Volume 41 | Number 1

1-1-1966

Private Action for Treble Damages under Clayton Act Section 7

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Justice Traynor indicated, a "defect may be variously defined; as yet no definition has been formulated which will resolve all cases."[42] Future cases dealing with defective houses will be faced with establishing criteria for defining a defect. These criteria will probably vary with different fact situations. The only criterion that can be relied upon from the opinion in the principal case is that the builder will not be held to a requirement of perfection. Although it is not yet certain what will be the basis for strict liability, there can be little doubt that strict liability will soon permeate realty as well as products liability.

PRIVATE ACTION FOR TREBLE DAMAGES UNDER CLAYTON ACT SECTION 7

Plaintiffs, corporate distributors, sought treble damages under section 4 of the Clayton Act,[1] alleging that defendant's acquisition of a manufacturer for which plaintiffs were distributors violated section 7 of the Clayton Act[2] and that plaintiffs were damaged by defendant's termination of plaintiffs' distributorship contracts pursuant to the acquisition. Defendant moved to dismiss, contending that there could be no action for damages under section 4 based upon a section 7 violation, as a section 4 recovery is predicated upon an *existing* illegal monopoly, which is not prohibited by section 7.[3] The United States District Court for the Southern District of New York denied defendant's

[42] Traynor, *supra* note 40, at 367.

[1] 38 Stat. 730 (1914), 15 U.S.C. § 15 (1964):

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[2] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964):

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[3] The original § 7 made corporate stock acquisitions illegal when the effect would be to substantially lessen competition "between" the acquired and the acquiring corporations, or to "create a monopoly in any line of commerce." 38 Stat. 730 (1914). Despite the hopes of its designers, the United States Supreme Court quickly rendered it nugatory. This was largely due to Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934) (holding that § 7 applied only to stock, and not to asset, acquisitions), and International Shoe Co. v. FTC, 280 U.S. 291 (1930) (holding that a charge of substantial lessening of competition must be based upon a showing that the acquired and the acquiring corporation substantially competed *with one another* prior to the merger). Several unsuccessful attempts were made to eliminate these restrictions, *e.g.*, Temporary National Economic Comm., *Final Report and Recommendations*, S. Doc. No. 35, 77th Cong., 1st Sess. 38-40 (1941); Note, 57 YALE L.J. 613, 621-27 (1948). The Celler-

motion and *held:* A treble damage action may be maintained by the distributor of a manufacturer who was acquired in violation of section 7 of the Clayton Act. *Julius M. Ames Co. v. Bostitch, Inc.,* 240 F. Supp. 521 (S.D.N.Y. 1965).[4]

While the Sherman Act[5] deals with consummated restraints, the Clayton Act seeks to reach monopolies in their incipiency,[6] providing in section 7 that mergers and acquisitions are illegal when their effect may be substantially to lessen competition, or to tend to create a monopoly. Section 4 of the Clayton Act gives private parties injured by any antitrust violation the right to treble damages. However, a right to treble damages for a section 7 violation had been denied in three prior cases,[7] and was recognized for the first time in *Bostitch.*

In finding a right to damages for a section 7 violation, the court in *Bostitch* noted that section 4 of the Clayton Act provides that anyone injured by reason of anything forbidden in the antitrust laws may sue for treble damages. Since the Clayton Act is an antitrust law, "log-

Kefauver Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), which amended 38 Stat. 730, added asset acquisition to the list of prohibitions, and broadened the standard of illegality, thereby rendering § 7 more viable. See, *e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 323-46 (1962); ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 115-17 (1955); Handler & Robinson, *A Decade of Administration of the Celler-Kafauver Antimerger Act,* 61 COLUM. L. REV. 629 (1961). For legislative history of the 1950 amendment, see Brown Shoe Co. v. United States, *supra* at 311-23; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 233-38 (1960). For a complete history of § 7, see generally MARTIN, MERGERS AND THE CLAYTON ACT (1959).

4 53 GEO. L.J. 1133; 79 HARV. L. REV. 445. Plaintiffs also alleged a violation of the Sherman Act § 1. The court found triable issues of fact and denied defendant's motion for summary judgment on that count. 240 F. Supp. at 528. In addition to damages, plaintiffs sought a decree of divestiture. Defendant maintained that a private party may not secure such a decree. The court held that a decree of divestiture is a form of injunctive relief available to private parties under Clayton Act § 16. 240 F. Supp. at 526.

