

# SECTION 7 OF THE CLAYTON ACT AS A BASIS FOR THE TREBLE- DAMAGE ACTION: WHEN MAY THE PRIVATE LITIGANT BRING HIS SUIT?

*John Ellsworth Stein\**

IN THE LAST DECADE the number of private antitrust suits has more than doubled,<sup>1</sup> a trend which is not likely to be reversed. The large majority of such actions have in the past been based upon alleged violations of sections 1 and 2 of the Sherman Act, which prohibit contracts, combinations or conspiracies in restraint of trade, and monopolization of trade.<sup>2</sup> The future, however, may well witness an increase in the number of private actions having as their genesis alleged violations of section 7 of the Clayton Act, which proscribes mergers or acquisitions that may be harmful to competition.<sup>3</sup> In view of the startling increase in the number and size of such consolidations in the United States,<sup>4</sup> a continually widening community is likely to be exposed to their frequently deleterious effects. Therefore, the availability of the private action under the latter section has become a question of prime importance.

The answer to the basic query—whether or not the base of the private antitrust action can and should be broadened so as to encompass violations of section 7—depends to a significant degree upon the period

\*A.B., 1964, University of Pennsylvania; J.D., 1967, Georgetown University Law Center. Member of the District of Columbia Bar.

<sup>1</sup>The following table, based upon figures set forth in Note, *Nolo Pleas in Antitrust Cases*, 79 HARV. L. REV. 1475, 1478 (1966), illustrates the dramatic increase in the number of private antitrust suits over the past quarter-century:

5-year period:	1941-45	1946-50	1951-55	1956-60	1961-65
Number of suits filed:	297	529	1,054	1,163	3,598*

\*Includes 1,948 electrical equipment cases.

<sup>2</sup>Sherman Act §§ 1,2, ch. 647, §§ 1,2, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1,2 (1964).

<sup>3</sup>Clayton Act § 7, ch. 323, § 7, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

<sup>4</sup>A recent statistical report, *Large Mergers in Manufacturing and Mining 1948-1967*, published by the Bureau of Economics of the Federal Trade Commission in May 1968 contained the following table:

of time within which such a suit must be brought. This Article will argue that section 7 does provide a private cause of action for treble damages; its primary focus, however, will be upon the question of the applicable statute of limitations. For the availability of a private action means very little if the period of limitations is such as to protect the parties responsible for inflicting the injury. If the right is to be a meaningful one, the statute of limitations must be construed in such a manner that it affords deterrent protection and, where necessary, adequate redress to a party injured by an illegal merger or acquisition.

The statutes of limitations applicable to a private suit for treble

Acquisitions of manufacturing and mining firms with assets of \$10 million or more, 1948 - 1967

Year	Number of acquisitions	Assets (millions)
1948	4	\$ 66
1949	5	67
1950	4	173
1951	9	201
1952	13	327
1953	23	679
1954	35	1,425
1955	68	2,129
1956	58	2,037
1957	50	1,469
1958	38	1,107
1959	64	1,960
1960	62	1,710
1961	59	2,129
1962	72	2,194
1963	68	2,889
1964	91	2,798
1965	93	3,900
1966	101	4,078
1967*	166	8,172
Total	1,083	\$39,510

\*Revised.

In addition, the same report indicates that the number of mergers in the one hundred million dollar plus range has increased markedly as well. The first purchase of a company with assets of more than one hundred million dollars took place in 1952. Between the date of that acquisition and 1962, only three or four mergers in the one hundred million dollars plus range were consummated each year. In 1963, there were five mergers exceeding one hundred million dollars. In 1964, and again in 1965, six such mergers were consummated. In 1966, there were four, but in 1967 the number jumped dramatically to 23. This number represents about one-third of all the one hundred million dollars plus mergers which took place during the entire 20-year period covered by the report.

The first six months of 1968, furthermore, saw mergers continue at a record pace. W. T. Grimm & Co., a financial consulting firm specializing in mergers and acquisitions, said that during the period there were "a record 1,703 corporate consolidations—up 20.3 percent over the 1,416 reported for the comparable 1967 period." According to Grimm, there were 2,975 mergers during

damages under section 4 of the Clayton Act,<sup>5</sup> based upon a violation of section 7 of the Act,<sup>6</sup> provide in pertinent part as follows:

Any action to enforce any cause of action under sections [4 and 4a of the Act] shall be forever barred unless commenced within four years after the cause of action accrued . . . .<sup>7</sup>

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section [4a of the Act], the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section [4 of the Act] is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.<sup>8</sup>

The language of these statutes narrows the issue. Must a private litigant bring a section 4 action within four years from the date the merger or acquisition violative of section 7 is consummated (or within the applicable extended period if an intervening government suit upon which plaintiff relies in whole or in part has been brought) or may such a private cause of action be brought at any time the plaintiff suffers injury by reason of a prior illegal merger or acquisition, even if such injury occurs after the statutory period of four years (or extended period) has expired?

Section 4b uses the language "within four years after the cause of action accrued." Does a cause of action for a section 7 violation "accrue" on the day the illegal merger or acquisition is completed, or does such an action accrue whenever the injurious effects of the illegal merger or acquisition are first experienced by the plaintiff? Or, can it reasonably be argued that the ill effects of an illegal merger or

all of 1967, and "[b]ased on first-half activity, mergers for [1968] should slightly exceed the 3,400 predicted previously." *The Washington Evening Star*, July 10, 1968, § D, at 2, col. 7.

<sup>5</sup>Clayton Act § 4, 15 U.S.C. § 15 (1964), provides in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained . . . ." Section 4a of the Act, 15 U.S.C. § 15a (1964), gives the Government a cause of action for such violations.

<sup>6</sup>Clayton Act § 7, 15 U.S.C. § 18 (1964), provides in part that: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . 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 tend to create a monopoly."

<sup>7</sup>Clayton Act § 4b, 15 U.S.C. § 15b (1964).

<sup>8</sup>Clayton Act § 5(b), ch. 323, § 5, 38 Stat. 731 (1914), *as amended*, 15 U.S.C. § 16(b) (1964).

acquisition may be continuing in nature and that therefore a private damage suit based on a violation of section 7 may be brought at any time the plaintiff suffers injury on a theory analogous to the "continuing conspiracy" doctrine evoked under the Sherman Act?<sup>9</sup>

Before reaching these questions, however, it must be established that a section 7 violation does in fact provide a basis for a private treble-damage action as contemplated by section 4 of the Act.

## I

### THE PREMISE

A violation of section 7 of the Clayton Act can be the basis for a treble-damage suit brought under section 4 of the Act.

Section 7 of the Clayton Act is defined by section 1 of the Act as being a part of the "antitrust laws,"<sup>10</sup> and section 4 of the Act authorizes private treble-damage recovery for "anything forbidden in the antitrust laws."<sup>11</sup> It would seem, then, that a violation of section 7 could unquestionably be the basis for a private plaintiff's action for treble damages under section 4.

This writer, however, has not found a single reported case litigated under section 4, alleging a section 7 violation, which has resulted in an award of damages. In those reported cases that plaintiff won, the relief has without exception been only equitable in nature.<sup>12</sup> A review of the federal district court decisions which have expressly addressed the issue of whether a private action for damages can be supported by a violation of section 7 of the Clayton Act indicates that most of the district judges who have spoken on the issue do not believe the right to exist.

In *Gottesman v. General Motors Corporation*,<sup>13</sup> for example, the minority stockholders of General Motors (GM) brought a derivative

<sup>9</sup>For a discussion of this possible analogy see text accompanying notes 84-110 *infra*.

<sup>10</sup>Clayton Act § 1, 15 U.S.C. § 12 (1964), provides in part: "Antitrust laws," as used herein, includes . . . also this Act."

<sup>11</sup>15 U.S.C. § 15 (1964).

<sup>12</sup>*See, e.g.,* Muskegon Piston Ring Co. v. Gulf & W. Indus., Inc., 328 F.2d 830 (6th Cir. 1964) (plaintiff granted a temporary injunction against defendant charged with violating § 7 of the Clayton Act, so that there was maintained the "status quo" in the relationship between the corporations as of the date of the filing of the complaint); Crane Co. v. Briggs Mfg. Co., 280 F.2d 747 (6th Cir. 1960) (plaintiff granted a preliminary injunction restraining defendant charged with violating section 7 from soliciting proxies or voting stock); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958) (plaintiff granted a permanent injunction prohibiting defendant, found to have violated section 7, from voting any shares of stock of the plaintiff company, and from acquiring any representation on the board of directors of the plaintiff).

