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would afford ample protection against being forced into unintended arbitration. Third, assuming that the defrauded party has a valid claim of a right to rescind the principal contract and that the arbitrator is competent, it should make no difference if the dispute is resolved by arbitration rather than by the judicial process unless the claimant is forum-shopping or seeking a jury determination.[38] The last three considerations, combined with a public policy in favor of arbitration, outweigh the single assent consideration and require a negative answer to the basic question.

The Second Circuit has apparently chosen the better rule: arbitration provisions are separable and a claim of fraudulent inducement of a contract containing an arbitration clause should be arbitrated regardless of the relief sought unless the arbitration clause was itself fraudulently induced or the arbitration clause was inserted as part of an overall scheme to defraud.

FTC PRELIMINARY RELIEF POWERS UNDER SECTION 7 OF THE CLAYTON ACT

Respondents Dean Foods Company and Bowman Dairy Company, substantial competitors in the sale of packaged milk, planned to merge. Dean was to purchase substantially all of Bowman's assets and Bowman was to cease doing business. The Federal Trade Commission, after issuing a formal complaint under section 7 of the Clayton Act[1] and section 5 of the Federal Trade Commission Act,[2] applied to the Seventh Circuit Court of Appeals for a preliminary injunction to maintain the status quo until the Commission could hold hearings to determine the legality of the merger. Dismissal of the Commission's petition was appealed to the Supreme Court which reversed and *held*: The FTC has the power to seek preliminary injunctions in the courts of

[38] At least one court has rejected what appeared to be a forum-shopping attempt. Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 466-67, 214 N.Y.S.2d 353, 357-58 (1961) (contract allegedly void for lack of mutuality.) Plaintiff apparently argued that because no court would enforce his promise to employ defendant for life, no arbitrator should be given an opportunity to do so. The court rejected the contention, reasoning that by agreeing to arbitrate, plaintiff had agreed to forgo courts in favor of a private judge. By implication the court held that plaintiff had assumed the risk that an arbitrator might resolve a dispute differently from a court.

[1] 64 Stat. 1125 (1950), as amended, 15 U.S.C. § 18 (1964).
[2] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

appeals which, under authority of the All Writs Act[3], may issue orders maintaining the status quo while Commission proceedings are in progress involving probable violations of section 7 of the Clayton Act. *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).

The Clayton Act gives the Department of Justice powers of enforcement concurrent with those of the FTC with respect to mergers and acquisitions.[4] The statute specifically authorizes the Commission to issue cease and desist orders[5] and empowers the Antitrust Division to seek preliminary relief in the district courts.[6] It is silent, however, with respect to the Commission's power to obtain preliminary relief.[7] Effective remedial action is predicated upon arresting a pending merger or acquisition before it progresses to a point where the acquired concern no longer exists, or where the companies involved become so inextricably intertwined that they cannot be restored to their original competitive status.[8] This has prompted most commentators and the FTC to conclude that the Commission cannot effectively enforce section 7 without some provision for preliminary relief in the difficult case.[9] One solution to the problem is congressional action amending the statute to give the Commission explicit authority either to seek the required preliminary relief in an appropriate court or to issue preliminary cease and desist orders in its own right.[10] Such Congressional action has not been forthcoming, however, and the principal case presents a judicial solution.[11]

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[3] 28 U.S.C. § 1651(a) (1964).

[4] *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. 243 (1956) (testimony of Congressman Cellar) [hereinafter cited as *1956 Hearings*]. See FTC v. International Paper Co., 241 F.2d 372, 373 (2d Cir. 1956); KAYSEN & TURNER, ANTITRUST POLICY 246 (1959); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 387 (1964).

[5] 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21(b) (1964).

[6] 38 Stat. 736 (1914), 15 U.S.C. § 25 (1964).

[7] FTC v. International Paper Co., 241 F.2d 372, 373 (2d Cir. 1956); Board of Governors of Fed. Reserve Sys. v. Transamerica Corp., 184 F.2d 311, 315 (9th Cir.), *cert. denied*, 340 U.S. 883 (1950).

