

Hold Separate Orders in Horizontal Acquisitions—Judicial Refuge Behind a Remedial Façade: FTC v. Weyerhaeuser

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COMMENT

HOLD SEPARATE ORDERS IN HORIZONTAL ACQUISITIONS—JUDICIAL REFUGE BEHIND A REMEDIAL FACADE: *FTC v. WEYERHAEUSER CO.*

Section 7 of the Clayton Act¹ protects the public from a non-competitive marketplace by proscribing mergers that may substantially lessen competition or tend to create a monopoly.² To foster

¹ Clayton Act § 7, 15 U.S.C. § 18 (1976 & Supp. IV 1980). Section 7 provides in pertinent part:

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

15 U.S.C. § 18 (Supp. IV 1980).

² See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562, 565-69 (1972); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552 (1966). Section 7 provides a statutory vehicle for directly attacking mergers that significantly may decrease competition or tend to create a monopoly. See 15 U.S.C. § 18 (Supp. IV 1980); S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5 (1950); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1949). To alleviate the uncertainty regarding the scope of the Clayton Act's proscriptions, see *id.*; Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 768-69 (1952), Congress enacted the Cellar-Kefauver Amendment, ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (1976 & Supp. IV 1980)). This provision expanded the reach of section 7 to cover the acquisition of corporate assets, Note, *supra*, at 770; see Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-35 (1960), and made it quite clear that the proscriptions of the Clayton Act were intended to apply to horizontal, vertical and conglomerate acquisitions, see *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

Unlike the Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1976 & Supp. IV 1980)), which is designed to abrogate extant anticompetitive practices, the Clayton Act is preventive in nature. See, e.g., *United States v. Griffith*, 334 U.S. 100, 107 (1948). Hence, the Clayton Act is intended to eliminate "monopolistic tendencies in their incipency, before they attain Sherman Act proportions." *In re Scott Paper Co.*, 57 F.T.C. 1415, 1441 (1960); accord *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 822 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962). See generally L. SULLIVAN, HANDBOOK OF THE LAW

this goal, Congress enacted section 13(b) of the Federal Trade Commission Act,³ which provides that a court may enjoin a proposed merger “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”⁴ Numerous issues have arisen regarding the operation of this section. For example, it has been unclear whether the statutory command to balance the equities applies only to public considerations, or whether it reaches private equities as well.⁵ In addition, although the issuance of a

OF ANTITRUST 602-03 (1977). A court considering the legality of a transaction, therefore, focuses upon whether the contemplated acquisition may substantially lessen competition. See *Crown Zellerbach Corp.*, 296 F.2d at 822.

³ Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. No. 93-153, § 408(f), 87 Stat. 576 (presently codified at 15 U.S.C. § 53(b) (1976)). Section 13(b) provides in pertinent part:

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission . . . the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted

15 U.S.C. § 536 (1976).

⁴ *Id.* Section 13(b) was enacted to provide the FTC with a viable method of enforcing section 7 of the Clayton Act. See Halverson, *The Federal Trade Commission’s Injunctive Powers Under the Alaska Pipeline Amendments: An Analysis*, 69 Nw. U.L. REV. 872, 872 n.1 (1975). This legislation was considered necessary because the competitive policies embodied in section 7 frequently had been frustrated by the FTC’s inability to prevent mergers or to accomplish effective divestiture. See *Hearings on S. 15 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 29 (1956); Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 53 (1969); see also NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND ATTORNEY GENERAL (1979), reprinted in 80 F.R.D. 509, 609-12 (1979). Compare *FTC v. National Tea Co.*, 603 F.2d 694, 697 (8th Cir. 1979) (in deciding whether to grant a preliminary injunction, the court may consider acquiring-firm’s promise to divest itself within 6 months in the event the merger is held in violation of section 7) with *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1096-97 (S.D.N.Y. 1977) (injunctions are more effective than divestiture in enforcing section 7).

⁵ Many courts regard the threat to the economy as well as the public interest in enforcement of the antitrust laws as the only considerations in determining whether to issue a section 13(b) injunction. *E.g.*, *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1096 (S.D.N.Y. 1977). In *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339 (4th Cir. 1976), for example, the court held that an injunction should be issued automatically upon a showing of a prima facie case. *Id.* at 1344-46. Many courts, however, will take private factors into consideration, *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1073 (S.D.N.Y. 1969) (private equities may be considered, but should not outweigh public considerations), *aff’d mem. sub nom. Bartlett v. United States*, 401 U.S. 986 (1971); *FTC v. National Tea Co.*, 603

temporary restraining order or a preliminary injunction clearly is permitted under the statute,⁶ neither the language nor the legislative history of section 13(b) indicates whether courts may award other types of equitable relief designed to protect the public's interest in a competitive market.⁷ Recently, in *FTC v. Weyerhaeuser Co.*,⁸ the Court of Appeals for the District of Columbia Circuit resolved these issues, holding that it is not erroneous for a court to consider private as well as public equities that support interim relief less drastic than a preliminary injunction,⁹ and that it is proper to issue a hold separate order¹⁰ in lieu of injunctive relief under section 13(b).¹¹

In *Weyerhaeuser*, the Federal Trade Commission (FTC) sought to prevent a proposed horizontal merger between Weybuy Incorporated¹² and Menasha Corporation, two west coast producers of "corrugating medium."¹³ Because each entity had made significant competitive contributions in the relevant geographic and product markets,¹⁴ the FTC expressed concern that the elimination of

F.2d 694, 697 (1979) (district court properly considered harm to the merging entities, but public interest is to be given the greater weight), notwithstanding that an injunction may be granted upon a showing of probable success on the merits regardless of harm to the parties, *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 568 (N.D. Ill. 1968).

