st Sess., *The Celler-Kefauver Act: Sixteen Years of Enforcement 37-39* (Coram. Print Oct. 16, 1967) [hereinafter cited as *Staff Report*]. (for years 1951-1966).

Source for years 1967-1968—Bureau of Economics, Federal Trade Commission, *Statistical Report No. 3*, p. 9 (March, 1969) and correspondence from the FTC.

GRAPH II

Total Number of Major Mergers Compared With Total
Major Mergers Challenged—1951-1968



Source: Staff Report 5, table 2.

Source for years 1967-1968—Bureau of Economics, Federal Trade Commission, Statistical Report No. 4, p. 6 (April, 1969) and correspondence from FTC.

ary to judicial decisions.¹⁵⁴ Though considered "fashionable to preach the superiority of judge-made law,"¹⁵⁵ Pound urged that:

It may be well . . . for judges and lawyers to remember that there is coming to be a science of legislation and that modern statutes are not to be disposed of lightly as off-hand products of a crude desire to do something, but represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focused upon all important details, and hearings before legislative committees.¹⁵⁶

Section 4 of the Clayton Act, applied only within the narrow boundaries drawn by judicial decisions, offers a good example of what Pound was making reference to. The legislative mandate that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained"¹⁵⁷ has been approached in the most unscientific fashion. Ignoring existing legislative history supporting the standing of "any person" injured, courts have used the interpretive process to curtail the full force of the treble damage suit.

Before considering specifics, certain general observations and assumptions must be made if for no other reason than to impose some limitation on this study. It is assumed that Congress by including Section 7 in the Clayton Act was desirous of stopping those corporate mergers that "substantially lessened competition". More important, it is concluded that Section 7 applies equally to horizontal, vertical, and conglomerate mergers.

Since conglomerate mergers bring together companies which are not in competition (horizontal mergers) nor in any integrated line (vertical mergers), the view has been expressed that conglomerate mergers are not illegal under Section 7. The statute makes illegal only those mergers that substantially lessen competition. This fact gave rise to a presumption that conglomerates were exempt, or at least should be considered under different standards. There seems no foundation for such a presumption. Congress, in creating a single statutory standard, was well aware of the existence of conglomerates.¹⁵⁸ Congressman Boggs, in the congressional debates, was even led to observe that the conglomerate merger "is one of the most detrimental movements to a free enter-

¹⁵⁴ Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

¹⁵⁵ *Id.* at 383-84.

¹⁵⁶ *Id.* at 384.

¹⁵⁷ Clayton Act § 4, 15 U.S.C. § 15 (1964).

¹⁵⁸ H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949).

prise economy.”¹⁵⁹ He stated: “By this process they build up huge business enterprises which enable them to play one type of business against another in order to drive out competition.”¹⁶⁰ Since *FTC v. Proctor & Gamble Co.*,¹⁶¹ any question still extant about the application of Section 7 to conglomerate mergers should be academic. As Justice Douglas observed: “All mergers are within the reach of section 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other.”¹⁶²

Thus it would follow that if Section 4 allows treble damages for Section 7 violations—the treble damage suit can be used against conglomerates. The strong legislative history accompanying the enactment of Sections 4 and 7 of the Clayton Act indicate that Congress, contrary to the effect of the “no standing” doctrine, manifested a clear desire to expose merging corporations to the force of private suits. To satisfy standing, one should need only to define business or property that has been injured by a corporate merger—be it horizontal, vertical, conglomerate or other.

A. *Private Suits Against Mergers*

The standing of private parties to seek treble damages against corporations violating Section 7 of the Clayton Act is best supported by the legislative history of that statute. The debates evidence Congressional opposition, at times reaching proportions of dogmatism, to economic bigness—or more precisely to the methods used to gain or retain economic bigness. In the statute, the authoritative boundary within which courts must remain, Congress attacked specifically those practices openly used by industrial giants to capture more power—price discrimination,¹⁶³ tying arrangements;¹⁶⁴ acquisitions of capital stock;¹⁶⁵ and interlocking directorates.¹⁶⁶ In the statutory sanctions, Congress relied upon the private plaintiff who suffered injury to curtail violations through the treble damage suit.

To understand the significance of the role of private suits one must

¹⁵⁹ 95 CONG. REC. 11496 (1949) (remarks of Congressman Boggs).

¹⁶⁰ *Id.*

¹⁶¹ 386 U.S. 568 (1967).

¹⁶² *Id.* at 577.

¹⁶³ Clayton Act § 2, 15 U.S.C. § 13 (1964).

¹⁶⁴ Clayton Act § 3, 15 U.S.C. § 14 (1964). This could well be termed the anti-*United Shoe Machinery Co.* section. See 51 CONG. REC. 9090, 16273-74, 15830-31, 15988-96 (1914).