[8] See *1956 Hearings* 245; H.R. REP. No. 486, 85th Cong., 1st Sess. 2 (1957); *Hearings before the Antitrust Subcommittee of the Committee on the Judiciary for the House of Representatives*, 87th Cong., 1st Sess. 43 (1961) [hereinafter cited as *1961 Hearings*]; Duke, *Scope of Relief Under Section 7 of the Clayton Act*, 63 COLUM. L. REV. 1192 (1963); Note, 79 HARV. L. REV. 391, 392 (1965); Note, 40 N.Y.U.L. REV. 771 (1965).

[9] See KAYSEN & TURNER, ANTITRUST POLICY 258 (1959); 79 HARV. L. REV. 391, 392-93 (1965); Comment, 32 N.Y.U.L. REV. 1297 (1957); Note, 40 N.Y.U.L. REV. 771 (1965).

[10] *1961 Hearings* 88; *1956 Hearings* 225. See FTC v. Dean Foods Co., 384 U.S. 597, 609 (1966).

[11] Prior judicial responses to this problem conflict. FTC v. International Paper Co., 241 F.2d 372, 373 (2d Cir. 1956):

The majority opinion noted that under the All Writs Act[12] the courts of appeals had not been confined to the issuance of writs in aid of jurisdiction already acquired, but that this power extended to cases prospectively within appellate jurisdiction, though no appeal had been perfected. Prior decisions of the Supreme Court have recognized a limited judicial power to issue writs maintaining the status quo by injunction prior to completion of agency action pending review through the prescribed statutory channels. Thus, the grant of power in section 11(c) of the Clayton Act,[13] giving the courts of appeals exclusive jurisdiction to review final FTC orders, includes the power to issue preliminary injunctions, preserving the status quo and protecting the court's jurisdiction to review final FTC orders. The Commission's capacity to seek these orders was held to be incidental to its main function—enforcing section 7 of the Clayton Act. In the absence of explicit direction from Congress to the contrary, the majority could find no basis for denying an agency charged with protection of the public interest the right to exercise "its inherent standing as a suitor to seek preliminary relief in courts of appropriate jurisdiction."[14]

Mr. Justice Fortas, with whom three justices concurred, dissented:

> This decision cannot be supported. Not a single one of the prior decisions of this court cited as authority sustains it, either specifically or directly, or by principle of analogy.... The plain unmistakable intent of the Congress in defining the Commission's powers and the jurisdiction of the courts of appeals is that no such threshold injunctive power is available at the Commission's behest.[15]

The All Writs Act, according to the dissent, was designed as an implementing statute to effectuate exercise of appellate jurisdiction by

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> These specific provisions as to who may seek injunctive relief, and in what courts, imply that the Commission itself is not authorized to do so. This implication is required by the statutory provisions of 15 U.S.C.A. § 21 under which a court of appeals acquires jurisdiction to review an order of the Commission only after the administrative proceeding has been concluded and a transcript of the record therein filed with the court. [Footnote omitted.]

A prior case involving the power of courts of appeals to issue preliminary orders upon application of the Federal Reserve Board reached a contrary result. Board of Governors of Fed. Reserve Sys. v. Transamerica Corp., 184 F.2d 311 (9th Cir. 1950). That court asserted jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (1964), and its grant of power to protect the exercise of the court's jurisdiction to review Board orders.

[12] 28 U.S.C. § 1651(a) (1964):

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[13] 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21(c) (1964).

[14] 384 U.S. at 608.

[15] *Id.* at 612.

correcting deficiencies in procedure. The act is abused when "contorted to confer jurisdiction where Congress has plainly withheld it."[16]

There is support for the majority's conclusion in the principal case that the All Writs Act includes a grant of judicial power to issue injunctions to preserve the status quo while administrative proceedings are in progress since it prevents impairment of the effective exercise of appellate jurisdiction.[17] The All Writs Act has long been regarded as general authority for appellate court power to issue extraordinary writs for all types of cases,[18] and this authority extends to cases prospectively within appellate jurisdiction even though no appeal has been perfected.[19] In *Arrow Transp. Co. v. Southern Ry. Co.*,[20] the Court reasoned that power to preserve the status quo was merely incidental to jurisdiction for final review, but was not to be recognized in derogation of a clear Congressional intent proscribing judicial intervention. The Court, in *Arrow*, refused to enjoin certain rate changes because the ICC Act specifically prescribes a maximum period for postponement of rate changes while those changes are under consideration by the board.[21]

The primary issue raised by the principal case is one of statutory

[16] *Id.* at 622.

