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Section 16 of The Clayton Act: 
Divestiture An Intended Type of 
Injunctive Relief

In 1914, Congress enacted the Clayton Act\(^1\) to complement the 
Sherman Antitrust Act of 1890\(^2\) in maintaining a competitive economy 
by increasing government control over corporate growth\(^3\) and by 
providing redress to persons adversely affected by violations of the 
regulations.\(^4\) Private litigants, under section 16 of the Clayton Act,\(^5\)

3. See Comment, Private Divestiture: Antitrust's Latest Problem Child, 41 Fordham L. 
Rev. 569, 583 (1973) [hereinafter comment, Private Divestiture] (quoting Chairman of Senate 
Judiciary Committee, testifying on the Senate floor, 63d Cong., 2d Sess. (1914)). “It is 
proposed, without amending the Sherman Antitrust Act . . . to supplement that act by 
denouncing and making unlawful certain trade practices which, while not covered by the act 
because not amounting to restraint of commerce or monopoly in themselves, yet constitute 
elements tending ultimately to violations of that act.” Id.
4. Section 16 of the Clayton Act states: 
Any person, firm, corporation, or association shall be entitled to sue for and have 
injunctive relief, in any court of the United States having jurisdiction over the 
parties, against threatened loss or damage by a violation of the antitrust laws . . . 
when and under the same conditions and principles as injunctive relief against 
threatened conduct that will cause loss or damage is granted by the courts of equity. 
5. Id.
are entitled to sue for injunctive relief when threatened with loss or damage by a violation of the antitrust laws. A question that remains undecided is whether the injunctive relief authorized by section 16 includes the remedy of divestiture. Divestiture refers to a forced sale of property, securities, or other assets unlawfully acquired by a corporate defendant. Since the federal circuit courts of appeal are divided on the issue, the availability of a divestiture order for the private litigant under section 16 rests on the location of the forum.

Two leading cases highlight the split of authority among the circuit courts regarding the availability of divestiture under section 16 of the Clayton Act. The Ninth Circuit, in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, concluded from the legislative history of section 16 that divestiture is not a potential remedy under section 16 of the Clayton Act for the private litigant. The First Circuit, in *CIA Petrolera Caribe, Inc. v. Arco Caribbean*, rejected the decision of the Ninth Circuit and concluded divestiture was a potential remedy under section 16. Both decisions remain the law in the respective circuits.

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6. Graves v. Cambria Steel Co., 298 F. 761, 762 (S.D.N.Y. 1924) (the courts had held that private suits to enjoin unlawful actions, in contrast to private actions for actual damages, were not authorized by the Sherman Act; one of the purposes of the Clayton Act was to fill this void by entitling individuals to injunctive relief in antitrust cases). See also Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 Tex. L. Rev. 54, 67 (1969).

7. Divestiture is distinguishable from the remedies of dissolution and divorcement, but divestiture is broad enough to include them, as well. Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 Minn. L. Rev. 267, 270 n.21 (1964) [hereinafter Note, Availability of Divestiture]. Dissolution refers to the termination of any illegal combination or association, including dissolution by divestiture or divorcement. Id. Divorcement is a type of divestiture designed to separate an integrated firm into smaller legal entities in order to cease antitrust violations occurring from the consolidation. Note, *The Use Of Divestiture In Private Antitrust Suits*, 43 Geo. Wash. L. Rev. 261, 261 n.1 (1974) [hereinafter Note, The Use of Divestiture]. See generally F. Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 Ind. L.J. 1 (1951).

8. Compare Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1060 (6th Cir. 1984) (section 16 does not create a private divestiture remedy) and Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 518 F.2d 913, 920 (9th Cir. 1975) (divestiture is not an available remedy in private actions under § 16 of the Clayton Act); with CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 429 (1st Cir. 1985) (declining to adopt a per se limitation on § 16 forbidding an order for divestiture in private antitrust cases) and NBO Industries Treadway Companies, Inc. v. Brunswick Corp., 523 F.2d 262, 279 (3rd Cir. 1976) (divestiture was simply an inappropriate remedy under the facts) and Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d 989, (5th Cir. 1973), aff'd 358 F.Supp. 780, 797 (S.D. Tex. 1971) (a federal court has the power to order divestiture under § 16 of the Clayton Act).

9. 518 F.2d 913 (9th Cir. 1975).

10. Id. at 920 (reversing the district court and holding that Congress did not intend § 16 to permit private divestiture suits).

11. 754 F.2d 404 (1st Cir. 1985).

12. Id. at 429.
The purpose of this comment is to examine the legal and policy issues concerning the availability of divestiture in private antitrust litigation. In analyzing this controversy a brief examination will be made of the history and purpose of the Clayton Act. Next, the language adopted by Congress in section 16 of the Clayton Act will be evaluated. This comment will also review the interpretations accorded to the legislative history of section 16 by the ITT and Arco Caribbean courts. In addition, this comment will explore the policies both in support of and against the availability of divestiture under section 16 of the Clayton Act. This comment will conclude that injunctive relief, as referred to in section 16 of the Clayton Act, was intended to include the remedy of divestiture.

Objectives Of Section 16 Of The Clayton Act

The Sherman Act was enacted in 1890 in order to preserve a competitive market place. The Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade and the monopolization of or attempt to monopolize trade or commerce. By 1914, the Sherman Act, though a potent weapon against demonstrated anticompetitive behavior, proved ineffectual against preventing corporate integrations that might result in future monopoly. By enacting section 7 of the Clayton Act, Congress prohibited mergers which threaten to substantially lessen competition. Consequently, anticompetitive mergers may be prevented in their incipiency. As a remedy

13. See Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 692 (9th Cir. 1976), cert. denied, 429 U.S. 940 (1976) (under the law of the Ninth Circuit the remedy of divestiture is unavailable to private plaintiffs in antitrust suits); Robert's Waikiki U-Drive v. Budget Rent-A-Car, 491 F.Supp. 1199, 1223 (D. Haw. 1980) (the court was bound by precedent, since the Ninth Circuit has ruled that divestiture is unavailable in private actions).
14. See infra text and accompanying notes 19 through 37.
15. See infra text and accompanying notes 38 through 90.
16. See infra text and accompanying notes 91 through 150.
17. See infra text and accompanying notes 151 through 194.
18. See Note, Availability of Divestiture, supra note 7, at 268. See also United States v. Crescent Amusement Co., 323 U.S. 173, 187-88 (1944) (recognizing that Congress has proclaimed the rule of the market place to be competition, not combination).
21. See Note, Availability of Divestiture, supra note 7, at 268.
23. Id. The litigant need only demonstrate that a corporate acquisition may lessen competition or tend to create a monopoly to prove a section 7 violation. Note, Availability of Divestiture, supra note 6, at 269. Courts have required only that a reasonable probability be shown that a corporate merger will adversely affect competition in section 7 cases. Id. In
for any antitrust violation that threatens loss or damage, section 16 of the Clayton Act, permits private litigants to maintain suits for injunctive relief.\textsuperscript{24} Under the authority of section 16, an individual may sue to enjoin anticompetitive practices in violation of section 7, thereby frustrating the consummation of a merger in restraint of trade or commerce.\textsuperscript{25}

When a corporate merger in violation of section 7 has occurred, divestiture of the illegal acquisition is a natural remedy\textsuperscript{26} for two reasons. First, divestiture of the unlawfully acquired stock or assets restores competition.\textsuperscript{27} Second, divestiture deprives the antitrust violator of the illegally obtained stock or assets.\textsuperscript{28}

In the Clayton Act, Congress recognized the futility of requiring a completed corporate integration in restraint of trade before permitting an individual to bring suit and obtain injunctive relief.\textsuperscript{29} The difference between ordinary injunctive relief and divestiture is largely one of timing. Normal injunctive relief is effective when a litigant seeks to prevent an illegal act. Divestiture becomes necessary when the litigant seeks to eliminate the effects of a completed wrongful business practice.\textsuperscript{30} Refusing to order divestiture under section 16


\textsuperscript{25} See Comment, Private Divestitures, supra note 3, at 587-88.

\textsuperscript{26} See United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961). "The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. It should always be in the forefront of a court's mind when a violation of § 7 has been found." (emphasis added). Id. at 331.

