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William C. Scott Jr.

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PRELIMINARY INJUNCTIONS FOR THE FTC IN MERGER CASES

*FTC v. Dean Foods Co.**

A major problem in enforcing the antitrust laws in merger cases has been the difficulty of giving appropriate and effective relief to the Government at the close of litigation. Since enormous quantities of evidence must be considered before reaching a judgment as to the merger's probable effects, prosecutions by the Department of Justice often last two or three years,[1] with Federal Trade Commission proceedings taking even longer.[2] By the time illegality is established, the merger often is a *fait accompli*, making restoration of competition virtually impossible.[3] Furthermore, should an order to divest acquired assets issue, curious results may follow, as in *Brown Shoe Co. v. United States*,[4] where the only buyer to be found for the acquired assets was another large competitor.[5] A solution in some situations is a preliminary injunction either blocking the merger or requiring that assets be kept separate during the course of litigation. The former tends to be a permanent obstacle to the contemplated transaction, since market fluidity severely reduces the ability of the parties to remain in their bargaining positions for any length of time; the result in many cases is that the government is able to get final relief without trial.[6] The latter type of injunction, however, has been utilized increasingly in recent prosecutions by the Justice Department[7] and private parties[8] despite the possibility of the *Brown Shoe* type of situation, for it permits the parties to execute their agreement before the market changes.

Proposed Legislation

Section 7 of the Clayton Act,[9] probably the most important antitrust tool presently in use, is enforced concurrently by the Federal Trade Commission (FTC) and the Justice Department,[10] the former proceeding by administra-

* 384 U.S. 597 (1966).

1 Note, "Preliminary Relief for the Government Under Section 7 of the Clayton Act," 79 Harv. L. Rev. 391 (1965).

2 E.g., A.G. Spalding & Bros. v. FTC, 301 F.2d 585 (3d Cir. 1962) (six years); Pillsbury Mills, Inc., 57 F.T.C. 1274 (1960) (eight years).

3 See United States v. Continental Can Co., CCH 1964 Trade Cas. 80,138-39 (S.D.N.Y.); Farm Journal, Inc., 53 F.T.C. 26, 50-51 (1956). See generally "Divestiture Problems in Merger Cases," BNA Antitrust & Trade Reg. Rep. No. 196, pp. B-1, B-2 (1965); Zimmerman, "The Federal Trade Commission and Mergers," 64 Colum. L. Rev. 500, 519-22 (1964).

4 370 U.S. 294 (1962).

5 "Divestiture Problems in Merger Cases," supra note 3, at B-2. Similar situations arose in United States v. Continental Can Co., 378 U.S. 441 (1964); Crown Zellerbach Corp., 54 F.T.C. 798, aff'd, 296 F.2d 800 (9th Cir. 1961).

6 In three recent cases, for example, mergers were abandoned when preliminary injunctions issued. United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964); United States v. Allied Chemical Corp., CCH 1964 Trade Cas. 79,756 (S.D.N.Y.); United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963).

7 E.g., United States v. Brown Shoe Co., CCH 1956 Trade Cas. 71,109, 71,117 (E.D. Mo.).

8 E.g., Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn.), aff'd, 206 F.2d 738 (2d Cir. 1953).

9 As amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964) provides in part:

> [N]o corporation subject to the jurisdiction of the Federal Trade Commission shall acquire . . . the assets of another corporation engaged also in commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

10 Clayton Act §§ 11, 15, 38 Stat. 734, 736 (1914), 15 U.S.C. §§ 21, 25 (1964).

tive, the latter by judicial, action. The Commission is empowered, after hearing, to issue self-enforcing divestiture orders,[11] reviewable in the federal courts of appeals.[12] Whereas the Clayton Act specifically provides procedures by which the Justice Department[13] or a private party[14] may seek a preliminary injunction, no such express authorization exists for the FTC. The Commission apparently has never attempted to get an injunction in the district courts, and past attempts in the courts of appeals have been unsuccessful, with one court denying the authority of the Commission to seek such relief.[15] Although the Commission repeatedly has requested legislation empowering it to seek injunctions in the district courts or, more recently, to issue such orders itself,[16] Congress has not acted.[17]