<sup>13</sup>221 F. Supp. 488 (S.D.N.Y. 1963), *motion for leave to appeal denied*, Misc. No. 1959 (2d Cir. 1964), *cert. denied*, 379 U.S. 882 (1964).

action against E.I. du Pont de Nemours & Co. and GM, based primarily on matters involved in an earlier government antitrust suit against the two corporations. In the earlier case, the Court had returned a judgment for the Government,<sup>14</sup> holding that du Pont's acquisition of GM stock violated section 7 of the Clayton Act. The *Gottesman* court held, however, that a violation of section 7 did not provide a private action for damages.

No case has been found discussing the question whether damages can be recovered for a violation of section 7 of the Clayton Act, and no case has been found where damages have been awarded for such a violation.<sup>15</sup>

The test of a section 7 violation is whether "there is a reasonable probability that the acquisition is likely to result in the condemned restraints."<sup>16</sup> Plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7.<sup>17</sup>

In *Bailey's Bakery, Limited v. Continental Baking Company*<sup>18</sup> the plaintiff sought treble damages on the basis of an allegation that the outright purchase by the defendants of Love's Biscuit & Bread Co., and the actions of defendants thereafter "violated and still violate"<sup>19</sup> section 7 of the Clayton Act. The court dismissed this count of the complaint, stating:

It is a well settled rule of torts that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts of a defendant committed prior to the filing of the action. If damages are attributable to protracted conduct and repetitive acts which continue beyond the date an action is filed, each time the plaintiff's interest is invaded by an act of defendant, he has a new cause of action, and for any particular invasion is thus entitled to recover as damages not only for the injuries he suffers at once but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial. However, a plaintiff cannot recover for anticipated invasions even though they were of the same general character of those he has already sustained.

The prohibitory sanctions of Clayton § 7 are triggered to explode by and at the moment of acquisition. That, *after* the moment of acquisition, subsequent business practices do injure competitors in that market does not because of those subsequent injurious acts, give rise to a claim for treble damages under Clayton § 7.

Since Clayton § 7 is concerned with the future monopolistic and restraining tendencies of corporate acquisition, i.e., probable (and hence not

<sup>14</sup>United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

<sup>15</sup>221 F. Supp. at 493.

<sup>16</sup>United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957).

<sup>17</sup>221 F. Supp. at 493.

<sup>18</sup>235 F. Supp. 705 (D. Hawaii 1964).

<sup>19</sup>*Id.* at 710.

certain) future restraints on commerce, any damages claimed for prospective restraint of trade would be purely speculative, and a plaintiff cannot recover money damages for anticipated but unimplemented acts of restraint which may invade its interests. While Clayton § 7 permits private injunctive and divestiture actions in merger situations which may result in the proscribed restraints or monopolies, nevertheless, no private action for treble damages accrues from a Clayton § 7 acquisition.<sup>20</sup>

In *Highland Supply Corporation v. Reynolds Metals Company*<sup>21</sup> the plaintiff moved in the district court for reconsideration of an order dismissing part of the plaintiff's amended and supplemental complaint. The plaintiff's original complaint had alleged injuries resulting from Reynolds Metals' alleged violation of section 7 of the Clayton Act, and asked treble damages. The defendant contended simply that there could be no private right of action based on a violation of section 7. The district court ruled for the defendant, holding that "[t]he § 7 Clayton claim was properly dismissed,"<sup>22</sup> and also stated:

There are three elements that must be alleged and proved in private treble-damage actions under § 4 of the Clayton Act: "(1) That the defendant has violated the antitrust laws; (2) that plaintiff has suffered an injury to his business or property susceptible of being described with some degree of certainty in terms of money damages; and (3) that a causal connection exists between the defendant's wrongdoing and the plaintiff's loss."<sup>23</sup>

The court found that plaintiff's claim alleged the first two elements, but that a private plaintiff "cannot allege that he has been injured solely by a merger or acquisition which has potential prohibited effects."<sup>24</sup> "The crucial matter remains that the prohibited acquisition, standing alone, caused no present, compensable injury,"<sup>25</sup> Relying heavily upon both *Bailey's Bakery* and *Gottesman*, the court found that the rationale of the two decisions prohibiting a private cause of action for treble damages based on a section 7 violation was the impossibility of demonstrating a causal nexus between any injury suffered and a "potential" evil.

In *Julius M. Ames Company v. Bostitch, Incorporated*,<sup>26</sup> however, a federal district court declined to follow this line of argument. The plaintiffs were engaged in the business of distributing metal fastener

<sup>20</sup>*Id.* at 716-17 (citations omitted).

<sup>21</sup>245 F. Supp. 510 (E.D. Mo. 1965).

<sup>22</sup>*Id.* at 514.

<sup>23</sup>*Id.* at 512, quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 289 F.2d 86, 90 (9th Cir. 1961).

<sup>24</sup>*Id.* at 513.

<sup>25</sup>*Id.*

<sup>26</sup>240 F. Supp. 521 (S.D.N.Y. 1965).

devices and products. The defendant was engaged in the business of manufacturing and selling machinery and devices for wire stitching, stapling, tacking, and fastening, as well as wire, staples, and related articles used with this machinery. The defendant sold its products through subsidiary and affiliated companies. On April 1, 1961, the defendant entered into an agreement with the owners of the stock of Calnail, which served as the exclusive sales agent for Calwire, a California manufacturer of heavy duty industrial tools, nails, and staples. Pursuant to the agreement, Calwire was merged into Calnail and all "pre-existing arrangements" for the distribution of Calnail products by the plaintiff were cancelled.<sup>27</sup>

The plaintiffs thereupon brought an action charging the defendant with having violated section 1 of the Sherman Act and section 7 of the Clayton Act. The defendant moved to dismiss the Clayton Act claim on the ground that the complaint failed to state a cause of action. Judge McLean refused to dismiss the claim, distinguishing *Gottesman, Bailey's Bakery*, and *Highland Supply* on their facts:

The rationale of each of these [three cases] would appear to be this: At the time of the alleged acquisition, a lessening of competition or a monopoly need not already have occurred, for Section 7 is violated merely by the probability that such a lessening of competition or monopoly may occur in the future. Therefore, plaintiff is not injured at the moment of the acquisition. His damage will occur, if at all, only in the future, when the lessening of competition or the monopoly actually manifests itself. Consequently, at the moment of acquisition, plaintiff's damages are purely speculative and hence he cannot recover.

In the case before me, however, a different situation is presented. Plaintiffs have lost their distributorships. They have lost them, according to the complaint, substantially at the moment when defendant acquired Calnail. Since, by hypothesis upon this motion, the acquisition of Calnail was illegal, defendant's illegal act has caused plaintiffs immediate and present damage. I cannot escape the conclusion that plaintiffs are entitled to recover that damage

. . . .<sup>28</sup>

Judge McLean's "time oriented approach"<sup>29</sup> permits a plaintiff to use section 7 as a basis for his treble-damage suit if his injury suffered by reason of the alleged illegal merger or acquisition occurs "substantially at the moment" when the defendant entered into the agreement. This emphasis on the time of injury seems to reflect the various courts' concern over the problem a private plaintiff faces in proving to a court the existence of the element of causal connection between the illegal merger

<sup>27</sup>*Id.* at 522.

<sup>28</sup>*Id.* at 524.

<sup>29</sup>In *Highland Supply Corp. v. Reynolds Metals Co.*, 245 F. Supp. 510, 513 (E.D. Mo. 1965), Judge Meredith used this phrase in referring to the approach taken by Judge McLean in *Ames*.

or acquisition under section 7 and the injury he suffers. Yet, it is a concern which should not be so troublesome. If there is consummated a merger or acquisition violative of section 7 and if a plaintiff suffers injury thereby, be it at the moment of consummation or at some later time, a cause of action should lie.<sup>30</sup> In either case, the plaintiff must show a causal connection between the violation and his injury.<sup>31</sup> Perhaps it is a greater burden in the case where his injury is delayed, but the fact of delay should not, as a matter of law, deprive the plaintiff of an opportunity to prove the necessary causation.

The *Ames* case can be viewed as standing for the proposition that a section 4 treble-damage suit may be brought on the basis of a section 7 allegation in at least certain cases: namely, those in which immediate injury can be shown as a result of the illegal merger or acquisition. This decision is laudably logical as far as it goes, but it quite clearly leaves important questions unanswered. Foremost among these is the question of whether a plaintiff can bring a section 4 suit for injury suffered considerably after the merger. Consider, for example, a situation where an acquisition allegedly violative of section 7 was consummated on January 1, 1960, but no agreement to cut off the plaintiff as supplier of the acquired company was made at the time of the acquisition; rather such an agreement was made on January 1, 1963. Clearly, injury results to plaintiff on January 1, 1963.<sup>32</sup> Equally clearly, it has occurred within the four-year statute of limitations of section 4b of the Clayton Act. Nevertheless, under the approach utilized in the *Ames* case, it cannot be said to have occurred "substantially at the moment" of the illegal acquisition. Therefore, although the plaintiff has unquestionably been injured within the statutory period, he is without a remedy—a highly unacceptable posture for the law to have assumed.