\textsuperscript{27} See generally Rogowsky, The Economic Effectiveness of Section 7 Relief, 31 ANTITRUST BULL. 187 (1986) (the article evaluates the effectiveness of merger relief in government § 7 cases).

\textsuperscript{28} Note, The Use of Divestiture, supra note 7, at 269.

\textsuperscript{29} Previously, the Supreme Court had narrowly interpreted the Sherman Act to exclude individuals from initiating suits for injunctive relief. See Paine Lumber Co. v. Neal 244 U.S. 459 (1917). The decision in \textit{Paine} was delivered after the enactment of the Clayton Act. Nevertheless, the Court reached the conclusion that private litigants could not maintain a suit for an injunction based on prior law, since the case was filed before 1914.). \textit{Peacock, supra} note 6, at 67, n.68.

\textsuperscript{30} To illustrate, a corporation whose stock is being acquired by a competitor may sue to enjoin further purchases of stock. In many instances the target corporation may obtain restrictions on the stock already acquired to neutralize the anticompetitive effect of the acquisition. However, bare equity ownership of a competitor is incompatible with the objectives of the antitrust laws. Most importantly, the stock remains in the hands of a competitor rather than in the possession of motivated investors interested in increased revenues and expansion. In this instance, divestiture is the only effective remedy and should be available. See Peacock, \textit{supra} note 6, at 56.
penalizes an individual for suing prior to the consummation of a corporate merger since individuals are unable to obtain effective relief from anticompetitive integrations. The law entitles the government to both forms of relief, but divesture has never been awarded to a private litigant.

Financial constraints and other non-legal reasons limit the ability of the government to prosecute antitrust violations. By enacting section 16 Congress promoted a competitive economy in two ways. First, section 16 provides a remedy to private litigants when the government fails to act against violations of the antitrust laws. Second, section 16 enhances the enforcement of the antitrust laws

31. Clayton Act § 15, 15 U.S.C. § 25 (1987). Section 15 of the Clayton Act states: The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of [the Clayton Act], and it shall be the duty of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by the way of petition setting forth the case and praying that such violation be enjoined or otherwise prohibited. Id. (emphasis added). Section 15 has been interpreted to permit the government to seek divestiture. United States v. E.I. Du Pont De Nemours & Co., 366 U.S. 316, 331 (1961) (divestiture should always be considered when § 7 has been violated, because divestiture is simple, relatively easy to administer, and a sure remedy).

32. Peacock, supra note 6, at 80-81; Note, The Use Of Divestiture, supra note 7, at 263; Note, Availability of Divestiture, supra note 7, at 272 n.32; Comment, Private Divestiture, supra note 3, at 570 n.10.

33. Note, The Use Of Divestiture, supra note 7, at 263, n.20; Peacock, supra note 6, at 80 n.137. See e.g. Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 351 F.Supp. 1153, 1185 (D.Haw. 1972) rev'd, 518 F.2d 913, 924 (1975). ITT obtained a no-action letter from the government regarding the proposed acquisition of United Utilities, Inc. Id. at 1185. The letter stated that no action would be taken against ITT unless or until action had been taken against industry members which were similarly vertically integrated. Id. One or both of two reasons convinced the government to postpone prosecuting ITT. First, as the court indicated, the government may have decided to maintain a consistent enforcement policy in connection with the telephone industry, since similar vertical relationships affected an extremely high percentage of the total market. Id. Additionally, given the unique circumstances in the telephone and telephone equipment industries, as the American Telephone & Telegraph Company break-up indicates, the government at one time believed the telephone communications industry would be more efficient if restricted to a few companies. Id.

34. For instance, the Department of Justice and the Federal Trade Commission, the agencies primarily charged with enforcing the antitrust laws, operate with a limited amount of resources, and hence are unable to prosecute every alleged antitrust violation. Note, Availability of Divestiture, supra note 7, at 272. Consequently, the Department of Justice and the Federal Trade Commission prioritize the complaints alleging antitrust infractions. Cases which establish precedent for the illegality of contested practices in restraint of trade are favored over those requiring long and costly litigation in order to prove known violations. Peacock, supra note, at 80.

35. See Note, Availability of Divestiture, supra note 7, at 274-75; Note, The Use of Divestiture, supra note 7, at 263 n.17 (quoting 51 Cong. Rec. 16319 (1914) (remarks of Rep. Floyd)). "Private suits were intended to provide 'the business men of the country' a means of obtaining remedies 'without waiting upon the slow and tortuous course of prosecution on the part of the Government.'" Id. at 263 n.18.
by enlisting the individual as a private attorney general. An analysis of the language Congress adopted as section 16 will offer insight into the scope of injunctive relief Congress intended for the private litigant.

DIVESTITURE THROUGH INDIRECT MEANS

The language of section 16 of the Clayton Act expresses no limitations on the power a court of equity has to order injunctive relief. Rather, section 16 provides that injunctive relief may be awarded to a private litigant to the extent permitted by the courts of equity. Divestiture is a form of affirmative injunctive relief in which the court orders an offending corporation to dispose of the illegally obtained assets or stocks. Although injunctions requiring affirmative acts were once held to be outside the equity powers of the courts, today mandatory injunctions are available in appropriate circumstances.

The district court in the ITT case suggested that divestiture should be available under section 16 since a court, by utilizing creative prohibitory injunctions, could effectuate an order of divestiture in-

36. The Supreme Court has emphasized the enforcement function of private suits as a guide to interpreting section 16: "[T]he purpose of giving private parties treble-damages and injunctive remedies was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969). See also Perma Life Mufflers Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) (the Court declined to recognize the defense of in pari delicto in private antitrust actions, since the application of the doctrine would undermine the important role served by private antitrust suits in enforcing the antitrust laws); Bruce's Juices, Inc. v. Am. Can Co., 330 U.S. 743, 751-52 (1947) (indicating that Congress clearly intended to use private antitrust actions as a means of enforcing the antitrust laws). Section 4 of the Clayton Act authorizes treble damages and attorney fees for the private litigant as potential remedies. 15 U.S.C. § 15 (1986).


40. See supra note 7 and accompanying text (definition of divestiture).

41. See Comment, Private Divestiture, supra note 3, at 580-81.

42. See Comment, Private Divestiture, supra note 3, at 580-81; Note, The Use Of Divestiture, supra note 7, at 266. "A mandatory injunction is an order to carry out an affirmative act, as opposed to the more usual prohibitory injunction, which forbids the doing of an act." D. Dobbs, THE LAW OF REMEDIES 105 (1973).

directly.\textsuperscript{44} For instance, courts of equity might place voting and other restrictions on the stock already acquired by the defendant, while enjoining the issuer of the stock from paying dividends on the shares obtained by the offender.\textsuperscript{45} These restrictions effectively frustrate any competitive advantage of the corporate offender and thereby leave the antitrust violator with no alternative but to dispose of the illegally obtained stock.\textsuperscript{46} Two cases in which indirect divestiture was ordered are \textit{Standard Oil Co. v. United States}\textsuperscript{47} and \textit{American Crystal Sugar Co. v. Cuban-American Sugar Co.}\textsuperscript{48} In \textit{Standard Oil}, the Supreme Court restrained the defendant from voting the acquired stock or exercising any control over the subsidiaries.\textsuperscript{49} The subsidiaries were enjoined from paying dividends on the shares owned by Standard Oil.\textsuperscript{50} In \textit{American Crystal Sugar}, the defendant was enjoined from voting the acquired shares and from obtaining representation on the board of directors of the offended corporation.\textsuperscript{51}