The desirability of this power for the FTC has been the subject of considerable debate.[18] Opponents contend that since FTC hearings are nearly always more protracted than actions in the district courts,[19] the danger of effectively preventing a merger without a full hearing would be much greater than it is already. They also argue that the overlapping jurisdiction of the FTC and the Justice Department is sufficiently confusing without eliminating the only existing practical basis for a division of labor and without increasing the possibility of competition for the most newsworthy cases,[20] and that the court issuing the injunction would have difficulty following the lengthy course of an FTC hearing in order to keep the provisions of its order up to date. Finally, it is urged that the unbiased and objective role required of an adjudicatory agency[21] would be compromised by a grant of power to seek injunctions. The FTC has been long criticized for its combined role of judge and prosecutor,[22] and the confusion of the two could be intensified if the Com-

11 Prior to 1959 the FTC had to seek enforcement in the courts of appeals. Clayton Act § 11, 38 Stat. 735 (1914), amended by 73 Stat. 244 (1959), 15 U.S.C. § 21(g) (1964). Section 7 was virtually a dead letter prior to the Celler-Kefauver Amendment of 1950, which made clear that certain asset as well as stock acquisitions are prohibited. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914).

12 Clayton Act § 11(c), 73 Stat. 243 (1959), 15 U.S.C. § 25 (1964).

13 Clayton Act § 15, 38 Stat. 736 (1914), 15 U.S.C. § 25 (1964).

14 Clayton Act § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964).

15 FTC v. International Paper Co., 241 F.2d 372 (2d Cir. 1956). An injunction was denied without opinion in FTC v. Farm Journal, Inc., FTC Docket No. 6388 (unreported); see Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 15, at 29 (1956) (statement of FTC Chairman Gwynne). But cf. Board of Governors v. Transamerica Corp., 184 F.2d 311 (9th Cir.), cert. denied, 340 U.S. 883 (1950).

16 E.g., H.R. 9424, 84th Cong., 2d Sess. (1956).

17 The 1956 bill was passed by the House and reported favorably out of committee in the Senate, but never acted on there. See 102 Cong. Rec. 6380, S. Rep. No. 2817, 84th Cong., 2d Sess. (1956). No subsequent bill has come as close to passage.

18 See Hearings on H.R. 6478, Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 15 (1956); Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. 5, at 1 (1961).

19 See notes 1 and 2 supra and accompanying text.

20 See Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 2, at 65 (1957) (Congressman Keating expressing fear that "the prize will be to the swift").

21 Cf. Administrative Procedure Act § 5(c), 60 Stat. 240 (1946); 5 U.S.C. § 1004(c) (1964).

22 See FTC v. Klesner, 280 U.S. 19 (1929) (rejecting a challenge to the Clayton Act on the ground that it combines in the FTC the roles of complainant, prosecutor, and judge). See also Hearings, supra note 20, at 296 (letter from National Association of Manufacturers).

mission is permitted to go to court as an advocate on one side of a dispute which it must then adjudicate impartially.[23]

Proponents of FTC injunctive power argue that the theoretical advantages of the FTC proceeding are consistency and expertise, and that experience has shown the district courts, any one of which only rarely hears a section 7 case, to be uneven in their application of the antitrust laws.[24] While the Commission has been criticized for failing to develop consistent doctrine and to provide expert and sophisticated treatment of antitrust problems,[25] this failure may be due in part to its inability to issue effective orders.[26] Furthermore, in the existing situation, the ultimate success of a proposed anticompetitive merger may depend on whether it is investigated by the Justice Department, which can obtain a preliminary injunction, or the Federal Trade Commission, which cannot. Consistency in enforcement, as well as full use of the advantages of the FTC, would therefore seem to be enhanced by giving the FTC remedial tools comparable to those of the Justice Department.

The case for an FTC injunctive power seems persuasive. The objection based on possible confusion of adjudicating and prosecuting functions is largely academic, since other agencies, and the FTC itself,[27] seek preliminary injunctions in many cases which they later must adjudicate, and this procedure apparently is successful. The problem of the lack of an adequate basis for a division of labor between the Justice Department and the FTC could, if necessary, be obviated by a statutory provision. Finally, the contention that the FTC operates too slowly to make preliminary injunctions fair to respondents is countered by the argument that injunctions of limited duration might speed up FTC proceedings.[28] Nevertheless, the fact remains that Congress has not seen fit to act on FTC proposals for an injunctive power.

