Cornell Law Review

Volume 64
Issue 4 *April 1979*

Article 6

Section 7 Clayton Act Remedies-the Rescission Decision

Raymond C. Zemlin

Recommended Citation

Raymond C. Zemlin, *Section 7 Clayton Act Remedies-the Rescission Decision*, 64 Cornell L. Rev. 736 (1979)
Available at: http://scholarship.law.cornell.edu/clr/vol64/iss4/6

SECTION 7 CLAYTON ACT REMEDIES—THE RESCISSION DECISION

Once a federal court finds that a merger is anticompetitive, thereby violating section 7 of the Clayton Act,[1] a crucial phase of the litigation begins; the court must attempt to fashion a remedy that restores the industry to its competitive *status quo ante*.[2] As the Supreme Court has recognized, "the suit has been a futile exercise if the government proves a [section 7] violation but fails to secure a remedy adequate to redress it."[3] In an attempt to provide an effective remedy, courts have consistently ordered divestiture.[4] Legal scholars have noted, however, that divestiture often fails to secure effective relief.[5]

This Note explores an alternative form of structural antimerger relief available in suits brought by the government[6]—

---

[1] Section 7 of the Clayton Act (15 U.S.C. § 18 (1976)) states in part:

> No 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 jurisdiction of 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.

[2] The Supreme Court in United States v. E.I. duPont de Nemours & Co., 366 U.S. 316 (1961), said that the key to an antitrust remedy "is of course the discovery of measures effective to restore competition.... [C]ourts are authorized, indeed required, to decree relief effective to redress the violations...." *Id.* at 326.

[3] *Id.* at 323.

[4] The Supreme Court characterized divestiture as "the most important of antitrust remedies" and stated that "[i]t should always be in the forefront of a court's mind when a violation of § 7 [of the Clayton Act] has been found." *Id.* at 330-31.

Section 11 of the Clayton Act (15 U.S.C. § 21 (1976)) explicitly authorizes regulatory agencies, including the Federal Trade Commission, to order divestiture against § 7 violators.

[5] *See* notes 67-73 and accompanying text *infra*.

[6] Structural remedies are available only in public antimerger actions. ITT v. General Tel. & Elec. Corp., 518 F.2d 913, 920-24 (9th Cir. 1975), *noted in* Note, *Divestiture Is Not an Available Remedy in Private Action under Section 16 of Clayton Act*, 25 CATH. L. REV. 167 (1975); NBO Ind. Treadway Co. v. Brunswick Corp., 523 F.2d 262, 278-79 (3d Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977). *Contra*, Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636, 640 (S.D.N.Y. 1975). The Clayton Act (15 U.S.C. §§ 12-27 (1976)) provides for enforcement by both private individuals and the federal government. A private party may seek treble damages under § 4 (15 U.S.C. § 15 (1976)), or an injunction under § 16 (15 U.S.C. § 26 (1976)). The government may seek imposition of criminal sanctions, such as fines or incarceration, under § 14 (15 U.S.C. § 24 (1976)), or injunctive relief under § 15 (15 U.S.C. § 25 (1976)). For a list of other, more exotic equitable remedies considered by Congress (including denying the antitrust violator the use of the courts, the mails, and the Panama Canal), see K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 17-29 (1976).

rescission. Divestiture requires the buyer of the target[7] to resell it on the open market. Rescission forces the purchaser to sell the target back to the original owner, who in turn must repurchase it for the original consideration.[8] In other words, rescission is divestiture to a predetermined party under predetermined terms.

Before a court orders rescission as an antimerger remedy, it must answer three questions affirmatively. First, is the court empowered to retain the target seller as a defendant and grant relief against him? Second, is a rescission order within the court's equitable jurisdiction? And third, is rescission a feasible and economically wise remedy?

I
Is THE SELLER A PROPER DEFENDANT?

To rescind a merger, a court orders the target seller to return the consideration received in exchange for return of the target.[9] For a court to grant such relief, it must first retain the target seller as a party. A strict reading of section 7 of the Clayton Act, however, reveals that the section does not proscribe the target seller's conduct.[10] The section speaks only to buyers; only an illegal *acquisition* violates section 7.[11] Lower courts have adopted this

---

[7] In this Note, "target" is the stock or assets sold by one party to the transaction and acquired by the other party. This term derives from premerger jargon where it refers to the stock or assets that the potential purchaser seeks to acquire.

[8] For example, assume Corporation A acquires the stock of Corporation B for $1,000,000 in violation of § 7 of the Clayton Act. Under a divestiture order, Corporation A must sell the stock to a third party. Under a rescission order, Corporation A must sell the stock back to Corporation B for the original sale price of $1,000,000.

[9] *See* McIntyre v. KDI Corp., 406 F. Supp. 592, 597 (S.D. Ohio 1975); 3 L. Loss, SECURITIES REGULATION 1793 (1961); RESTATEMENT OF RESTITUTION § 65 (1937).

[10] Section 7 of the Clayton Act states in pertinent part that "[n]o corporation engaged in commerce shall *acquire* ...." 15 U.S.C. § 18 (1976) (emphasis added).

[11] There is no evidence that Congress by its use of the word "acquire," intended to exclude target sellers from the reach of § 7. *See In re* Dean Foods Co., 70 F.T.C. 1146, 1291 (1966).