Nevertheless, the Ninth Circuit Court of Appeals in \textit{ITT} ruled that divestiture could not be achieved in private antitrust actions through "verbal calisthenics" when divestiture could not be ordered directly.\textsuperscript{52} The Ninth Circuit reasoned that the Congressional intent of section 16 was to exclude divestiture in private actions.\textsuperscript{53} Permitting divestiture by indirect means would be inconsistent with this legislative intention.\textsuperscript{54} The court indicated that the \textit{Standard Oil} decree, in effect, directing divestiture was permissible.\textsuperscript{55} The government may achieve divestiture indirectly, since the government can obtain an explicit divestiture order.\textsuperscript{56} Therefore, the \textit{Standard Oil} decision was

\begin{itemize}
\item \textsuperscript{45} See e.g., \textit{Standard Oil Co. v. United States}, 221 U.S. 1 (1911); \textit{American Crystal Sugar Co. v. Cuban-American Sugar Co.}, 152 F. Supp. 387 (S.D.N.Y. 1957), \textit{aff'd} 259 F.2d 254 (2d Cir. 1958).
\item \textsuperscript{46} See supra note 30 and accompanying text.
\item \textsuperscript{47} 221 U.S. 1 (1911).
\item \textsuperscript{48} 152 F.Supp. 387 (S.D.N.Y. 1957), \textit{aff'd} 259 F.2d 524 (2d Cir. 1958). See also \textit{Int'l Tel. & Tel. v. Gen. Tel. & Elec.}, 518 F.2d at 924.
\item \textsuperscript{49} \textit{Standard Oil}, 221 U.S. at 79.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{American Crystal Sugar}, 152 F.Supp. at 400.
\item \textsuperscript{52} \textit{ITT}, 518 F.2d at 924.
\item \textsuperscript{53} \textit{Id.} at 922.
\item \textsuperscript{54} \textit{Id.} at 924. (The \textit{American Crystal Sugar} case, the product of another circuit court of appeals, was not binding on the Ninth Circuit.)
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961). Section 15
not binding precedent for the court, since ITT, a private litigant, initiated the action rather than the United States.

Interestingly, neither court mentioned Georgia v. Pennsylvania Railroad. In that case, the Supreme Court held that the state of Georgia was a person for the purposes of section 16. The Court enjoined a rate fixing conspiracy even though the practical effect of the injunction might be the dissolution of the combination. Thus, the Supreme Court held that indirect divestiture or dissolution was an available form of relief to a person under section 16. Consequently, there appears to be no reason why divestiture could not be achieved directly, since divestiture may be achieved indirectly through negative injunctions.

A second argument in favor of divestiture as a remedy authorized by section 16 is that the courts possess inherent powers to effectuate equity. Thus, the courts can order divestiture in appropriate circumstances despite the lack of express authority in section 16. Judicial powers of equity, however, may be limited by a clear and valid legislative command. No express Congressional intention to limit...

has been interpreted as permitting the government to seek the remedy of divestiture. Id. at 331. See supra note 31 and accompanying text (text of § 15). . .

57. 324 U.S. 439 (1945)

58. “Georgia asserts rights based on the anti-trust [sic] laws. The fact that the United States may bring criminal prosecutions or suits for injunctions under those laws does not mean that Georgia may not maintain the present suit. Georgia sues as a proprietor to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions. Georgia, suing for her own injuries, is a ‘person’ within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust [sic] laws or to recover damages by reason thereof.” (citation omitted) Georgia v. Pennsylvania Railroad, 324 U.S. at 447.

59. The Supreme Court in Georgia v. Pennsylvania Railroad stated:

So long as the collaboration which exists exceeds lawful limits and continues in operation, the only effective remedy lies in dissolving the combination or in conforming it within legitimate boundaries. Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust [sic] suits. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust [sic] laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination. And no adequate or effective remedy other than this suit is suggested which Georgia can employ to eliminate the unlawful conspiracy alleged to exist here.

Pennsylvania Railroad, 324 U.S. at 461-62 (emphasis added). See also Peacock, supra note 6, at 75; Comment, Private Divestitures, supra note 3, at 592.

60. See Peacock, supra note 6, at 75.


the type of injunctive relief available to the courts of equity appears in the language of section 16. Instead, the language authorizes injunctive relief to the extent permitted by general principles of equity.

**The Language of Sections 15 and 16 of the Clayton Act**

The language of section 15, which entitles the government to equitable relief, is similar in meaning to that of section 16. The

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E.I. du Pont de Nemours & Co., 366 U.S. 316, 328 n.9 (1961) (The Department of Justice claimed that divestiture is required for section 7 violations since section 11 expressly authorizes divestiture for the Federal Trade Commission for section 7 violations. The Court responded that Congress could not be deemed to have restricted the broad remedial powers of courts of equity absent explicit language so doing or some other strong indication of intent.).

63. *Arco Caribbean*, 754 F.2d at 417. The court in *Arco Caribbean* stated: The plain language of section 16 fails to indicate by either a clear and valid legislative command, or even a veiled suggestion, any intended limitation of the types of injunctive relief available to private litigants under § 16. Nor do we find any indication of intention to limit the district court's inherent powers of equity.

Id. *Contra* Int'l Tel. & Tel. v. Gen. Tel. & Elec., 518 F.2d at 921-22 (1975) (the court interpreted the legislative history of section 16 as excluding divestiture in private actions). See also note 4 and accompanying text (text of §16).

64. See *supra* note 4 (text of § 16).

At the time the Clayton Act was passed, a split in authority existed among the circuits regarding the availability of injunctive relief to a private party suing under the Sherman Act. Although the Sherman Act expressly conferred the power to initiate 'proceedings in equity' for injunctive or other equitable relief only upon the government, the Sixth Circuit affirmed a case where the district court had granted a preliminary injunction to a private party pursuant to its inherent powers of equity. Through the injunction, the court had forbidden an acquiring corporation to vote the stock of its new acquisition, and then, after trial, had dissolved the injunction and dismissed the bill. *Bigelow v. Calumet & Hecla Mining Co.*, 155 F.2d 869 (W.D. Mich. 1907), aff'd, 167 F. 704 (6th Cir. 1909). The Second Circuit, however, held that injunctions were not available to private parties under the Sherman Act. *See Greater New York Film Rental Co. v. Biograph Co.*, 203 Fed. 39 (2d Cir. 1913). These cases, and the question whether inherent powers of equity were withdrawn from the courts under the Sherman Act, were discussed in the committee hearings on section 16. *See S. Hearings on S. Rep. No. 698, 63d Cong., 2d Sess. 629-31 (issue and cases) (1914); H. Hearings on H.R. 15657, 63d Cong., 2d Sess. 485-87 (case), 963-64 (issue but not cases) (1914). Notably, then, no exclusion of inherent powers of equity, or of certain kinds of injunctive relief, was included in the Clayton Act.

CIA Petrolera Caribe v. Arco Caribbean, 754 F.2d at 417, n.10.


*Id.* The Supreme Court has never agreed that the remedy of divestiture is unavailable to the Department of Justice because such specific language providing for divestiture does not appear in section 15. *Comment, Private Divestitures, supra* note 3, at 584, n.106.
government may, under section 15 of the Clayton Act, institute proceedings in equity to enjoin or otherwise prohibit antitrust violations. Under section 16, any person may sue for injunctive relief when threatened with loss or damage by such violations. Although neither section expressly authorizes the remedy of divestiture in antitrust actions, section 15 has been interpreted to include the remedy of divestiture. Two reasons may be advanced to explain the different interpretation given to the two sections. First, divestiture may be appropriate under section 15, and not section 16, on the basis that "proceedings in equity" are dissimilar from "suits for injunctive relief". Secondly, the phrase "to otherwise prohibit" of section 15 justifies divestiture in government actions whereas no similar language is found in section 16 of the Clayton Act. Divestiture is within the ambit of injunctive relief as presently conceived and practiced. Consequently, a conclusion that the statutory language "proceedings in equity" embraces divestiture while "actions for injunctive relief" does not is difficult to reach, given contemporary legal use. This conclusion can only be based upon a historical meaning of the language, or upon a finding that the legislative history indicates that a distinction was intended by Congress. The ITT court determined that equitable proceedings and injunctive relief had different meanings. After examining the legis-