A Judicial Solution—The Dean Foods Case

When the Commission learned of a proposed merger between Dean Foods Co. and Bowman Dairy Co., two of the largest packaged milk distributors in the Chicago area, it advised them unofficially, and at their request, that it believed the merger illegal. When the agreement nevertheless was signed, the Commission issued a complaint under Section 7 of the Clayton Act[29] and

[23] See FTC v. Dean Foods Co., 384 U.S. 597, 618 (1966) (Fortas, J., dissenting).

[24] Zimmerman, supra note 3, at 504.

[25] See ibid.; Simon, "The Case Against the Federal Trade Commission," 19 U. Chi. L. Rev. 297 (1952).

[26] See Farm Journal, Inc., 53 F.T.C. 26, 50-51 (1956).

[27] The FTC may seek preliminary injunctions in the district courts in certain specified situations. Federal Trade Commission Act § 13(a), 52 Stat. 115 (1938), 15 U.S.C. § 53a (1964) (to restrain false advertising of foods, drugs, or cosmetics); Wool Products Labeling Act § 7(b), 54 Stat. 1132 (1940), 15 U.S.C. § 68e(b) (1964) (to restrain false labeling or importation without appropriate labeling); Fur Products Labeling Act § 9(b), 65 Stat. 180 (1951), 15 U.S.C. § 69g(b) (1964); Textile Fiber Products Identification Act § 8, 72 Stat. 1721 (1958), 15 U.S.C. § 70f (1964); Flammable Fabrics Act § 6(a), 67 Stat. 113 (1953), 15 U.S.C. § 1195(a) (1964) (to restrain the manufacture, offering for sale, or sale of wearing apparel of the proscribed degree of flammability); Food, Drug, and Cosmetic Act § 302, 52 Stat. 1043 (1938), 21 U.S.C. § 332 (1964).

[28] In Dean Foods Co., FTC Docket No. 8674, the court of appeals injunction was limited to a four-month period. Four months later, the Commission reversed the trial examiner's order dismissing the complaint, the entire course of the proceedings taking less than a year. 3 Trade Reg. Rep. ¶¶ 17,628, 17,682, 17,765 (1966).

[29] See note 9 supra.

Section 5 of the Federal Trade Commission Act.[30] The agreement provided that Dean Foods would take over Bowman's routes and processing plant and that the latter would distribute the rest of its assets to its stockholders. Because of the resulting complete integration of Bowman's operation into Dean's and extinction of the former, divestiture could never reestablish the *status quo*. Therefore, the FTC sought a preliminary injunction in the Seventh Circuit Court of Appeals under the All Writs Act.[31] A temporary restraining order was granted, but on hearing the order was dissolved and the injunction denied for lack of jurisdiction.[32] Mr. Justice Clark, however, on application of the Solicitor General issued a preliminary injunction restraining respondents from making substantial changes in Bowman's structure or assets. On certiorari, the Supreme Court, four justices dissenting, reversed the court of appeals and remanded for a hearing on the merits of the petition for the writ.[33] The majority reasoned that, if Dean Foods went ahead with its plans to acquire all of Bowman's fixed assets and goodwill and if Bowman distributed cash and securities, it would be impossible to restore Bowman after a finding that the merger was illegal. The FTC would be unable to provide a meaningful order, and the court of appeals would, in effect, be deprived of its jurisdiction to review a possible future appeal by the respondents. The result of the Supreme Court's decision is that the FTC henceforth will have the power denied it by Congress.

The All Writs Act—Legislative Authorization for the Issuance of Preliminary Injunctions

The All Writs Act, on which the Court relied in *Dean Foods*, authorizes the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[34] The Act is derived from provisions contained in the Judiciary Act of 1789.[35] It does not create powers in the courts, but "mak[es] . . . explicit the right to exercise powers implied from the creation of such courts."[36] The usual writs formed by appelate courts with express reference to it have been mandamus, certiorari, and prohibition "to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so."[37] Almost every grant of a writ in aid of appellate jurisdiction has been in response to a jurisdictional error below that would make important questions unreviewable or moot.[38] The writ of injunction, when

30 52 Stat. 111 (1938), 15 U.S.C. § 45 (1964).

31 28 U.S.C. § 1651 (1964).