[17] Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963). See Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411 (1965); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942). Because protecting the public interest is of principal concern, no artificial restrictions on a court's power to grant equitable relief in the furtherance of that interest will be allowed. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 924 (D.C. Cir. 1958). *Cf.* West India Fruit & S.S. Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948) (distinguished between preservation of the status quo and intervention in the agency's exercise of its powers). A court of appeals has authority to issue injunctions under FED. R. CIV. P. 62(g) when read with 28 U.S.C. § 1651(a) (1964), and the power should be exercised if otherwise jurisdiction might be ousted and the moving party is a public agency clothed with specific responsibility in the matters involved. Public Util. Comm'n v. Capital Transit Co., 214 F.2d 242, 245-46 (D.C. Cir. 1954).

[18] Whitney Nat'l Bank, *supra* note 17; Arrow Transp. Co., *supra* note 17, at 679 (dissenting opinion of Clark, J.); Scripps-Howard Radio, Inc., *supra* note 17, at 9-10. See Application of President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964); Note, 77 HARV. L. REV. 1539, 1542 (1964). *Cf.* Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 675 (1934). *Contra,* Stell v. Sabannah-Chatham County Bd. of Educ., 318 F.2d 425, 426 (5th Cir. 1963); *Ex parte* Fahey, 332 U.S. 258 (1947).

[19] Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943). See McClellan v. Carland, 217 U.S. 268 (1910); President & Directors of Georgetown College, *supra* note 18. See also FED. R. CIV. P. 62(g) which recognizes the "power of an appellate court or of a judge or justice thereof to ... grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

[20] 372 U.S. 658, 673 (1963).

[21] Mr. Justice Clark, dissenting, would have recognized jurisdiction of the courts of appeals: "A simple grant of jurisdiction to an administrative agency without reference to a long-recognized equity jurisdiction which is not inconsistent therewith is a strange way to dispose of judicial power." 372 U.S. at 679.

interpretation. Does the Clayton Act manifest a clear Congressional intention to prohibit preliminary injunctions in Commission proceedings? If a clear expression akin to that in the ICC statute is required,[22] then the majority is justified in allowing the courts of appeals to issue preliminary writs in FTC proceedings. Literally, the Clayton Act does no more than grant the courts of appeals jurisdiction to review final agency orders. It does not preclude the majority's use of the All Writs Act in the principal case.

It is argued that the result reached in *Dean Foods* will vest courts of appeals with a fact finding function outside their area of competence.[23] Preliminary injunctions in merger cases almost always involve presentation by the parties of a full case and a large amount of evidence.[24] Hearings of this nature, however, are not beyond the competence of the circuit courts. The Clayton Act grants these courts the power to modify final Commission orders.[25] A court that can modify a final order in a complicated merger or acquisition proceeding and, in addition, issue orders *pendente lite*, should be capable of determining the desirability and propriety of a preliminary injunction.[26]

The assertion by the majority that the Federal Trade Commission has standing to seek preliminary orders in the courts of appeals is

[22] When Congress ousts jurisdiction it does so explicitly. See, *e.g.*, INT. REV. CODE OF 1954, § 7421; Norris-La Guardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964).

[23] 384 U.S. at 623 (dissenting opinion of Fortas, J.).

[24] KAYSEN & TURNER, *op. cit. supra* note 4, at 258; *1961 Hearings* 71 (testimony of Hon. L. Lovinger); *id.* at 86 (testimony of Paul Rand Dixon); *1956 Hearings* 248 (testimony of Chairman Gwynne). See United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); United States v. Penick & Ford, Ltd., 242 F. Supp. 518 (D.N.J. 1965).

[25] 73 Stat. 734 (1914), as amended, 15 U.S.C. § 21(c) (1964).