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66. See supra note 32 and accompanying text (text of § 15).
67. See supra note 4 (text of § 16).
68. The right of government to seek divestiture originated in Standard Oil v. United States. 221 U.S. 1 (1917). In Standard Oil, the Supreme Court indicated that a proper remedy is one which will effectively dissolve the combination found to exist in violation of the Sherman Act. Id. at 78. The court held that the government was entitled to divestiture under section 4 of the Sherman Act. Id. at 30. Section 15 of the Clayton Act was considered a reenactment of section 4 of the Sherman Act. Comment, Private Divestitures, supra note 3, at 589. The language of section 4 of the Sherman Act and section 15 of the Clayton Act is identical, except for a service and summons clause at the end of section 15. Compare Sherman Act § 4, 15 U.S.C. § 4 (1987) with Clayton Act § 15, 15 U.S.C. § 25 (1987).
70. See Note, Availability of Divestiture, supra note 7, at 278 (expressing doubt that the phrase "to otherwise prohibit" of section 15 was intended to confer exclusively on the government the ability to obtain divestiture).
71. See Note, Availability of Divestiture, supra note 7, at 278. See also CIA Petrolera Caribe v. Arco Caribbean, 754 F.2d. at 404 (indicating that that the Ninth Circuit in ITT apparently conceded that divestiture is presently considered a form of injunctive relief). See also Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 526 (S.D.N.Y. 1965) (divestiture is a form of injunctive relief).
72. See infra notes 91 through 150 and accompanying text (discussion of the legislative history of § 16).
73. ITT, 518 F.2d at 922.
ative history of the Clayton Act, the court concluded that injunctive relief was not intended to include divestiture.\textsuperscript{74}

In \textit{CIA Petrolera Caribe v. Arco Caribbean}, the First Circuit indicated that a court is not free to disregard the contemporary meaning of statutory language.\textsuperscript{75} The court reasoned that a restrictive interpretation of the injunctive relief would be inappropriate, given the absence of a clear statutory limitation of the term and the growth of equitable powers over time.\textsuperscript{76} In addition, the courts are required to interpret a remedial statute generously.\textsuperscript{77} The court held that the express statutory language of sections 15 and 16 of the Clayton Act did not establish a distinction between "proceedings in equity" and suits for "injunctive relief."\textsuperscript{78} The court, therefore, found no principled basis upon which to exclude divestiture in private actions while permitting divestiture in government suits.\textsuperscript{79}

A second explanation for the denial of divestiture to private litigants is that section 15 entitles the court to "enjoin or otherwise prohibit" antitrust violations.\textsuperscript{80} This phrase is arguably broader in scope than the phrase "injunctive relief?" in section 16. To assume that the words, "otherwise prohibit," uniquely empower government to utilize divestiture as a remedy may be illogical.\textsuperscript{81} Congress specifically empowered the Federal Trade Commission to seek divestiture orders in section 11 of the Clayton Act\textsuperscript{82} and could have incorporated the same specific language for government enforcement under section 15. Of course, section 15 was a reenactment of section 4 of the Sherman Act,\textsuperscript{83} under which divestiture was ruled available.\textsuperscript{84} Never-
theless, Congress could have specifically provided for divestiture in section 15 since Congress did so in section 11. Congressional materials do not indicate that the omission of the phrase “to otherwise prohibit” from section 16 was intended to preclude divestiture in private antitrust suits. From a comparison of sections 15 and 16, the government is unable to assert any more of a legal right to divestiture than the private litigant. The government, however, is entitled to divestiture notwithstanding the similar legal implications arising from the language of sections 15 and 16. Therefore, section 16 should be interpreted as providing the remedy of divestiture in private actions since the government is entitled to such relief under section 15. The debate continues, however, over whether a Congressional intention to exclude divestiture as a remedy authorized by “injunctive relief” may be found in the legislative history of section 16.

THE LEGISLATIVE HISTORY OF SECTION 16

A. “Dissolution” As a Point of Reference

The legislative materials on the Clayton Act do not refer to the term divestiture. Therefore, other forms of injunctive relief referred to at the time, such as dissolution and partition, are critical in interpreting the legislative history of section 16. Ascertainment of the relationship between these concepts and divestiture is a prerequisite of any discussion of the legislative history.

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84. See Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911). In construing § 4 of the Sherman Act the Court decided divestiture was available in government antitrust actions. The Court, however, did not mention whether or not the power to order divestiture was derived from the provision of the statute conferring upon the court the power to do equity or from the language authorizing the court to “otherwise prohibit” antitrust violations. Congress, therefore, had every reason to expressly provide for divestiture in section 15 and explicitly deny divestiture in section 16, in order to effectively define the equitable powers the courts are to possess under these statutes.

85. See Comment, Private Divestitures, supra note 3, at 583, 589; Note, Availability Of Divestiture, supra note 7, at 278; Peacock, supra note 6, at 76. See also CIA-Petrolera Caribe v. Arco Caribbean, 754 F.2d 404, 417-18 (1985).

86. See supra note 31 and accompanying text (text of § 15). Arco Caribbean, 754 F.2d at 418.

87. Arco Caribbean, 754 F.2d at 418.

88. An unambiguous statute is conclusive unless a clearly expressed legislative intent to the contrary is present. Arco Caribbean, 754 F.2d at 416.

89. Id.

90. Id.
In *ITT v. GTE*, the court relied on *Standard Oil Co. v. United States* in concluding that the term “dissolution” includes the notion of divestiture. In *Standard Oil*, the Supreme Court ordered the defendant to divest itself of the illegally acquired stock of the subsidiary corporations. The order of divestiture in *Standard Oil*, however, was referred to as “dissolution of the illegal combination.” Since Congress discussed *Standard Oil* in conjunction with section 16, the *ITT* court opined that divestiture was considered by Congress when determining whether or not to authorize private dissolution suits. Consequently, the court in *ITT* held that if Congress intended to exclude “dissolution” from relief authorized by section 16, then “divestiture” was prohibited as well. Therefore, “divestiture” was substituted for “dissolution” when the *ITT* court reviewed the legislative history of section 16.

In *Arco Caribbean*, the First Circuit rejected the substitution of divestiture for dissolution. Rather, the court argued that the interpretations of the distinction between “dissolution” and “divestiture” in 1914 were varied and complex. The court noted that the relief ordered in *United States v. American Tobacco Co.*, was considered by Congress to constitute divestiture. In *American Tobacco*, the Supreme Court suggested that “dissolution” may be accomplished by dissolving illegal market power, selling illegally acquired assets, 

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91. 518 F.2d 913 (9th Cir. 1975).
92. 221 U.S. 1 (1911).
93. *ITT*, 518 F.2d at 922 (the ITT Court rejected the technical distinction “that the members of the House Judiciary Committee used the term 'dissolution' in a 'technical' sense to mean 'complete destruction of a corporation.'”). See also *Arco Caribbean*, 754 F.2d at 419.
94. *Standard Oil*, 221 U.S. at 78.
95. *ITT*, 518 F.2d at 924. See also *Standard Oil Co. v. United States*, 221 U.S. 1, 31 (1911).
96. *ITT*, 518 F.2d at 924. “Congress knew what the Supreme Court had approved of by way of remedy in *Standard Oil*; in the hearings on § 16 [Congress] considered and rejected proposals to extend the right to obtain that type of relief [divestiture] to private parties.” *Id.* at 924.
97. *Id.* at 922.
98. *Arco Caribbean*, 754 F.2d at 422. See also *ITT*, 518 F.2d at 924; H.R. No. 627, 63d Cong., 2d Sess. at 263 (Rep. Floyd); at 273 (Rep. Nelson); at 331 (Rep. McCoy); 51 Cong.Rec. at 15821-23 (Sept. 28, 1914) (Sen. Reed); id. at 15864 (Sept. 29, 1914) (Sen. Reed); id. at 15864-5 (Sen. Overman).
99. *Arco Caribbean*, 754 F.2d at 422.
100. *Id.* at 421. “It appears that over the years the legal meaning of the concepts 'dissolution' and 'divestiture' have become somewhat more settled than in 1914, so much so that the Supreme Court has recently pronounced them to be a [sic] 'large degree interchangeable.'” *Id.* n.19.
or dissolving the offending corporation. Moreover, the First Circuit noted that other members of Congress equated "dissolution" with "the complete destruction and reorganization" of the offending enterprise. The Arco Caribbean court concluded, therefore, that divestiture could not be substituted for dissolution in reviewing section 16 of the Clayton Act. Any review of the legislative history of section 16 which merely substitutes the word "divestiture" for "dissolution" is deficient because the legislative history indicates that in 1914 dissolution was a general term subject to several interpretations.

B. Committee Reports

The official committee reports of Congress are entitled to substantial weight as indicia of the intentions of Congress. Neither the report of the House of Representatives nor the Senate report identify any intended limits on the scope of injunctive relief available to individuals under section 16. The committee reports, therefore, do

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103. *Id.* at 421.