¹⁶⁵ Clayton Act § 7, 15 U.S.C. § 18 (1964).

¹⁶⁶ Clayton Act § 8, 15 U.S.C. § 19 (1964).

think in terms of, and with, the fever then present in Congress. In describing this fever, Senator Clapp remarked: "There are those who fear the tyranny of the many, but the fact is that the eternal struggle of the ages has been on the part of the many to protect themselves from the aggressions of the few."¹⁶⁷ Protection of the public from aggression of this few, required the elimination of the use of value judgments in distinguishing good and bad combinations. In response to a suggestion that the dissolution of the "great combinations" might cause more harm than good, Senator Reed bluntly retorted:

I deny, Sir, that monopoly is a good thing. There can be no monopoly that is not built upon the grave of human hopes. There can be no monopoly that has not crushed out the life and the prosperity of individuals and of communities.¹⁶⁸

Big business, the invisible government that over the years controlled the visible government had, Congressman Kelly insisted, through its "arts of trickery and debauchery" brazenly defied the spirit of the laws made to protect the public.¹⁶⁹ He urged Congress to act immediately to halt further increases in economic concentration, stating: "The time for forbearance is over and the time to strike has come."¹⁷⁰ Congressman Kelly saw no room for compromise; there must, he said, be a complete halt to the "evils which have brought concentration of wealth and diffusion of poverty."¹⁷¹

Challenging the economic combinations that created, in the hands of private parties, sufficient power with which to demand and obtain obedience from the states and their political subdivisions, compelled a policy of vigorous enforcement. The solution to the trust problem, in the opinion of Senator Norris, required at least one of two things—"make it financially unprofitable for anyone or any set of men to organize a trust [or] provide, by proper criminal law, jail sentences for those who organize and control trusts in violation of the law."¹⁷² The most effective enforcement would, according to some, come through criminal sanctions applied against the violator of the antitrust law just as the criminal law is used against "the poor devil who is engaged in stealing because he is hungry."¹⁷³

Congressman Floyd agreed that criminal penalties should have been

¹⁶⁷ 51 CONG. REC. 16053 (1914) (remarks of Senator Clapp).

¹⁶⁸ *Id.* at 15867 (remarks of Senator Reed).

¹⁶⁹ *Id.* 9087 (remarks of Congressman Kelly).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 16,051 (remarks of Senator Norris).

¹⁷³ *Id.* at 16,045.

retained, but believed and insisted that the civil remedies would in practice be far more effective.¹⁷⁴ Courts and juries have generally followed the philosophy that penal statutes ought to be strictly construed. In criminal cases, consistent with this notion of strict construction, proof to establish guilt must be beyond a reasonable doubt. On the other hand, a point affirmatively urged by Congressman Floyd, civil cases require only a preponderance of evidence.¹⁷⁵ With this lesser burden of proof,¹⁷⁶ coupled with the right of any person injured to initiate prosecution, the most effective and the most vigorous enforcement would be assured.¹⁷⁷

No distinction between public and private complainants was intended in the application of suits against persons violating any of the several substantive provisions of the Clayton Act. With all differences existing between the bills passed by each House resolved, Congressman Floyd acknowledged that the Conference Committee understood that private suits applied in Section 7 merger cases. He conceded that for price discrimination, tying arrangements and unlawful acquisition of stock under Section 7, there were no criminal penalties, but emphasized that "they are still provisions of the antitrust laws, and every civil remedy that is applicable to any antitrust law may be invoked for their enforcement."¹⁷⁸ "If a man is injured . . . by the unlawful acquisition of stock of competing corporations¹⁷⁹ . . . , he can go into any court and enjoin and restrain the party from committing such unlawful acts or sue for his damages."¹⁸⁰ Furthermore, these private plaintiffs can go

¹⁷⁴ *Id.* at 16,319 (remarks of Congressman Floyd).

¹⁷⁵ *Id.* at 16,318.

¹⁷⁶ The Supreme Court has moved closer to the Congressional policy established in the Clayton Act in a series of private cases. As early as 1931 the Court, in *Story Parchment Co. v. Peterson Parchment Paper Co.*, 282 U.S. 555 (1931), expressed sentiments toward changing the strict proof of damages requirement. *Id.* at 562-63. The change came in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). It was determined that uncertainty in the proof of damages must be borne by the wrongdoer. *Id.* at 265. The impact of *Bigelow* was discussed in Clark, *supra* note 52.

In its most recent move to relax the judicial strictness applied in treble damage cases, the Court greatly reduced the proof necessary to show directness or causal relation. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-50 (1969).

¹⁷⁷ 51 CONG. REC. 16,319 (1914) (remarks of Congressman Floyd).

¹⁷⁸ *Id.* at 16,318.