32 FTC v. Dean Foods Co., 356 F.2d 481 (7th Cir. 1965), rev'd, 384 U.S. 597 (1966).

33 FTC v. Dean Foods Co., 384 U.S. 597 (1966). An injunction of four months duration was granted by the court of appeals on remand. Two months later the FTC trial examiner dismissed the complaint under the "failing company" doctrine. The Commission reversed just before the injunction expired. 3 Trade Reg. Rep. ¶¶ 17,682, 17,765 (1966).

34 28 U.S.C. § 1651(a) (1964).

35 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, provides in pertinent part:

> That all the . . . courts of the United States, shall have power to issue . . . all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

36 Reviser's Notes to Judicial Code of 1948 § 1651, U.S.C. Cong. Service, 80th Cong., 2d Sess. 1867 (1948).

37 United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945).

38 See id. (certiorari to review preliminary injunction against defendants where district court patently had not jurisdiction); DeBeers Consol. Mines, Ltd. v. United States, 325 U.S.

issued, has usually had the same general purpose as a stay of execution, that is, to preserve the *status quo* pending appeal,[39] and, like most section 1651 writs, it is used primarily in cases where the issue to be appealed otherwise would be mooted.[40] Such preliminary orders may issue even where the question to be decided is whether the court has jurisdiction to enjoin the defendant.[41] The preliminary injunction issued by Mr. Justice Clark in the present case is typical of this conventional, implicit use of the All-Writs power, as is the temporary restraining order issued by the Seventh Circuit.

Whether the writ actually will be granted is termed a matter of "discretion," since the "power," theoretically, is unlimited.[42] This discretion may be exercised before an appeal has been taken, and even before the lower court has issued an appealable order.[43] Nevertheless, previous decisions of the Supreme Court had indicated that, where the orders of an administrative agency are reviewable in a court of appeals, the "appellate jurisdiction" of the court of appeals for the purpose of section 1651 does not attach at least until a final order has been issued by the agency. In *Matter of NLRB*[44] the Court held that, since the court of appeals is "without jurisdiction to take action at the behest of the Board until the transcript shall have been filed," it has "no power . . . [to restrain the Board at the request of the respondents] prior to such plenary submission of the cause."[45] In *Federal Power Comm'n v. Metropolitan Edison Co.*[46] the court of appeals had enjoined the Commission from conducting an investigation until a hearing was held on respondent's petition challenging the agency's jurisdiction to conduct the investigation. The Supreme Court held that the court of appeals "had no appellate jurisdiction to protect"[47] until the agency issued a reviewable order. One court of appeals did issue a writ on the application of an agency before its final decision, but the case turned on a rather exceptional situation. In *Board of Governors v. Transamer-*

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212 (1945) (same); Ex parte United States, 287 U.S. 241 (1932) (mandamus to compel district court to issue bench warrant which it had no discretion to refuse); McClellan v. Carland, 217 U.S. 268 (1910) (mandamus by court of appeals requiring circuit court to determine pending action where respondent improperly had been granted a stay until final judgment in related state court action).

39 E.g., In re Equitable Office Bldg. Corp., 72 Sup. Ct. 1086 (1946) (Reed, J., in chambers). See generally Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States §§ 438-39 (Wolfson & Kurland ed. 1951). Appellate courts also may issue section 1651 injunctions to prevent interference with the status quo of cases already before them. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923); see Whitney National Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 425 (1965) (dictum).

40 See, e.g., Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964), 77 Harv. L. Rev. 1539 (1964). District courts often use writs "in aid of jurisdiction" to preserve questions pending trial. See Fisk v. Union Pac. R.R., 9 Fed. Cas. 167 (C.C.S.D.N.Y. 1873) (defendant corporation properly enjoined from dissolving itself in order to defeat court's jurisdiction).

41 Arrow Transp. Co. v. Southern Ry., 372 U.S. 658, 662, n.4 (1963); cf. Ex parte Republic of Peru, 318 U.S. 578 (1943). For district court injunctions pending decision of jurisdictional questions, see United States v. United Mine Workers, 330 U.S. 258 (1947); United States v. Shipp, 203 U.S. 563 (1906).

42 LaBuy v. Howes Leather Co., 352 U.S. 249, 255 (1957).

43 Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

44 304 U.S. 486 (1938).