Congress used the term "acquire" perhaps in recognition of the particular evil that § 7 was designed to cure, the holding company. Holding companies were huge corporations whose primary purpose was to acquire and control stock of other corporations. To eliminate holding companies, Congress proscribed their modus operandi—*acquiring* stock of other corporations. *See* H.R. REP. No. 627, 63d Cong., 2d Sess. 17 (1914). For a discussion of the 1914 legislative history of the Clayton Act, see D. MARTIN, MERGERS AND THE CLAYTON ACT, ch. 2 (1950). Congress amended § 7 of the Clayton Act in 1950 to proscribe anticompetitive asset, as well as stock, acquisitions. *See* Clayton Act Amendment of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (amending Act of Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731); Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962); Note, *The Amendment to Section 7 of the Clayton Act*, 46 ILL. L. REV. 444 (1951); Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766 (1952).

strict interpretation and concluded that a target seller does not violate section 7 and cannot be retained solely under its authority.[12] Nonetheless, by employing section 15 of the Clayton Act[13] in conjunction with Section 7, courts may retain target sellers as defendants in public[14] antitrust actions. Section 15 states in part:

> Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshall thereof.[15]

Lower courts have concluded that in enacting this sentence of section 15, "Congress invoked the equity jurisdiction of the federal courts and provided that when the interest of justice requires, [the target seller] can be joined in proceedings under the act . . ."[16] The Supreme Court has yet to consider the question directly.[17]

---

[12] *See* United States v. Coca-Cola Bottling Co., 575 F.2d 222, 227 (9th Cir.) ("[b]y its express terms § 7 proscribes only the act of acquiring, not selling"), *cert. denied sub nom.* Aqua Media, Ltd. v. United States, 99 S. Ct. 362 (1978); Dailey v. Quality School Plan, Inc., 380 F.2d 484, 488 (5th Cir. 1967); Record Club of America, Inc. v. Capitol Records, Inc., [1971] Trade Cas. ¶ 73,694, at 90,900 (S.D.N.Y. 1971).

[13] 15 U.S.C. § 25 (1976).

[14] Section 15 provides, in part, that "it shall be the duty *of the several United States attorneys . . . under the direction of the Attorney General*, to institute proceedings in equity to prevent and restrain such violations." 15 U.S.C. § 25 (1976) (emphasis added). Courts have dismissed private suits, brought under the Clayton Act (*see* note 6 *supra*), seeking damages or injunctions against target sellers. *See* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 488 (5th Cir. 1967); Record Club of America, Inc. v. Capitol Records, Inc., [1971] Trade Cas. ¶ 73, 694, at 90,900 (S.D.N.Y. 1971).

[15] 15 U.S.C. § 25 (1976).

[16] United States v. Coca-Cola Bottling Co., 575 F.2d 222, 228 (9th Cir.), *cert. denied sub nom.* Aqua Media, Ltd. v. United States, 99 S. Ct. 362 (1978). *See* United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1262 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974); United States v. E.I. duPont de Nemours & Co., 177 F. Supp. 1, 11 (N.D. Ill. 1959), *rev'd on other grounds*, 366 U.S. 316 (1961). *Cf.* United States v. Pabst Brewing Co., 183 F. Supp. 220, 221-22 (E.D. Wis. 1960) (without citing § 15, court retained seller as party because "relief might be granted against them"); *In re* Dean Foods Co., 70 F.T.C. 1146, 1290-91 (1966) (court retained seller under § 5 of Federal Trade Commission Act).

[17] The Supreme Court has only alluded to this issue in dicta. In United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 607 (1957), the Court concluded that duPont's 1923 purchase of General Motors Stock from General Motors violated § 7 of the Clayton Act. On remand, the district court granted relief against duPont and General Motors. United States v. E.I. duPont de Nemours & Co., 177 F. Supp. 1 (N.D. Ill. 1959). On appeal, the Supreme Court affirmed in part, vacated in part and remanded, stating that General Motors "will thus be able to renew, for the District Court's decision in the first instance, any objections they may have to the power of the Court to grant relief against them."

Legislative history, however, may obstruct this simple resolution of the issue. The 1914 legislators, without comment, lifted the quoted portion of section 15 of the Clayton Act verbatim from section 5 of the Sherman Act.[18] Although the Clayton Act Congress did not elaborate on the purpose behind this language, the 1890 Sherman Act legislature had. Proponents of the Sherman Act explained that they intended section 5 to facilitate antitrust enforcement in two ways. First, section 5 granted a court power to "bring in [Sherman Act violators] wherever they reside or wherever they are doing business and have as full and complete jurisdiction over them upon publication as if they voluntarily appeared in the action."[19] Second, section 5 allowed a court "vigorous and drastic use of the writ of injunction" by providing for service anywhere in the United States.[20] Thus, Congress intended section 5 to extend a federal court's *in personam* jurisdiction, enabling a single court to resolve all issues related to each antitrust violation. Section 5 did not increase the number of parties against whom relief could be granted; its purpose was to reduce the number of actions required to effect that relief.

This hurdle is not insurmountable. The 1914 drafters were not bound by the interpretation given to the language by the 1890 legislature,[21] even if they were aware of it.[22] It strains the boundaries of statutory construction to assume that the Clayton Act Congress intended to perpetuate this twenty-four year old limit on the section's plain meaning without ever mentioning the operative legislative history. The wiser assumption is that the drafters of the Clayton Act did not even consider this limitation; although they did not explicitly sanction retaining target sellers as defendants, neither did they preclude the practice. The drafters

---

United States v. E.I. duPont de Nemours & Co., 366 U.S. 316; 334-35 (1961). The Court has left the question open.

