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COMMENTS

ASPECTS OF DIVESTITURE AS AN ANTITRUST REMEDY

America's antitrust policy has traditionally been corrective rather than preventive.¹ Although its recent thrust is more pointedly directed at "incipient restraints" and the "reasonable probability" of anticompetitive effects,² the full impact of our antitrust machinery is usually not appreciated until a monopolistic situation has developed or is reasonably certain to develop. In such instances, divestiture of corporate stock or assets, the epitome of *corrective* antitrust enforcement, may be ordered.

Divestiture today creates problems considerably different from those faced in the early landmark cases. Wide public ownership of the modern corporation and ubiquitous tax regulation have created problems unknown to the early trustbusters.

Symptomatic, or perhaps at the forefront of a current trend toward a broader effectuation of antitrust policy is *United States v. Philadelphia Nat'l Bank*,³ where the Supreme Court ruled that the proposed merger of two Philadelphia banks was subject to the operation of the antitrust laws—in particular, Section 7 of the Clayton Act. The Court pointed out that Congress did not intend to exclude bank mergers from the act, and, further, that prior agency approval under the Bank Merger Act of 1960⁴ did not immunize a bank merger from the antitrust laws.⁵

The singular breadth of authority which has been given the courts in the antitrust field had fostered a somewhat more reactionary attitude toward the philosophy of "those aiming at immediate realization of the social, political and economic advantages of dispersal of power."⁶ This attitude is, in part, the rationale of a still viable judicial reluctance to order a divestiture, especially where "violations . . . can be eliminated by means of the other provisions of the judgment [and] . . . divestiture . . . is not necessary to foster competition . . ." ⁷ Thus, although "power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the

1. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176 (1955).

2. See the review and interpretation of the legislative history of the 1955 amendment of § 7 of the Clayton Act in *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962).

3. 374 U.S. 321 (1963). This case was the most important antitrust decision of the year and, perhaps, of the decade, according to Antitrust Division Chief William H. Orrick, Jr. Mr. Orrick has noted that the case put to rest any lingering notions that the banking industry as a whole was exempt from the antitrust laws, and added that the case applies to all mergers, not merely to bank mergers. Address by Ass't Att'y Gen. W. H. Orrick, Jr., ABA Antitrust Section Meeting, Aug. 12, 1963, Trade Reg. Rep. ¶ 50197, at 55220-21.

4. 74 Stat. 129 (1960), as amended, 12 U.S.C. § 1828(c) (Supp. IV, 1963).

5. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-55 (1963).

6. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

7. *United States v. General Elec. Co.*, 115 F. Supp. 835, 871 (D.N.J. 1953).

legislative policy . . . is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate."⁸

In view of a recently increasing reliance on divestiture as a remedy, it is surprising to note the statement, in 1955, by the Attorney General's National Committee to Study the Antitrust Laws, that "over the 60-odd years of Sherman Act history, courts have in *only 24* litigated cases entered decrees requiring divorcement, divestiture or dissolution."⁹ It may be that in the past the judiciary has too often vigorously denounced monopoly power in their opinions and then ordered what amounted to a relatively mild form of relief.¹⁰ On the other hand, it is clear that prior to the amendment of Section 7 of the Clayton Act,¹¹ much of this "judicial reluctance" was a direct result of inadequate legislation,¹² and, simply the human tendency to resist the drastic changes generally involved in divestiture.¹³ Finally, judicial misconceptions of economic factors have been cited to explain an overreliance on the self-regulating forces of competition.¹⁴

Divestiture is not new. The early cases involved the giant holding companies in the railroad, oil and tobacco industries.¹⁵ Quite typical of the monopolistic holding company cases is *Northern Securities Co. v. United States*,¹⁶ where the defendant held large interests in two railroads. This combination was held to destroy competition between them. Rather than face a potentially disastrous forced sale of the stock, the defendant company was permitted to distribute it in kind back to its original owners, thus reinstating the situation as it existed prior to the illegal combination.