⁶ See 15 U.S.C. § 53(b) (1976).

⁷ See *id.*; H.R. REP. No. 624, 93d Cong., 1st Sess. 31, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2523, 2533.

⁸ 665 F.2d 1072 (D.C. Cir. 1981).

⁹ *Id.* at 1083-84.

¹⁰ A hold separate order permits the consummation of a merger, but mandates that the assets of the merging entities remain segregated until the legality of the transaction can be considered in a plenary section 7 action. See, e.g., *FTC v. PepsiCo., Inc.*, 477 F.2d 24, 30 (2d Cir. 1973); *Ohio-Sealy Mattress Mfg. Co. v. Duncan*, 486 F. Supp. 1047, 1055 (N.D. Ill. 1980); *United States v. United Technologies Corp.*, 466 F. Supp. 196, 202 (N.D.N.Y. 1979). Although this form of relief has been used since 1956, see, e.g., *United States v. Brown Shoe Co.*, 1956 Trade Cas. (CCH) ¶ 68, 244, at 71, 116-17 (E.D. Mo. 1956), hold separate orders remain embedded in "one of the grey areas of merger law" because of a lack of authoritative commentary suggesting criteria and guidelines for their use, Axinn & Stoll, *Weyerhaeuser Decision: FTC Is Boxed Again*, N.Y.L.J., Oct. 20, 1981, at 2, col. 4. For an article advocating more liberal resort to hold separate orders, see Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 HARV. L. REV. 391, 394-98 (1965).

¹¹ 665 F.2d at 1084.

¹² Weybuy was a wholly owned subsidiary of Weyerhaeuser Company, and had been formed to facilitate the merger. *Id.* at 1074 n.3.

¹³ *Id.* at 1074. Under the terms of the proposed merger, Weyerhaeuser was to acquire all of Menasha's holdings on the West Coast. *Id.* These assets included an unimproved parcel of land, a corrugating medium mill, and a corrugated container plant. *Id.*

¹⁴ Prior to the merger, there had been an economically significant corrugating medium market on the West Coast, encompassing the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. 1981-1 Trade

Menasha as a competitor and the corresponding increase in market concentration would encourage collusive pricing policies.¹⁵ Accordingly, the FTC filed for preliminary injunctive relief pursuant to section 13(b) of the FTC Act.¹⁶ Although the evidence presented by the FTC demonstrated the requisite likelihood of success on the merits for issuance of the injunction pursuant to section 13(b),¹⁷ the district court denied this relief, relying upon the statute's command to weigh the equities.¹⁸ Focusing upon those equities, the court determined that the unchallenged aspects of the merger would create sufficient public benefits, including a potential increase in employment, to support denial of the injunction.¹⁹ The district court then concluded that a hold separate order was a more appropriate remedy, reasoning that such relief would obviate the need to enjoin the merger while accomplishing the basic goals of section 13(b).²⁰

On appeal, the District of Columbia Circuit²¹ affirmed, holding that the trial judge did not abuse his discretion by refusing to grant the injunction.²² The court rejected the FTC's contention that an injunction should issue automatically upon a satisfaction of the statutory burden,²³ explaining that Congress intended the

Cas. (CCH) ¶ 63,974, at 76,043-44 (D.D.C. 1981). Within this relevant geographic market, Menasha had been considered the third largest, and Weyerhaeuser the seventh, among producers of corrugating medium—the fluted, cardboard-like material which forms the center layer of the cardboard sheets from which corrugated containers are made. 665 F.2d at 1074 & n.2.

¹⁵ 665 F.2d at 1074-75. The FTC was concerned only with the anticompetitive effects of the merger upon the corrugating medium market. *Id.* at 1074. Hence, the Commission objected to the acquisition of the corrugating medium mill, but did not contest the transfer of the unimproved land or the corrugated container plant. *Id.*

¹⁶ *Id.*

¹⁷ 1981-1 Trade Cas. (CCH) ¶ 63,974, at 76,041-47. The district court conceded that the FTC had satisfied its burden of demonstrating a likelihood of success on the merits pursuant to section 13(b). *Id.* at 76,047.

¹⁸ 665 F.2d at 1080-81; see 15 U.S.C. § 53(b) (1976); *supra* note 3.