¹⁷⁹ Since these words were spoken, Congress strengthened § 7 by the 1950 Celler-Kefauver amendment. Reference here to "competing corporations" is, however, interesting in light of *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). For 35 years prior to this case, § 7 had not been applied against vertical mergers; it was held here that the statute applied to both horizontal and vertical mergers.

¹⁸⁰ 51 CONG. REC. 16,319 (1914) (remarks of Congressman Floyd).

into court "without waiting upon the slow tortuous course of prosecution on the part of the Government."¹⁸¹

In spite of this unquestionably clear declaration of legislative purpose contained in the report of the Conference Committee, courts following the "no standing" doctrine have held that there can be no private recovery of damages based on a Section 7 violation. Since Section 7 uses the language "may be to substantially lessen competition," it has been reasoned that the statute was directed at potential and not actual lessening of competition. Thus injury to a private plaintiff is too speculative or remote. As if conscious of the eventual judicial creation of the "no standing" doctrine, Congressman Webb has said that one of the main features that would make this law effective was the private suit.¹⁸²

Under Clayton, unlike Sherman, the individual who is harmed, reasoned Congressman Webb, is not required to prove an actual restraint of trade. The private action can be supported upon proof of "things that lead up to restraints of trade and monopolies."¹⁸³ Even though a corporate merger has not ripened into any actual lessening of competition or into a monopoly, the "business or property" of many people might be effected detrimentally by the acquisition itself. Without trying to identify specific parties injured, a showing that would differ with each case, one might say that the efficiency gained by a merger will generally have a damaging effect on others. To gain efficiency, departments of the acquiring and acquired corporations may be consolidated to the detriment of employees, supply firms, supporting institutions and the community itself. If these persons are injured in their business or property by the things that, if left alone, could lead to a lessening of competition, they have the right to bring suit.¹⁸⁴

Private parties "threatened with a loss" can, in their effort to regain a competitive market, likewise obtain divestiture relief.¹⁸⁵ In expressing the understanding of the Conference Committee, Congressman Floyd observed that private litigants were, under the proposed Clayton Act, given a remedy never enjoyed before. "Heretofore, there has been only one power that might enjoin an unlawful trust or monopoly in restraint of trade, and that was the Government of the United States, under the

¹⁸¹ *Id.*

¹⁸² *Id.* at 16,274 (remarks of Congressman Webb).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See* Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969).

direction of the Attorney General.”¹⁸⁶ Now it is proposed that “any individual, company or corporation . . . can . . . go into court and enjoin the doing of these unlawful acts.”¹⁸⁷ This private injunctive relief was said to be “specifically applicable to Sections 2, 3, 4, 7, and 8 of the bill.”¹⁸⁸

Although most authority would allow private plaintiffs divestiture action, there is some evidence to the contrary.¹⁸⁹ This evidence is found in the congressional consideration of explicit statutory language that would have conferred standing on stockholders to sue their own corporation for violating the act.¹⁹⁰ Before sending the bill into conference to iron out the differences between the two Houses, there was a proposed section that provided:¹⁹¹

That any suit, action, or proceeding under the antitrust laws against a corporation or against officers of a corporation *by stockholders thereof* may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts any business

When the bill came out of conference, reference to stockholders had been deleted, causing in the Senate, a heated debate between Senators Chilton and Norris.¹⁹² Senator Chilton, explaining and defending what the conferees did, gave two reasons for striking the words. First, he said that the right of stockholders to sue, if that was desirable, was misplaced—had nothing to do with the question of venue involved in the section changed.¹⁹³ The second reason, more pertinent to the present discussion, was that these stockholders ought not to have jurisdiction to “mix up in a suit by the Government to dissolve these corporations.”¹⁹⁴

Continuing even more insistently, Senator Chilton argued that “we do not want to bring the antitrust laws into contempt by allowing officers and stockholders who go into these trusts to use the antitrust laws to fight out and settle their own differences.”¹⁹⁵ “We do not want Tom, Dick, and Harry, who may be stockholders, to bring suits against the di-

¹⁸⁶ 51 CONG. REC. 16,319 (1914) (remarks of Congressman Floyd).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 16,048-51.

¹⁹⁰ *Id.* at 16,048.

¹⁹¹ *Id.*

¹⁹² *Id.* at 16,048-51.

¹⁹³ *Id.* at 16,049 (remarks of Senator Chilton).

¹⁹⁴ *Id.* at 16,050.