"The combination's market power could effectively be dissolved by a prohibitory injunction forbidding the corporation from engaging in interstate commerce, with the result that the offending combination partitions itself, sells assets, or otherwise restricts itself in a manner that recreates a competitive market. Or, the court could take a more active role as by appointing a receiver to sell assets in such a manner as to restore market conditions. Or, in lieu of either of these two drastic remedies, the court could encourage the formulation of a consent decree under the direction of the court . . . . Today, as then, we would say that dissolution achieved through the use of any of these mechanisms were achieved by use of the injunctive power according to principles of equity."

104. *Arco Caribbean*, 754 F.2d at 421.

"[W]hen the Second Circuit, on remand in *American Tobacco*, fashioned relief according to what it conceived to be mandated by the Supreme Court's order for 'dissolution,' some members of Congress considered this not to be a dissolution in fact, but merely a 'circuitous course' by which that end was not achieved."

105. *Id.* at 421. *See e.g.*, United States v. Standard Oil Co., 173 F. 177, 192-93 (E.D. Mo. 1909), aff'd, 221 U.S. 1 (1911).

106. *Arco Caribbean*, 754 F.2d at 421.

not establish a legislative intention to limit the scope of injunctive relief which is provided by section 16. Notably, the House Minority Report, expressing reservations about the broad scope of private relief authorized by section 16, indicated that some committee members feared that section 16 injunctive relief would encompass dissolution and corporate reorganization. Consequently, the House Minority Report indicates that some Representatives understood section 16 as permitting the actual termination of an offending corporation. Less formal indicia of Congressional intent, such as floor debates and hearings, are entitled to consideration in the interpretation of legislative history in the absence of a clear statement of Congressional intent in the committee reports.

C. Floor Debates

The remarks on the floor of the Senate or House by the sponsor of a bill are entitled to substantial weight as evidence of Congressional intent. Representative McGillicuddy did not mention any implied limitations on the scope of injunctive relief that may be awarded in private actions under section 16. In addition, Representative Carlin stated that the House Judiciary Committee intended the bill to give the individual the same power to enjoin antitrust violations as the government commanded. In sum, the comments made on the floor

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108. *Arco Caribbean*, 754 F.2d at 423.

The provision giving to any individual the right to enjoin any threatened loss or damage is a serious one. . . . The beginning of an investigation by the government on any complaint that a concern has violated the antitrust laws almost immediately to some extent affects his credit but not so seriously as an *injunction and perhaps receivership which might be brought by an individual.*

*Arco Caribbean*, 754 F.2d at 422 n.21.

While the fears and doubts of the minority are not an authoritative guide to the construction of legislation, their report did comprise the only specific explanation of the meaning of the private injunction provision that was readily accessible to the whole Congress.

Id. (citation omitted).

112. 51 Cong.Rec. 9261 (1914). See also *Arco Caribbean*, 754 F.2d at 423.
113. Representative Carlin coauthored the bill with Representatives Clayton and Floyd.
114. Representative Carlin defended the bill by stating: First, we found that the Sherman law did not permit an injunction on petition of an individual. The Government could enjoin a combination or trust; and though an individual was standing face to face with destruction, though the monster of
in the House of Representatives suggest a desire, on the part of the sponsors of the Clayton Act, to arm the private litigant with an effective arsenal of weapons to combat business practices in restraint of trade.\textsuperscript{115}

The Senate debated a similar bill authorizing private suits seeking injunctive relief for antitrust violations. Senator Shields remarked that section 16 would empower individuals to bring suits in equity to enjoin violations of antitrust laws to the same extent as the government under section 4 of the Sherman Act.\textsuperscript{116} Notably, the Senate passed a floor amendment, section 25, which would have required a court to decree a dissolution whenever a corporate defendant was guilty of anticompetitive acts, without regard to the nature of the plaintiff.\textsuperscript{117}

Senate amendment section 25 was not passed by the conference committee in the reconciliation of the House and Senate bills.\textsuperscript{118} One inference to be drawn from the failure to enact section 25 is that Congress intended dissolution to be unavailable in private antitrust suits.\textsuperscript{119} Although section 25 did not differentiate between types of

\textsuperscript{115} 51 Cong.Rec. 9270 (1914) (emphasis added). See also Arco Caribbean, 754 F.2d at 423-24.

\textsuperscript{116} 115. Arco Caribbean, 754 F.2d at 423-24.

\textsuperscript{117} 116. 51 Cong.Rec. 14,215 (1914). See also, Comment, Private Divestiture, supra note 3, at 590.

\textsuperscript{118} Senate amendment, section 25 read:
Whenever a corporation shall acquire or consolidate the ownership or control of the plants, franchises or property of other corporations, copartnerships, or individuals, so that it shall be adjudged to be a monopoly or combination in restraint of trade, the court rendering such judgment shall decree its dissolution and shall to that end appoint receivers to wind up its affairs and shall cause all of its assets to be sold in such manner and to such persons as will, in the opinion of the court, restore competition as fully and completely as it was before said combination began to be formed. The court shall reserve in its decree jurisdiction over said assets so sold for a sufficient time to satisfy the court that full and free competition is restored and assured. (emphasis added).

51 Cong.Rec. 15863 (1914). The First Circuit noted that the Senate amendment indicates greater conflict over the meaning of "dissolution" than the Ninth Circuit acknowledges, since the amendment refers to dissolution as the termination of the illegal combination. Arco Caribbean, 754 F.2d at 424. (Ultimately, Senate amendment § 25 was excluded from § 16 of the Clayton Act by the conference committee.)

118. H.Rep. No. 1168, 63d Cong., 2d Sess. 1 (1914); S.Doc. No. 585, 63d Cong., 2d Sess. 3 (1914). See also Arco Caribbean, 754 F.2d at 424-25. "[N]either [the Senate nor the House Conference Report] mentioned the Senate amendment except to note the Senate 'recede[s].'"

Id.

119. Arco Caribbean, 754 F.2d at 425.
plaintiffs, the repeal of section 25 has not prevented the government from obtaining divestiture. Moreover, alternative language which would have made dissolution permissive rather than mandatory and would have limited the availability of the remedy to the government was also rejected. Additionally, the proposed Senate amendment to section 16 is an example of another interpretation accorded the term "dissolution."

Consequently, no Congressional intention to limit the scope of injunctive relief authorized by section 16 is evidenced by the remarks of the representatives charged with explaining the proposal to their colleagues. To the contrary, the floor debates indicate that both the House and the Senate intended the scope of injunctive relief of section 16 to be extensive and unrestrictive.

D. Conference Committee Reports And Debates

Representative Floyd, co-author of the Clayton Act, explained the conference bill to the House and noted that prior to the proposed section 16 only the government could enjoin an unlawful trust or monopoly in restraint of trade. Floyd implied that with the passage

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120. Id. at 425. See supra note 117 and accompanying text (text of Senate Amendment § 25).
121. Arco Caribbean, 754 F.2d at 425.
123. See supra notes 89 through 103 and accompanying text (discussion of "dissolution"); supra note 109 and accompanying text (discussion of the House Minority's understanding of the term "dissolution").
124. The Ninth Circuit, in JTT, stated that "far from approving the exclusion of less formal material, [the Supreme Court] has repeatedly interpreted legislation by referring to statements made in floor debates and hearings." JTT, 518 F.2d at 921. The court, however, makes no mention of any of the remarks made during legislative debate on section 16 by bill sponsors and committee members. Instead, the Ninth Circuit relies principally on the comments made by Congressman John Floyd during House Judiciary Committee Hearings in response to Samuel Untermeyer, an antitrust attorney who advocated private dissolution suits for antitrust violations. Id. at 922. See also infra notes 133 through 148 and accompanying text. (Apparently, the Ninth Circuit looked beyond the statements made concerning section 16 on the floors of the House and the Senate to find support for the decision of the court that Congress intended to exclude divestiture for private antitrust cases. The decision of the Ninth Circuit to accord principle weight to statements made during the House Hearings was improper in light of other very relevant and reliable evidence of legislative intent.)
125. 51 Cong. Rec. 16319 (Oct. 8, 1914)). Congressman Floyd stated:

Heretofore there has been only one power that might enjoin an unlawful trust or monopoly in restraint of trade, an that was the Government of the United States .... This provision in § 16 gives any individual, company, or corporation damaged in its property or business by the unlawful operations or actions of any corporation or combination the right to go into court and enjoin the doing of these unlawful acts ....