¹⁹ 665 F.2d at 1082. The district court observed that Weyerhaeuser planned to build a linerboard mill on the land acquired from Menasha. *Id.* at 1075. Because construction of this mill would increase the supply of linerboard in the market and would relieve unemployment in the area, the court found that "public equities" militated against issuance of the injunction. *Id.* Looking to private equities, the court reached a similar conclusion, noting that the shareholders of Menasha, a closely held corporation, would obtain a liquid asset by exchanging their stock for Weyerhaeuser shares. *Id.*

²⁰ *Id.* at 1075; see 1981-1 Trade Cas. (CCH) ¶ 63,974, at 76,049.

²¹ The circuit panel consisted of Judges Ginsburg, MacKinnon, and Mikva.

²² 665 F.2d at 1090.

²³ *Id.* at 1081; see, e.g., *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1073 (S.D.N.Y. 1969), *aff'd mem. sub nom. Bartlett v. United States*, 401 U.S. 986 (1971); *United*

courts to weigh both public and private equities and to evaluate the likelihood of competitive harm when deciding whether an injunction under section 13(b) is appropriate.²⁴ Noting that both types of equities have been considered in cases decided before the enactment of the statute, the court reasoned that “[s]ince Congress intended to codify that case law, we have no warrant to drop private equities from the calculus.”²⁵ The court emphasized, however, that private equities, standing alone, are not sufficient to outweigh the FTC’s showing of a “likelihood of ultimate success.”²⁶ Observing that the public equities considered by the district court in *Weyerhaeuser* “would not qualify as defenses” in a plenary action for an injunction under section 7 of the Clayton Act,²⁷ the court nevertheless determined that these factors could be considered in a section 13(b) proceeding.²⁸ The court reasoned that because “[t]he determination of a likelihood of success must be made under time pressure and on incomplete evidence,” the potential for erroneous decisions justified the examination of factors not ordinarily considered in section 7 actions.²⁹

Examining the trial court’s decision to award relief less drastic than an injunction, the court noted that it was “logical to assume” that section 13(b) was intended by Congress to permit the courts to “mold decrees ‘to the necessities of the particular case.’”³⁰ In this regard, the court observed that a hold separate order would afford sufficient protection to the public interest in some circumstances.³¹ Attempting to identify these situations, the court enunciated a three-pronged test which must be satisfied before the order properly may be issued.³² First, “significant equities” must favor consummation of the transaction; second, the hold separate order must safeguard the availability of final relief if the merger ulti-

States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 568 (N.D. Ill. 1968). *Contra* FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1345-46 (4th Cir. 1976); FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1097 (S.D.N.Y. 1977).

²⁴ 665 F.2d at 1083.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 1084.

³¹ *Id.* at 1087.

³² *Id.* at 1085. The court explained that its novel three-pronged standard would neither “countenance” equity nor supercede the independent judgment of the court by permitting the FTC to promulgate a per se rule. *Id.*

mately does not withstand scrutiny; and finally, the order must be expected to restrain interim competitive harm.³³ Applying these guidelines to the facts involved in *Weyerhaeuser*, the majority concluded that the hold separate order issued by the trial court was indeed appropriate.³⁴

Judge Mikva dissented, asserting that the court should not have granted a form of relief which the legislature failed to include as a statutory remedy.³⁵ Noting that the policy arguments advanced by the majority³⁶ were unpersuasive, Judge Mikva stated that the court had "turn[ed] a blind eye to the costs to the public of permitting this merger to be consummated."³⁷ Finally, Judge Mikva expressed concern that the decision would be interpreted as a signal that the District of Columbia Circuit would resolve future "hard cases" by resorting to the "easy" remedy of hold separate orders.³⁸

Through reliance upon the admonition contained in section 13(b) that the judiciary must "weigh the equities" before issuing a preliminary injunction, the *Weyerhaeuser* court has permitted the consummation of an allegedly anticompetitive transaction.³⁹ It is

³³ *Id.* at 1087.

³⁴ *Id.* at 1088-90. The court stated that its decision to issue a hold separate order should not be construed as a "compromise [of] the public interest in antitrust enforcement." *Id.* at 1090. Instead, the court cautioned, "[e]ach case must be approached on its unique facts and with appropriate attention to the purpose of Section 13(b)." *Id.* (footnote omitted).

³⁵ *Id.* at 1091 (Mikva, J., dissenting). The dissent argued that this is the first case to hold that a court may issue a hold separate order pursuant to section 13(b), notwithstanding that the remedy is not explicitly authorized by the section. *Id.* (Mikva, J., dissenting); see 15 U.S.C. § 53(b) (1976). Moreover, Judge Mikva posited that a hold separate order is permissible only in those circumstances when the FTC has not satisfied the terms of section 13(b). 665 F.2d at 1091 (Mikva, J., dissenting).

³⁶ *Id.* at 1087. The majority noted that a hold separate order seeks to preserve a transaction that ultimately may be upheld under section 7. *Id.* Additionally, the court stated that "a hold separate order shifts the risk of decline in value of the challenged assets" to the acquiring entity. *Id.* Finally, the majority observed that since this transaction contained unchallenged benefits, a hold separate order would enable the public to enjoy these benefits without FTC interference. *Id.*

³⁷ *Id.* at 1092 (Mikva, J., dissenting). Judge Mikva concluded that although the hold separate order may appear to be an effective compromise measure in close cases, the effectiveness of the order for the most part is superficial and "thrust[s] the courts into an activist supervisory role that ill suits them." *Id.* at 1096 (Mikva, J., dissenting); see *United States v. Paramount Pictures*, 334 U.S. 131, 163 (1948).