[26] A conclusion to the contrary would require an unrealistic view of the role of these courts, particularly with respect to injunctions. *Compare* United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963), *with* United States v. Penick & Ford, Ltd., 242 F. Supp. 518 (D.N.J. 1965).

Ultimate facts which must be found in order for an injunction to issue in any Clayton Act proceeding are: (1) it is reasonably probable that the FTC will issue a cease and desist order; (2) the preliminary relief sought is necessary to prevent irreparable injury; (3) the injunction will not subject the defendant to unnecessary hardship. Fact finding of this nature is not a function so foreign to courts of appeals that it should warrant a different decision in the principal case. See Public Util. Comm'n v. Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954). Courts of appeals dispose of many applications for injunctions or stays pending appeal, presenting issues no more difficult to determine than those in the principal case. See, *e.g.*, Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Dunn v. Retail Clerks Ass'n, Local 1529, 299 F.2d 873 (6th Cir. 1962) (refused to grant injunction because it would decide the merits of the case).

[27] See, *e.g.*, Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411 (1965) (Federal Reserve Board); Board of Governors of Fed. Reserve Sys. v. Transamerica Corp., 184 F.2d 311 (9th Cir. 1950) (Federal Reserve Board); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) (FCC); Virginia Petroleum Jobbers Ass'n, *supra* note 26 (Federal Power Comm'n).

sound. Agencies have been allowed to seek myriad rulings and orders without express legislative authority.[27] The intent of Congress should control, and with the Clayton Act Congress sought to provide a means by which the FTC and the courts could deal with monopoly in its incipiency, particularly the trend toward monopoly reflected in the increasing number of mergers.[28] The primary concern is preservation of competition,[29] and to this objective the Court properly addressed itself. The dissent pursues a phantom in attempting to infer Congressional intention from the interstices of legislation.[30] Mr. Justice Fortas, dissenting, placed great emphasis on the Clayton Act's detailed enumeration of FTC procedures and its silence with respect to the Commission's power to seek preliminary orders, in contrast to the express grant of such preliminary power to the Attorney General,[31] and to private parties.[32] The result reached in the principal case, however, based as it is on legislative history and analogous precedent, is more rational than the position advocated by the dissent which requires negative implications based on little more than congressional silence.

The result reached in the principal case is essential from the standpoint of antitrust policy. Enforcement by the Antitrust Division has not been sufficient. Apart from congressional intention that the FTC be the primary "guardian of the public interest" in merger proceedings, section 7 of the Clayton Act requires energetic enforcement and no one agency possesses sufficient manpower resources to accomplish the job effectively.[33] Effective enforcement should not depend upon which

[28] See Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177, *aff'd*, 280 F.2d 747 (6th Cir. 1960); S. REP. No. 1775, 81st Cong., 2d Sess. (1950); *1956 Hearings* (testimony of Sen. Sparkman); H.R. REP. No. 486, 85th Cong., 1st Sess. (1957); Note, 40 N.Y.U.L. REV. 771 (1965).

[29] See *1961 Hearings* 42-43 (testimony of Congressman Patman).

[30] "To explain the cause of non-action by Congress when Congress itself shed no light is to venture into speculative unrealities." Helvering v. Hallock, 309 U.S. 106, 119-20 (1940). "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." Blau v. Lehman, 368 U.S. 403, 418 (1962) (Douglas, J., dissenting). See Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-11 (1942); West India Fruit & S.S. Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948).

[31] 38 Stat. 736 (1914), 15 U.S.C. § 25 (1964).

[32] 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964).

[33] See KAYSEN & TURNER, ANTITRUST POLICY 246-48 (1959). For a discussion of the compelling reasons behind the FTC's demand for preliminary relief power see generally Brief for Appellant, pp. 22-35, FTC v. Dean Foods Co., 384 U.S. 597 (1966); MASSEL, COMPETITION & MONOPOLY 321 (1962); *1961 Hearings*; H.R. REP. No. 486, 85th Cong., 1st Sess. (1957); *1956 Hearings*; Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 387 (1964); Comment, 32 N.Y.U.L. REV. 1297 (1957); Note, 40 N.Y.U.L. REV. 771 (1965); Note, 79 HARV. L. REV. 391 (1965).