[18] 15 U.S.C. § 5 (1976).

[19] 21 Cong. Rec. 2640 (1890).

[20] *Id.* at 2640-41.

[21] *See* 2A C. Sands, Statutes and Statutory Construction § 45.15 (4th ed. 1973). *But cf.* Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law").

[22] The problem of retaining target sellers as defendants does not arise under § 5 of the Sherman Act since the Act proscribes the conduct of *all* parties attempting anticompetitive collusion. 15 U.S.C. § 1 (1976). The language in § 5, therefore, did not limit enforcement of the Sherman Act, but rather extended it. The Clayton Act legislature may not have foreseen that the same language might present a bar to effective antitrust relief under the Clayton Act.

left the question open for future judicial interpretation and thus courts are correct in concluding they may bring in target sellers as defendants under section 15.

Section 15's requirement of "justice" implicates equitable notions that may limit the court's power to implement rescission, even when it is the only effective antimerger remedy. The target seller has not violated any section of the Clayton Act.[23] But equity should permit a court to retain as defendants all persons who were parties to an anticompetitive merger transaction, because of their collective responsibility for the section 7 violation. Both the buyer and the target seller typically have either actual notice[24] or constructive notice[25] prior to the merger that it may violate section 7 and that the government may challenge it once consummated. A court, therefore, could retain the target seller as a defendant in a section 7 action without contravening fairness notions inherent in equity.

---

[23] *See* notes 10-11 and accompanying text *supra*.

[24] The government may inform the parties to the transaction that it intends to challenge the merger if they consummate it. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 279 (1966). The parties may also seek premerger clearance of the transaction. *See* 1 TRADE REG. REP. (CCH) ¶ 4230 (1977). The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title II, 90 Stat. 1383, should increase the number of cases where parties have actual notice that the proposed merger will violate § 7. The Act amends the Clayton Act by requiring that the parties to a proposed merger provide premerger notification to the government and observe a 30-day waiting period before consummating the merger. Proposed mergers are covered by the Act when, in simplified form, the target seller has at least $10,000,000 in annual net sales or total assets and the buyer has at least $100,000,000 in annual net sales or total assets. For a discussion of the Act, see Kinter, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1 (1977).

[25] In 1968, the Department of Justice promulgated guidelines to "acquaint the business community [and] the legal profession . . . with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act." 1 TRADE REG. REP. (CCH) ¶ 4510.1 (1971). The Department of Justice will "ordinarily challenge" a horizontal merger (between directly competing firms) where the industry is "highly concentrated", *i.e.*, where the four largest firms together account for 75% or more of total industry sales, and where the combined market shares of the acquiring and acquired firms are between 8% and 16% or greater. *See id.* ¶ 4510.5. If the industry is not "highly concentrated," then the Department will "ordinarily challenge" horizontal mergers where the combined market shares are between 10% and 26% or greater. *See id.* ¶ 4510.6. In the case of vertical mergers (between supplier and purchaser), the guidelines warn that the Department will "ordinarily challenge" the merger if the supplying firm accounts for 10% or more of the sales in the market and the purchasing firm accounts for 6% or more of the purchases in that market. *See id.* ¶ 4510.12.

United States v. Coca-Cola Bottling Co., 575 F.2d 222 (9th Cir.), *cert. denied sub nom.* Aqua Media, Ltd. v. United States, 99 S. Ct. 362 (1978), is an excellent example of how these guidelines should have given notice to the parties that the proposed merger violated § 7. In *Coca-Cola*, the parties consummated a horizontal merger where their shares of the

II
IS RESCISSION AN ANTIMERGER REMEDY AVAILABLE TO THE COURT?

Even if a federal court has the power to grant relief against the target seller, it must still decide whether the remedy of rescission lies within its equitable jurisdiction. A court must recognize that the use of rescission as an antimerger remedy is radically different from the remedy's traditional application. Under traditional analysis, rescission is a private contract remedy; one of the parties to a contract seeks to abrogate the contract on grounds of fraud, misrepresentation, mistake, or failure of consideration.[26] The use of rescission as a public antimerger remedy is novel and must stand on legal principles distinct from those which traditionally support its invocation.

The Ninth Circuit, in *United States v. Coca-Cola Bottling Co.*,[27] was the first and only court to consider this issue directly.[28] Relying on broad precedents authorizing liberal use of equity power, the court concluded that an independent foundation for rescission does exist.[29] The court stated that "[t]he equity jurisdiction of

---

three potentially relevant markets were 51% and 26%, 9% and 81%, and 36% and 44% respectively. *See* United States v. Coca-Cola Bottling Co., No. 76-3988-LTL (C.D. Cal., filed Apr. 27, 1977) (unreported district court findings), *reprinted in* Brief for Appellant Aqua Media, Ltd., App. II, at 19-20, United States v. Coca-Cola Bottling Co., 575 F.2d 222 (9th Cir. 1978). These two firms alone constituted a "highly concentrated" market and their combined market shares exceed by 26 to 44 times the limits established in the guidelines. *See* 1 TRADE REG. REP. (CCH) ¶ 4510.5 (1971). These guidelines should have warned the parties that the government would challenge the merger once consummated. *See In re* Dean Foods, 70 F.T.C. 1146, 1293-94 (1966).