³⁸ 665 F.2d at 1096 (Mikva, J., dissenting).

³⁹ Corporate acquisitions frequently have been abandoned after preliminary injunctions were issued. *E.g.*, Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 ANTITRUST BULL. 1, 7 & n.2 (1972); see *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 248

submitted, however, that Congress never intended the judiciary to look to the types of equities considered by the District of Columbia Circuit to deny the requested injunctive relief in *Weyerhaeuser*. The legislative history of section 13(b) clearly indicates that the controversial language of the statute was intended merely to codify existing case law which has required courts to exercise independent judgment in the issuance of temporary restraining orders and preliminary injunctions.⁴⁰ Hence, it is apparent that neither section 13(b) itself nor its legislative history suggests that the judiciary should examine private equities before determining the propriety of the requested relief.⁴¹ Moreover, injection of private considerations into the 13(b) analysis is inconsistent with recent lower court decisions which have held that such interests are entitled to little, if any, weight in 13(b) proceedings.⁴²

Perhaps more disturbing than the District of Columbia Circuit's approach to the equities involved in *Weyerhaeuser* was its substitution of a hold separate order for the statutorily sanctioned preliminary injunction.⁴³ Although section 13(b) expressly provides

(4th Cir. 1977); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 570 (N.D. Ill. 1968); Kelley, *Preliminary Injunctions in FTC Merger Cases: A Proposal for Expanded Use of Preliminary Structural Decrees*, 14 U.S.F.L. Rev. 1, 37-41 (1979); Note, *supra* note 10, at 392-94.

⁴⁰ H.R. REP. NO. 624, 93d Cong., 1st Sess. 31, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2523, 2533; see *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 677 (2d Cir. 1963); *FTC v. National Health Aids*, 108 F. Supp. 340, 346 (D. Md. 1952). Congress, fearing that the judiciary automatically would issue injunctions upon mere request, included in section 13(b) a clause requiring the courts to use independent judgment before granting the petitioned-for relief. H.R. REP. NO. 624, 93d Cong., 1st Sess. 31, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2523, 2533.

⁴¹ See 15 U.S.C. § 53(b) (1976); H.R. REP. NO. 624, 93d Cong., 1st Sess. 31, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2523, 2533; *supra* note 40.

⁴² See, e.g., *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1345-46 (4th Cir. 1976); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D. Ill. 1978); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1097 (S.D.N.Y. 1977). But see *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1073 (S.D.N.Y. 1969), *aff'd mem. sub nom. Bartlett v. United States*, 401 U.S. 986 (1971); *United States v. Brown Shoe Co.*, 1956 Trade Cas. (CCH) ¶ 68,244, at 71,116 (E.D. Mo. 1956). Interestingly, the *Weyerhaeuser* court itself noted that no weight ought to be accorded to "a mere expectation of private gain from a transaction the FTC has shown is likely to violate the antitrust laws." 665 F.2d at 1083 n.26. In addition, the court appeared to suggest that private equities should not be considered in cases where the "entire transaction [is] vulnerable to legal challenge." *Id.*

⁴³ Had a hold separate order been provided for in section 13(b), it is suggested that such a remedy would have presented an attractive, albeit undesirable, alternative to the issuance of a preliminary injunction in a horizontal merger context. In this regard, it should be recognized that the effect of a hold separate order is to suspend the actual mingling of corporate assets, rather than to preclude the consummation of a potentially lawful merger.

for the issuance of temporary restraining orders and preliminary injunctions,⁴⁴ it makes no reference to hold separate orders. The fashioning of this new remedy, not specifically contemplated by the FTC Act, raises serious questions as to whether the province of the legislature has been invaded.⁴⁵ Hence, a well-known canon of statutory construction warns that a court should not correct legislative omissions through interpretation, since the legislature may have decided affirmatively not to include that particular avenue of relief.⁴⁶ When Congress enacted section 13(b), it apparently was well aware that hold separate orders frequently had been used by the FTC.⁴⁷ Nevertheless, the legislature chose not to include such orders within the remedial scheme of the statute.⁴⁸