¹⁹⁵ *Id.* at 16,049.

rectors here and there and probably interfere with the ordinary course of the Government's suits."¹⁹⁶ Senator Norris shot back with the question: "What are you going to do when you have an Attorney General who believes in these combinations, who will not turn a wheel to break any of them up?"¹⁹⁷

Isolated from the general congressional policy conceived in the Clayton Act, some credence must be given to the remarks of Senator Chilton. Nevertheless, in viewing the legislative history and the adopted words as a whole, there exists an apparent inconsistency. Explaining the Conference Report on the House side, Congressman Floyd had emphatically said that private injunctive relief did apply to Section 7 merger cases. "If a man is injured . . . by the unlawful acquisition of stock by competing corporations . . . , he can go into any court and enjoin and restrain the party from committing such unlawful acts or sue for his damages."¹⁹⁸

Neither the mechanics of the change nor the legislative history of the Clayton Act, support the enforcement philosophy urged by Senator Chilton. As the proposed section stood, the stockholders referred to were limited to those of the corporation participating in the antitrust violation. Furthermore this reference was in a section of the bill involving venue, a matter foreign to the standing of individuals to sue. There were already separate provisions authorizing any person injured in his business or property to seek damages or injunctive relief. The question of a stockholder's standing to sue must be decided on the basis of these general provisions.

Philosophical support is found for the views expressed by Senator Chilton. Professor Day, influenced by the theory of Professors Kaysen and Turner,¹⁹⁹ believed that dissolution and divestiture should be limited to cases initiated by official agencies—namely the Justice Department and the Federal Trade Commission.²⁰⁰ He observed that "the private antitrust plaintiff is interested only in his own competitive well being and may seek divestiture without regard to broader public-interest considerations."²⁰¹ Unlike private plaintiffs, motivated perhaps by greed, revenge, self-interest, the official enforcement agencies weigh all policy matters before suit is filed. Even with prosecution, these agencies,

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 16,051 (remarks of Senator Norris).

¹⁹⁸ *Id.* at 16,391 (remarks of Congressman Floyd).

¹⁹⁹ C. KAYSEN & D. TURNER, *supra* note 117.

²⁰⁰ Day, *supra* note 46 at 161-62.

²⁰¹ *Id.* at 162.

on the basis of a policy decision, may seek a remedy short of complete divestiture or dissolution.²⁰²

It was partially to avoid such a policy approach and to insure vigorous enforcement, not enforcement based on a regulatory plan, that Congress elevated the private suit to a position of prominence. Viewed generally or specifically, there is no compelling evidence found to support the argument that Section 7 enforcement should be a function exclusively held by official agencies. Floor debates preceding the Clayton Act, evidence no strong Congressional expressions of faith or confidence in the Attorney General's enforcement competency. In fact one finds evidence of the antithesis. For example, Senator Thompson, explaining why the Sherman Act had failed, said that "those in power were either too friendly with or too much afraid of the men of wealth."²⁰³ If this were the problem, it was suggested that instead of passing new laws to go unenforced, Congress ought to pass a law to force those responsible to do their duty.²⁰⁴ But what can be done to force an Attorney General, sympathetic to economic combinations, to prosecute? As Senator Norris noted, even if we should hire 10,000 lawyers they would be under the supervision of the Attorney General.²⁰⁵

One Senator who played a major role in the Clayton Act debates, offered a solution. By amendment, Senator Reed suggested that the Attorney General of the United States be given 90 days in which to act to prevent a violation of the antitrust laws. If, during this period, he failed to act "the Attorney General of any state" could initiate prosecution.²⁰⁶ Senator Reed, in support of his amendment, observed that there were then pending in the courts only 46 antitrust cases when "there ought to be 400."²⁰⁷ "If that is the record that has been made for 20 long years in the Department of Justice it is high time that men elected by the people of the respective States should be given authority to invoke this great law and to put some blood and iron into its enforcement."²⁰⁸ Denying any vindictiveness, Senator Reed declared:

I am not prepared to charge bad faith to past Attorneys General of the United States, but I am prepared to say that, in my humble judgment, the same zeal has not been back of the enforcement of this law many times that has been back of the enforcement of the laws aimed at the poor fel-

²⁰² *Id.*

²⁰³ 51 CONG. REC. 14,222 (1914) (remarks of Senator Thompson).

²⁰⁴ *Id.* at 14,261 (remarks of Senator Lane).

²⁰⁵ *Id.* at 14,524 (remarks of Senator Norris).

²⁰⁶ *Id.* at 14,514 (remarks of Senator Reed).

²⁰⁷ *Id.* at 14,519-20.