[26] *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 254-56 (1973); RESTATEMENT OF RESTITUTION (1937); G. WEBB, EQUITY 155-61 (1970).

[27] 575 F.2d 222 (9th Cir.), *cert. denied sub nom.* Aqua Media, Ltd. v. United States, 99 S. Ct. 362 (1978).

[28] The court in *Coca-Cola* considered the availability of rescission only in the context of a preliminary injunction to restrain the target seller from distributing the remaining proceeds of the sale to its shareholders *pendente lite*. The court stated that it could deny the injunction only if "under no conceivable circumstances could a final decree involving rescission be permissable." 575 F.2d at 231. Holding that rescission was legally available, the court sustained the injunction pending a determination that rescission was appropriate. *Id.* at 230-32.

[29] *Id.* at 228. The court relied on Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) ("power of equity to provide complete relief" authorizes order to employer to reimburse back wages to wrongfully discharged employee); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947) (courts "are invested with large discretion to model their [antitrust] judgment to fit the exigencies of the particular case"); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (equity jurisdiction is the power "to do equity and to mould each decree to the necessities of the particular case").

the federal courts traditionally has permitted the fashioning of broad and flexible decrees molded to the necessities of the particular case."[30] This jurisdiciton is even broader and more flexible in a case that implicates a public interest, like economic competition.[31] The *Coca-Cola* court briefly considered two additional precedents arguing for a court's power to invoke rescission as a public antimerger remedy—*United States v. E.I. duPont de Nemours & Co.*[32] and *Ford Motor Co. v. United States.*[33]

In *duPont*, the Supreme Court rejected the partial divestiture remedy approved by the district court and instead ordered complete divestiture. In mandating this harsher remedy, the Court emphasized that courts are "authorized, indeed required, to decree relief effective" to restore competition.[34] This demand for effectiveness will justify other structural antimerger remedies, including rescission, in appropriate cases.[35] The *duPont* Court also reasoned that "[t]he very words of [section 7] suggest that an undoing of the acquistion is a natural remedy."[36] Rescission, even more than divestiture, returns the market to its pre-acquisition state. Finally, *duPont* states that "once the government has successfully borne the considerable burden of establishing a violation . . ., all doubts as to the remedy are to be resolved in its favor."[37] The

The *Coca-Cola* court also relied on J.I. Case Co. v. Borak, 377 U.S. 426 (1964), where the Court rescinded a merger induced by fraud, stating that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433. The issue in *Borak* was "whether § 27 of the [Securities Exchange Act (15 U.S.C. § 78a (1976))] authorizes a federal cause of action for rescission . . . to a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a [false and misleading] proxy statement." *Id.* at 428. The Court held that under these circumstances rescission was within the court's equitable jurisdiction. This decision, however, merely reaffirmed the traditional use of rescission in private suits involving fraud or misrepresentation. *See* note 26 and accompanying text *supra*. As the *Coca-Cola* court recognized, *Borak* did not consider the availability of rescission as a public antimerger remedy. *See* 575 F.2d at 230 n.8. Nonetheless, *Borak* does demonstrate that there is nothing inherently exotic about mergers that prevents courts from rescinding them.

[30] 575 F.2d at 228.

[31] *Id.* (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)). *See* Virginia R.R. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937)(action seeking to compel employer to bargain with union: "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved").

[32] 366 U.S. 316 (1961). For a brief discussion of *duPont's* procedural history, see note 17 *supra*.

[33] 405 U.S. 562 (1972).

[34] 366 U.S. at 326.

[35] The circumstances in which rescission is an effective antimerger remedy are described in notes 65-81 and accompanying text *infra*.

[36] 366 U.S. at 329.

[37] *Id.* at 334.

government's request for rescission is, therefore, presumptively appropriate.

The Court's holding in *Ford Motor Co. v. United States*[38] implies that rescission is available as an antimerger remedy. In *Ford*, the Court upheld the lower court's determination that Ford's acquisition of a portion of the assets of Electric Autolite, a spark plug manufacturer, violated section 7 and approved a battery of equitable remedies designed to allow the target "an opportunity to establish its competitive position."[39] The relief included a divestiture order, a ten-year injunction prohibiting Ford from manufacturing spark plugs, and an order requiring Ford to purchase fifty percent of its spark plugs from the divested company for five years.[40] these extraordinary remedies[41] drastically interfered with the competitive structure of the industry.[42] The remedies foreclosed Ford from actively competing in the industry and thus were potentially anticompetitive themselves.[43] Nonetheless, the Court approved the remedies because they were "needed to restore and encourage the competition adversely affected by the acquisition."[44]

Rescission is a much tamer remedy than the relief granted in *Ford*.[45] Ideally, it merely reinstates the premerger market structure and, unlike the *Ford* remedies, does not eliminate a potential competitor. Nor does it require extensive court supervision or review, one of the major stumbling blocks to a court's invocation of its equitable powers;[46] the court merely reverses the terms of the original transaction.[47] Since the court approved the *Ford* antimerger remedies, it would likely accept a less intrusive but effective remedy like rescission.

---

[38] 405 U.S. 562 (1972).

[39] United States v. Ford Motor Co., 315 F. Supp. 372, 378 (E.D. Mich. 1970)(supplemental opinion), *aff'd* 405 U.S. 562 (1972).