Moreover, it is submitted that the remedial approach adopted

See *FTC v. Exxon Corp.*, 636 F.2d 1336, 1344 (D.C. Cir. 1980); Note, *supra* note 10, at 391-98 (1965); see also Kelley, *supra* note 39, at 37-42. Indeed, several courts have issued hold separate orders where the party seeking the preliminary injunction did not establish a probability of success on the merits or a risk of anticompetitive harm pending the section 7 action. See, e.g., *FTC v. Southland Corp.*, 471 F. Supp. 1, 6 (D.D.C. 1979); *United States v. Culbro Corp.*, 436 F. Supp. 746, 754-56 (S.D.N.Y. 1977); *United States v. Brown Shoe Co.*, 1956 Trade Cas. (CCH) ¶ 68,244 at 71,116-17 (E.D. Mo. 1956). Hold separate orders also have been issued where the court has made a determination that the competitive strength of the acquired entity would improve under the terms of the order. See *United States v. Heileman Brewing Co.*, 345 F. Supp. 117, 124 (E.D. Mich. 1972) (hold separate order was appropriate since acquired entity would have gone out of existence by the time of final determination on the merits). See generally Note, *supra* note 10, at 400-01. Additionally, the issuance of a hold separate order has been deemed proper where both parties consented to such issuance. See *FTC v. Pillsbury Co.*, 88 F.T.C. 769, 769-73 (N.D. Ill. 1976).

⁴⁴ 15 U.S.C. § 53(b) (1976).

⁴⁵ See generally 1 A.J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 1.02, at 4 (C. Sands 4th rev. ed. 1972). Apparently admonishing fellow members of the bench, Justice Traynor stated that one of the limits on judicial creativity was preserving "the distance between judicial analysis and legislative innovation." Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 2 (1977).

⁴⁶ See 1 A.J. SUTHERLAND, *supra* note 45, § 1.02, at 4. A basic tenet of statutory construction states that when a statute requires that an act be done in a specific form or manner, it excludes every other form or manner of performance. See *Smith v. Stevens*, 77 U.S. (10 Wall.) 321, 326-27 (1870); see also F. FRANKFURTER, *SOME REFLECTIONS ON THE READINGS OF STATUTES* 20 (1947) ("legislation has an aim; it seeks to . . . supply an inadequacy That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute").

⁴⁷ Cf. *supra* note 43 (indicating circumstances where FTC has issued hold separate orders). Prior to the enactment of section 13(b), the Commission possessed no direct statutory authority to enjoin an anticompetitive merger. See Halverson, *supra* note 4, at 873-74. This congressional inaction prompted the Commission to seek other methods of obtaining preliminary relief. *Id.* at 876-77. For instance, in 1966 the Supreme Court allowed the FTC, pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1976), to petition the circuit courts for preliminary relief in section 7 cases. *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-05 (1966).

⁴⁸ See 15 U.S.C. § 53(b) (1976).

by the *Weyerhaeuser* majority does not comport with the legislative purpose of the statute. The enactment of section 13(b) was motivated in part by a congressional awareness that anticompetitive mergers endanger legitimate economic and societal objectives.⁴⁹ Congress selected the preliminary injunction as the vehicle to forestall the consummation of such mergers because this remedy not only maintains the preventative focus of the Clayton Act,⁵⁰ but also provides the courts with a viable method of preserving a meaningful status quo pending review of a merger's competitive impact.⁵¹ The *Weyerhaeuser* court's conclusion that hold separate orders will achieve that status quo pendente lite appears misplaced, particularly in the context of horizontal mergers.⁵²

⁴⁹ Section 7 of the Clayton Act was intended to halt anticompetitive practices in their incipiency. See *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 90 (D. Colo. 1975); *supra* note 3 and accompanying text. More specifically, the objective of section 7 is to quash mergers that may harm competition by eliminating competitors or by increasing concentration within the market. See *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 366 (1970). "Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18 (1962); see S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5 (1950). See generally Note, *supra* note 2, at 767-68 (1952).

⁵⁰ See *supra* notes 1-3 and accompanying text.

⁵¹ See *United States v. Hospital Affiliates Int'l, Inc.*, 1980-1981 Trade Cas. (CCH) ¶ 63,721, at 77,853-54 (E.D. La. 1980) (preliminary injunction rather than hold separate order is the appropriate remedy if there is a risk of anticompetitive harm); *United States v. Pennzoil Co.*, 252 F. Supp. 962, 988 (W.D. Pa. 1965) (congressional intent underlying section 7 and the inadequacy of divestiture favor issuance of preliminary injunction). Indeed, the availability of injunctive relief to the FTC is essential to effective enforcement of antitrust legislation. See *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.5 (1966) ("[w]ithout standing to secure injunctive relief and thereby safeguard its ability to order an effective divestiture of acquired properties, the Commission's efforts would be frustrated"); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 569 (N.D. Ill. 1968).

⁵² See, e.g., *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 790-91 (N.D. Ill. 1978) (issuance of hold separate order places judiciary in an inappropriate activist supervisory role); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1096-97 (S.D.N.Y. 1977) (hold separate order is unsatisfactory because allowing acquisition to go forward eliminates actual and potential competition between merging entities); *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. 199, 247 n.21 (D. Md.) (hold separate orders in situations where merger is probably illegal run contrary to public policy as embodied in section 7 of Clayton Act), *aff'd*, 546 F.2d 25 (4th Cir. 1976); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1073-74 (S.D.N.Y. 1969) (public interest, legislative intent in section 7, and difficulties of divestiture all require preliminary injunction rather than hold separate order in horizontal acquisition), *aff'd mem. sub nom. Bartlett v. United States*, 401 U.S. 986 (1971); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 569 (N.D. Ill. 1968) (consummation of merger under hold separate order would not obviate interim competitive harm). See generally L. SULLIVAN, *supra* note 2, at 669-71; Elzinga, *supra* note 4, at 53; Pfunder, Plaine & Whittemore, *Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of*