There does exist some other judicial support for the proposition that

<sup>30</sup>If, as in *Ames*, the plaintiff alleges an injury was caused at the time of the merger or acquisition, the lawfulness of that consolidation should be viewed as of that moment. Cf. *Suckow Borox Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951). But, if the plaintiff alleges that he is suffering continuous injury, the lawfulness of the merger or acquisition in question should be subject to continuous inspection. Cf. *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 730-31 (8th Cir. 1964), *rev'g* 221 F. Supp. 15 (E.D. Mo. 1963) (statute of limitations question); *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949) (statute of limitations question). But cf. *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 405-06 (S.D.N.Y. 1961) (statute of limitations question). See Note, 53 GEO. L.J. 1133, 1134-35 n.8 (1965).

<sup>31</sup>*Duff v. Kansas City Star*, 299 F.2d 320, 323 (8th Cir. 1962); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 289 F.2d 86, 90 (9th Cir. 1961).

<sup>32</sup>Demonstrable injury may not be suffered even at the time when the subsequent agreement to illegally cut off the plaintiff is made. The parties to the agreement conceivably could decide to cut off plaintiff but not to act on their decision until a later date. If so, the injured plaintiff might save



a plaintiff may use section 7 as a basis for a section 4 treble-damage suit. Though the courts have not actually awarded such damages, many, as in *Ames*,<sup>33</sup> have implied they had the power to do so. In *Rayco Manufacturing Company v. Dunn*,<sup>34</sup> for example, the plaintiff moved for summary judgment against a section 7 counterclaim and prevailed. The district court held that the defendant had failed to present sufficient evidence of proximate cause; however, unlike *Gottesman* or *Bailey*, the court noted:

Under Section 7 of the Clayton Act, a civil suit may lie upon a showing that (1) the acquisition did or reasonably might substantially lessen competition or create a monopoly, and (2) the complainant suffered some special damage to his business as a direct and proximate result of the acquisition.<sup>35</sup>

It is well settled that the purpose of section 4 is to make enforcement of the antitrust laws more effective by giving individuals an incentive to bring suit when they are injured by a violation of such laws.<sup>36</sup> It would seem, furthermore, that a section which plays such an integral role in the enforcement of the antitrust laws should not be construed narrowly.<sup>37</sup>

his cause of action through the equitable doctrine of fraudulent concealment; this doctrine, however, contains pitfalls which are not easily avoided in every instance. In no event should a rule be established which would give the parties to such an illegal agreement immunity from a private damage action. See the discussion of the need to show measurable loss in a section 4 suit at text accompanying notes 65-69 *infra*.

<sup>33</sup>In *Ames*, the court said: "Section 4 says that any person who is injured by reason of anything forbidden in the antitrust laws may sue. It does not say that a person may sue if he is injured by reason of anything forbidden in the 'antitrust laws' except that which is forbidden by Section 7 of the Clayton Act." 240 F. Supp. at 524.

<sup>34</sup>234 F. Supp. 593 (N.D. Ill. 1964).

<sup>35</sup>*Id.* at 597.

<sup>36</sup>The purpose of the right to sue for treble damages is not only to recompense those so injured, but also to enlist private enforcement help. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 378 (1955). The need for enforcement help was expressed even before the 1955 Report. In 1951, the Assistant Attorney General for the Antitrust Division testified before a congressional hearing to the effect that to maintain the level of enforcement of the antitrust laws without private actions the Division would have to be increased in size fourfold. *Hearings Before the House Committee on the Judiciary*, 82d Cong., 1st Sess., pt. 3, at 15 (1951) (remarks of H. Graham Morison). See *United States v. Borden Co.*, 347 U.S. 514, 518 (1954) (dictum) (the design of the act is that private and public actions are to be "cumulative, not mutually exclusive"); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 893 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955) ("the grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which would help enforce the antitrust laws . . ."). See also Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

More recently, the Ninth Circuit has stated that a "niggardly construction of the treble-damage provisions would do violence to the clear intent of Congress." *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 335 U.S. 835 (1957).

<sup>37</sup>See *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 845 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964) (cited in *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 525 (1965). *Contra*, *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 110

The Supreme Court has recently adopted this position. In *Minnesota Mining & Manufacturing Company v. New Jersey Wood Finishing Company*,<sup>38</sup> the plaintiff brought an action for damages allegedly suffered by reason of defendant's violation of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. The violation arose from the defendant's acquisition of the stock and assets of a second company. The issue before the Supreme Court was whether the cause of action was barred by the statute of limitations, or whether the statute was in fact tolled by the provision of section 5(b) of the Clayton Act because of a prior Federal Trade Commission proceeding against the defendant on grounds that the acquisition had violated section 7 of the Clayton Act. The Court held that the statute had been tolled, and that therefore the plaintiff's cause of action was not barred.

Throughout the opinion the Court assumed that as long as the statute of limitations is not found to be a bar, the plaintiff may maintain an action for treble damages on the basis of a section 7 violation. The Court treated the *whole* of plaintiff's complaint, which alleged violations of sections 1 and 2 of the Sherman Act as well as section 7 of the Clayton Act, as being subject to the tolling provision of section 5(b). Finding the statute tolled, the Court affirmed the decision of the court of appeals<sup>39</sup> allowing the plaintiff's complaint to stand. By clear implication the Court viewed the section 7 violation charge as a proper basis for the suit for damages under section 4 of the Clayton Act.

The Supreme Court soon reaffirmed its decision in *Minnesota Mining*. In *Leh v. General Petroleum Corporation*,<sup>40</sup> the issue again was whether the plaintiffs' cause of action for damages was barred by the statute of limitations or brought within its purview by reason of the tolling provision of section 5(b). In *Leh*, plaintiffs did not bring a section 7 charge, but confined their allegations to violations of sections 1 and 2 of the Sherman Act. However, in referring to the *Minnesota Mining* decision, the Court attached no qualification to that earlier holding.

F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941) (cited by the court in *Highland Supply Corp. v. Reynolds Metals Co.*, 245 F. Supp. 510, 514 (E.D. Mo. 1965) for the proposition that section 4 should be strictly construed in view of the drastic and unusual nature of the treble-damage remedy).

<sup>38</sup>381 U.S. 311 (1965).

<sup>39</sup>*New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346 (3d Cir. 1964).

<sup>40</sup>382 U.S. 54 (1965).

The *Minnesota Mining* decision was decided by the Court on May 24, 1965. Mr. Justice Clark wrote the opinion for the Court. Mr. Justice Black along with Mr. Justice Goldberg dissented, arguing that in the circumstances the statute of limitations was not tolled. The *Leh* decision was rendered on November 8, 1965. Mr. Justice White wrote the opinion of the Court; there were no dissenters, Mr. Justice Black apparently being won over for the moment.

Here . . . we may find guidance in *Minnesota Mining*. In that case, the plaintiff . . . brought suit against Minnesota Mining and Manufacturing Company and the Essex Wire Corporation, the complaint alleging violations of § 7 of the Clayton Act and §§ 1 and 2 of the Sherman Act.<sup>41</sup>

The Supreme Court exhibited no reticence in reciting the fact that plaintiff in *Minnesota Mining* was asking for damages based in part on a section 7 charge.

In *Dailey v. Quality School Plan, Incorporated*,<sup>42</sup> the Court of Appeals for the Fifth Circuit heard an appeal involving a suit for treble damages under section 4 of the Clayton Act based on an alleged violation of section 7. The district court had dismissed the complaint for failure to state a claim within its jurisdiction or upon which relief could be granted. The court of appeals was concerned principally with the question of whether plaintiff, an employee in the acquired company whose services were shortly thereafter terminated, had standing to sue.<sup>43</sup> However, part of the opinion dealt expressly with the right of a private party to use a violation of section 7 as a basis for a section 4 damage suit. The court stated:

This is a question concerning which some uncertainty has crept into the law through the decisions. The better view to us is that § 7 is included in the term "antitrust laws" as that term is used in § 4 of the Act. The Third Circuit has so stated although this particular argument was apparently not made [citing *Minnesota Mining and Ames*]. . . . We see no escape from the logic that § 7 of the Clayton Act is an antitrust statute within the scope and meaning of § 4 of the Act and so hold.<sup>44</sup>

If section 7 permits no logical escape from the conclusion that it authorizes private treble-damage actions, the pertinent statutory language in sections 2, 3, and 16 of the Act reinforces this conclusion.