[40] The decree also prohibited Ford from using its own trade name on spark plugs for 5 years, and protected the target's employees by requiring Ford to continue selling spark plugs to its dealers at the suggested prevailing minimum prices for 10 years, and to condition its divestiture sale on the purchaser's assuming existing wage and pension obligations. *See* 405 U.S. at 572.

[41] *See id.* at 581 (concurring opinion, Stewart, J.).

[42] *See id.* at 582, 591 (concurring and dissenting opinion, Burger, C.J.) (remedies "drastic" and "go far beyond any that have been cited to the court").

[43] *See id.* at 591-92 (concurring and dissenting opinion, Burger, C.J.).

[44] *Id.* at 578.

[45] A court could, of course, supplement its rescission order with orders similar to those used in *Ford*.

[46] *See* D. DOBBS, *supra* note 26, at 63; G. WEBB, *supra* note 26, at 56-57.

[47] *See* note 9 and accompanying text *supra*; note 60 and accompanying text *infra*.

III
IS RESCISSION A WISE REMEDY?

Even if a court has the power to rescind a merger, the question remains whether it should exercise this power. The answer depends in each case upon the feasibility and effectiveness of rescission.

A. *Feasibility*

Since rescission normally requires each party to the merger to return the consideration respectively received,[48] it is feasible only if both parties still exist after the merger.[49] In many mergers, one party sells all its stock or assets to the purchaser and is thereby dissolved;[50] the target seller no longer exists and can neither accept the target nor return the consideration received.[51] Although the former shareholders of the dissolved seller may still be available, a court may not order them to refund the consideration distributed to them or to re-incorporate and receive the target back because they were not parties to the original transaction and thus are not proper defendants.[52]

---

[48] *See* note 8 *supra.*

[49] The ideal merger for invoking rescission is a conglomerate cash-for-asset acquisition of the functioning subsidiary of another conglomerate. Both parties to the transaction still exist and are large relative to the transaction. The discrete and functioning nature of the target tends to deter intermingling. Stock-for-stock mergers or stock acquisitions present the possibility that the stock will be sold to third parties thereby rendering rescission infeasible. *See* note 55 *infra.*

[50] *Cf.* McIntyre v. KDI Corp., 406 F. Supp. 592, 597-98 (S.D. Ohio 1975) (court could not order rescission in securities fraud action because acquired corporation no longer existed).

[51] In cases where the corporate seller may dissolve or where rescission or divestiture are not effective, it may be appropriate for the government to seek a preliminary injunction under § 15 to enjoin the consummation of the merger. If the government proves a § 7 violation at trial, the merger can be permanently enjoined. *See* United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968). For discussions of the use of a preliminary injunction to prevent the consummation of a merger that violates § 7, see Elzinga, *Mergers: Their Causes and Cures*, 2 ANTITRUST L. & ECON. REV. 53, 83-93 (1968) [hereinafter cited as *Causes and Cures*]; Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 ANTITRUST BULL. 1 (1972); Pfunder, Plaine & Wittemore, *Compliance with Divestiture Orders under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 ANTITRUST BULL. 19, 115-23 (1972); Note, *Preliminary Relief for the Government under Section 7 of the Clayton Act*, 79 HARV. L. REV. 391 (1965). The premerger notification requirements in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Pub. L. No. 94-435, Title II, 90 Stat. 1383, 1390-94) should provide the government with the opportunity, in more cases, to seek a preliminary injunction before the consummation of a merger. *See* note 24 *supra.*

[52] *See* text accompanying notes 23-25 *supra.*

Even when the parties still exist, rescission may not be feasible if one of them has spent, sold, or otherwise committed the consideration received. If the surviving seller is small compared to the sale in question, he may be unable to amass sufficient funds, by either loan or liquidation, to repurchase the target. For example, in *United States v. Coca-Cola Bottling Co.*,[53] the target seller had distributed two-thirds of the net sale proceeds to its own shareholders by the time the government filed its complaint. The *Coca-Cola* court suggested, in dicta, that the seller need only return to the buyer that consideration which he had not already distributed, with the difference absorbed by the buyer as a loss.[54] This solution, however, borders on unjust enrichment of the seller and, in practice, may induce sellers, anticipating a rescission order, to dispose of merger proceeds immediately. Sounder analysis dictates that the court deny rescission as infeasible in circumstances like these.[55]

Excessive intermingling of the target assets with the seller's original assets may also render rescission impracticable. As with divestiture, a court must unscramble the merger and decide what assets should be resold. The government must initiate its complaint quickly to forestall this intermingling; unfortunately, it rarely does. A 1969 study concluded that the average time between acquisition and complaint was 10.6 or 19.0 months, depending on the federal agency involved.[56] When the government files its complaint, it may seek a hold-separate order to maintain

---

[53] 575 F.2d 222 (9th Cir.), *cert. denied sub nom.* Aqua Media, Ltd. v. United States, 99 S. Ct. 362 (1978).

[54] *Id.* at 231.