²⁰⁸ *Id.* at 14,520.

low who makes moonshine whiskey or sells a box of cigars without having the correct number of stamps upon the box. As to any law that has been so enforced that monopoly has grown like a green bay tree, so that its evil roots have spread into every State and every community, I am prepared to say that you need some more enforcement and you need some independent action by independent men.²⁰⁹

These independent men to whom reference was made were the States' Attorney General—the 48 watchdogs as Reed called them.²¹⁰

The Reed Amendment failed by a vote of 21 to 39 with 36 not voting. Notwithstanding this defeat there was strong support for the amendment and the opposition expressed was not based on any favor to trusts or economic combinations.²¹¹ It was generally believed that there were already sufficient checks placed on the Attorney General. If he refused or failed to prosecute "the individual himself has a wide-open door to go into court and sue."²¹² In addition, creation of a Federal Trade Commission was considered another check on the office of the Attorney General.²¹³

The most effective check placed on the Attorney General, the "real teeth in enforcement" as Congressman Webb described it,²¹⁴ was the private suit seeking treble damages or injunctive relief. Recognizing its deterrent force, it was believed that private prosecution should be made easier and more available to individuals.²¹⁵ To increase this deterrent force by making private suits easier, final judgments in suits filed by the government were made "prima facie evidence against such defendant" in a subsequently prosecuted private action.²¹⁶

²⁰⁹ *Id.* at 14,522.

²¹⁰ *Id.* at 14,515.

²¹¹ For the full debates, *see id.* at 14,514-26.

²¹² *Id.* at 16,275 (remarks of Congressman Webb).

²¹³ *Id.* at 14,516 (remarks of Senator Gallinger). During the debates of the bill creating the FTC, it was suggested that enforcement would be more effective if the Attorney General was given investigatory power. *Id.* at 8845 (remarks of Congressman Covington). As this is a political office, such power was considered unsafe. *Id.* at 8857 (remarks of Congressman Morgan). Congress therefore considered it safer to place such power in the hands of a Commission not subject to any political office but "subject only to the people of the United States." *Id.* at 8981 (remarks of Congressman Willis).

²¹⁴ *Id.* at 16,274 (remarks of Congressman Webb).

²¹⁵ *Id.* at 16,046 (remarks of Senator Borah).

²¹⁶ Clayton Act § 5, 15 U.S.C. § 16 (1964). There were lengthy debates leading to the conclusion that these final judgments should be given prima facie and not conclusive weight. 51 CONG. REC. 9079, 9090, 9164-65, 9198, 9270, 9487-94, 13,851-55, 13,897-902, 15,824-25, 15,939, 16,003, 16,046, 16,058, 16,276 (1914). Included in these debates was a strong feeling for making final Government judgments conclusive evidence. Objections raised involved two points with one showing more evidence of an

Confidence was placed in the private suits, even more than criminal sanctions, to stop the growth of trusts and the anti-competitive concentration of economic power. While preferring retention of the criminal penalty, Congressman Webb defended its deletion by observing that the real teeth in enforcement was the private suit.²¹⁷ Just "let a businessman somewhere in the United States, or 40 or 50 of them, be damaged by the things that are denounced as unlawful in this section, and let them all bring suit. "That", said Congressman Webb, "is bigger . . . and will have a more deterrent effect on the men who practice those things than a mere criminal penalty."²¹⁸ The deterrent force of private suits was vocalized even louder by Senator Borah, who said:

There is no influence or power quite so effective in the enforcement of law as that of the injured private party. A bureau or a department of justice may postpone or procrastinate with reference to the enforcement of statutes, but a man who has suffered an injury, and knows that he has suffered an injury, and sees a speedy remedy for it, a remedy which he can pursue without the fear of bankruptcy, though he be a man of limited means, will almost invariably seek his recovery; and while he is seeking his recovery he is bringing about greater respect for the law and more obedience to the law upon the part of those who might violate it.²¹⁹

Calling for an army of private litigants, Senator Borah continued:

There could be no safer guardian for the Sherman Antitrust Law than the hundreds and thousands of people who are injured by these monopolies if the law were made easy of enforcement so far as they are concerned.²²⁰

Congress, contrary to what courts have done, demonstrated no effort to categorically define persons who could seek treble damages or injunctive relief against violators of Section 7 or any of the other provisions of the Clayton Act. Reference instead was made to the hundreds and thousands of people who are injured. Congressman Webb observed that under Section 4 "any man throughout the United States, hundreds and thousands, can bring suit . . . , and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket."²²¹

existing lack of confidence in the Attorney General. Besides the constitutional issues raised (*Id.* at 13,851, 15,824), fear was expressed that collusive suits would be invited between Government and defendant. *Id.* at 9489-93.

²¹⁷ 51 CONG. REC. 16,274 (1914) (remarks of Congressman Webb).

²¹⁸ *Id.*

²¹⁹ *Id.* at 15,986 (remarks of Senator Borah).

²²⁰ *Id.*

²²¹ *Id.* at 16,275 (remarks of Congressman Webb).