Section 16 of the Clayton Act<sup>45</sup> provides injunctive relief for private parties to insure "against threatened loss or damage" from a section 7 violation. If a plaintiff can suffer *threatened* loss by reason of a violation of section 7, there seems to be little reason why it cannot incur *actual* loss by reason of the same section 7 violation. The plaintiff injured by reason of a violation of section 7 should therefore have available to him the

<sup>41</sup>*Id.* at 62-63 (emphasis added).

<sup>42</sup>380 F.2d 484 (5th Cir. 1967).

<sup>43</sup>The problem of standing is of particular importance to the private litigant in antitrust actions. The problem is treated in Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

<sup>44</sup>380 F.2d at 488 (emphasis added; citations omitted).

<sup>45</sup>15 U.S.C. § 26 (1964), provides in part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title . . . ."

section 4 damage remedy as well as the section 16 injunctive remedy unless it can be said that section 4 is to be construed more narrowly than is section 16. However, in light of *Minnesota Mining* and *Leh* in which the Supreme Court apparently bent over backward to allow the private litigant's damage action to be brought, there seems to be left little vitality in the early decision of *Twin Ports Oil Company v. Pure Oil Company*,<sup>46</sup> which had sought to construe section 4 narrowly.

Further support for the premise is found in the fact that damages have been awarded frequently to private litigants under sections 2<sup>47</sup> and 3<sup>48</sup> of the Clayton Act.<sup>49</sup> Sections 2 and 3 use the language, "[M]ay be . . . [to] lessen competition or tend to create a monopoly." Both these sections are clearly aimed at anticipated injury. There seems little reason to distinguish between sections 2, 3, and 7 of the Clayton Act as far as allowing a suit for damages is concerned. If a private damage suit may be brought on the basis of an alleged violation of either section 2 or 3 of the Clayton Act, it should similarly be allowed under section 7 of the Act.<sup>50</sup>

Some of the opinions which have rejected a Clayton Act charge by a private litigant appear to have taken the position that the availability of the Sherman Act as a basis for recovering damages resulting from illegal mergers or acquisitions renders the section 7 allegation academic. The short answer to this notion is that a violation of section 7 actually can

<sup>46</sup>26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941).

<sup>47</sup>15 U.S.C. § 13 (1964). Under § 2 of the Clayton Act, treble damages may be recoverable. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378-79 (1958) (dictum).

<sup>48</sup>15 U.S.C. § 14 (1964).

Treble damages may be recovered in private suits alleging violations of § 3 of the Clayton Act. *Alles Corp. v. Senco Prods., Inc.*, 329 F.2d 567 (6th Cir. 1964); *Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11 (6th Cir. 1959).

<sup>49</sup>*See Dean Oil Co. v. American Oil Co.*, 147 F. Supp. 414 (D.N.J. 1956), *aff'd per curiam*, 254 F.2d 816 (3d Cir.), *cert. denied*, 358 U.S. 835 (1958); *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal. 1951); *Hipps v. Bowman Dairy Co.*, 1950-51 Trade Cas. ¶ 62,859 (N.D. Ill.); *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S.D. Cal. 1950). These cases have, however, met the disapproval of a special antitrust study committee. *See ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS*, REPORT 199-201 (1955). *See also F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 524-33 (1962).

In a recent case, *Moore Co. v. Sid Richardson Carbon & Gas. Co.*, 347 F.2d 921 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966), plaintiffs filed a complaint for damages based on alleged violations of the Robinson-Patman Act and the Clayton Act. The court did not reach the substantive merits of the complaint in deciding the procedural statute of limitations question, but said nothing to weaken the plaintiff's basis for his damage suit. In finding the statute of limitations did not bar the suit, the court impliedly sanctioned, it would seem, the use of "incipiency statutes" as the basis for a private damage action.

<sup>50</sup>Congress has used much the same language in the three sections. Each of the sections contains nearly the identical anticipatory language quoted in the text.

cause damage to business or property even though it may not reach the monopoly or conspiracy proportions of the Sherman Act. Thus the illegal acquisition may still be only a potential evil in Sherman Act terms but nevertheless an actual evil to the injured party. Suppose, for example, that a corporation (*Y*), of which *X* is a supplier, is acquired by *Z*, a competitor of *X*. After *Z* acquires *Y*, *X* loses its sales to *Y*. The acquisition may be illegal under section 7 and yet not be reachable under the Sherman Act. Nevertheless there does not seem to be any reason, if *X* in fact has been injured, why he cannot recover damages if the acquisition violates section 7.<sup>51</sup> The court's statement in *Gottesman v. General Motors Corporation* that "[p]laintiffs cannot be damaged by a potential restraint of trade or monopolization"<sup>52</sup> is suspect in these circumstances.

A fair reading of the statutes involved results in the conclusion that a treble-damage suit can properly be brought based upon a violation of any of the antitrust laws, which expressly include section 7 of the Clayton Act. Further, the most recent federal court decisions and the Supreme Court decisions in *Minnesota Mining* and *Leh* have clearly implied that such a private right of action for damages does exist. It is therefore urged that the cases which have rejected plaintiffs' section 7 charges in section 4 damage suits should be given little weight in the future, and should be overruled at the first opportunity.<sup>53</sup>

## II

### THE THEORY

A private litigant may bring his treble-damage suit having as its basis a violation of section 7 of the Clayton Act at any time he is suffering injury by reason of that violation.

If a suit for treble damages can properly be brought on the basis of a violation of section 7, the next question which must be answered is

<sup>51</sup>A similar example appeared in BNA, *Analysis: Treble Damages Under Section 7 of the Clayton Act*, in ANTITRUST AND TRADE REGULATION TODAY 192 (1964).

It has long been clear that the Clayton Act can be violated by conduct which escapes the proscription of the Sherman Act. See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957).

<sup>52</sup>221 F. Supp. 488, 493 (S.D.N.Y. 1963).

<sup>53</sup>Such an opportunity may be on the horizon. On October 23, 1967, the Purex Corporation brought a treble-damage action against Procter & Gamble and Clorox alleging, *inter alia*, defendants' violation of section 7. *Purex Corp. v. Procter & Gamble Co.*, Civ. No. 67-1546 WPG (C.D. Cal., filed Oct. 23, 1967). Plaintiff's complaint charging the unlawful acquisition seeks damages in the amount of \$174.5 million trebled to \$523.5 million. Similarly, in *Record Club of America, Inc. v. Columbia Broadcasting System, Inc.*, Civ. No. 68-1132 (E.D. Pa., filed May 29, 1968), plaintiff, in count three of its complaint expressly seeks treble damages based upon the defendant's alleged violations of section 7.

when can such a suit be brought? Section 4b of the Clayton Act allows an action for treble damages under section 4 if such suit is commenced "within four years after the cause of action accrued."<sup>54</sup> Within the context of a section 7 violation, four theories can be advanced:

(1) The cause of action accrues only at the moment the illegal merger or acquisition is consummated.

(2) The cause of action accrues when the merger or acquisition threatens to ripen into the prohibited effect,<sup>55</sup> which may not occur until sometime after the combination has taken place, regardless of when plaintiff first suffers injury.

(3) The cause of action accrues at the moment when the plaintiff first suffers actual injury, which may or may not be at the moment the illegal merger or acquisition is completed or threatens to ripen into the prohibited effect.

(4) The cause of action accrues at any time the plaintiff is being injured by reason of continuous anticompetitive effects flowing from the illegal merger or acquisition.

It is urged herein that the injured plaintiff may bring his suit at any time he is suffering injury and recover the most recent four years' worth of damages.<sup>56</sup> A survey of the case law dealing with the issue reveals that the inquiry has received surprisingly little attention within the framework of an alleged section 7 violation. The courts which have addressed the question have been asked to do so for the most part by plaintiffs charging only Sherman Act violations. Nevertheless, many of these decisions prove extremely useful in providing support by analogy for the theory herein advanced.<sup>57</sup>

The first theory, that a section 4 cause of action based on a violation

<sup>54</sup>15 U.S.C. § 15b (1964).

<sup>55</sup>*United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957), uses such language.

<sup>56</sup>The damage period as noted can be extended by an intervening government suit. See note 8 *supra* and accompanying text. See generally Hardy, *The Evisceration of Section 5 of the Clayton Act*, 49 GEO. L.J. 44 (1960); Note, 67 COLUM. L. REV. 572 (1967); Note, 61 YALE L.J. 417 (1952).

The damage period may also be extended under the doctrine of fraudulent concealment, which holds that all federal statutes of limitations are subject to an equitable doctrine to the effect that, absent negligence on the part of a plaintiff in becoming aware of a fraud, and absent laches, the relevant statute will not be held to run until the fraud is discovered. *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348-49 (1874) (cited as controlling by Mr. Justice Frankfurter in *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946)). See also Costikyan, *The Statute of Limitations and Fraudulent Concealment*, N.Y. STATE BAR ANTITRUST LAW SYMP. 126 (1966); McSwecney, *The Statute of Limitations in Treble Damage Actions Under the Federal Antitrust Laws—When the Period Begins and Tolling By Government Actions and Fraudulent Concealment*, 11 ANTITRUST BULL. 717 (1966).