Id. (emphasis added) See also, Arco Caribbean, 754 F.2d at 425; supra notes 73 through 81 and accompanying text.
of section 16 the right to enjoin illegal business practices would be extended to the individual. Congressman Floyd's statement is significant in two respects. First, an explicit parallel between the power of the government to obtain injunctive relief and that of the individual under section 16 was stressed as an expressed purpose of the statute. Alternatively, no distinction was mentioned between the injunctive relief granted to the United States and that extended under section 16 to private individuals. Secondly, Congressman Floyd's choice of the word "enjoin" as descriptive of the power that both the government and the individual would share suggests that the phrases "proceedings in equity to enjoin" and "injunctive relief" were not intended to represent a distinction supporting a prohibition of divestiture to the individual. The conference committee reports and debates also fail to clearly express a legislative intent to limit the scope of injunctive relief under section 16. In addition, the conference committee reports and debates do not establish "a clear and valid legislative command" to restrict the inherent equitable powers of a court to order divestiture.

E. Committee Hearings

Committee hearings, as the least formal indicia of Congressional intent, are entitled to less credibility than committee reports and statements on the floor by the author of a bill. The Ninth Circuit, in ITT, placed great emphasis on Representative Floyd's responses

126. Arco Caribbean, 754 F.2d at 425.
127. Id.
128. See supra notes 73 through 81 and accompanying text. (Section 15 authorizes the courts to "enjoin or otherwise prohibit antitrust violations in government actions. Representative Floyd's use of the word 'enjoin' in his explanation of section 16 indicates further that the words 'injunctive relief' and not 'enjoin' in section 16 were not intended to disallow divestiture in private antitrust actions.)
129. Arco Caribbean, 754 F.2d at 424-25. See also supra notes 108 through 126 and accompanying text (demonstrating the lack of an express legislative intent in the committee reports and floor debates to remove divestiture from the ambit of section 16 injunctive relief).
130. Arco Caribbean, 754 F.2d at 424-25.
131. The court in Arco Caribbean noted that:
When reviewed as a whole, only scant consideration was given in the hearings to the remedy provisions, or the judicial 'machinery,' of the proposed act. In House hearings that lasted over four months and filled over 2000 pages of record, the testimony relating specifically to the scope of § 16 is contained in approximately thirty pages.
during committee hearings to Samuel Untermeyer, an advocate of private dissolution suits.\textsuperscript{134} Floyd indicated that the House Judiciary Committee did not intend section 16 to authorize individuals, as opposed to the government, to bring dissolution suits.\textsuperscript{135}

The context of the Floyd-Untermeyer exchange undermines the significance of Representative Floyd's assertion that the committee did not intend to give the individual litigant the power to seek dissolution of a corporation.\textsuperscript{136} At the time Floyd responded to Untermeyer, public hearings had been in session less than a week.\textsuperscript{137} The hearings continued for some weeks, during which committee members repeatedly sought the opinion of other invitees on the question whether private litigants should be permitted to obtain the dissolution of an offending corporation.\textsuperscript{138} Despite Rep. Floyd's remarks, therefore, the committee members were probably undecided about the scope of the provision until some time after the public hearings.\textsuperscript{139}

In addition, Rep. Floyd's reply to Untermeyer on February 6, 1914 is remarkably inconsistent with his explanation of the relief authorized by section 16 on October 8.\textsuperscript{140} The February 6 statement was made

\textsuperscript{134.} ITT, 518 F.2d at 922.
\textsuperscript{135.} Hearings on H.R. 15657, 63d Cong., 2d Sess. 842 (February 6, 1914). See also ITT, 518 F.2d at 922; Arco Caribbean, 754 F.2d at 425-26.
\textsuperscript{136.} Arco Caribbean, 754 F.2d at 426.
\textsuperscript{137.} Id.
\textsuperscript{138.} Id.
\textsuperscript{139.} See, e.g., H.R. Rep. No. 15657, 63d Cong., 2d Sess. 492 (1914); id. at 666; id. at 1049-53; id. at 1183. See also Arco Caribbean, 754 F.2d at 404.

Our belief that Representative Floyd's comments cannot be taken as stating a Judiciary Committee intention regarding the scope of § 16 is supported by an exchange between Representative Floyd and a later witness. Floyd stated during the hearings on February 27, 1914, in reference to another proposed section "the purpose of these provisions as tentatively drafted . . . ." The next witness that day then begins his comments by referring to that clarification and stating, 'but as that point has been disposed by the committee . . . it is unnecessary to discuss that phase.' Representative Floyd responded: 'I think it has not been disposed of, Mr. Harlan. There are 21 members of this Committee, and matters are not so easily disposed of. I simply made an explanation as one member of the subcommittee that had prepared the bill, as to my view of it. I would be very glad . . . if you would state your views. . . .

Arco Caribbean, 754 F.2d at 426, n.25 (quoting H.R. Rep. No. 15657, 63d Cong. 2d Sess. 1049-53 (1914). The First Circuit concluded that Representative Floyd's remarks were insufficiently reliable to entitle a court to consider them in construing section 16. Arco Caribbean, 754 F.2d at 426. See also New England Power Co. v. New Hampshire, 455 U.S. 331, 342 (1982) ("Reliance on such isolated statements of legislative history in defining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously'" (quoting Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 26 (1977))).

140. See supra note 127 and accompanying text. The latter statement by Congressman Floyd should supersede his former comment, since committee hearings are entitled to less
in the early stages of the legislative development of section 16, while his later statement occurred after the final bill had been prepared by the conference committee. Congressman Floyd’s October 8 statement thus more accurately reflects the final intention of Congress.

Finally, even if the Floyd-Untermeyer exchange does credibly indicate Congressional intent, Rep. Floyd was only opposed to granting an individual the power to sue for “dissolution” of an illegal combination. The reply is significant only if Floyd intended “dissolution” to encompass divestiture. Some members of Congress equated “dissolution” with the complete termination of an offending corporation, a remedy entirely different from divestiture. If Rep. Floyd used the term in this way, his statement does not establish an intent to prevent the private litigant from seeking divestiture. Therefore, the Floyd-Untermeyer exchange is at best an ambiguous expression of Congressional intent to prohibit the individual from obtaining divestiture. The committee hearings do not clearly demonstrate legislative intent to limit the scope of the “injunctive relief” available under section 16.

Both the purpose of section 16 to provide a remedy to persons under the antitrust laws and the broad language incorporated into the statute strongly suggest Congressional intent to allow the individual to obtain divestiture. This conclusion is reinforced by the absence of a clear legislative intent to exclude divestiture in the recorded proceedings on the statutory enactment of the bill. Therefore, the remedy of divestiture should be available to the individual. Several practical considerations, however, affect the matter of permitting private divestiture actions.

weight than remarks made by the sponsor of a bill on the floor of the House or Senate. See Arco Caribbean, 754 F.2d at 425.
141. Arco Caribbean, 754 F.2d at 426.
142. See supra notes 125 through 131 and accompanying text.
143. Arco Caribbean, 754 F.2d at 426.
144. See supra note 109 and accompanying text (text of House Minority Report).
145. Arco Caribbean, 754 F.2d at 426. “As divestiture of an acquisition can be so different in degree of impact on a combination as to amount to a difference in kind, we cannot hold [Congressman Floyd's] remarks to indicate a proscription of divestiture.” Id. But cf. ITT, 518 F.2d at 922. “We believe the circumstantial evidence indicates that by disallowing private suits for ‘dissolution’ Congress also disallowed private ‘divestiture’ suits.” Id. On the other hand, if Representative Floyd understood dissolution as including divestitive, then on February 6 the history would indicate that the committee intended to exclude divestiture from section 16 injunctive relief. Id.
146. Arco Caribbean, 754 F.2d at 428.
147. See supra note 35 and accompanying text.
148. See supra note 4 and accompanying text (text of §16).
149. See Peacock, supra note 6, at 77.
POLICY CONSIDERATIONS

A. Policies Against Divestiture

The historical reluctance of the courts to construe section 16 of the Clayton Act as permitting divestiture may be due to the policy arguments against divestiture as a remedy to private litigants. One policy argument against the use of divestiture in private actions is that a misuse of divestiture could harshly affect the defendant.150 The possibility that divestiture could be misused simply raises the question of when the court should award the remedy.151 This concern should

In sum, courts were recoiling instinctively from a rule that might require them to preside over the dismemberment of large corporations at the suit of comparatively insignificant parties; in such cases the risk of harm far outweighed the possibility of private benefit. The argument against authorizing private parties to sue for and obtain divestiture is, then, purely a policy argument, and it must be approached as such.