There was discussion, dating to the Sherman Act days, that might shed light on the meaning of the statutory phrase—"any person." Senator George assumed that the Sherman Act treble damage section gave standing to the farmer, mechanic, laborer and small consumer.²²² Yet he thought it a shame to throw these "poor unlettered" parties against the large corporations with their unmatched economic power.²²³ Urging strongly that "the consumer is the party damnified or injured",²²⁴ Senator George predicted (a prediction not too far from being true) that "not one suit will ever be brought under section 7 of the Sherman Act by any person who is simply damaged in his character as consumer."²²⁵ With passage of the Clayton Act, in which injunctive relief was added, these same parties were recognized as those protected by the Act. Persons suffering the most from the great combinations of wealth were identified as "the consuming public";²²⁶ "the struggling poor of our country";²²⁷ the employee who loses his job;²²⁸ and the "citizens and their children" who desire the right to enter business.²²⁹

There was fear expressed that the scope of the treble damage provision would possibly lead to "blackmail" suits.²³⁰ It was argued that there was nothing to protect businessmen from these suits. "This bill," observed Congressman Levy, "is all in favor of the complainant."²³¹ Replying to this fear, Congressman Webb said; "I do not know any way to stop a man from making accusations or bringing a suit, but people soon get tired of bringing blackmailing suits when they are mulcted in costs, and there are not very many such suits brought."²³²

There should be no doubt about the congressional desire for a policy of vigorous enforcement. But doubt or not, it is still an inescapable and unfortunate fact that courts have, in spite of a rich and persuasive legislative history, so narrowed the standing of private antitrust plaintiffs that little enforcement emanates from this source. Even if standing is recognized for competing and acquired corporations, the real force of the private suit has been weakened. Since merger activity, is

²²² 21 CONG. REC. 3150 (1890) (remarks of Senator George).

²²³ *Id.* He desired that jurisdiction be placed in state courts considered, at that time, more available to the poor.

²²⁴ *Id.* at 1767 (remarks of Senator George).

²²⁵ *Id.* at 3150 (remarks of Senator George).

²²⁶ 51 CONG. REC. 16,043 (1914) (remarks of Senator Norris).

²²⁷ *Id.*

²²⁸ *Id.* at 16,044.

²²⁹ *Id.* at 9088 (remarks of Congressman Mitchell).

²³⁰ *Id.* at 16,275 (remarks of Congressman Levy).

²³¹ *Id.*

²³² *Id.* at 16,275 (remarks of Congressman Webb).

so prevalent and acceptable in the business world, commercial enterprises are no longer a completely reliable enforcement factor. Private prosecution has at times been initiated in an attempt to accomplish a more desirable merger rather than to enforce Section 7 of the Clayton Act.²³³ To achieve effective enforcement it is necessary for courts to discard the strict rules of directness and to expand standing to *any person* who has suffered injury.

B. Legislative Silence

Courts have been content with perpetuating strict rules of standing in antitrust cases under the fiction that congressional silence over many years amounts to legislative approval or ratification. When stripped of its value judgment embellishments, legislative silence should not be controlling. If one considers the complexities of the legislative process, the constitutional requirements for the passage of a law, the device must be rejected. There can be no presumption that legislators, who have neither the time nor the inclination, sift through all judicial opinions to decide when to act.²³⁴ There is no technical legislative machinery set up to review all judicial opinions. More often than not, Congress is motivated into action by the force of public opinion.

Actually, a philosophical discourse against the judicially conceived "legislative silence" device is not necessary in the area of antitrust; for Congress in 1914, was far from remaining silent about the judicial interpretation of the Sherman Act. Motivated by the loud cries of the populace, as evidenced in the 1912 National Political Party Platforms,²³⁵ Congress sharply criticized, almost to the point of being vindictive, the federal courts. The vindictive spirit present during the debates on the Clayton Act led one Senator to say that, "[T]o my mind, the most reprehensible piece of politics that has been practiced upon the public has

²³³ For a discussion of such use, see *Lunkenheimer Co. v. Condec Corp.*, 268 F. Supp. 667 (S.D.N.Y. 1967); *Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 230 A.2d 769 (1967). But see *Mills v. Electric Auto-Lite Co.*, 281 F. Supp. 826, 831 (N.D. Ill. 1967), *rev'd*, 403 F.2d 429 (7th Cir. 1968), *cert. granted*, 395 U.S. 971 (1969).

²³⁴ Legislative inaction or misunderstanding cannot change the meaning of a statute. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

²³⁵ NATIONAL PARTY PLATFORMS, 1840-1956 at 169 (compiled by K. Porter & D. Johnson, 1956). "We regret that the Sherman antitrust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation." *Id.*

been the constant attack upon the courts."²³⁶

It is apparant that Congress was reacting to the judicial hostility so freely exercised against the antitrust laws. There was concern over the fact that this hostility had so weakened antitrust enforcement that the threat of economic combinations continued unabated. The courts were further criticized for converting the Sherman Act from an anti-trust law to an anti-labor law. Although used with temerity against trusts, the Sherman Act was used freely as authority to issue injunctions against labor organizations.²³⁷ It was such use of the Sherman Act that drew the most violent and bitter remarks.