[55] Mills v. Electric Auto-lite Co., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,354 (N.D. Ill. 1972) is another example of the infeasibility of rescission where one party to the merger has sold the consideration received. There, plaintiffs brought a private action alleging fraud and seeking rescission of a stock-for-stock merger. By the time the plaintiffs filed suit, however, one-half of the stock exchanged in the merger had been sold to third parties. The district court held as a matter of law that rescission was inappropriate because it "would not be practicable to attempt to trace the stock transactions involving . . . shares which have been traded on the New York Stock Exchange and over-the-counter." *Id.* at 91,900. *Cf.* Harmen v. Diversified Medical Inv. Corp., 524 F.2d 361, 364 (10th Cir. 1975) (where stock sold, buyer in private suit could rescind stock-for-stock merger by substituting cash for stock).

[56] *See* Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 52 (1969). Elzinga also concluded that the average delay between complaint and implementation of the remedy was approximately 5½ years. *Id.* A delay of this length may require the court to "uncook" as well as unscramble the merger. The obvious solution to this problem of delay is a hold-separate order. *See* note 57 and accompanying text *infra*.

the availability of rescission *pendente lite*.[57] Such orders typically require the buyer to maintain the acquired assets as a separate functioning unit and prohibit the target seller from spending or unduly burdening the consideration it received.[58] Without a timely hold-separate order, the buyer tends to integrate his administration and use of the target with his original assets[59] and make improvements to the target.[60]

The nature of the target also plays a role in determining the extent of intermingling likely to occur. If the target is a distinct entity, such as a functioning firm or plant, the buyer need not assimilate the assets to realize the target's value; some targets, however, are valuable only when integrated into the buyer's existing operations.[61]

In sum, rescission is feasible only when: (1) both parties still exist after the merger; (2) the seller still has, or can raise, the consideration he received; (3) the government promptly obtains a hold-separate order; and (4) the nature of the target tends to

---

[57] For discussions advocating the use of a hold-separate order, see Lewis, *supra* note 51, at 10-13; Note, *supra* note 51, 79 HARV. L. REV. at 394-401 (1965). *But cf. Causes and Cures*, *supra* note 51, at 91-92 (noting defects in "No Comingling" agreements); Pfunder, Plaine & Wittemore, *supra* note 51, at 77 n.85 (keep-separate orders only partly responsive to problems created by integration).

[58] *See, e.g.*, United States v. ITT, 306 F. Supp. 766, 799-802 (D. Conn. 1969) (detailed hold-separate order); United States v. Coca-Cola Bottling Co., 575 F.2d 222, 231 (9th Cir.) (enjoining seller from distributing proceeds of sale), *cert. denied sub nom.* Aqua Media, Ltd. v. United States, 99 S. Ct. 362 (1978).

[59] *But see* Elzinga, *supra* note 56, at 53-54; Pfunder, Plaine & Wittemore, *supra* note 51, at 76-77, 87 n.95 (indicating that time is not only factor determining extent of integration).

[60] Improvements made to the target by the buyer subsequent to the merger pose a perplexing and unresolved problem for both divestiture and rescission. *See* Elzinga, *supra* note 56, at 59-61. Because courts often do not implement antimerger remedies until years after the acquisition, buyers will almost certainly have added to or at least repaired targets, if only to maintain their productivity. In its final order, a court should insist that the buyer include these improvements, even if severable, in the return of the target to the original seller to avoid requiring the seller to buy back an outmoded target. But the court should also require the seller to pay a fair price for reasonable improvements made by the buyer. The seller would normally have incurred these expenses if he had owned the target throughout. To rule otherwise might discourage a target buyer, fearful of a rescission order, from making necessary repairs thereby allowing the target to atrophy. *See* Pfunder, Plaine & Wittemore, *supra* note 51, at 90-92. Nevertheless, the court must evaluate and price the improvements, which will impede the administration of a rescission order.

[61] *See, e.g.*, FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967) (purchaser acquired "Clorox" tradename and goodwill of past advertising); Farm Journal Inc., 53 F.T.C. 26 (1956) (purchaser acquired subscription list and right to solicit substitution of buyer's magazine for unexpired subscriptions of defunct seller's magazine). An efficient hold-separate order will, of course, deter intermingling regardless of the nature of the target. However, if the hold-separate order has some leaks (*see* note 75 *infra*), the nature of the target may transform those leaks into floods.

deter its intermingling with the buyer's original assets. For example, even though the government sought divestiture in *Ford Motor Co. v. United States*,[62] the case seems to have met three, and perhaps all four, of the prerequisites to rescission. First, Ford and Electric Autolite continued to exist after the merger. Second, the sale of the target represented only nineteen percent of the seller's total assets;[63] he should have been able to repay the money he received. Third, the government moved against the merger within six months of its consummation;[64] this delay may have rendered rescission infeasible, depending on the extent of intermingling. Fourth, the target consisted of an entire spark plug factory and an entire battery plant, neither of which lent themselves to assimilation by the buyer.

B. *Effectiveness*

The Supreme Court requires a court to employ an antimerger remedy effective to restore competition, regardless of its impact on private interests.[65] When rescission is feasible, it may be a more effective remedy than divestiture.[66] Contrary to the Supreme Court's pronouncement in *duPont*, divestiture is not

---

[62] 405 U.S. 562 (1972).

[63] Electric Autolite's assets at the time of the acquisition totaled approximately $150,000,000. United States v. Ford Motor Co., 286 F. Supp. 407, 410 n.10 (E.D. Mich. 1968), *aff'd*, 405 U.S. 562 (1972). The sale price of the target was $28,000,000 (*id.* at 408), or 19% of Electric Autolite's assets.