The dissent notes that the statute appears to provide that the Commission should turn cases requiring preliminary relief over to the Department of Justice. 384 U.S.

agency initiates action, the Commission or the Antitrust Division.[34] It will no longer be possible for parties served with Commission complaints to proceed with planned mergers or acquisitions by means of delaying tactics, causing the acquired concern to disappear as a competitive entity and frustrating hopes of preserving competition.[35]

Although much can be said for the result reached in the principal case, the majority failed to recognize certain problems inherent in its decision. Prolonged preliminary relief is likely to be permanent relief in many cases.[36] Not all mergers, however, are anticompetitive in effect. Because an acquisition or merger will often not survive a temporary injunction, heel dragging enforcement should not be allowed to deprive innocent parties of the economic benefit of their bargain.[37] A preliminary injunction will not expedite enforcement proceedings unless the courts of appeals follow the lead of the seventh circuit and place a time limit on the restraining order.[38] The four month limit imposed in the principal case on remand may not be long enough, however, and the Commission should have the right to an extension if it can show cause.

The experience of the Department of Justice with regard to obtaining preliminary orders illustrates another problem. It is difficult to make the requisite showing of a reasonable probability that the Clayton Act is being violated. Although the district courts have set varying standards, one judge went as far as requiring that the Department establish to a certainty that the defendant was violating the statute.[39] Moreover, the Court's decision in *Dean Foods,* focusing on the need

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at 615. Although this may be true, it does not appear that either agency has developed a means for utilizing the particular skills of the other or that the FTC has called upon the Department more than once. *1961 Hearings* 71. Furthermore, the position taken by the dissent does allow for further development by each agency of areas of expertise. The Commission should be allowed to carry on effectively its own proceedings without turning the case over to the antitrust division and the courts. Brief for Appellant, pp. 32-33, FTC v. Dean Foods Co., 384 U.S. 597 (1966).

[34] *1961 Hearings* 43; *1956 Hearings* 235.

[35] See Note, 79 HARV. L. REV. 391, 392 (1965). The situation is graphically illustrated by Farm Journal, Inc., FTC No. 6388, where the Commission lost its petition to the Third Circuit for a preliminary injunction and, by the time hearings were concluded, the acquired concern no longer existed as an entity and could not be restored to competitive status. See H.R. REP. No. 486, 85th Cong., 1st Sess. 3 (1957).

[36] Note, 79 HARV. L. REV. 391, 393 (1965).

[37] Substantial costs are incurred in arranging complex corporate reorganizations. *Ibid.* See, *e.g.*, Maryland Gas. Co. v. American Gen. Ins. Co., 1964 Trade Cas. ¶ 71, 188 at 79, 725 (D.D.C.) ($485,000); United States v. Standard Oil Co. (Ind.), 1961 Trade Cas. ¶ 70, 131, 78, 522 (N.D. Cal.) ($1,100,000). As cited in Note, 79 HARV. L. REV. 391 (1965).

[38] P. B-3, BNA ATTR No. 267, August 23, 1966 (no opinion filed.).

[39] *Ibid.*

for an effective remedy and protection of the courts of appeals' jurisdiction for review, could lead to a reduction of the requisite showing for obtaining preliminary orders.[40] On remand of the principal case, an injunction was issued on the basis "that it is *reasonably probable* that the purchase agreement . . . between Dean and Bowman *may* ultimately *be* determined by the Federal Trade Commission to be in violation of section 7 of the Clayton Act." (Emphasis added.)[41] It is possible that all the Commission will need to show in future cases is a prospective impairment of effective remedial action, and a possibility of a Clayton Act violation.