*Standard Oil Co. v. United States*¹⁷ and *United States v. American Tobacco Co.*¹⁸ are the two most important of the earlier cases, enunciating some of the basic remedial policy underlying a divestiture decree. They have both been

8. *United States v. Great Lakes Towing Co.*, 217 Fed. 656, 658 (N.D. Ohio 1914).

9. Att'y Gen. Nat'l Comm. Antitrust Rep. 354 (1955). (Emphasis added.)

10. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). "It is a case in which the Government . . . won a resounding legal victory only to suffer a crushing economic defeat. . . . On the problem of relief the court merely recommended that remedial measures be withheld until such time as the district court could evaluate the effects of the Government's program for the disposal of surplus aluminum plants." Adams, *Disso- lution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 Ind. L.J. 1, 6-7 (1951).

11. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

12. See Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Act*, 61 Colum. L. Rev. 629, 652 (1961).

13. See Van Cise, *Limitations Upon Divestiture*, 19 Geo. Wash. L. Rev. 147 (1950).

14. See, e.g., Adelman, *Economic Aspects of the Bethlehem Opinion*, 45 Va. L. Rev. 684, 685-86 (1959).

15. See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

16. 193 U.S. 197 (1904).

17. 221 U.S. 1 (1911).

18. 221 U.S. 106 (1911).

criticized, however, as poor examples of what a dissolution policy can accomplish.¹⁹ The *Standard Oil* decree left economic control over the newly divided companies in the same hands that had exercised control over the parent company prior to the dissolution.²⁰ In *American Tobacco*, the defendant was divided so as to create firms of too small a size to be individually subject to monopoly prosecution under the Sherman Act.²¹ Unfortunately, their successor firms were large enough to join in a monopolistic conspiracy which, years later, was held violative of the antitrust law.²²

After suffering a number of resounding defeats and being rebuffed by the famous ruling that the law does not make mere size an offense,²³ the government won a major victory in *United States v. Paramount Pictures, Inc.*²⁴ But in spite of this victory and several lesser achievements, Congress viewed with alarm the post-World War II merger movement superimposed on the mergers of the 1920's which had themselves firmly implanted an oligopolistic structure in most basic industries.²⁵ Congress finally moved to remedy the situation in 1950 by amending Section 7 of the Clayton Act,²⁶ thereby more broadly proscribing²⁷ increased concentration through vertical, horizontal or conglomerate mergers.²⁸

*United States v. E.I. du Pont de Nemours & Co.*²⁹ and *Brown Shoe Co. v. United States*³⁰ are two of the most significant recent cases ordering divestiture.

19. Adams, *supra* note 10, at 2.

20. Stocking, *Workable Competition and Antitrust Policy* 324-25 (1961).

21. *United States v. American Tobacco Co.*, 191 Fed. 371, 374-76 (C.C.S.D.N.Y. 1911). See also Hale, *Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, 40 *Colum. L. Rev.* 615, 618-19 (1940).

22. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

23. *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932).

24. 334 U.S. 131 (1948).

25. Houghton, *Revelations and Paradoxes of Recent Antitrust Decisions*, 7 *Antitrust Bull.* 733, 736 (1962).

26. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

27. "Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, read together, reach mergers, which fit neither category perfectly, but lie somewhere between the two ends of the spectrum." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 342 (1963). (Emphasis omitted.)

28. With reference to corporate mergers, the term "vertical" refers to the integration of two firms at different levels of production or distribution of the same product, e.g., an automobile manufacturer's acquisition of a steel mill. A horizontal merger is the acquisition of one firm by another at the same level of production, e.g., the merger of two retail organizations. "Conglomerate merger" is a catch-all referring to the merger of two companies with no classifiable relationship to one another; this is frequently applicable where the aim of the merger is diversification. See Clark, *Conglomerate Mergers & Section 7 of the Clayton Act*, 36 *Notre Dame Law.* 255, 256 (1961).

29. 366 U.S. 316 (1961).

30. 370 U.S. 294 (1962).