5 Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

6 See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957). The purpose of the bill was stated by the Senate Judiciary Committee as follows, S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914):

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.

Congress reiterated this view when § 7 was amended in 1950, S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950):

> The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.

7 Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964), *reversing* 221 F. Supp. 15 (E. D. Mo. 1963); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964); Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D.N.Y. 1963), *motion for leave to appeal denied,* (unreported) (2d Cir.), *cert. denied,* 379 U.S. 882 (1964).

ically, it follows inevitably that a person injured by reason of anything forbidden in the Clayton Act may sue for treble damages."[8] The court distinguished earlier cases on the ground that those plaintiffs had demonstrated no present injury, whereas plaintiffs in the principal case were presently injured by loss of their distributorships. However, the court did not consider the consequences of extending treble damage actions to the potential restraints proscribed by section 7, or the effect upon expanded liability.

The first case to deny the possibility of compensable damages for a section 7 violation was *Gottesman v. General Motors Corp.*,[9] in which minority shareholders of General Motors brought a derivative action for damages sustained through du Pont's illegal acquisition of General Motors stock.[10] Concluding that "plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization,"[11] the court held that no right to damages accrues from a section 7 violation. *Highland Supply Corp. v. Reynolds Metals Co.*,[12] in which recovery was sought for injury caused by a competitor's acquisition of a manufacturer, approved *Gottesman* in dictum. *Bailey's Bakery, Ltd. v. Continental Baking Co.*,[13] in dismissing an action for damages allegedly sustained through defendant's acquisition of plaintiff's competitor in violation of Clayton section 7, provided *Gottesman* with its most cogent rationale:

> Since Clayton § 7 is concerned with the future monopolistic and restraining tendencies of corporate acquisition, i.e., probable (and hence not certain) future restraints on commerce, any damages claimed for prospective restraint of trade would be purely speculative, and a plaintiff cannot recover money damages for anticipated but unimplemented acts of restraint which may invade its interests.[14]

In rejecting this line of cases, the court in the principal case relied solely upon the integrity of its reasoning. This decision was technically correct—and dispositive of the issue—since, given an actual violation of section 7, plaintiffs are clearly injured by reason of "something" for-

[8] 240 F. Supp. at 523.

[9] 221 F. Supp. 488 (S.D.N.Y. 1963), *motion for leave to appeal denied*, (unreported) (2d Cir.), *cert. denied*, 379 U.S. 882 (1964), 64 COLUM. L. REV. 597. For a summation of the legislative history and statutory interpretations pertaining to the right to damages for a § 7 violation, see 64 COLUM. L. REV. 597, 598-99 (1964).

[10] The du Pont acquisition was condemned in United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957). See Dirlam & Stelzer, *The Du Pont-General Motors Decision: in the Antitrust Grain*, 58 COLUM. L. REV. 24 (1958); Note, YALE L. J. 1251 (1957); 71 HARV. L. REV. 165 (1957).

[11] 221 F. Supp. at 493.

[12] 327 F.2d 725 (8th Cir. 1964), *reversing* 221 F. Supp. 15 (E.D. Mo. 1963).

[13] 235 F. Supp. 705 (D. Hawaii 1964).

[14] *Id.* at 717.

bidden in the antitrust laws. But the "thing forbidden" by section 7 is a present tendency towards a future-arising substantive evil, and the reasoning precludes consideration of the difference between the thing forbidden and the intrinsically potential nature of the thing itself.

In view of the increasingly broad judicial interpretation of antitrust laws in recent years, this difference may be something of a mirage. Nevertheless, the central issue in the principal case is sufficiently important to warrant an articulate development of both the nature of substantive offenses under section 7, and the relationship of this decision to other related holdings. Although a "public injury" is no longer needed to support a claim for damages,[15] and effectuation of the restraint (the preparatory stages of which are forbidden by section 7) may well require considerably more than the individual injury to plaintiffs, consideration of the nature and extent of the section 7 violation seems unavoidable. This is particularly true if the quantitative substantiality test[16] is utilized, by which a plaintiff is required to show, without more, that the acquired firm handled a substantial share[17] of the relevant market.

It is unfortunate that the court in the principal case failed to expound on what it would consider sufficient as a substantive violation, standing alone.[18] Despite the amenability of the result to strict statutory construction, it is questionable whether the laws were ultimately intended to invoke section 4 remedies simply by combination of individual present injury with a defined violation whose existence is still assumed to rest upon mere predictive likelihood of future restraint.