45 Id. at 493-94.

46 304 U.S. 375 (1938).

47 Id. at 383.

ica Corp.[48] the Federal Reserve Board had no power to order asset divestiture and actually would have lost jurisdiction upon asset acquisition,[49] so that permitting the merger to be completed pendente lite would have barred absolutely any future review. Since the Celler-Kefauver Amendment[50] no similar case has arisen, and one court expressly has repudiated *Transamerica.*[51]

Dean Foods apparently rejects the assumption of most of these cases that courts may not intervene in an administrative case without express statutory authorization, and it does so in a peculiarly inapt situation. *First*, it is difficult to say that the Seventh Circuit was protecting its "appellate jurisdiction" when quite possibly it might never have acquired jurisdiction even if respondents appealed. A person against whom an order is entered may appeal in "any circuit within which such violation occurred or within which such person resides or carries on business."[52] As Mr. Justice Fortas points out in his dissenting opinion, a final order in this case could be reviewed in either the Sixth or Eighth Circuit, where both respondents do business.[53] Such an anomaly would not exist, had Congress intentionally and specifically provided a procedure for preliminary injunctions in these cases. This, however, is one hazard of applying too broadly, as the Court seems to have done, Professor Jaffe's thesis that the statutory provisions should be "projected against the institutional framework of agencies and courts."[54] *Second*, the decision permits an injunction in aid of appellate jurisdiction at the application of a party which by statute is precluded from appealing; logically, the agency would have no standing to invoke the court's appellate jurisdiction at the outset, since it cannot do so later. The possibility of this anomaly may have been a tacit reason for the generally accepted view that the All-Writs power could not be exercised in these circumstances.[55] In reality, the jurisdiction being protected by this decision is that of the FTC, not the court of appeals. In effect, therefore, the Court is giving the agency itself the injunctive power.

The Clayton Act—Legislative Authorization for the Commission To Seek Preliminary Injunctions

Professor Jaffe's thesis is not the traditional view. Reference by the Court to the FTC's "inherent standing as a suitor" is unprecedented. The traditional theory is that administrative agencies are creations of the legislature with circumscribed powers, limited to those activities authorized by statute,[56] and

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48 184 F.2d 311 (9th Cir.), cert. denied, 340 U.S. 883 (1950).

49 The Supreme Court, in Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 594 (1934), had held that under the old § 7 the enforcing agency had no jurisdiction to proceed against a merger once assets were acquired. See note 10, supra.

50 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). This amendment empowered the agencies enforcing § 7 to order asset divestiture.

51 FTC v. International Paper Co., 241 F.2d 372, 374 (2d Cir. 1956), 32 N.Y.U.L. Rev. 1297 (1957).

52 Clayton Act § 11(c), 73 Stat. 243 (1959), 15 U.S.C. § 21(c) (1964).

53 FTC v. Dean Foods Co., 384 U.S. 597, 624, n.12 (1966) (dissenting opinion).

54 Jaffe, Judicial Control of Administrative Action 681 (1965).

55 See, e.g., Kronstein, Miller & Dommer, Major Ameriean Antitrust Laws 289-90 (1965); "Divestiture Problems in Merger Cases," BNA Antitrust & Trade Reg. Rep. No. 196, p. B-1 (1965); "Restraining Orders and Preliminary Injunctions Against Mergers," BNA Antitrust & Trade Reg. Rep. No. 180, p. B-1 (1964); Notes, 79 Harv. L. Rev. 391 (1965), 40 N.Y.U.L. Rev. 771 (1965). But see Note, 46 Geo. L.J. 190 (1957).