Despite the advantages to enforcement of such a reduction of the burden of proof, such a result could subject the complexion of Clayton Act enforcement to radical change. It is not difficult to show that a proposed or pending merger possibly violates the Clayton Act using the tests laid down by the Supreme Court in the recent *Von's Grocery Co.* case.[42] Indeed, a merger or acquisition approaches a per se offense[43] if the acquiring firm possesses more than a minimal share of market power. Ultimately, the reasoning in the principal decision combined with the reasoning in *Von's Grocery Co.* may foreclose chances of legally selling or combining to better compete. Thus, the decision could have a major adverse impact on smaller competitors,[44] those whom the statute arguably was designed to protect.[45]

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[40] The burden of gathering the large amount of evidence necessary for success in obtaining a preliminary injunction is largely responsible for the protracted nature of the proceeding. To expedite the process would require adoption of one of two approaches: revising statutory standards to diminish the quantity of evidence needed and to limit the number of relevant issues; or substantially altering both judicial and administrative enforcement procedures. KAYSEN & TURNER, *op. cit. supra* note 4, at 248.

[41] P. B-3, BNA ATTR No. 267, August 23, 1966.

[42] United States v. Von's Grocery Co., 384 U.S. 270, 277-78 (1966). See Fortune, July 1, 1966, p. 65.

[43] It might be concluded that *Von's Grocery Co.* dealt a death blow to the concept of reasonable probability. "The incipiency doctrine and the test dealing with elimination of substantial competitors have been made presumptions of illegality rather than aids in determining whether there is a 'reasonable probability' of adverse effects on competition." Note, 41 ST. JOHN'S L. REV. 263, 270 (1966).

The only underlying principle of the majority opinion "that I can find is that in litigation under § 7, the Government always wins." United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

[44] Small businessmen should favor continuing "rule of reason" methods of extensive inquiry in adjudicating the legality of mergers. Without use of "rule of reason," § 7 might operate to strike down mergers of small firms or to obstruct their opportunity to dispose of their businesses. Oppenheim, *Small and Big Business: Orientation of Antitrust Points and Counterpoints*, 39 U. DET. L.J. 155, 162 (1961). See also Fortas, *Small Business, Mergers, and Section 7 of the Clayton Act*, 39 U. DET. L.J. 200, 202 (1961).

[45] *1956 Hearings* 235 (testimony of Sen. Sparkman).

Further problems can be anticipated with respect to the *Dean Foods* decision. The reasoning would seem to be easily applicable to enforcement provisions of the Federal Trade Commission Act. The enforcement section of that act is almost identical to section 11 of the Clayton Act.[46] Although Congress may have originally had conflicting motives in establishing the Commission,[47] it is apparent that currently Congress looks to the Commission for enforcement. The Commission is likely to seek preliminary relief power in areas other than section 7 of the Clayton Act,[48] and should this be accomplished with respect to section 5 of the FTC Act, the entire field of trade regulation would be affected significantly.[49] However, there are two basic hurdles which are not likely to be overcome in seeking court sanction of preliminary power in areas other than section 7 of the Clayton Act. First, only mergers and acquisitions present fact situations with the compelling need for relief required for an injunction under the *Dean Foods* rationale. Second, section 7 of the Clayton Act presents a special need for quick and effective enforcement. Congress enacted that statute to counter monopoly in its incipiency. The Commission will find it difficult to pinpoint another aspect of anti-trust law enforcement which requires immediate action preserving the status quo prior to hearings and a determination of legality. Attempts by the Commission to extend the decision in the principal case will probably prove futile.

[46] *Compare* 38 Stat. 719 (1914), 15 U.S.C. 45(b), (c), (d) (1964), *with* 38 Stat. 744 (1914), 15 U.S.C. §21(c) (1964). See also Dixon, *Significant New Commission Developments*, 21 A.B.A. ANTITRUST SECTION 247 (1962).

[47] See HENDERSON, THE FEDERAL TRADE COMMISSION 19-27 (1924).

[48] A.B.A. ANTITRUST SECTION 247 (1962). Arguing for the grant to the Commission of power to issue preliminary cease and desist orders, Chairman Paul Rand Dixon cited the area of deceptive practices as being one where such power was necessary from the Commission's standpoint.

[49] Section 5 of the FTC Act prohibits unfair methods of competition and is expanding in scope (already including §§ 1 and 2 of the Sherman Act, with strong advocates for Robinson-Patman type application). See *Eine Kleine Juristische Schummergeschichte*, 79 HARV. L. REV. 921, 933 (1965).