Id. 150. See Peacock, supra note 6, at 78; Note, Availability of Divestiture, supra note 7, at 267. For example, a corporation may be forced to split up assets and management and to sell the acquired stock with detrimental tax and price consequences. The rights of the stockholders inevitably are affected by divestiture yet shareholders may later discover divestiture was unnecessary to restore competition. Id.

151. See Peacock, supra note 6, at 78. Arnett v. Gerber Scientific, Inc., 566 F.Supp. 1270 (S.D.N.Y. 1983). “Dismissal of plaintiff’s claim under Clayton 7 [sic] on the ground that rescission and divestiture are not available would be to rule as a matter of law that no other form of injunctive relief would be appropriate . . . . Selection of an appropriate remedy, if any, must await full development of the facts.” Id. at 1274. Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 669 F.2d 490 (7th Cir. 1982). “We need not decide today, however, whether divestiture is ever available. We hold only that the district court did not err in refusing to award divestiture in this case.” Id. at 496; Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d. 989 (5th Cir. 1973), 358 F.Supp. 780 (S.D. Texas 1971). “Divestiture, being the severe measure that it is, should be avoided when other forms of injunctive relief can adequately protect against the ‘threatened injury’ within section 16.” Id. at 798; Julius M. Ames Co. v. Bostitch, Inc., 240 F.Supp. 521 (S.D.N.Y. 1965). “Divestiture is a form of injunctive relief. It may or may not be appropriate, depending upon the circumstances.” Id. at 526. See also Brief for the United States as Amicus Curiae at 17, Calnetics v. Volkswagen of America, Civil Nos. 73-1953, 73-1958 (9th Cir., filed 1973) (the Department of Justice noted that a court may assume divestiture is appropriate in section 7 cases, unless there is a showing to the contrary, since the Supreme Court has indicated divestiture is a natural remedy for such violations). Additionally, the consequences of divestiture may be reduced since courts have great flexibility in ordering injunctive relief and can shape divestiture decrees accordingly; Note, The Use Of Divestiture, supra note 7, at 284.

Interests which are threatened by divestiture may be protected by the careful framing of an order, which is ‘ . . . capable of nice adjustment and reconciliation between the public interest and private needs . . . .’ For example, the extent and timing of divestiture can be adjusted to suit particular situations. Detailed supplementary injunctions can be issued to ensure the viability of the divested concern, which will in turn protect shareholders, employees, and consumers. (citations omitted)

Id. See generally Comment, Private Divestiture, supra note 3, at 601 (remarking that even if the Supreme Court approves of divestiture in private actions, courts will nevertheless decree
not determine the issue of whether or not such relief is permitted by section 16. Additionally, the danger of misusing divestiture is no greater when an individual is a plaintiff rather than the government since a grant of divestiture is always left to the sound discretion of the court and subject to the same equitable principles.

Another consideration against divestiture is that a private litigant should not be able to obtain such a powerful remedy. The argument is that if the violation is so serious as to require divestiture, the government would have initiated the antitrust suit. This argument presupposes that the government has both the ability and desire to litigate every antitrust violation in which divestiture may be appropriate. Limited resources force the government to prosecute only the most severe violations. Moreover, while the government is successful in proving antitrust violations, the government generally fails to obtain meaningful relief in antimerger cases. Finally, the argument that government can adequately protect individual competitors ignores the fact that one of the purposes of enacting the Clayton Act was to provide individuals with an effective remedy for anticompetitive acts and to encourage private plaintiffs to enforce the antitrust laws.

Another objection against private divestiture suits is that a flood of litigation designed to harass competitors would result. The

the remedy infrequently because the private litigant lacks impartiality and the breadth of information the government agencies possess.) A further factor that suggests the courts will use divestiture sparingly is the tremendous amount of administration required by the court a divestiture decree. Rogowsky, supra note 27.

152. See Peacock, supra note 6, at 77-78.
153. See id. at 78.
154. See id. at 80-81; Note, Availability of Divestiture, supra note 7, at 272. See also supra notes 33 through 35 and accompanying text.
155. See Peacock, supra note 6, at 80-81; Note, Availability of Divestiture, supra note 7, at 272. See also supra note 34 and accompanying text.
156. See Rogowsky, supra note 27, at 188-216. The article indicates that the relief obtained by the government in section 7 actions is a failure and when timeliness of the relief is considered as a variable, the record of the government in achieving relief is a complete failure. Id. at 216. The results of this study demonstrate that the bundle of assets ordered divested usually is substantially less than was acquired and inadequate to undo the perceived anticompetitive effect. Id. at 202. In several instances no assets were ordered divested, at all. Id. at 209. Moreover, nearly 75% of the orders were obtained more than four years after the acquisition and divestiture agreements reached more than two years after the order. Id.
157. See Note, Availability of Divestiture, supra note 7, at 274-75; Note, The Use of Divestiture, supra note 7, at 263 n.17. See supra notes 35 and 36 and accompanying text.
159. See Note, Availability of Divestiture, supra note 7, at 281; Comment, Private Divestitures, supra note 3, at 602.
argument, however, applies equally to suits for treble damages and injunctive relief. Additionally, the cost of attorney fees acts as a deterrent to nonmeritorious litigation. Further, the threat of a malicious prosecution suit should also act to deter any potentially unscrupulous plaintiff. Finally, the courts have decided that the threat of frivolous litigation is an insufficient basis upon which to deny a legitimate remedy. This reasoning should apply to private antitrust litigation as well.

An additional possibility militating against private divestiture is that awarding an individual divestiture extinguishes any benefits which may accrue to similarly situated competitors. In this instance, like competitors are affected differently by the antitrust violation. To remedy the apprehension of one competitor obtaining divestiture to the disadvantage of other related competitors and to ensure that other private and public interests are presented to the court, a few measures are available. First, the Federal Rules of Civil Procedure provide for joinder and intervention. A court, in addition, could grant leave to interested parties to file amici curiae briefs. Furthermore, if a business practice is made illegal by the antitrust laws it should be restrained, even though some competitors may benefit from the actions of an unscrupulous business. Finally, individual

160. See Note, Availability of Divestiture, supra note 7, at 281.
161. "[T]he availability of [attorney] fees under section 16 is unclear. There are arguments for allowing fees when injunctive remedies are in the public good, therefore [sic] the courts should be open to all claimants, without the deterrent of huge legal expenses. On the other hand, it may be argued that the cost of litigation would serve as a control on the flood of litigation that might otherwise occur." Comment, Private Divestiture, supra note 3, at 602.
162. Id. at 602. A wholly frivolous claim is insufficient to state a cause of action under the antitrust laws. Radovich v. National Football League, 352 U.S. 445 (1957). However, a complaint under the antitrust laws need not be set forth with the particularity of an indictment. Monarch Tobacco Works v. American Tobacco Co. 165 F. 774 (1908).
163. See Comment, Private Divestitures, supra note 3, at 602.
164. Id.
165. Id. at 603.
169. See Comment, Private Divestiture, supra note 3, at 603.
interests are more likely to be neglected when the government prosecutes to divest an unlawful merger, since an individual does not have a right to intervene. Therefore, a number of safeguards are available to the courts to ensure the protection of other related competitors.

A final pragmatic concern against private divestiture is the conflict that may develop between the government and private parties. To illustrate, a private divestiture suit might be initiated against an offending corporation which had obtained a consent decree from the government permitting the combination in question. Any conflict between the individual and the government may be resolved in the discretion of the court. The court is free to balance the equities should a government consent decree be in effect. A court could consider factors such as changed circumstances from the time the decree permitting the offending corporation was issued, the effect of the combination on the competition within the field of enterprise, and the degree to which the consent agreement benefits the public interest, when balancing the equities.