Notwithstanding these considerations, the United States Supreme Court has "not disapproved" of the result in the principal case. In

[15] This is at least true with reference to the Sherman Act. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), 73 HARV. L. REV. 200 (1959), 57 MICH. L. REV. 1244 (1959), 68 YALE L.J. 949 (1959).

[16] This test derives from the so-called *Standard Stations Case*, Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949), which enjoined the enforcement of contract clauses binding defendant's distributors to purchase all requirements of certain goods from a given purchaser, on the ground that the clauses violated § 3 of the Clayton Act. Section 3 provides that tying agreements and requirements contracts are illegal when the effect of the particular arrangement ". . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Since this language is virtually identical to that of § 7, it is reasonable to assume that any holding applicable to the former will be applicable to the latter.

[17] *Cf. Standard Stations Case, supra* note 16, in which only 6.7% of the taxable gallonage of gasoline sold in the relevant market was subject to the exclusive dealing contracts.

[18] Consider, for example, whether parties such as plaintiffs in the principal case would have an action for damages if the FTC, through a preliminary injunction, had restrained all control over the acquired corporation immediately after the cancellation of plaintiffs' contracts.

Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.,[19] plaintiff brought a treble damage action alleging violations of section 7 of the Clayton Act and sections 1 and 2 of the Sherman Act arising out of defendant's corporate acquisition. The lower court, dealing primarily with a statute of limitations problem, assumed the existence of the right to damages for a section 7 violation. Upon appeal to the Supreme Court, defendant not only raised the specific issue decided in *Bostitch*,[20] but also referred to the *Bostitch* opinion:

> The unanimity of these cases [*Gottesman, Highland Supply, Bailey's Bakery*] is, however, somewhat counterbalanced by *Ames v. Bostich* [*sic*]. . . . That case, however, clearly errs in purporting to draw authority from the decision below.[21]

The Supreme Court dealt with the limitations problem only, and did not discuss *Bostitch*. Other Supreme Court decisions, however, express a policy of effectuating antitrust statutes to the fullest extent permissible by their language,[22] implying concurrence with the result in the principal case.

If treble damage claims are to be generally recognized for section 7 violations, potential liability for illegal corporate acquisition is significantly increased, and a question is raised regarding the extent of the class of potential plaintiffs. As in any judicial balancing of interests, protection of injured parties should not be so covetous as to detrimentally curtail beneficial corporate acquisition.

Basically, two interpretations of standing to recover treble damages under section 4 have evolved. There is some authority, mostly older and all in lower courts, for what is sometimes called a "competitor" theory, under which only a competitor of the antitrust violator can have standing to recover treble damages.[23] A second theory, termed the

[19] 381 U.S. 311 (1965), *affirming* 332 F.2d 346 (3d Cir. 1964).

[20] Brief for Petitioner-Defendant, pp. 75-76, Reply Brief for Petitioner-Defendant, p. 18.

[21] Reply Brief for Petitioner-Defendant, p. 18.

[22] See text accompanying note 28, *infra*.

[23] See, *e.g.*, Rossi v. McCloskey & Co., 149 F. Supp. 638, 640 (E.D. Penn. 1957), an action for damages by employees against their employer for his illegal antitrust activities:

> The plaintiffs are not competitors in the excavation business . . . being monopolized, and any injury they may have suffered from the asserted suppression of competition was wholly incidental thereto. Injury which is merely a collateral effect of illegal restraint upon competition is not compensable under the antitrust laws.

Compare Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), where the court said:

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

"target" theory, is that anyone who is a target of illegal antitrust activity can be injured; thus, anyone who is "aimed at" and "hit" may recover, regardless of his competitive relationship to the antitrust violator.[24] Although recent decisions in the lower courts have favored the target theory, the Supreme Court has intimated that even that test is too restrictive for section 4. In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[25] the Court allowed growers of beet sugar to recover from their purchasers, rejecting the defense that plaintiff was not a competitor:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. . . . The act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. . . .[26]

Mandeville laid the foundation for the Court's analysis of section 4 in *Radovich v. National Football League*,[27] in which a player was held to have standing to recover for the anticompetitive activities of defendant, which allegedly prevented plaintiff from obtaining a job within

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See also Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962) (supplier cannot recover from customer's competitor); Melrose Realty Co. v. Loew's Inc., 234 F.2d 518 (3d Cir. 1956), *cert. denied*, 352 U.S. 890 (1956) (landlord cannot recover from tenant's competitor); Productive Inventions Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) (patentee cannot recover from licensee's competitor); Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929) (shareholder cannot recover from corporation's competitor).