In *Du Pont* the Supreme Court ordered complete divestiture of Du Pont's stock holdings in General Motors.³¹ Under the plan, sixty-three million shares of General Motors stock is to be distributed to holders of Du Pont common by February 28, 1965.³²

In *Brown Shoe* the Supreme Court ruled that the merger of Brown, the nation's fourth largest shoe manufacturer, and Kinney, which owns the nation's largest independent chain of family shoe stores,³³ followed the dangerous trend toward concentration in the shoe industry and had purposeful anticompetitive motives, and thus violated the present section 7. Fortunately for both, when the merger had been negotiated in 1956, it was conditioned upon the maintenance of complete separation between the two companies as to their assets and operations. Such a situation appreciably reduced some of the more painful aspects of divestiture.

I. PROCEDURE

A. Statutory Authority

The Government may pursue a divestiture order against a corporate defendant for violations arising under Sections 1 and 2 of the Sherman Act³⁴ and Section 7 of the Clayton Act.³⁵

The original Section 7 of the Clayton Act³⁶ was dealt "the apparent death blow" by the Supreme Court in *Arrow-Hart & Hegeman Elec. Co. v. FTC*.³⁷ This section, which authorized a divestiture order against illegally held *stock*, was held not to apply to *assets* acquired by direct purchase or otherwise. One of the major purposes of the amendment passed in 1950 was to close this loophole.³⁸ The section now provides in pertinent part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or . . . the assets of another corporation . . . , where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.³⁹

The prohibition of this section is considered to include "mergers with a probable anticompetitive effect,"⁴⁰ thus proscribing, *inter alia*, incipient concentration.⁴¹

31. 366 U.S. at 334-35.

32. *United States v. E.I. du Pont de Nemours & Co.*, 1962 Trade Cas. ¶ 70245 (N.D. Ill. 1962).

33. *Brown Shoe Co. v. United States*, 370 U.S. 294, 331 (1962).

34. 26 Stat. 209, 210 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).

35. As amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

36. Ch. 323, 38 Stat. 731 (1914).

37. 291 U.S. 587 (1934); see Martin, *Mergers and the Clayton Act* 118 (1959).

38. See S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950).

39. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

40. *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

41. *Id.* at 317-23. The scope of the amended section is also treated extensively in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 335-49 (1963).

B. Enforcement

To enforce federal antitrust laws in general, and to prosecute divestiture cases in particular, we have what is sometimes called "dual enforcement," or "overlapping jurisdiction" of the Federal Trade Commission and the Antitrust Division of the Department of Justice.⁴² Although the functions of these two agencies were originally quite different, the enforcement potential of each is actually quite similar, despite current dissimilarities as to investigative powers and authority to seek pre-merger injunctions.⁴³ The two organizations work together to avoid duplication of effort, and strive to assign a case according to its particular demands and the possible familiarity of one agency with a particular company or industry.⁴⁴ Although, in *FTC v. Cement Institute*,⁴⁵ the Supreme Court refused to find anything wrong with both agencies proceeding against the same violation, the Government, as a practical matter, has not thereafter done so.

Actually the only specific statutory reference to divestiture as a remedy for a section 7 violation is in Section 11 of the Clayton Act, wherein the Federal Trade Commission is granted authority to order a violating corporation to "divest itself of the stock, or other share capital or assets" illegally held.⁴⁶ This section in no way impinges on the power of the Department of Justice to request divestiture under section 7. In fact, the Supreme Court has stated that "complete divestiture is *peculiarly appropriate* in cases of stock acquisitions which violate § 7,"⁴⁷ and further; that "it should always be in the forefront of

42. In addition to the Antitrust Division of the Department of Justice and the Federal Trade Commission, there are about twenty other federal agencies with varying degrees of scope and responsibility for the enforcement of antitrust laws. Massel, *Competition and Monopoly: Legal and Economic Issues* 320 (1962).