The hold separate order appears to be a markedly unsuited means of checking interim competitive harm in horizontal mergers⁵³ because the entities involved are direct competitors prior to consummation of the transaction.⁵⁴ It has been recognized that it is somewhat unrealistic to expect a held separate company to maintain vigorous competition with its acquiring parent.⁵⁵ Clearly, the hold separate order creates inherent conflicts of interest and practical disincentives for competition between the acquired and acquiring entities *pendente lite*. Moreover, since the records, trade secrets, and confidential market information of the held separate entity will be vulnerable to transfer to personnel of the acquiring parent, a return to premerger market conditions may be impossible if the transaction ultimately fails to survive scrutiny.⁵⁶ In view of

the Relief Obtained, 17 ANTITRUST BULL. 19, 76-77 n.84 (1972).

⁵³ A horizontal merger is an acquisition prior to which the acquiring firm and the firm to be acquired compete directly with each other in the same relevant geographical and product markets. See Clayton Act § 7, 15 U.S.C. § 18 (1976) (statute refers to relevant geographic and product markets by use of terminology such as "section of the country" and "line of commerce"); L. SULLIVAN, *supra* note 2, at 600. Indeed, the Supreme Court has defined a horizontal merger as "[a]n economic arrangement between companies performing similar functions in the production or sale of comparable goods or services." *Brown Shoe Co. v. United States*, 370 U.S. 294, 334 (1962). See generally Meehan, *Rules v. Discretion: A Re-evaluation of the Merger Guidelines for Horizontal Mergers*, 23 ANTITRUST BULL. 769, 772 (1978); Note, *Horizontal Mergers After United States v. General Dynamics Corp.*, 92 HARV. L. REV. 491, 499-502 (1978).

⁵⁴ See generally R. POSNER, ANTITRUST 381-510 (1974). As previously noted, see *supra* note 53, horizontal mergers are mergers between companies that sell one or more competing products in the same geographic market. E. KINTNER, AN ANTITRUST PRIMER 90 (2d ed. 1973); e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270, 272 (1966) (third largest retail grocery chain in the Los Angeles area acquired sixth largest retailer). Thus, in the horizontal merger context, it is apparent that, after the issuance of a hold separate order, the company being acquired may not be able to maintain vigorous competition with its acquiring parent. See *United States v. Pennzoil Co.*, 252 F. Supp. 962, 987-88 (W.D. Pa. 1965). In *Pennzoil*, the court specifically addressed the problems which arise after a merger has been consummated. *Id.* The court, rejecting the acquired company's argument that it could continue to function as a separate entity after consummation, stated that

[t]he defendants' contention is . . . for present purposes meaningless. Pennzoil will be the sole stockholder of [the defendant's] Board of Directors and determine its policies. For the defendants to urge that [the acquired corporation] would remain an active competitor of Pennzoil is to totally disregard the realities of the market place.

Id. at 987.

⁵⁵ L. SULLIVAN *supra* note 2, at 671; see Note, *supra* note 10, at 395-96 (even if entities are held separate *pendente lite*, their executives will find it difficult to forget that success on the merits is tantamount to union).

⁵⁶ Hold separate orders create the risk that confidential information and trade secrets will be transferred from the held separate entity to the acquiring company. See, e.g., *F. & M. Schaefer Corp. v. Schmidt & Sons, Inc.*, 597 F.2d 814, 818 (2d Cir. 1979) (access to

the clearly expressed congressional policies favoring the growth of competition and advocating the issuance of injunctions to preserve the status quo,⁵⁷ it is suggested that the *Weyerhaeuser* court's insertion of hold separate orders into the remedial scheme of section 13(b) does not further the goals of the statute.⁵⁸

Although the hold separate order does not fall within the scope of remedies offered by section 13(b), it is submitted that there are cases in which a court may rely upon its inherent equity powers to issue such relief.⁵⁹ When the challenged transaction is a vertical merger,⁶⁰ for example, the prospects of competitive harm

confidential trade information). Even if a hold separate order contains strict proscriptions against the transfer of such confidential information, the relationship between the parties to the transaction nevertheless presents ample opportunity for inadvertent transfers. *See Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741, 754 (D. Del. 1973); *see also United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 543 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963); L. SULLIVAN, *supra*, note 2 at 670-71; Note, *supra* note 10, at 395-96.

⁵⁷ *See Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741, 754 (D. Del. 1973) ("the potential for future control, as a practical matter, is bound to influence Elco's market place decisions to some degree in the interim").

⁵⁸ *See supra* notes 1-3 and accompanying text. In addition to the intercorporate problems created by the issuance of hold separate orders, *see supra* text accompanying notes 53-55, the courts and the FTC are burdened with the onerous task of ensuring compliance with the terms of such orders, *see, e.g.*, *FTC v. Exxon Corp.*, 636 F.2d 1336, 1344-47 (D.C. Cir. 1980); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 790-91 (N.D. Ill. 1978); *see also FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1097 (S.D.N.Y. 1977).