170. Id.

172. Comment, Private Divestiture, supra note 3, at 602; Note, The Use Of Divestiture, supra note 7, at 285.

173. Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942); United States v. Swift & Co., 286 U.S. 106, 114 (1932). "Clearly, the government is not forever bound by its consent decrees, and may bring action to have such decrees reformed as made necessary by changing conditions and circumstances." Id. See also ABA Section of Antitrust Laws, Antitrust Developments 1955-1968 at 239 (1968) (a consent decree is binding only on those parties present in the proceeding in which the decree was entered); Sam Fox Pub. Co. v. United States, 366 U.S. 683 (1961) A person whose private interests coincide with the public interest in government antitrust litigation is not bound by such litigation and hence may not as of right intervene in the government action. Id. at 689. Private and public actions were designed to be cumulative, not mutually exclusive. Id.


175. Comment, Private Divestiture, supra note 3, at 662; Note, The Use Of Divestiture, supra note 7, at 285.
Alternatively, courts might formulate a rule that makes a valid consent decree prima facie evidence of legality only upon a showing of mistake by the government in issuing the decree.\textsuperscript{176} On the other hand, the courts, in the spirit of judicial efficiency, may desire to adopt a rule prohibiting per se private divestiture where a government consent decree is already in force. A per se limitation on private divestiture actions subsequent to a government consent decree does not support the position that all private divestiture suits are impracticable. Rather, a per se limitation presupposes only that rights of the individual should be subordinated to those of the government. In sum, many of the policy arguments against allowing private litigants to obtain divestiture simply do not withstand logical analysis. In addition, the availability of divestiture in private actions is supported by a number of policy considerations.

\textbf{B. Policies In Support Of Divestiture}

Policies favoring the remedy of divestiture in private antitrust suits outweigh the practical concerns against the use of divestiture. One sound policy reason for private divestiture is that courts should have the power to dismantle an illegal combination that the courts could have prevented from forming in the first place.\textsuperscript{177} The Supreme Court has noted that divestiture does not add to the sanctions imposed by the antitrust laws.\textsuperscript{178} Rather, the aim of divestiture is to undo what could have been prevented, namely, mergers in restraint of trade.\textsuperscript{179} A rule against divestiture effectively permits antitrust violations that are executed rapidly. The offender may benefit more by retaining the illegal organization than is lost through treble damages.\textsuperscript{180} Consequently, denying divestiture to private litigants could frustrate the purpose of the antitrust laws.\textsuperscript{181}

\begin{flushleft}
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{See Peacock, supra} note 6, at 81.
\textsuperscript{178} Schine Chine Theatres v. United States, 334 U.S. 110 (1948).
\textsuperscript{179} \textit{See Schine Chine Theatres, 334 U.S. at 110.}
\textsuperscript{180} \textit{See Peacock, supra} note 6, at 81; \textit{See also} CIA Petrolera Caribe, Inc. v. Arco Caribbean, 754 F.2d 404, 430 (1st Cir. 1985). A competitor may profit by violating the antitrust laws despite the possibility of a treble damage penalty, since lucrative illegal acquisitions may be retained.
\textsuperscript{181} \textit{See supra} notes 35 through 36 and accompanying text.
\end{flushleft}
The most important policy consideration in support of divestiture is that there may be no other remedy that can afford adequate relief to the private plaintiff.\textsuperscript{182} In the Ninth Circuit, where divestiture orders are prohibited,\textsuperscript{183} the only relief available to the private plaintiff is an award of treble damages.\textsuperscript{184} For a competitor that desires to remain in business treble damages amount to no relief at all, since an adversary, by voting the acquired shares, can affect business decisions and probably obtain representation on the board of directors. In a takeover situation, the Ninth Circuit would even compel the plaintiff to pay the antitrust violator dividends on the illegally acquired stock.\textsuperscript{185}

Divestiture in private actions, in addition to providing relief to litigants, benefits the public by restoring a competitive product line in the affected market.\textsuperscript{186} Treble damages, to the extent the illegal acquisitions are retained by the offender, do not restore market conditions to the same degree as a divestiture order.\textsuperscript{187} Since the government cannot prosecute every antitrust violation,\textsuperscript{188} the deterrent effect of the antitrust laws would be enhanced by making divestiture a potential remedy to private parties.\textsuperscript{189} A final benefit of divestiture

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182. See Comment, Private Divestiture, supra note 3, at 598. See generally Rogowsky, supra note 28; Adams and Heimforth, The Effect Of Conglomerate Mergers On Changes In Industry Concentration, 31 Antitrust Bull. 133 (1986).

183. Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 518 F.2d 913, 924 (9th Cir. 1975). In jurisdictions permitting restrictions on stock that aim to neutralize the anticompetitive effect of the acquisition, bare equity ownership of the stock is inconsistent with the objectives of the antitrust laws. See supra note 30 and accompanying text.

184. The deterrent effect of treble damages without the threat of divestiture is minimal. A corporation that expects to earn substantial profits through an illegal merger may find the integration profitable despite a damage award, since the corporation may retain the acquired stock and conceivably the amount of profits earned could exceed the amount of damages. But the remedies of divestiture and treble damage awards together have a very real deterrent effect. An offending corporation will face paying out monetary damages and relinquishing control of the illegal acquired stocks or assets. See Comment, Private Divestitures, supra note 3, at p. 598-99.

185. \textit{ITT}, 518 F.2d at 924 (prohibiting attempts at achieving divestiture indirectly).

186. See Comment, Private Divestiture, supra note 3, at 598.

187. \textit{Id}.

188. \textit{Id}. See also supra notes 32 through 34 and accompanying text.

189. Comment, Private Divestiture, supra note 3, at 598.

190. There also remains the deterrent effect of treble-damage actions, which plays directly upon the divestiture deterrent. Consider, for example, the case in which a corporation acquires a subsidiary through which it expects a high degree of profit. The threat of divestiture may be considered and dismissed on the ground that the excessive time lag between intiation of the claim, either by the Government or private party, and the final decree will provide ample time for the accrual of profits that will far outweigh the costs of litigation. However, the threat of large monetary damages may take the profit motive out of the 'get away with it as long as you can' rationale. \textit{Id}. at 598-99.
in private antitrust suits is that allowing divestiture would reduce the large amount of litigation caused by government injunctive actions and multiple private treble damage suits.190 The amount of litigation could be reduced since a private litigant, the first to initiate an antitrust action against the questioned business practice, may obtain a divestiture order, thereby terminating any further injury to other related competitors and eliminating the need for the government to sue for divestiture in cases of severe violations.191

Policy arguments against divestiture are insufficient to justify limiting the scope of "injunctive relief" available under section 16 to exclude the remedy of divestiture.192 Furthermore, the policy arguments in support of divestiture as an available remedy to private litigants would promote three advantageous results. First, equity would be effectuated; second, competitive economic conditions would be strengthened; and, third, administrative costs and tasks would be reduced. Policy considerations, therefore, dictate a need to allow divestiture as an available remedy under section 16.

CONCLUSION

By enacting the Sherman and Clayton Acts, Congress established the policy that free competition is the goal of the economy. By enacting section 16 of the Clayton Act, Congress intended to provide individual victims of antitrust violations with an equitable remedy and to encourage their participation in the enforcement of the antitrust laws. Until recent years, however, section 16 had been narrowly interpreted by the courts so as to prohibit the effective remedy of divestiture. The availability of divestiture as a remedy to private litigants is both legally and practically justified. Significantly, no limitations or restrictions on the equitable powers of the courts are expressed within the statutory language of section 16. Moreover, the legislative history of section 16 does not indicate a clear Congressional intention to limit or restrict the "injunctive relief" authorized by the section. Strong policy objectives also support the availability of divestiture as a remedy in antitrust suits initiated by private litigants.

190. Comment, Private Divestiture, supra note 3, at 600.
191. Of course, several actions may still be required in instances where more than one competitor has become injured before the divestiture of the anticompetitive merger. Treble damage actions are evaluated on the basis of the individual damage of respective competitors. Comment, Private Divestitures, supra note 3, at 600.
192. See supra notes 151 through 176 and accompanying text.
Divestiture should be viewed as a potential remedy provided within the "injunctive relief" authorized by section 16 of the Clayton Act.

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