43. Kaysen & Turner, *Antitrust Policy: An Economic and Legal Analysis* 251-60 (1959). Statistics indicate the extent to which section 7 cases have been apportioned. "As of August 25, 1960, 106 complaints had been filed against alleged illegal mergers since 1914. Of these, 53 were issued by the Federal Trade Commission and 53 filed by the Attorney General. Since the 1950 amendment of Section 7, the Attorney General has filed 33 complaints alleging violations and the Commission has issued 40." Kintner, *Developments Under the Antimerger Act and Other Aspects of the Federal Trade Commission's Antitrust Program*, 5 *Antitrust Bull.* 387, 388 (1960).

44. "On some matters, criminal sanctions imposed by the courts may be most appropriate; on other matters, the Commission's broad powers to investigate, subpoena, and require reports may be most effective. Sometimes one agency has a more complete recent experience with a particular industry. These are only a few of the many considerations which may influence the decision on which agency shall proceed in a given situation." Gwynne, *The Federal Trade Commission and the Antitrust Laws*, in *Understanding the Antitrust Laws* 149 (Van Cise ed. 1958).

45. 333 U.S. 683 (1948).

46. 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1958).

47. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961). (Emphasis added.) But see, Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 *Record of N.Y.C.B.A.* 411, 433 (1962) ("But as things stand now . . . the Government has been squarely rebuffed in its efforts to convert Section 7 into a per se statute.").

a court's mind when a violation of § 7 has been found."⁴⁸

Although the Commission itself may bring proceedings leading to divestiture, it may also be designated as a "master in chancery" to determine the appropriate relief in a suit instituted by the Attorney General. Section 7 of the Federal Trade Commission Act provides in part that "the court may, upon the conclusion of the testimony . . . if it shall be then of opinion that complainant is entitled to relief, refer said suit to the commission . . . to ascertain and report an appropriate form of decree therein."⁴⁹ The section thus provides the court with a talented overseer to apply the relief, while at the same time freeing the court to attend to other cases.⁵⁰ Unfortunately, this section is rarely if ever used, apparently because most courts, after becoming familiar with a case and finding a violation, choose to administer the remedy, believing that a referral to the Commission would unduly delay the matter.⁵¹

After the FTC uses its extensive investigative powers,⁵² a commission proceeding begins with the initial decision of a hearing examiner. His findings are then reviewed by the five-member Commission itself. A divestiture order issued by the Commission operates much like a court injunction, and, if violated, may be enforced in a court of appeals with penalties being assessed at the court's discretion. Appeals may, of course, be taken from the Commission's findings, by either the alleged violator or by the Commission as the case may be.⁵³

The Justice Department's Antitrust Division once lacked the investigative powers of the Federal Trade Commission, often finding itself stifled by a company's refusal to cooperate in an investigation.⁵⁴ However, as to the relative effectiveness of the Division's enforcement, this disadvantage was perhaps balanced by its ability to bypass administrative hearings and immediately avail itself of the courts to enforce appropriate remedies.⁵⁵

48. *United States v. E.I. du Pont de Nemours & Co.*, supra note 47, at 331.

49. 38 Stat. 722 (1914), 15 U.S.C. § 47 (1958).

50. Commenting on referrals to the FTC under this section, a former aide suggests that the present Commission may be ill equipped to handle any sizable case, but what is needed is "to proceed with somewhat more deliberate speed to build an atmosphere and the personnel at the Trade Commission so that the conception of Congress may be fulfilled." E. Rockefeller, *Antitrust Enforcement: Duopoly or Monopoly?*, 1962 *Wis. L. Rev.* 437, 447.

51. *Kaysen & Turner*, op. cit. supra note 43, at 255-56.

52. See, e.g., *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), where the Supreme Court held that the Commission could compel production of copies of Census Bureau reports, despite the fact the reports stated on their face that they "cannot be used for purposes of taxation, investigation or regulation." *Id.* at 216 n.6.

53. 73 Stat. 243 (1959), 15 U.S.C. § 21(b), (c), (d) (Supp. IV, 1963); 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(b) (1958).