[24] See, *e.g.*, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955), allowing a manufacturer to recover from a producer:

> . . . [C]oncerning the "target area" . . . the rule is that . . . the bystander who was hit but not aimed at, cannot recover against the violator.

See also Simpson v. Union Oil Co. of Calif. 377 U.S. 13 (1964) (*semble*) (consignee can recover from consignor); Radovich v. National Football League, 352 U.S. 445 (1957) (player can recover from league); Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251 (1946) (by implication) (theater operator recovered from distributors); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957) (lessor); Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942) (sales agent). See generally TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 4.03 (1963); BNA ANTITRUST & TRADE REG. REP., B-1, B-4 (Dec. 17, 1963), which defined the target theory as follows:

> . . . [C]laimant's loss entitles him to treble damages only if he or his business activity was one of the economic factors the antitrust violation was intended to eliminate or counteract. . . .

This statement may well be true only if the "intention" factor is taken with a broadened connotation encompassing all direct and advertent consequences of the violation, since the cited cases make it very doubtful that any element of malicious or predatory behavior is needed. Indeed, in *Bostitch* there is no indication that plantiffs' distributorships were terminated for any reason other than anticipated efficiencies in distribution growing out of vertical aspects of the acquisition.

[25] 334 U.S. 219 (1947). See Barnard & Zlinkoff, *Patents, Procedure and the Sherman Act—The Supreme Court and a Competitive Economy, 1947 Term*, 17 GEO. WASH. L. REV. 1 (1948).

[26] 334 U.S. at 236 (dictum).

[27] 352 U.S. 445 (1957), 57 COLUM. L. REV. 725 (1957), 71 HARV. L. REV. 170 (1957), 105 U. PA. L. REV. 110 (1956).

the United States. Emphasizing the breadth of section 4, the Court declared:

> . . . Congress has . . . provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.[28]

It would be unfortunate if the *Radovich* policy gained general application without some thought given to its effect upon the more putative antitrust provisions, like section 7. Predication of treble damage recovery on the "target" test of liability, while denying literal effect to the provisions of section 4, does effectuate the theoretically cumulative nature of private actions.[29] If used in conjunction with the target test, the result in *Bostitch* would not inordinately promote unlimited liability, stifle business expansion, or create windfalls for persons tangentially suffering losses derivative from corporate acquisition. On the other hand, liberal implementation of the *Radovich* policy might work the opposite effect. Before allowing the courts to inaugurate such a policy, Congress should reconsider such possibilities as (1) discretionary trebling of damages,[30] (2) making compensatory damages more freely available while restricting treble damages to consummated restraints, or (3) restricting treble damages to intentional injuries in the case of unconsummated restraints.

UCC—LIBERAL INTERPRETATION OF FINANCING STATEMENT REQUIREMENTS

Filing requirements under the Connecticut enactment of the Uniform Commercial Code[1] have been construed by two recent decisions

[28] 352 U.S. at 453-54.

[29] The purposes of the private action for damages under § 4 are (1) compensation for injuries caused by violators of the antitrust laws, (2) prevention of violations through fear of cumulative damages, and (3) private assistance to the government in enforcing these laws when proof is difficult for the government acting alone to obtain. See ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 378-80 (1955); MacIntyre, *The Role of the Private Litigant in Enforcement,* 7 Antitrust Bull. 113 (1962); Comment, *Antitrust Enforcement by Private Parties: Analysis of Development in the Treble Damage Suit,* 61 YALE L.J. 1010, 1061-2 (1952).

[30] Discretionary trebling of of damages was recommended by the Attorney General's Committee, but the recommendation was not adopted by Congress. See ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 378-80 (1955).

[1] UNIFORM COMMERCIAL CODE 1962 OFFICIAL TEXT WITH COMMENTS [hereinafter cited as UCC].

Forty-three jurisdictions have enacted the *Uniform Commercial Code:* Ala. Acts 1965, act 549; ALASKA STAT. §§ 45.05.002—.794 (1962); ARK. STAT. ANN. §§ 85-1-101