<sup>57</sup>See text accompanying notes 82-110 *infra*.

of section 7 accrues only at the moment the illegal merger or acquisition is consummated, is logically unsound. It is obvious that if this were the hard and fast rule, companies about to merge could readily make certain that the merger agreement on its face would do no harm to a specific competitor and that activities injurious to *any* such competitor would not be practiced until more than four years after execution of the agreement. In cases like *Julius Ames Company v. Bostitch, Incorporated*,<sup>58</sup> in which a cut-off distributor sought treble damages, it would be highly unfair to insist that such distributor show injury immediately upon consummation of the horizontal acquisition. The merging companies might easily agree that a distributor would not be cut off until after the statutory period had run. Even where merging companies may not have any plan to cut off a particular distributor when the merger is effected, and do not do so at that time, they may subsequently change their attitude and decide to cut him off. The cut-off distributor should not be left without a remedy in either case. Damage has been suffered by reason of the illegal merger in both situations, whether there was premeditation involved or not.

The validity of the first theory is further weakened by the important Supreme Court opinion in *United States v. E.I. du Pont de Nemours & Company*.<sup>59</sup> There the Government charged E.I. du Pont de Nemours & Co. and General Motors (GM) with violation of section 7 of the Clayton Act. Du Pont had achieved a commanding position as GM's supplier of automotive finishes and fabrics. The Government alleged that this position was achieved, not on the basis of competitive merit alone but, in large measure, because of du Pont's acquisition between 1917-1919 of a 23 percent stock interest in GM. The Government further charged that the close intercompany relationship which followed the acquisition of the stock led to the insulation of the greater part of the GM market from free competition with the resultant probability, in 1949, of the creation of a monopoly in a line of commerce in violation of section 7. Mr. Justice Brennan for the Court stated:

Even when the purchase [the acquisition of the stock interest] is solely for investment, the plain language of § 7 contemplates an action *at any time the stock is used to bring about . . . the substantial lessening of competition*.<sup>60</sup>

[T]he test of a violation of § 7 is whether, *at the time of suit*, there is a reasonable probability that the acquisition is likely to result in the condemned restraints.<sup>61</sup>

<sup>58</sup>240 F. Supp. 521 (S.D.N.Y. 1965).

<sup>59</sup>353 U.S. 586 (1957).

<sup>60</sup>*Id.* at 597-98 (emphasis added).

<sup>61</sup>*Id.* at 607 (emphasis added).

It is the time when the acquisition threatens to “ripen into the prohibited effect,”<sup>62</sup> not the time when the acquisition is actually made that the Supreme Court found to be the controlling factor.<sup>63</sup> It is emphasized that the *du Pont* decision was a suit brought by the Government and therefore not strictly analogous to the treble-damage action. Nevertheless, the language used by Mr. Justice Brennan to define the time when the section 7 action should be brought is broad enough to include a private litigant’s action as well as an action brought by the Government. It is fair to say that the Supreme Court was concerned with the time when the suit was filed, not with who initiated it. If a section 7 suit can be filed by the Government at any time the merger or acquisition threatens to ripen into the prohibited effect, the filing of a suit for damages under section 4 based on that illegal merger or acquisition should be similarly treated, if damage is suffered at that time, and ought not be confined to the moment the illegal merger or acquisition is consummated.<sup>64</sup>

The second theory which might be advanced to govern the running of the four-year statute of limitations is that suggested by the *du Pont* case: namely, the cause of action accrues when the merger or acquisition threatens to ripen into the prohibited effect, which may not occur until sometime after the merger or acquisition has been completed, regardless of when the plaintiff first suffers injury.

Like the first theory—that the cause of action accrues only at the moment the merger or acquisition is consummated—this second alternative is seriously defective. At the moment the merger or acquisition is consummated, or even at the moment it threatens to ripen into the prohibited effect, a particular private litigant may not yet have suffered any demonstrable injury.

Section 4 of the Clayton Act, of course, provides a remedy for damages, not for injunctive relief. To recover under section 4, a private plaintiff must establish not only that a violation of the antitrust laws in fact has occurred<sup>65</sup> and that the illegal conduct charged actually caused a

<sup>62</sup>*Id.* at 597.

<sup>63</sup>Earlier cases brought under section 7 were filed at or near the time of acquisition, but according to the Court in *du Pont*, did not hold, “or even suggest” that a section 7 suit may not be brought “at any time when a threat of the prohibited effects is evident.” *Id.* at 598.

<sup>64</sup>Though apparently no suit involving a private plaintiff has discussed the point as yet, the language of Mr. Justice Brennan continues to find support in suits brought by the Government under § 7. *See, e.g.,* *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 823 (9th Cir. 1961) in which the court noted: “As stated in [*du Pont*] the ‘test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints.’ ”

<sup>65</sup>*Simpson v. Union Oil Co.*, 311 F.2d 764, 767 (9th Cir. 1963), *rev’d on other grounds*, 377 U.S. 13 (1964); *Goldsmith v. St. Louis-S.F. Ry.*, 201 F. Supp. 867, 870 (W.D.N.C. 1962).



business or property injury,<sup>66</sup> but that the injury suffered is measurable in dollars.<sup>67</sup> It would be unfair to make a cut-off distributor show monetary loss at the moment a merger or acquisition is consummated,<sup>68</sup> and it would be similarly unfair to insist that such a showing of financial injury be made at the moment a merger or acquisition threatens to ripen into the prohibited effect. It may be that measurable loss can be shown at that time and, if that is possible, the injured party should have the right to initiate immediately his section 4 action. However, where no pecuniary loss is actually suffered, the statute of limitations governing the period of time in which an action for damages can be brought should not be held to have begun to run.

For example, assume company *X* acquires company *Y*. Five years later, as a direct result of that acquisition, *Z1*, a distributor, is cut off. The services of a second distributor, *Z2*, are still used by *X*. *Z1* brings a suit for treble damages alleging a violation of section 7 because the acquisition may tend substantially to lessen competition or tend to create a monopoly. Additionally, the claim is asserted that, in fact, the acquisition has injured *Z1*. *Z1* wins its lawsuit. *Z2* having suffered no damages, as yet, does not bring suit. Five years thereafter (ten years after the acquisition was consummated) *Z2*, as direct result of the acquisition, is also cut off by *X*. Will *Z2* be precluded from bringing its own damage suit because the four-year statute of limitations began running when *Z1* was cut off by *X* five years earlier—the time when the acquisition was found to be threatening to ripen into the prohibited effect? To so hold would leave *Z2*, as a party injured by reason of a violation of the antitrust laws, without a remedy.

In the foregoing example, *Z1* was in much the same position as the Government was in the *du Pont* case. *Z1* did not suffer injury at the moment the acquisition was completed. Rather it suffered injury five years later when that acquisition threatened to ripen into the prohibited effect. It was at that time that *Z1* was cut off and actually sustained injury. A cause of action for damages under section 4 could not accrue to *Z1* until the cutoff and, hence, the four-year statute of limitations as to

<sup>66</sup>See, e.g., *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 909 (2d Cir.), cert. denied, 369 U.S. 865 (1962); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 289 F.2d 86, 90 (9th Cir. 1961).

<sup>67</sup>*Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 909 (2d Cir.), cert. denied, 369 U.S. 865 (1962); see *Burnham Chem. Co. v. Borax Consol.*, 170 F.2d 569, 571 (9th Cir. 1948), cert. denied, 336 U.S. 924 (1949); Pollock, *The "Injury" and "Causation" Elements of a Private Antitrust Action*, 21 ABA ANTITRUST SECTION 341, 342 (1962); Comment, *Proof Requirements In Antitrust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHI. L. REV. 130 (1950).

<sup>68</sup>See text accompanying note 58 *supra*.

Z1's damage action could not be deemed properly to commence at an earlier date.

Z2, on the other hand, was not injured because of the acquisition until an additional five years had elapsed. Nevertheless, Z2 should not be without redress. In the example, Z2 was not damaged either at the moment the acquisition was consummated or when that acquisition threatened to ripen into the prohibited effect. Therefore, neither of those times should be held to start the statute of limitations running with respect to Z2's possible cause of action for damages. A cause of action for damages cannot logically accrue before injury is sustained.<sup>69</sup> The question then becomes: If a cause of action for damages does not accrue until injury is sustained, must the statute of limitations governing that cause of action begin to run when the injury is first suffered?