54. Hearing on S. 167 Before a Subcommittee of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 55-66 (1961); see Att'y Gen. Nat'l Comm. Antitrust Rep. 343-49 (1955).

55. The Antitrust Civil Process Act, 76 Stat. 548 (1962), 15 U.S.C. §§ 1311-14 (Supp. IV, 1963), giving the Justice Department the power to examine company books and records

Once an alleged violator decides to appeal a divestiture order, a series of administrative and enforcement problems are created, usually resulting in considerable cost and delay. Litigating the appeal actually involves two quite distinct steps. The enforcement agency, whether it be the Justice Department or the Federal Trade Commission, must first establish the *fact* of the violation requiring divestiture.⁵⁶ Only then can the agency proceed to the second step of obtaining the approval of the court for an effective, yet equitable plan for disposing of the illegally held stock or assets.⁵⁷ Such a complex task has been aptly termed the "big" antitrust case.

Upon certification by the Attorney General that a case is of general public importance, a three-judge federal district court may be convened to hear an antitrust case.⁵⁸ However, out of consideration of the court's time and the pressure of other litigation, this is rarely done. The result is that one judge is left to decide a case of far-reaching importance. This procedure for handling "big" cases has been criticized for its lack of consistency and uniformity in enforcement, and for the tremendously heavy burden it places on the individual jurist.⁵⁹ Although the violations of Section 7 of the Clayton Act may, themselves, be more subtle though less burdensome to prove, than Sherman Act violations, it would nonetheless seem advisable to rely, at least occasionally, upon the procedure of having three judges hear the testimony in a "big" case.

In a sense, the Supreme Court becomes a victim of the standard procedure under which the "big" case is litigated. Antitrust procedure permits direct appeal from the district court to the Supreme Court.⁶⁰ Although the Court usually

during civil antitrust investigations, may eliminate these investigative "disadvantages." For the first time in its history, the Department has a compulsory device for gathering evidence before filing its civil antitrust cases. Previously, it had to rely on the cooperation of companies under investigation or upon grand jury proceedings in cases where criminal proceedings also were contemplated. Trade Reg. Rep. Letter, No. 55, September 24, 1962. *Matter of Gold Bond Stamp Co.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70872 (D. Minn., Aug. 9, 1963), has upheld the constitutionality of the act against the charge that it was violative of the fourth amendment, and adopted a nonrestrictive interpretation of § 3(b)(1) which states that the "demand shall . . . state the nature of the conduct constituting the alleged violation . . . and the provision of law applicable thereto." *Id.* at 78520. The test adopted by the court was whether the demand "is sufficient to inform adequately . . . and sufficient to determine the relevancy of the documents demanded for inspection." *Id.* at 78521. (Emphasis omitted.)

56. See note 53 *supra* and accompanying text.

57. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962).

58. 56 Stat. 199 (1942), 15 U.S.C. § 28 (1958). This section of the Expediting Act provides in part that upon receipt of the Attorney General's certification of the case's public importance, "it shall be the duty of the chief judge . . . to designate immediately three judges . . . to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited."

59. *Kaysen & Turner*, *op. cit. supra* note 38, at 254.

60. 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958). This section provides: "In every civil action brought in any district court of the United States under any of said Acts, wherein

upholds the decree in the absence of a showing of the district court's abuse of its "large discretion,"⁶¹ the Court nonetheless is required to sift through the records, which are usually "most voluminous and their review exceedingly burdensome."⁶² Mr. Justice Clark, citing the two and one-half year period between the district court and Supreme Court hearings on the *Brown Shoe* case, inferred that the procedure did not live up to its purpose since it "seldom results in much expedition."⁶³

II. CONSIDERATIONS IN DRAFTING A PLAN OF DIVESTITURE

It is difficult to discuss the elements involved in a divestiture with any degree of specificity. Every divestiture situation presents its own unique problems. Industries differ, companies within an industry differ, and the passage of time brings different products and novel competitive situations.