For their misapplication of the antitrust laws, federal judges were called tyrants who usurped and assumed power rightly belonging to the legislature.²³⁸ Congressman Quin charged that:

"the judicial tyranny of this country is today written through the decisions. If you will read these decisions, you can see tyranny there that is equaled nowhere on earth except by the Czar of Russia or, perhaps the ruling of some military court; and there is not a man in the United States who could ever have any respect for the ruling of a court-martial."²³⁹

Powerful corporations were accused of having too much influence in naming federal judges. Before being named a judge, Congressman Quin observed, it is often true that the judge "has spent his life as the retained attorney of the special interests, and it matters not how honest he may be, he sees the law from a different view point as distinguished from the ordinary citizen."²⁴⁰

Similar views were expressed by other Congressmen. Congressman Graham, for example, felt "[t]he history of the world proves that the possessors of great wealth constantly strive for special privileges, and too often get them."²⁴¹ Referring to the struggle between organized wealth and organized labor, he said that "the Federal courts, consciously, have leaned too much to the side of organized wealth."²⁴² Remarks such as these²⁴³ did not fall on deaf ears. Congress incorporated Section

²³⁶ 51 CONG. REC. 15,984 (1914) (remarks of Senator Borah).

²³⁷ *Id.* at 9173-74 (101 cases listed to show free use of Sherman Act against labor).

²³⁸ *Id.* at 9665 (remarks of Congressman Quin).

²³⁹ *Id.*

²⁴⁰ *Id.* at 9666.

²⁴¹ *Id.* at 9250 (remarks of Congressman Graham).

²⁴² *Id.*

²⁴³ 51 Cong. Rec. 9173, 9541, 9559 (1914).

6 and Section 20 of the Clayton Act²⁴⁴ as the most expedient way to remove the interpretation of the law that had been "influenced by the vicious combinations of the criminal rich."²⁴⁵

As critical but not as vehement were charges that the existing judicial interpretation of the Sherman Act had nurtured and contributed to the growing threat of trusts and economic combinations. "Trusts," observed Senator Thompson, "would never have existed in their present and iniquitous form if the laws already on the state books had been vigorously enforced in the beginning."²⁴⁶ Even those who expressed confidence in the integrity of the courts, considered them "inadequate to handle the trusts question."²⁴⁷ Standing alone, these debates and charges cannot establish any clear and unambiguous conclusion. But reliance need not stop here. Reacting in a positive way to these charges, Congress passed the Clayton Act and the Federal Trade Commission Act.

Congress included in the Clayton Act, the Section authorizing private individuals to initiate action against economic combinations. Not unmindful that such a provision already existed in Section 7 of the Sherman Act, Congress passed a duplicate treble damage provision in Section 4 of the Clayton Act. This duplication was necessary, observed Congressman Floyd, because Section 7 of the Sherman Act "has been of little value and practically useless in the past, because the individual, the small man, and the small concern, were utterly helpless in their efforts to confront in the courts these great and powerful corporations."²⁴⁸

Perhaps the strongest evidence of Congressional displeasure with federal courts came with an amendment that would have given state courts jurisdiction, concurrent with federal courts, to hear antitrust cases.²⁴⁹ The purpose of this amendment, as explained by its author, was to bring convenience and justice to the people.²⁵⁰ Even more powerful was the argument that jurisdiction in the state courts would insure a vigorous

²⁴⁴ Clayton Act § 6, 15 U.S.C. § 17 (1964) (originally enacted as Act of Oct. 15, 1914, Ch. 323, § 6, 38 Stat. 731); Clayton Act § 20, 29 U.S.C. § 52 (1964) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 20, 38 Stat. 731).

²⁴⁵ 51 CONG. REC. 9674 (1914) (remarks of Congressman Buchanan).

²⁴⁶ *Id.* at 14,222 (remarks of Senator Thompson).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 9490 (remarks of Congressman Floyd). Reference was being made here to the additional aid given to private parties, i.e., judgment in Government suits considered *prima facie* evidence.

²⁴⁹ *Id.* at 9663 (amendment offered by Congressman Cullop). State court jurisdiction was also suggested when Congress was considering the Sherman Act. 21 CONG. REC. 3146 (1890) (remarks of Senator Reagan).