56 Stark v. Wickard, 321 U.S. 288, 309 (1944).

that no powers can be implied except those absolutely necessary to give effect to the statute.[57] Although this rule has often been interpreted rather broadly by the Court,[58] no authority suggests that the Clayton Act provides the FTC with the ability to seek preliminary injunctions against section 7 violations. In contrast, express provision *has* been made for such a procedure in actions brought by the Justice Department or aggrieved private parties.[59] Furthermore, the FTC *is* specifically authorized to seek an injunction in certain other types of cases.[60] The exclusion of any express authorization under the Clayton Act and its inclusion in other statutes relating to the FTC suggests that Congress meant to withhold this power.[61] This is confirmed by the Clayton Act provision that FTC cases requiring preliminary injunction can be prosecuted by the Attorney General and expedited in the district courts.[62] Although it involves some duplication of effort, this procedure is apparently workable.[63] Thus, neither congressional intent nor compelling need seems to justify reading such authority into the act. Nevertheless, the Court finds a broad congressional purpose to entrust the FTC with Clayton Act enforcement and to give it adequate power to provide effective remedies for violations: "It would stultify congressional purpose to say that the Commission did not have the *incidental* power to ask the courts of appeals to exercise their authority derived from the All Writs Act."[64] This statement begs the question, but it is consistent with the recent trend of the Court toward strengthening the merger provisions of the antitrust laws[65] and construing broadly the enforcement provisions of the Federal Trade Commission Act.[66]

Effect of the Dean Foods Decision

When the Justice Department or a private party asks for a preliminary injunction, the district courts have required showings of reasonable probability of government success on the merits[67] and probable difficulty of divestiture after trial,[68] although no very clear standards for granting the injunction have

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[57] In FTC v. Radalam Co., 283 U.S. 643, at 649 (1931), the Court said:
Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot . . . be created by the courts in the proper exercise of their judicial functions.

[58] See Atlantic Refining Co. v. FTC, 381 U.S. 357, 367-68 (1965).

[59] Clayton Act §§ 15, 16, 38 Stat. 736, 737 (1914), 15 U.S.C. §§ 25, 26 (1964).

[60] See note 27, supra.

[61] See FTC v. International Paper Co., 241 F.2d 372, 373 (2d Cir. 1956).

[62] Clayton Act § 11(b), 64 Stat. 1127 (1950), 15 U.S.C. § 21(b) (1964).

[63] At the Hearings, supra note 20, at 65, Attorney General Brownell testified:
Under the present law, of course, we work it out that if a preliminary injunction seems to be required, whether the matter first comes to the attention of the FTC or ourselves, we cooperate with them and bring the necessary action so that it is not as though the situation were critical or anything of that sort . . . .

[64] FTC v. Dean Foods Co., 384 U.S. 597, 606. [Emphasis added.]

[65] See Day, "Conglomerate Mergers and 'The Curse of Bigness,'" 42 N.C.L. Rev. 511 (1964); Rahl, "Current Antitrust Developments in the Merger Field," 8 Antitrust Bull. 493, 507 (1963). On the Court's history of holding for the Government in recent cases, see Comment, "Clayton Section 7: A Critical Appraisal of the Supreme Court's Antitrust-Anti-Bigness Complex in Merger Litigation Since the Brown Shoe Case," 11 Wayne L. Rev. 739, 743 (1965).

[66] See Atlantic Refining Co. v. FTC, 381 U.S. 357, 367-68 (1965).

[67] United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964).

[68] United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), aff'd, 320 F.2d 509 (3d Cir. 1963).

been developed.[69] Evidence is presented showing the share of the market occupied by the merging parties, the extent of concentration in the industry, the probable effect of the merger on competition, and the like.[70] Because the effect of a preliminary injunction usually is abandonment of merger plans,[71] parties have a natural tendency to present all possible evidence. Thus the hearings often last several days.[72]

In fairness, parties sought to be enjoined in the courts of appeals under the *Dean Foods* decision should be entitled to require the FTC to make at least as much showing as the Justice Department. Unlike an injunction granted on application of the Justice Department,[73] one granted under the All Writs Act is for a very narrow purpose. Nevertheless, logic indicates that the FTC should have to show (1) probable future appellate jurisdiction in the court of appeals, *i.e.*, probability that the FTC will issue a restraining order, and (2) probable "defeat" of jurisdiction in the absence of a preliminary injunction, *i.e.*, probability that respondents will merge to such an extent that an FTC divestiture order would be ineffectual, and appellate review meaningless.[74] Although differently derived, these standards are of the same type as those imposed on the Justice Department.[75]

The courts of appeals, to decide these questions fairly, will have to take testimony, receive evidence, and make findings of fact in order to issue the detailed and individualized orders which are most desirable for antimerger injunctions. Such tasks ordinarily are assigned to the district courts, not the courts of appeals.[76] Given the willingness of the Supreme Court to permit the FTC to seek an injunction, the possibility should not be ignored that the latter might, on a somewhat related theory, be able to do so in the district courts where logically such procedures belong. The district courts are said to be possessed of inherent equitable powers to enforce rights among parties over which they can obtain personal jurisdiction.[77] Such powers have been used to protect the jurisdiction of other tribunals, notably state courts.[78] To allow the FTC to seek antimerger injunctions in district courts in order to protect its own jurisdiction seems at least as logical as the procedure endorsed by the present case. Certainly such a procedure would be much more practical, whether judicially or legislatively established.