Today, in our more sophisticated economy, divestiture obviously creates problems considerably different from those faced in the early landmark cases. The sixteenth amendment, the authority for taxing personal income, was not ratified until 1913, and thus, tax consequences did not have to be considered prior to that date. Another important point is the wide public ownership of industry today, as contrasted with the high degree of control in the hands of a relative few in past eras. Today's average shareholder is largely an investor with no practical control over management. He is truly "innocent" regarding his corporation's antitrust violations, and thus, his interest must be given high priority in drafting the plan for divestiture. Finally, in this age of job specialization and high unemployment rates, special consideration should be accorded to the contractual and social rights of employees, so as to cause the least possible economic disruption.

Ideally, account should not be taken of these considerations until divestiture has been determined to be the necessary remedy. In actual practice, however, the interests of the corporate defendant, its stockholders and employees are often weighed with the public's stake in a freely competitive economy to determine initially the feasibility of a divestiture order. To counter the government's demands for a decree of divestiture, counsel for the defendant corporation will usually demonstrate to the court the hardships which a divestiture order would work, and will suggest one or more alternative remedies which it is felt will accomplish the same end, but without the hardships to private interests. If the argument for the alternative remedy fails and divestiture is ordered, the "hardships" argument is again employed, this time to attempt to mold a divestiture plan most favorable to the private interests involved.

the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

61. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 322 (1961).

62. *Id.* at 323.

63. *Brown Shoe Co. v. United States*, 370 U.S. 294, 355 (1962) (concurring opinion).

III. ALTERNATIVE REMEDIES

Nothing seems quite so harsh as a divestiture order, and the very suggestion of it causes the defense to search for alternative proposals. Assuming that a violation has definitely been found, the initial consideration in designing an alternative remedy is the character of the illegally held property. If the violation consists of stockholdings, perhaps the "passing-through" or even disenfranchisement of voting power will suffice as a remedy; whereas with patent rights and leasing operations the court may permit the assets to be disposed of in an orderly fashion over a period of time, rather than demand their immediate and perhaps costly elimination. Finally, although not strictly an alternative, the severity of an ultimate divestiture may be considerably eased by a court injunction requiring the assets of merging firms to be kept separate pending a determination of the legality of a prospective merger.

The pass-through remedy was approved by the district court in the *Du Pont-General Motors* case.⁶⁴ Although that decision was reversed by the Supreme Court; the Court did so because it believed divestiture was necessary under the special circumstances involved, and not because it objected to the use of this form of relief in a proper case. The district court, in approving the pass-through relief, held that it would be "unnecessarily harsh and punitive" to require Du Pont to divest its holdings in General Motors and that it would be sufficient if voting rights in General Motors were divested and passed through to Du Pont shareholders.⁶⁵ To insure the effectiveness of its decree the court went further and incorporated injunctive provisions relating to trade between Du Pont and General Motors.⁶⁶ Although the pass-through relief may require somewhat more imagination and additional expense as well as time to the court, defense counsel should evaluate this alternative, and in the appropriate case take the initiative in proposing such a plan.

The 1956 consent decree involving Western Electric Company and American Telephone and Telegraph Company⁶⁷ illustrates how patents may provide an escape from complete divestiture. According to the Government, the chief purpose of this action was to restore competition in the manufacture and sale of telephone equipment produced and sold almost exclusively by Western Electric at noncompetitive prices.⁶⁸ The Justice Department's main proposal for achieving this purpose was to separate Western Electric from American Telephone and to dissolve Western Electric into three competing manufacturing concerns. Although several of Western Electric's satellite organizations were finally ordered to be divested, the basic Western Electric-American Telephone relationship was permitted to remain essentially intact. The most important relief achieved, at least partly in lieu of complete divestiture, was that part of

64. *United States v. E.I. du Pont de Nemours & Co.*, 177 F. Supp. 1 (N.D. Ill. 1959).

65. *Id.* at 51.

66. *Id.* at 52.

67. *United States v. Western Elec. Co.*, 1956 Trade Cas. ¶ 68246 (D.N.J. 1956).