²⁵⁰ 51 CONG. REC. 9663 (1914) (remarks of Congressman Cullop).

enforcement of the "law in all its phases."²⁵¹ In the federal courts, Congressman Cullop urged, it is the owners of the trusts and big corporations that receive protection. They have succeeded in forcing the "poor man out of the benefits of such legislation as this" by seeking and obtaining a federal forum for the adjudication of their cases.²⁵² Congressman Reagan, supporting state jurisdiction when the Sherman Act was being considered, said "[i]f we intend to give a civil remedy we ought to give it in a jurisdiction within reach of the people of the United States so as to make the remedy available to the people. If we do not mean to give them a remedy we had better strike this section out, because this would be only a remedy for corporations or wealthy men, and would not be a remedy for the great mass of the people."²⁵³

Opposition to the amendment, which was finally defeated, was not based on the *purpose* sought.²⁵⁴ Congressman Floyd, leading the opposition, believed that this great dispersion of jurisdiction would weaken—not strengthen—the enforcement of the newly affirmed Congressional policy.²⁵⁵ Though racked with criticism, federal courts, in the end, retained their status as the exclusive guardians of the national economic system believed by Congress to be, under our political system, the most desirable.

The United States Supreme Court, slow initially in assuming the full responsibility charged to it by the Clayton Act has, since 1957, aligned judicial policy with the vigorous enforcement sought by Congress.²⁵⁶ The Court has repeatedly struck down corporate mergers and refused to accept arguments and evidence based on value judgments.²⁵⁷ This

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ 21 CONG. REC. 3146 (1890) (remarks of Senator Reagan).

²⁵⁴ Resolved into the Committee of the Whole House, the amendment was first passed by a vote of 35 to 30. Upon a call for tellers on a second count, however, it was defeated by a vote of 32 to 34. 51 CONG. REC. 9664 (1914).

²⁵⁵ *Id.* at 9663 (remarks of Congressman Floyd).

²⁵⁶ The first major turn in judicial construction of the original § 7 came in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). After § 7 was amended in 1950 by the Celler-Kefauver Act, the same hard stand was present in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). The only problem with this case was that the opinion could be read to support almost any position for or against mergers. A greater manifestation of judicial change is seen in *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964), where the Court revived the early railroad cases in which a hard stand had been taken against mergers that increased private economic power.

²⁵⁷ Since the Celler-Kefauver Act, no corporate merger has, after full consideration, received Supreme Court approval. The closest that any merger has come to being approved was that between Pennsalt Chemicals and Olin Mathieson Chemical

evolving judicial strictness, limited at the present time to the Supreme Court, is not only present in merger cases but the Court has in recent years been moving against all forms of economic power.²⁵⁸

Although in accord with congressional policy, the hard stand against mergers and economic power has brought severe and undue criticism upon the Court—and Justice Douglas in particular.²⁵⁹ Unmoved by this criticism, the Court continues undeterred, consistently demanding divestiture as the only acceptable solution.²⁶⁰ The official enforcement agencies have however, not responded to this hard judicial policy and many large mergers have gone unchallenged, unquestioned, even encouraged. Thus the concentration of economic power has become so acute that the congressionally accepted concept of free competition is facing extinction.

Perhaps as a result of this lax official enforcement policy, the United States Supreme Court is manifesting a greater interest in private suits.²⁶¹ Challenge to corporate mergers will, following a more relaxed judicial attitude, come from treble damage and divestiture suits filed by private individuals injured in their business or property. Motivated solely by their injury, free from the economists vision of a planned society, these private parties will be seeking blind obedience to legislative standards. When employees, suppliers, creditors and others forgotten or ignored in the past, apply their full force against corporate mergers, further concentration of economic power should decrease. If stopped, the economy of the nation will move toward decentralization—the goal sought by

(joint venture). This approval came in a *per curiam* opinion which affirmed a lower court decision by an equally divided Court. Justice Marshall took no part in the case. *United States v. Penn-Olin Chem. Co.*, 389 U.S. 308 (1967). See also *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Philadelphia Natl. Bank*, 374 U.S. 321 (1963). The latest and most severe rejection of value judgments came in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

²⁵⁸ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

²⁵⁹ Bork, *The Supreme Court Versus Corporate Efficiency*, *FORTUNE*, Aug., 1967, at 93; Bork, *Antitrust in Dubious Battle*, *FORTUNE*, Sept., 1969, at 103.

²⁶⁰ *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969).

²⁶¹ *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969); *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Congress since 1890. As the injured parties recover treble damages and obtain divestiture orders, perhaps a burden will be imposed on the technological advancements sought by industry leaders and economists.

Should the burden outweigh the advantages of a decentralized economy, then it will be necessary for Congress to reconsider its earlier declared and codified economic policy. This, of course, would not mean that corporate mergers would be freely permitted. As previously noted, an alternative to a highly decentralized economy is government control. Merger engineers, who have formed massive empires in the form of conglomerates, with their unrelenting acquisition pace, bring this alternative closer to reality. The issue will be determined by the success or failure of the private suit.