⁵⁹ After a violation of section 7 has been established, courts typically attempt to provide remedies which will restore premerger competition to the marketplace. *See* 1 M. HANDLER, *TWENTY FIVE YEARS OF ANTITRUST* 146-49 (1973). To this end, a divestiture order mandates that the acquiring entity dispose of the acquired assets following the successful prosecution of the unlawful merger. *E.g.*, *United States v. Brown Shoe Co.*, 179 F. Supp. 721, 741 (E.D. Mo. 1959); 15 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION LAWS* § 114.03[1]; *see, e.g.*, *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1379-80 (9th Cir. 1978); *OKC Corp. v. FTC*, 455 F.2d 1159, 1162-63 (10th Cir. 1972). Even where the assets have remained segregated pursuant to a hold separate order, the complexities of divestiture are often overwhelming. *See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL* (1979), *reprinted in* 80 F.R.D. 509, 609-11 (1979). In its report, the Commission noted that divestiture is burdensome not only because the assets become "scrambled," but also because the nature of the assets themselves may have changed. 80 F.R.D. at 609. Notably, several lower federal courts have recognized that hold separate orders do not aid in rectifying the problems inherent in divestiture. *See, e.g.*, *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 790 (N.D. Ill. 1978); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1096 (S.D.N.Y. 1977).

⁶⁰ A vertical merger is a merger by which one company acquires all or part of the stock or assets of a company which, itself, is a customer or supplier of the company to be acquired. *See* 3 J. VON KALINOWSKI, *supra* note 59, § 17.03[1]. In contrast to a horizontal merger, a vertical merger alone does not increase market concentration in either of the two markets involved. *Id.* § 17.03[3]. For a discussion of the different types of vertical mergers, *see id.* § 17.03[1]; *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962).

may not be serious enough to support the issuance of an injunction under section 13(b).⁶¹ A court nonetheless may exercise its equitable powers to render less drastic relief, reasoning that such a course of action is necessary to further the policies embodied in the antitrust laws.⁶² It is suggested that a hold separate order can be useful in such instances. To be sure, after a vertical merger is consummated, the participating entities operate through a reciprocal relationship in which each must rely upon the other to attain economic success.⁶³ Although this type of merger presents the danger of "market foreclosure"—in which the acquired entity's competitors are harmed by the exclusive dealing between the merged companies—⁶⁴ there is little risk that either entity will disappear from the competitive scene before a court can adjudicate the merits in a plenary action.⁶⁵ Indeed, because the parties are not direct competitors, the combined entity will not benefit from the elimination of the acquired entity, and hence, the risk of interim competitive harm is more limited than that occasioned by a horizontal merger.⁶⁶

Hold separate orders are also well suited to the conglomerate merger situation.⁶⁷ Conglomerate mergers, generally, do not have an immediate effect on existing competition.⁶⁸ The primary evil

⁶¹ See 3 J. von Kalinowski, *supra* note 59, § 17.03[3]. A vertical merger does not lessen competition immediately because it does not necessarily eliminate any competitors in the relevant market. *Id.* For instance, where a manufacturing entity provides the supply and a retailer furnishes the market for such supply, neither company, regardless of which is the acquiring firm, has any incentive to create interim competitive harm. *Id.*

⁶² Cf. *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066, 1097-1100 (N.D. Ill. 1969) (hold separate order is more effective in a vertical merger context). See generally Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1321-22 (1965).

⁶³ See 3 J. VON KALINOWSKI, *supra* note 59, § 17.03[3].

⁶⁴ See R. BORK, *THE ANTITRUST PARADOX* 231 (1978).

⁶⁵ See *id.*

⁶⁶ See *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 63-67 (S.D.N.Y. 1966); *Smith-Victor Corp. v. Sylvania Elec. Prod., Inc.*, 242 F. Supp. 315, 317-20 (N.D. Ill. 1965); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 611-15 (S.D.N.Y. 1958). See generally E. KINTNER, *PRIMER ON THE LAW OF MERGERS* 214-16 (1973).

⁶⁷ Conglomerate mergers have been defined as any "mergers that are neither horizontal nor vertical." Vanderstar, *Conglomerate Mergers: The Developing Antitrust Guidelines*, 44 ST. JOHN'S L. REV. 596, 596 (spec. ed. 1970); see *Babcock & Wilcox Co. v. United Technologies Corp.*, 435 F. Supp. 1249, 1284 (N.D. Ohio 1977). This type of merger accounts for the majority of large mergers. Note, *The Business Protection Act and the Control of Conglomerate Mergers*, 58 TEX. L. REV. 588, 598 & n.38 (1980).