The third theory, that the cause of action accrues only at the moment when the plaintiff first suffers actual injury, stands on only slightly stronger foundations than the first two theories. It contains the same loopholes as the first theory. It allows the same merging companies to cut off their unwanted distributor without fear of a private damage action if they cut him off gradually. Since, under this theory, if the plaintiff is to sue he must do so when first injured, the scheme would be simply to injure him slightly at the outset and delay the "coup de grace." Logic and the broad, encouraging language of the *du Pont* case would seem to be as damaging to this third theory as they were to the first.

In addition, the *United States v. Penn-Olin Chemical Company*<sup>70</sup> decision seems to suggest that the moment of first injury should not be determinative of the question of when suit must be brought. There, the Government brought an action against a joint-venture corporation based on an alleged violation of section 1 of the Sherman Act and section 7 of the Clayton Act. Mr. Justice Clark, for the Court, addressed himself to the question of the timeliness of the section 7 suit: "The test of the section [Clayton § 7] is the effect of the acquisition. . . . [A]nd the

<sup>69</sup>"It is the impact of the violation on the private plaintiff—the so-called 'fact of damage'—which constitutes the gist of the private action, and not the violation itself." Pollock, *supra* note 67, at 342; *see, e.g.*, *Suckow Borax Mines Consol., Inc. v. Borax Consol., Inc.* 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied*, 336 U.S. 924 (1951) (statute of limitations runs from the "time the plaintiff's interest is invaded to his damage"); *Momand v. Universal Film Exch.*, 43 F. Supp. 996, 1006-08 (D. Mass. 1942), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949).

In other areas of the law this same rule applies. *E.g.*, *United States v. Reid*, 251 F.2d 691, 694 (5th Cir. 1958) (negligence); *Sears, Roebuck & Co. v. Cleveland Trust Co.*, 355 F.2d 705, 708 (6th Cir. 1966) (injury to property); 34 AM. JUR. *Limitation of Action*, §§ 160, 161 (1941).

<sup>70</sup>378 U.S. 158 (1964).

economic effects of an acquisition are to be measured at [the time of suit] rather than at the time of acquisition.”<sup>71</sup>

In *Penn-Olin* as in *du Pont* the Government brought suit. Nevertheless, neither decision qualifies the time in which the section 7 suit should be brought by reference to the particular plaintiff who may bring it. Rather, *du Pont* and *Penn-Olin* suggest suit may be brought at any time the adverse effects are being felt by the plaintiff, and such effects should be measured at the time that suit is brought.

It is herein argued that the time for filing either a section 7 suit by the Government, or a section 4 suit based on a section 7 violation by a private plaintiff, may be the same.<sup>72</sup> Neither the Government nor the private litigant is bound to file at the moment the acquisition is completed, and it would seem, too, that neither is bound to file when first “touched” by the effects of the merger or acquisition. This is the fourth theory and the alternative advanced by this Article: A plaintiff injured by reason of a violation of the antitrust laws, which laws expressly include section 7 of the Clayton Act, may maintain his damage action under section 4 at any time he is suffering injury by reason of that violation, and may recover the most recent four years’ worth of damages. The statute of limitations commences to run anew each time the plaintiff is injured by reason of the anticompetitive effects flowing from a merger or acquisition which violates section 7 of the Clayton Act. Under this theory, if such anticompetitive effects are continuing in nature, the injured plaintiff is given a continuing cause of action.

Obviously, if the plaintiff, as a result of a merger or acquisition, suffers an injury which results in a single demonstrable loss with no continuing effects, it is clear that he must sue within four years from the time he is so injured. For example, if company *X* acquires company *Y* in violation of section 7, and as a direct result thereof company *Z* loses a single sale to company *Y*, but is not precluded thereafter from making other sales to the newly merged company, *Z*’s loss is clearly of an isolated nature and cannot be viewed as continuing. In such a case, *Z* seemingly must sue within four years from the date of losing the contract if it is to be recompensed. However, if as a result of the illegal acquisition, *Z* is forever precluded from competing for the contracts it formerly had, then *Z* is being continuously damaged and should have a continuing cause of action for damages. *Z* should be able to collect four years’ worth of damages at any time it chooses to bring suit.<sup>73</sup>

<sup>71</sup>*Id.* at 168 (citing *du Pont*).

<sup>72</sup>See discussion at text following note 63 *supra*.

<sup>73</sup>As noted, the four-year statutory period can be extended either by an intervening government suit or under the doctrine of fraudulent concealment. See note 56 *supra*.

This theory, however, has not been accepted universally. In 2361 *State Corporation v. Sealy, Incorporated*,<sup>74</sup> the time when the plaintiff was first injured was held to start the four-year statute of limitations running. The plaintiff did not allege a section 7 violation, but sued to recover damages under section 4 for injuries allegedly sustained as the result of violations by defendants of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act. Defendants moved for summary judgment based, in part, on the argument that the applicable statute of limitations had run. The district court found that the statute had not run and noted: "[T]he statute of limitations commenced to run from the date on which the plaintiff first sustained injury . . . ."<sup>75</sup>

The Court of Appeals for the Seventh Circuit has taken a similar stance regarding the commencement of the running of the statute of limitations in private antitrust damage actions. Its holdings, however, unlike *Sealey*, have not supported the injured plaintiff's cause of action, but have served, instead, to bar them.

In *Baldwin v. Loew's International*,<sup>76</sup> certain theatre owners brought a treble-damage action against a movie-leasing operation which gave preference to large chain operators while at the same time allegedly compelling the plaintiffs to lease their single theatre to such chain operators on unprofitable terms. Although the challenged arrangement was still in effect at the time the suit was filed in 1953, the lease in question had last been renewed by the plaintiffs eight years earlier. The court stated: "Where one has been injured by a civil conspiracy a statute of limitations begins to run at the time that injury is inflicted. In this case that date was when the lease was executed between plaintiffs and the lessee in 1945."<sup>77</sup>

*Emich Motors Corporation v. General Motors Corporation*<sup>78</sup> presented the Seventh Circuit with the same question. There, the plaintiffs, in a treble-damage action, alleged that the defendants had combined to restrain trade and commerce in various automobiles manufactured by General Motors. Emich Motors had been a dealer in the defendant's products, but its dealership had been terminated, allegedly for its failure to cooperate with the defendants' illegal business

<sup>74</sup>263 F. Supp. 845 (N.D. Ill. 1967).

<sup>75</sup>*Id.* at 850. The defendants had argued that the statute of limitations should have been deemed to have commenced running at an earlier date—when the exclusive dealing arrangement in question was entered into by defendants. The court disagreed and noted that, despite the agreement, defendants had not in fact cut off plaintiff until a later date. It was the actual cutoff, rather than the agreement to do so, which first injured plaintiff and started the statute running.

<sup>76</sup>312 F.2d 387 (7th Cir. 1963).

<sup>77</sup>*Id.* at 390.

<sup>78</sup>229 F.2d 714 (7th Cir. 1956).

scheme. Regarding the running of the applicable statute of limitations, the court stated: "With few exceptions not here material, statutes of limitations begin running on the date on which the plaintiff first has the right to bring action."<sup>79</sup> The court held that the plaintiff could have first brought an action when it received notice that its dealership was being cancelled and, hence, the statute began running from that date. The plaintiff's suit for damages was held barred by the expiration of the period of limitations.

These cases did not involve an allegation by plaintiffs of a violation of section 7 of the Clayton Act, no merger or acquisition having been involved. Rather, sections 1 and 2 of the Sherman Act and, in *Sealey*, section 3 of the Clayton Act as well, provided the basis for the section 4 treble-damage actions. However, it is unlikely, even had it been possible to allege a section 7 violation, that the Seventh Circuit would have altered its view that the statute of limitations starts to run when the plaintiff is first injured (or when plaintiff first has the right to bring an action).

The Seventh Circuit's position has been cogently attacked in a very recent opinion of a Wisconsin federal district court. In *Century Hardware Corporation v. Pownail Company*,<sup>80</sup> the court noted that the *Baldwin* and *Emich* decisions "appear to be inconsistent with precedent in some other circuits," and "harbor[ed] serious doubt about the soundness of the two decisions."<sup>81</sup>

The theory herein advanced finds support in various areas of the law. The common law requires one suffering injury because of a tort to take whatever steps he can to mitigate the damages. One cannot stand idly by and reap a financial harvest at the expense of a negligent defendant. But the private businessman has no duty to enforce the antitrust laws. There seems to be little reason why he may not wait until his injury is substantial and warrants his bringing suit before he goes forward under section 4.