[64] *Id.* at 411.

[65] United States v. E.I. duPont de Nemours & Co., 366 U.S. 316, 326 (1961) (courts "are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests"). Nonetheless, the fact that a court can only retain as defendants those persons who were parties to the merger limits this power to obtain effective antimerger relief. *See* text accompanying notes 23-25 *supra*.

[66] An imaginative reading of *duPont* dicta suggests that a court need not select the *most* effective remedy. The Court stated that "[e]conomic hardship can influence choice only among two or more effective remedies." 366 U.S. at 327. This may imply that if two or more remedies attain a threshold level of effectiveness, a court must choose the one that interferes the least with private interests. The same reasons that make rescission easy to apply—prescribed parties, prearranged price—make it more destructive of private interests than divestiture. A divestiture order interferes only with the property interests of the target purchaser. Rescission interferes with both the purchaser's and seller's property interests; not only must the purchaser sell the acquired target, but the buyer must repurchase it. Under the above interpretation of the *duPont* dicta, a court may order rescission only when it is the sole effective remedy. This limitation narrows the use of rescission only slightly; divestiture has been an ineffective remedy. *See* notes 67-73 and accompanying text *infra*.

"simple, relatively easy to administer, and sure."[67] Divestiture requires a court to decide exactly what to divest and under what guidelines. The government supervises compliance with these guidelines and seeks court enforcement if they are ignored.[68] More troublesome than these procedural burdens is evidence that divestiture has rarely achieved a pro-competitive result. Both the Elzinga study[69] and the Pfunder study[70] concluded that at least

---

[67] *See* 366 U.S. at 331. *Cf.* United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1074 (S.D.N.Y. 1969) ("Divestiture is usually fraught with difficulties and presents a whole range of problems which should be avoided if possible.")

[68] *See* Pfunder, Plaine & Wittemore, *supra* note 51, at 97-98, 108-11.

[69] Elzinga, *supra* note 56. After developing a population of all § 7 cases filed after 1950 and resolved by 1964, either by a consent decree or a litigated order (39 cases), Elzinga categorized the relief obtained as either Successful, Sufficient, Deficient, or Unsuccessful. Elzinga's criteria for Successful relief required that the divestiture order reestablish the target as an independently viable firm. Elzinga assumed that this could only occur if the target was purchased by "some individual, group, or corporation [who has no] ties, either in a horizontal or vertical sense, with the industry of the firm being acquired." *Id.* at 47. Elzinga also required that the purchaser not already be a "corporate congomerate," defined as a firm listed as one of Fortune's top 200 manufacturing firms. The criteria for the remaining categories were:

Sufficient—target sold to a small horizontal competitor, or sold as a market or product extension, or sold as a conglomerate acquisition.

Deficient—target sold in such a manner that potential competition is reduced, or government fails to obtain divestiture of the entire illegally acquired target.

Unsuccessful—no or insignificant divestiture, or sold to a significant horizontal competitor, or the target sold is no longer a viable entity.

Elzinga concluded that 10 of the 39 divestiture orders resulted in Successful or Sufficient relief, 8 produced Deficient relief, and 21 resulted in Unsuccessful relief.

Elzinga then introduced time as a factor in his evaluation. He argued that "[a]s long as an anticompetitive acquisition remains consummated, the incremental market power can be used by the acquiring firm." *Id.* at 45. Under this formula, only 5 divestiture orders achieved Successful or Sufficient relief, 4 resulted in Deficient relief, and 30 produced Unsuccessful relief.

A Nader Study Group Report of Antitrust Enforcement agrees wholeheartedly with Elzinga's analysis and conclusion that divestiture is ineffective in restoring competition to the industry. *See* M. GREEN, B. MOORE & B. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM ch. 6 (1972).

[70] Pfunder, Plaine & Wittemore, *supra* note 51. The Pfunder study analyzed 114 cases instituted after 1950 and resolved prior to 1970. The study found that only 16% of the cases resulted in the "sale of all or part of the asset ordered divested to a newly formed corporation backed by a group of independent investors or by former independent owners." *Id.* at 37-38. This category is similar to Elzinga's Successful category. *See* note 69 *supra*. Pfunder also discovered that in 17% of the cases, the divestiture ordered did not occur or occurred only with serious modification. Pfunder, Plaine & Wittemore, *supra* note 51, at 34. In six cases, for example, the court finally withdrew its divestiture order because it held that, due to delay, divestiture was no longer feasible. *Id.* at 42, n.30. The Pfunder study concluded that "[a]n examination of 114 section 7 cases which have resulted in a litigated or consent decree of divestiture suggests that the Government has failed to obtain an effective remedy in a substantial number of cases." *Id.* at 40.

seventy-five percent of all divestiture decrees produced few or no pro-competitive effects. The studies suggest three basic causes: first, it is difficult to locate a pro-competitive buyer offering an acceptable price; [71] second, it is difficult to unscramble a consummated merger; [72] and third, the defendant lacks an incentive to comply with the divestiture order.[73]

Superficially, rescission is an alluring alternative. Rescission returns each party to its original position, thereby reinstating the market's original competitive structure. Furthermore, rescission avoids the sources of divestiture's ineffectiveness.