⁶⁸ Unlike horizontal mergers, which immediately reduce the number of competitors in a given market, see *supra* note 53, the impact of a conglomerate merger is not immediately

such mergers promote is eventual change in overall market structure and, thus, the anticompetitive effect is prospective.⁶⁹ Since a hold separate order is only a preliminary remedy,⁷⁰ most cases in-

discernible, Note, *supra* note 67, at 601. Consequently, three basic theories have been expounded to assess market impact: potential competition, entrenchment, and reciprocity. The potential competition theory is predicated upon the possibility that, had there been no merger, the acquiring firm may have entered the market as a competitor of the acquired firm. See Note, *supra* note 67, at 602. A corollary to this doctrine is the "perceived" potential competition theory which states that the threat of an outside competitor entering the market stimulates competition within the market. See *id.* Entrenchment, on the other hand, involves a merger in which the dominant market position of a firm would be so strengthened or entrenched by the merger that new firms would be impeded from entering the market and smaller firms would be reluctant to compete aggressively. See *FTC v. Procter & Gamble*, 386 U.S. at 578; Vanderstar, *supra* note 67, at 603. This inhibiting effect on competition is based, in part, upon the threat of cross-subsidization, whereby a conglomerate uses its resources from one market to support low, or even predatory, prices in another. See Standridge & Santopietro, *Regulating the Pure Conglomerate Merger: Important Legislative Task or Useless Exercise?*, 30 SYRACUSE L. REV. 607, 632 (1979). Reciprocity, the third major theory employed to prove the anticompetitive market impact of conglomerate mergers, has been defined as "the use of buying power to secure a competitive advantage in the sale of one's own products." 8 J. VON KALINOWSKI, *supra* note 59, § 63.01. Indeed, a large conglomerate often serves as both supplier and customer of a smaller firm. Thus, faced with actual or potential threats of losing the conglomerate as a customer, the smaller business may feel compelled to continue dealing with the conglomerate as a supplier, regardless of the quality or price. See generally Note, *Reciprocity as a Basis for Challenging Conglomerate Mergers Under the Clayton Act*, 12 LOY. U. CHI. L.J. 481 (1981).

⁶⁹ See *supra* note 68. Recently, large conglomerates have assumed a more pervasive role in our economic structure. See Note, *supra* note 68, at 481-82. Many view these conglomerates as inherently evil since their very size implies a degree of political and social power. See, e.g., Standridge & Santopietro, *supra* note 68, at 610 & n.7; Vanderstar, *supra* note 67, at 610; cf. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 810-12 (1978) (White, J., dissenting) (recognizing fear of corporate domination of political process). As these firms continue to grow, so does the number of lives their activity affects, see R. BORK, *supra* note 64, at 50-71, 90-106, and so does the political power they eventually can wield, Note, *supra* note 67, at 596-97. See generally Seneca & Haight, *The Concept of Power: Antitrust as an Illustration*, 23 ANTITRUST BULL. 339, 339-53 (1978). In contrast, it has been argued that conglomerate mergers are justified since large firms are able to compete more effectively in international trade. See Note, *supra* note 67, at 600.

In the context of the antitrust laws, such extensive conglomeration is symptomatic of a trend toward monopolization. See Turner, *supra* note 62, at 1323-30. Although section 7 of the Clayton Act proscribes any merger that tends to create a monopoly, courts have not construed conglomerate mergers as violative of section 7 when prosecution is based solely upon a trend to aggregate concentration. See, e.g., *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066, 1096 (N.D. Ill. 1969); *United States v. ITT*, 306 F. Supp. 766, 796 (D. Conn. 1969), *appeal dismissed*, 404 U.S. 801 (1971). Moreover, opposition to conglomerate mergers is often difficult. This is due in part to the inapplicability of horizontal and vertical merger rules to the conglomerate merger situation, see Vanderstar, *supra* note 67, at 596, and residually, to the courts' reluctance in recent years to avail themselves of the anticompetitive theories proposed by the FTC, Standridge & Santopietro, *supra* note 68, at 614 & n.29.

⁷⁰ See *supra* note 10.

volving conglomerate mergers will be decided before the anticompetitive effects have manifested themselves as contravening the preventive antitrust laws. The hold separate order, therefore, can provide effective protection for the marketplace by furnishing a viable method of preserving the status quo until a complete resolution of the issues can be accomplished.⁷¹

CONCLUSION

By refusing to issue a full-stop preliminary injunction despite a showing of a likelihood of success on the merits, it is submitted that the District of Columbia Circuit has sharply curtailed the enforcement role created for the FTC in section 13(b). In addition, the court's endorsement of the less than stringent relief provided by hold separate orders in the horizontal merger context appears to undermine the precautionary policies embodied in section 7 of the Clayton Act. Unfortunately, the *Weyerhaeuser* decision may serve to encourage acquisition-minded entities to structure their transactions in a manner contrary to the purposes of section 7, section 13(b), and other statutes designed to further a competitive marketplace. At the very least, this decision substantially will impair the FTC's efforts to eliminate anticompetitive behavior in its incipiency and to protect the public's interest in maintaining a procompetitive economy.

Kevin J. Lyons

⁷¹ See generally 3 J. VON KALINOWSKI, *supra* note 59, § 15.02[1][a]; *supra* note 10.