68. Goldberg, *The Consent Decree: Its Formulation and Use* 38-39 (1962).

the order which required the defendants to grant nonexclusive licenses to any applicant under all existing and future patents. From the defendants' standpoint they took a "licking" as to the patents, but this was certainly not too large a price to pay to avoid divestiture of Western Electric.

Although in the *Brown Shoe* case divestiture was finally deemed necessary, its circumstances admitted of a variant solution to the potentially more severe repercussions that a divestiture might cause. There the Government brought suit to enjoin consummation of a merger of two corporations, on the ground that it would violate Section 7 of the Clayton Act. The motion for a preliminary injunction was denied and the companies were permitted to merge, but only on the condition that their assets be kept separately identifiable. Subsequent disentanglement of the merger in obedience to the Supreme Court's affirmance of a section 7 violation was thus considerably facilitated by the lower court's far-sighted action.

IV. TAX CONSEQUENCES

The tax consequences of a divestiture order may play a predominant role in drafting a plan, the classic example of this being the *Du Pont-General Motors* case. The problem centers on the taxing of a profit realized on the distribution of stock or disposition of other assets. Generally, there is no question that the antitrust violator is entitled to capital gains treatment on profits realized from a divestiture. But even then taxes may be a severe burden. In the *Du Pont-General Motors* case there was tremendous price appreciation on the sixty-three million shares of General Motors stock held for forty-odd years, and consequently, despite capital gains treatment, the taxes would normally be very high. In less extreme instances, however, with the vigorous policing of mergers under section 7, divestiture is more likely to be ordered within a reasonably short time after the acquisition of the property, and thus, for tax purposes, there may be no significant difference between the value at the time of disposition and the value at the time of acquisition.

Where the tax is negligible, the issue is weighted accordingly in drafting the plan. This is usually the situation where the acquiring corporation, eager to obtain the sought after property, pays a premium price which is difficult or impossible to match at a subsequent "forced sale." Although the loss of the premium asset may injure shareholders in another manner, no injurious tax consequences are felt by them in such a situation.

While some instances involve the severity of the capital gains tax, others present the question of whether the profits obtained through the sale of the illegal assets even qualify for the "luxury" of capital gains treatment. A recent United States Court of Appeals decision, *American Can Co. v. Commissioner*,⁶⁹ is enlightening on this point. As an alternative to the Government's request for complete divestiture of operations under which container-closing machines were leased but never sold, American Can Company won

69. 317 F.2d 604 (2d Cir. 1963).

approval of a plan to sell the machines to its customers. The company then urged capital gains treatment for profits under the plan on the ground that the subjective intent of the seller is determinative, *i.e.*, that the equipment was not "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business . . . since it was the compulsion of the antitrust decree, and not business policy, that resulted in the . . . sale . . ." ⁷⁰ The court rejected this argument in holding that, irrespective of motive or cause, "the fact remains that . . . the taxpayer held the machines for sale as part of its ordinary trade or business." ⁷¹ Considering the effort involved in establishing capabilities for selling what amounts to a new addition to the product line, this alternative to complete divestiture could well prove as unpleasant as the remedy it seeks to avoid.

The Du Pont-General Motors Case

The *Du Pont-General Motors* case ⁷² involved two industrial giants and thousands of average citizens who held stock in one of the companies, and was so unique that it is unlikely that a similar case will ever occur. Nonetheless, the case presented, and perhaps resolved, the serious tax complications of a sizable stock divestiture.