This alternative procedure becomes even more attractive when one notes that

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69 See Note, 79 Harv. L. Rev. 391, 398-401 (1964).

70 See United States v. Ingersoll-Rand Co., supra note 68.

71 See cases cited in note 6 supra and accompanying text.

72 United States v. Ingersoll-Rand Co., supra note 68, took five full days. See also United States v. FMC Corp., 218 F. Supp. 817, 823 (N.D. Cal. 1963) (injunction denied after lengthy hearing).

73 The court may issue "such temporary restraining order or prohibition as shall be deemed just under the circumstances." Clayton Act § 15, 38 Stat. 736 (1914), 15 U.S.C. § 25 (1964).

74 Paradoxically, the effect of Dean Foods may be to deprive the courts of appeals of a chance to review, since an injunction often results in abandonment of merger plans.

75 Perhaps these standards are stricter. The Justice Department need not make even that showing required for ordinary preliminary injunctions. See United States v. Brown Shoe Co., CCH 1956 Trade Cas. 71,109, 71,114 (E.D. Mo.).

76 On the role of the appellate court, see the dissenting opinion of Fortas, J., in FTC v. Dean Foods Co., 384 U.S. 597, at 630-31 (1966).

77 Jaffe, supra note 54, at 657.

78 See Louisville & N.R.R. v. Western Union Tel. Co., 207 Fed. 1, 5 (6th Cir. 1913).

the *Dean Foods* decision potentially affects much more than FTC practice. Decisions of most administrative agencies are at least theoretically reviewable in the courts of appeals.[79] Unless modified, this case could be used to support an attempt by any agency not otherwise equipped with such authority to seek preliminary injunctions from a court which may review its final orders. The SEC, for instance, might seek a preliminary order restraining sale of a new stock issue on the strength of the possibility that the court might later have reason to review a Commission stop order, which might otherwise come too late to prevent the issue.[80] Since *Dean Foods* rests on a practical rather than a technical loss of potential jurisdiction, this procedure might be used whereever the agency considers inadequate the remedial powers granted it by the legislature.

CONCLUSION

The apparent inability of the Federal Trade Commission to procure preliminary injunctions restraining mergers against which it had filed complaints was a defect in its power to enforce Section 7 of the Clayton Act. While considerable objection from the business community to an injunction procedure exists, it probably is necessary for effective and consistent enforcement of section 7. The Supreme Court's decision in *FTC v. Dean Foods Co.*[81] permits the courts of appeals to issue such injunctions under the All Writs Act upon application of the FTC, on the theory that an injunction will protect the jurisdiction of the appellate court, which may later be called on to review the FTC order. While out of line with procedural precedents and legislative history, the decision is consistent with the Court's favorable attitude toward strengthened antitrust enforcement.

Although FTC authority to seek preliminary injunctions in merger cases may be desirable, the *Dean Foods* decision may have unfortunate results. The courts of appeals are not well-suited to the extensive fact-finding hearings which are essential to the judicious use of preliminary injunctions against mergers. Possibly, however, reasoning similar to the Court's could support the more practieal alternative of an FTC power to seek these injunctions in the district courts. Furthermore, it is a bit unsettling to speculate on the possible use of *Dean Foods* as a precedent for granting an injunction whenever any administrative body's usual modes of relief are in some way inadequate. It may be that the decision will stimulate Congress to enact legislation setting up statutory procedures whereby the FTC or other agencies may obtain preliminary injunctions in the district courts under clearly defined circumstances.

*William C. Scott, Jr.**

[79] Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

[80] A somewhat similar application was denied in the district court in SEC v. Long Island Lighting Co., 148 F.2d 252 (2d Cir.), judgment vacated as moot, 325 U.S. 833 (1945).

[81] 384 U.S. 597 (1966).

* Editorial Supervisor, Jonathan E. Gaines.