In this regard, it is interesting to note that in *Bailey's Bakery*,<sup>82</sup> the court, in rejecting the right of a private plaintiff to sue for damages on the basis of a section 7 violation, prefaced its holding with a reference to the plaintiff's right under the common law to sue for continuing damages inflicted by a negligent defendant. The court stated that the plaintiff has a new cause of action each time his interest is invaded if the damage is attributable to "protracted" conduct.<sup>83</sup> If an illegal merger or

<sup>79</sup>*Id.* at 719.

<sup>80</sup>282 F. Supp. 223 (E.D. Wis. 1968).

<sup>81</sup>*Id.* at 227.

<sup>82</sup>Discussed at text accompanying notes 18-20 *supra*.

<sup>83</sup>235 F. Supp. at 716.

acquisition results in the delendant company's constant refusal to deal with the plaintiff, such action can certainly be viewed as "protracted" conduct. If, as suggested in *Bailey's Bakery*, a plaintiff has a new cause of action each time his interest is invaded and such plaintiff's interest is being continuously invaded, then he should have a continuing cause of action.

This theory is also supported by analogy to many of the recent decisions in the conspiracy and monopolization cases brought by private plaintiffs under section 4 for damages based, for the most part, upon violations of section 1 or 2 of the Sherman Act.

In *Hoopes v. Union Oil Company of California*,<sup>84</sup> appellants, owners and conditional vendors of service stations, brought a treble-damage action against Union Oil alleging violations of sections 1 and 2 of the Sherman Act and section 2 of the Clayton Act. Union Oil defended on various grounds, one of which was that because appellants' cause of action rested upon certain 1955 "lease-leaseback" agreements, and suit was not filed until 1963, the four-year statute of limitations barred the suit. The court in rejecting this argument stated:

Union views appellants' claim too narrowly. The alleged antitrust violation consists of Union's entire course of conduct directed to the establishment and maintenance of exclusive dealing arrangements with service station outlets . . . Acts of Union in furtherance of this purpose, which appellants contend caused them injury and damage, included Union's efforts to prevent appellants from selling or leasing their station free of the exclusive dealing condition. These acts continued until the complaint was filed and thereafter. Thus, appellants' action is not barred even if the invasion of their interests is considered to have been episodic rather than continuous.<sup>85</sup>

In *Highland Supply*,<sup>86</sup> cited by the court in *Hoopes*, the complaint alleged that since the date of the acquisition "and continuing until [the] present time," the defendant had wrongfully sought to achieve a monopoly position in violation of section 2 of the Sherman Act. The court took the position that: "The plaintiff alleged that the conspiracy continued to the date of the filing of the . . . complaint. Therefore, the statute of limitations does not bar this claim, because a conspiracy 'is in effect renewed during each day of its continuance.'"<sup>87</sup>

The Court of Appeals for the Eighth Circuit,<sup>88</sup> in discussing this case before remanding it to the district court had noted: "It is well settled

<sup>84</sup>374 F.2d 480 (9th Cir. 1967).

<sup>85</sup>*Id.* at 486.

<sup>86</sup>Discussed at text accompanying notes 18-22 *supra*.

<sup>87</sup>238 F. Supp. 561, 564 (E.D. Mo. 1965), quoting *United States v. Bordon Co.*, 308 U.S. 188, 202 (1939). The decision discussed at notes 21-25 *supra* involved a later opinion.

<sup>88</sup>327 F.2d 725 (8th Cir. 1964).

that where a private cause of action under the antitrust law is based upon a continuous invasion of one's rights, his cause of action accrues from day to day as his rights are invaded to his damage."<sup>89</sup>

In *Radio Corporation of America v. Rauland Corporation*,<sup>90</sup> a conspiracy case, the district court had the opportunity to discuss the running of the applicable statute of limitations. The court had before it for decision three motions, one of which was made by Radio Corporation of America (RCA), the plaintiff and counterdefendant, to strike and dismiss a counterclaim of Rauland for damages for loss of profits as a result of RCA's alleged worldwide conspiracy, on the ground that such counterclaim was barred by the applicable statute of limitations. In denying RCA's motion, the court stated:

There can be no really serious argument over the point that a cause of action for damages under the antitrust laws does not arise with the formation of an illegal conspiracy, but rather when the interests of the plaintiff are invaded by such a conspiracy so as to cause him loss and damage. That being so, each continued invasion of interest causing loss and damage is in effect a new cause of action, and the statute of limitations begins to run when it occurs . . . .<sup>91</sup>

Perhaps the most persuasive decision in this area of the law is *Delta Theaters, Incorporated v. Paramount Pictures, Incorporated*.<sup>92</sup> Plaintiff was an owner and operator of an independent motion picture theater in New Orleans. Its complaint asking treble damages was based on the allegation that the defendants had destroyed competition between the plaintiff's theater and some of their own theaters by conspiring to preclude from his theater "first-run" movies. The conspiracy was alleged to have continued since 1947, the date on which plaintiff opened his theater. Defendants filed a motion to strike from the complaint the demand for damages for all years prior to one year before the filing of the complaint on the ground that the applicable statute of limitations was a bar. District Court Judge Skelly Wright agreed, and granted the

<sup>89</sup>*Id.* at 732. Some earlier decisions also show an acceptance of the continuing cause of action theory in conspiracy and monopolization cases. In *Momand v. Universal Film Exchanges*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949), the plaintiff, a motion picture exhibitor, brought an action against certain distributors, alleging a conspiracy. Discussing the point at which the applicable statute of limitations begins to run in a conspiracy case, the court held: "[A] cause of action for each invasion of the plaintiff's interest arose at the time of the invasion and . . . the applicable statute of limitations ran from that time." *Id.* at 49.

<sup>90</sup>186 F. Supp. 704 (N.D. Ill. 1956).

<sup>91</sup>*Id.* at 707. In the same year, 1956, *Image & Sound Serv. Corp. v. Altex Serv. Corp.*, 148 F. Supp. 237 (D. Mass. 1956), was decided. The court noted: "Since the complaint charges the defendants with a continuous series of violations, a cause of action for each invasion of the plaintiff's interest arose at the time of that invasion, and the applicable statute of limitation runs from that time." *Id.* at 240 (citations omitted).

<sup>92</sup>158 F. Supp. 644 (E.D. La. 1958), *appeal dismissed*, 259 F.2d 563 (5th Cir. 1958).

defendant's motion to strike. In effect he allowed the plaintiff to recover damages only for the statutory period, which in this instance was one year.<sup>93</sup>

Though the decision resulted in a victory for the defendant in this particular case, the holding clearly sanctioned the right of the private plaintiff to recover damages for injury incurred during the statutory period. In cases covered by section 4b of the Clayton Act at least four years' worth of damages should be recoverable. After discussing various theories, Judge Wright came to the conclusion that:

In the case of successive damages suffered day by day from a continuing conspiracy, the statute begins to run on each day's damage as it occurs. When suit is brought, the plaintiff may recover only for damages inflicted during the period of limitation immediately preceeding the filing of the complaint.<sup>94</sup>

This rule has been followed in a line of cases,<sup>95</sup> and has recently been reaffirmed by the United States Supreme Court in *Hanover Shoe, Incorporated v. United Shoe Machinery Corporation*.<sup>96</sup> Relying upon a prior successful action by the Government,<sup>97</sup> Hanover brought a treble-damage suit against United for injury suffered by reason of United's violation of section 2 of the Sherman Act. Holding that the plaintiff was entitled to damages for the entire period of the applicable statute of limitations, the Court observed:

United has also advanced the argument that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on

<sup>93</sup>At the time the cause of action arose, the federal antitrust acts contained no limitations period for damage suits as they do now. *See, e.g.*, Clayton Act, ch. 323, 38 Stat. 731 (1914), *as amended*, 15 U.S.C. § 15(b) (1964). The present four-year statute took effect in 1956. Prior to that date the limitations period was governed by the law of the state in which the cause of action arose. *E.g.*, *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.*, 191 F.2d 912, 913 (7th Cir. 1951), *cert. denied*, 342 U.S. 947 (1952).

<sup>94</sup>158 F. Supp. at 649. The rule has also been stated as follows: "[T]he statute begins to run as to each item of damage from the time such damage occurs. Where an illegal continuing course of conduct causes damage, plaintiff may generally recover only for the statutory period. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 382 n. 72 (1955).

<sup>95</sup>*See, e.g.*, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964); *Susser v. Carvel Corp.*, 206 F. Supp. 636 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965); *Cardinal Films, Inc. v. Republic Pictures Corp.*, 148 F. Supp. 156 (S.D.N.Y. 1957).

<sup>96</sup>36 U.S.L.W. 4643 (U.S. June 17, 1968).

<sup>97</sup>*United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).



Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.<sup>98</sup>

These cases are representative of the case law and establish two propositions: (1) A private plaintiff has a continuing cause of action if he is being subjected to continuous injurious invasions as a result of the defendant's violation of section 1 or 2 of the Sherman Act; and (2) a private plaintiff may recover damages, not for the duration of the defendant's illegal conduct, but for the period of limitations backward from the time suit is filed. It is not suggested that these two rules are without dissenters.<sup>99</sup> It is submitted, however, that they are the majority rules.

In the recent opinion in *Century Hardware*,<sup>100</sup> the district court agreed, by way of dictum, that these are the proper rules to apply to the running of the statute of limitations in a private antitrust-damage action. Before the court was a motion by defendants to dismiss the plaintiff's treble-damage action on the ground that the applicable statute of limitations had run and the claim was barred. Plaintiff claimed that its dealership had been terminated wrongfully by defendant acting in violation of the antitrust laws,<sup>101</sup> and sought treble damages pursuant to section 4 of the Clayton Act. The court, "despite misgivings," found for defendant on the ground that more than four years had elapsed since the time plaintiff first suffered injury—termination of its dealership. The court felt bound to follow the "first injury" theory expounded in the decisions of its own court of appeals in *Baldwin* and *Emich Motors*.<sup>102</sup> The court stated:

In some other circuits, antitrust violations, whether or not they involve an 'overt act' like the termination of a dealership, seem to be envisioned as a

<sup>98</sup>36 U.S.L.W. 4643, 4649 n.15 (U.S. June 17, 1968) (citation omitted). A particularly perceptive supplemental opinion was written in the Third Circuit below:

"The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's right occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period. Indeed, any other rule would be an affront to reason, for it would require that injury and damages which were inflicted, as in this case, in 1955, by concrete and specific business transactions, were barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical conduct. *The policy of the statute of limitations is maintained by allowing recovery for measurable injury within the period and barring recovery for injury beyond it.*" 377 F.2d 776, 795 (3d Cir. 1967) (citation omitted) (emphasis supplied).

<sup>99</sup>See, e.g., 2361 State Corp. v. Sealy, Inc., 263 F. Supp. 845 (N.D. Ill. 1967). See also discussion of the Seventh Circuit court of appeals decisions construing the four-year period of limitations in private antitrust suits at text accompanying notes 76-79 *supra*.

<sup>100</sup>*Century Hardware Corp. v. Povernail Co.*, 282 F. Supp. 223 (E.D. Wis. 1968) (noted at text accompanying notes 80-81 *supra*).

<sup>101</sup>It is not clear from the opinion which provisions were allegedly violated.

<sup>102</sup>Both cases are discussed at text accompanying notes 76-79 *supra*.

continuing series of acts, each of which creates a cause of action on which the statute of limitations begins to run as of the time of that act. . . . Applying this view . . . plaintiff could assert its claim if it could establish: (1) that defendants performed some acts pursuant to a scheme of business activity that violated the antitrust laws . . . within four years before the commencement of this suit; . . . and (2) that these unlawful activities of defendants occurring [within that four year period] caused injury to plaintiff. Damages would be limited to those incurred [within the four year period]. This perspective, in our view, is fully in accord with both common sense and sound policy.<sup>103</sup>

The court felt that the premise of the two Seventh Circuit decisions seemed to be that an injury inflicted by reason of an antitrust violation is something which occurs at a given point in time. The opinion intimated, however, that it may be more logical to view such injury as continuing over an interval. For example, in *Baldwin* it is unlikely that the injury suffered was concluded at the initial signing of the lease. The injury should have been viewed as continuing over the period of the renewals.<sup>104</sup>

This view of the conspiracy and monopolization cases insures the plaintiff a meaningful remedy while at the same time prevents the defendant from being held accountable for conduct committed so long ago as to make production of explanatory or exculpatory evidence impossible.<sup>105</sup> It allows the plaintiff to wait until his damage is sufficient to warrant the costs of suit, while at the same time putting him on notice that if the defendant ceases his anticompetitive conduct (or if the effects from such anticompetitive conduct are otherwise terminated) plaintiff may not delay his damage suit for an unreasonable period of time. Plaintiff in such a case must bring suit within the applicable limitations period.

These are the most equitable rules in the Sherman Act cases and there should be no hesitancy in applying them to an action under section 7 of the Clayton Act. The ill effects that flow from a conspiracy or from monopolization can flow with equal force from an illegal merger or acquisition which has not yet reached Sherman Act proportions. Whether two companies as separate entities conspire not to sell their machinery or not to allow their motion pictures to reach plaintiff competitor, or whether they merge and thereafter as a single company refuse plaintiff competitor the right to purchase their products, the damages to the plaintiff are identical. Where two separate companies continue by agreement to boycott the plaintiff, or where two companies

<sup>103</sup>282 F. Supp. at 226 (citations omitted).

<sup>104</sup>*Id.*

<sup>105</sup>The *Century Hardware* opinion does not ignore the plight of the antitrust defendant. "[A]ntitrust defendants must be protected against stale evidence and old claims of grievance. But the experience of this court has not been such to indicate that defendants in such suits need any more protection than is presently afforded to them in other circuits." *Id.* at 227.

merge and thereafter refuse to do business with the plaintiff, the continuing effects of the illegality persist with equally damaging results.

Since section 7 is an incipency statute reaching conduct which may not as yet have assumed the magnitude of a violation of section 1 or 2 of the Sherman Act, it is not unreasonable to assume that the continuing effects from such illegal conduct similarly may not be of Sherman Act proportions. Nevertheless, if damage to plaintiff is continuing, there seems little reason to leave him without a remedy. In other words, if the premise established is correct—that there exists a private right for damages because of a section 7 violation—it seems but a logical extension of that premise to afford an adequate remedy where the damage from such an illegal merger or acquisition is of a continuing nature. Not to make that extension would leave a gap in the law which might work severe hardship upon the individual who suffers injury year after year, not as a result of conspiracy or monopolization, but due to a merger or acquisition which has not as yet reached “Sherman size.”

The language used by the courts in setting forth the recovery rules in the “continuing conspiracy” cases is broad enough to be applicable to continuing effects which are generated by the single act of merger or acquisition. For example, in the *Highland Supply*<sup>106</sup> case the Eighth Circuit noted that the cause of action for damages under the antitrust laws does not arise with the “formation of an illegal conspiracy” but rather “when plaintiff’s interests are invaded” by such conspiracy with resultant loss.<sup>107</sup> It is hardly offensive to use this language in terms of a section 7 offense. A cause of action does not arise with the formation of an illegal merger, but rather when plaintiff’s interests are invaded by such merger. That invasion, of course, may occur precisely at the moment the merger is consummated, or it may take place some years afterwards. Conceivably, it may be continuing in nature. In any event, the cause of action should be said to accrue at *any* time the invasion of plaintiff’s interests is measurable.

Similarly, *Delta Theaters*<sup>108</sup> is as compelling with respect to a section 7 offense as it is in the context of a continuing conspiracy case. The court noted that where successive damages are being suffered day-by-day as a result of a continuing conspiracy “the statute begins to run on each day’s damage as it occurs.”<sup>109</sup> If day-by-day damage is suf-

<sup>106</sup>Discussed at text accompanying notes 21-25, 81-84 *supra*. The decisions discussed previously involved 1965 district court opinions. The decision cited here involved a court of appeals reversal of an earlier district court decision.

<sup>107</sup>327 F.2d 725, 732 (8th Cir. 1964).

<sup>108</sup>Discussed at text accompanying notes 92-94 *supra*.

<sup>109</sup>158 F. Supp. at 649.

ferred because of an illegal merger or acquisition, there seems to be no reason to refuse the injured plaintiff a limitations period which "begins to run [anew] on each day's damage." *Delta Theaters* allowed the plaintiff recovery only of damages "inflicted during the period of limitations immediately preceding the filing of the complaint";<sup>110</sup> the theory herein advanced for the plaintiff injured by a section 7 violation seeks nothing more.

#### CONCLUSION

To conclude that a private plaintiff may have, in the appropriate case, a continuing cause of action for damages based on a violation of section 7 of the Clayton Act is to fill a lacuna in the law. Allowing an injured plaintiff to sue at any time he is suffering injury by reason of defendant's illegal merger or acquisition is the only means to insure proper compensation. It allows an injured plaintiff the necessary flexibility in bringing his action so as to avoid being deprived of his remedy by the ingenuity of defendants, or by a judicial attitude, such as that of the Seventh Circuit, which severely restricts the use of section 4.

Such a conclusion does not urge judges to set aside existing rules at their pleasure in favor of another rule which they may hold to be expedient; rather, it calls upon them to extend the existing rules so that the law leaves no wrong without a remedy.<sup>111</sup>

<sup>110</sup>*Id.*

<sup>111</sup>"There are [in the law] gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (1923).

"The final cause of law is the welfare of society . . . . [W]hen they [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance." *Id.* at 66-67.