In 1961, when the Supreme Court ordered complete divestiture of Du Pont's sixty-three million shares of General Motors stock, the existing law would have taxed such distributed stock as ordinary income, requiring individual stockholders to pay income tax at rates ranging from sixteen to eighty-seven per cent on the full market value of the stock received. ⁷³ Mass selling of both Du Pont and General Motors stock would have resulted from some investors' seeking to avoid paying the tax and from others being forced to liquidate part of their holdings in order to pay the income tax on the balance, with a resultant depression of market prices and a loss to stockholders of both companies running to several billion dollars. ⁷⁴

The solution came in 1962, prior to the district court's final divestiture decree, when the President signed legislation granting tax relief to shareholders in the *Du Pont-General Motors* divestiture. ⁷⁵ The bill provides that noncorporate shareholders may treat the distributed General Motors stock as a return of capital rather than as ordinary income. The fair market value of General Motors stock on the dates of distribution is to be used to determine how much; if any, capital gains tax must be paid. This means that there will be no tax to the individual stockholder unless and until the value of the

70. *Id.* at 605.

71. *Ibid.*

72. 366 U.S. 316 (1961).

73. Background Information, *United States v. E. I. du Pont de Nemours & Company, General Motors Corporation, et al.*, Public Relations Department, E. I. du Pont de Nemours & Company, Wilmington, Delaware, p. 4 (1962).

74. See *United States v. E. I. du Pont de Nemours & Co.*, 177 F. Supp. 1, 51 (N.D. Ill. 1959).

75. 76 Stat. 4 (1962), 26 U.S.C. § 1111 (Supp. IV, 1963).

General Motors shares he receives exceeds the cost of his Du Pont stock. However, the distribution would serve to reduce the tax base of holdings in Du Pont.⁷⁶ Whether this procedure will become the general rule for similar situations remains to be seen.

V. CONCLUSION

It seems unlikely that the future will bring any startling changes in either the basic mechanics of a divestiture, or even in the frequency or vigor with which the Government seeks to employ the remedy. While it is true that divestiture has become more prominent in recent years, one has only to look at its opposing forces to see the obstacles to its widespread use. Bigness in American business and industry has been "inbred" too long to attempt any regression. Much of our "bigness" is essential from the standpoint of the demands for efficiency, for capital investment, for relatively secure employment, and for the ability of American industry to compete with foreign monopolies in world trade. All this is not to deny that divestiture will remain important for the integrity of the nation's antitrust policy, but only to indicate that divestiture can have farther-reaching consequences than simply those involving the immediate parties.

How then should divestiture be used? Legislation has been introduced to lessen the difficulties of the Justice Department in obtaining preliminary injunctive relief in antimerger proceedings.⁷⁷ In urging passage of such a bill it has been noted that even if the Government later shows the merger as an antitrust violation, the court may find it difficult or impossible to design an effective divestiture. Although the impact of *Brown Shoe* may be a step toward such legislation,⁷⁸ easier government access to injunctive relief, or a plan requiring government approval of all mergers, seems too restrictive and could possibly result in a business climate in which even mergers conducive to healthy competition would become suspect. Perhaps the answer lies in a continuance of the present policy with a concerted effort to provide *speedy* advisory opinions by enforcement officials to merging companies who wish, by the simple expedient of obeying the law, to avoid possible future hardships to themselves and their investors.⁷⁹

76. Since the distribution is regarded as a return of capital, the stockholder will be required to subtract the value of the General Motors stock received from the cost of his Du Pont stock to arrive at a new tax cost basis for computation of capital gain or loss upon any subsequent sale of the Du Pont stock. Background Information, *supra* note 73, at 3.

77. See, e.g., H.R. 12032, 85th Cong., 1st Sess. (1957).

78. See, e.g., *United States v. Aluminum Co. of America*, 1962 Trade Cas. ¶ 76684 (E.D. Mo. 1962).

79. It should be noted that both the Justice Department and the FTC presently give advisory opinions. But, as to the operations of the Commission, in the words of an agency spokesman in an appeal for more funds, "the success of this new instrument is being threatened by the FTC's most ancient enemy—delay," and often the needed guidance is offered too late to achieve its purpose. Trade Reg. Rep. Letter, No. 97, July 1, 1963. New FTC rules and procedures describe current Commission policy as to the rendition of advisory opinions. 28 Fed. Reg. 7082-83 (1963), amending 16 C.F.R. §§ 1.91-93 (1963).