Rescission sidesteps the first stumbling block to divestiture—locating an acceptable buyer. The buyer is the original seller. Rescission can also partially avoid the second impediment. The government, seeking either rescission or divestiture, can promptly seek a hold-separate order.[74] But to the extent that the hold-separate order is not effective,[75] less intermingling will occur when the court orders rescission, because the court can implement rescission more quickly than divestiture. Divestiture involves locating a buyer and negotiating a price.[76] Both these factors are predetermined under rescission; the court need only determine the value of any improvements.

Rescission also seems to alleviate the third factor, the target buyer's incentive to comply. Although it may want to delay compliance,[77] a target buyer faced with a rescission order has no excuse for delay. With divestiture, the target buyer may claim that

---

[71] *See* Elzinga, *supra* note 56, at 61-66; Pfunder, Plaine & Wittemore, *supra* note 51, at 45-54.

[72] *See* Elzinga, *supra* note 56, at 53-54; Pfunder, Plaine & Wittemore, *supra* note 51, at 54-77.

[73] *See* Pfunder, Plaine & Wittemore, *supra* note 51, at 95-107. The Pfunder study also listed court and prosecutorial leniency with the defendant as a factor in rendering divestiture ineffective. The study suggests that courts show excessive deference to the violator's property interest in the target; courts steer clear of orders which may appear punitive and they allow defendants to design and enforce the relief. *See id.* at 40-42.

[74] *See* notes 57-58 and accompanying text *supra*.

[75] *See* United States v. White Consol. Indus. Inc., 323 F. Supp. 1397, 1399 (N.D. Ohio 1971) (hold-separate order could not maintain status quo *pendente lite*); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 569-70 (N.D. Ill. 1968) (hold-separate order not used hecause it reduces competition *pendente lite*); Pfunder, Plaine & Wittemore, *supra* note 51, at 77 n.85.

[76] A court typically sets a time limit, often between 6 and 24 months after the decree, within which the defendant must comply with the divestiture order. *See* Pfunder, Plaine & Wittemore, *supra* note 51, at Appendix B. Nevertheless, even these lengthy limits are often ignored with impunity. *See id.* at 92-94.

[77] *See Causes and Cures, supra* note 51, at 76-83.

no one has offered an acceptable price for the target. With rescission, the buyer is cornered into selling the target back to its original owner promptly, thereby restoring the industry's original competitive structure.

The competitive structure will remain static only so long as the original owner retains its reacquired target. Presumably, the original owner initially sold the target because it preferred, for one of any number of reasons,[78] to have the proceeds of the sale instead of the target. The court's order cannot change the owner's preference. Nonetheless, if the owner originally sold the target for a price higher than fair market value—because the buyer paid more in anticipation of oligopolistic profits[79]—the seller may not be able to resell the target for the same high price. Even if the seller is willing to settle for the fair market value, there may be no other buyers with enough capital or desire to purchase the target. In both cases, the seller may then decide to operate the business again, thus restoring the competitive premerger *status quo ante*.

Even where the original owner intends to resell and willing buyers exist, rescission is a more effective antimerger remedy because it places the burden of completing the sale on the party who wants to sell. A divestiture order requires the target buyer to locate a divestiture buyer. The implementation and effectiveness of the remedy depend on the party who wants to postpone divestiture as long as possible in order to extract ogligopolistic profits from the target. Rescission, on the other hand, returns the target to its original owner who then must locate a new buyer if he still wants to get rid of it.

Shifting this burden may also deter a seller from making sales that violate section 7. No longer could a target seller reap the benefits of an anticompetitive sale for a higher than fair market value price without risking the burden of undoing the transaction.

Rescission may also lessen the buyer's incentive to purchase a target in violation of section 7. A buyer sometimes risks violating section 7 with the hope that the government will not challenge the acquisition, and the solace that even if it does, he can still delay

---

[78] For example, the seller may have decided to sell because the business was unprofitable or in debt, or because it wanted to leave the market, either to enter another market or to retire.

[79] A pro-competitive buyer can only anticipate normal profits from the acquisition. An anticompetitive buyer expects abnormal profits because it maintains or increases its oligopolistic power as a result of the purchase. An expectation of greater profits allows the anticompetitive buyer to bid the price up.

the remedy and profit from the target in the interim.[80] To the extent that the buyer recognizes that rescission will deprive him of the opportunity to delay the remedy and to set his own selling price, he may be less willing to execute an anticompetitive merger.

Placing the burden of antimerger relief on the seller, who has not violated section 7, may appear harsh. Nonetheless *duPont* demands effective relief, regardless of its impact on private interests.[81] Once a court has retained the target seller as a defendant and concluded that rescission is more effective than divestiture, it is no defense that the remedy weighs heavily on the seller.

Conclusion

Courts seeking an antimerger remedy usually order divestiture, even though it has proven in many instances to be an unsatisfactory remedy. As an alternative structural remedy, courts should consider rescission. Because of the effectiveness and ease of administration of rescission, courts should retain target sellers under the broad authority of section 15 of the Clayton Act and order rescission whenever it is feasible—that is, when both parties still exist after the merger, the consideration is intact, and the buyer has not intermingled the target with its other assets. To ensure that these prerequisites are met, the government should secure a hold-separate order promptly. If courts employ rescission when it is appropriate, antimerger prosecution will be more than a futile exercise.

Raymond C. Zemlin

---

[80] *See Causes and Cures*, *supra* note 51, at 76-83.

[81] *See* 366 U.S. at 316; note 65 *supra*.