Antitrust Law

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CASENOTES


Although the federal government may obtain divestiture as a form of injunctive relief under section 15 of the Clayton Act, an issue which has


"Divestiture" refers to antitrust decrees by which defendants are required to alienate themselves of specified property, most often stocks. Related terms are "dissolution," which refers to any antitrust judgment dissolving an illegal combination, and "divorce," which refers to the effect of specific divestiture decrees aimed at violations resulting from vertical integration. See Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws: Economic Background*, 19 GEO. WASH. L. REV. 119, 120-21 (1950).

Although the terms "divestiture" and "dissolution" are often used interchangeably, see United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 329 n.11 (1960), dissolution should be considered the inclusive term since it refers to any termination of an unlawful combination whether by contract cancellation, injunction or divestiture. In *International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.*, 5 TRADE REG. REP. (1975 Trade Cas.) ¶ 60,291 (9th Cir. April 25, 1975), the Ninth Circuit unequivocally asserted that dissolution should be considered the inclusive term. Id. at 66,143 n.49. See note 50 infra. See also Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951).


The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition . . . praying that such violation shall be enjoined or otherwise prohibited.

In addition, the government often obtains divestiture decrees for violations of section 7 of the Clayton Act, 15 U.S.C. § 18 (1970), which prohibits a corporation from acquiring any stock of another corporation when the effect may be to substantially lessen competition or tend to create a monopoly. Since section 15 is a reenactment of section 4 of the Sherman Act, 15 U.S.C. § 4 (1970), see H.R. REP. No. 627, 63d Cong., 2d Sess.
long been unsettled is whether the same remedy is available to a private litigant under section 16 of the Act. Recently, in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, the United States Court of Appeals for the Ninth Circuit answered this question when it examined the legislative history of the Clayton Act and held that divestiture was not an available remedy in section 16 actions.

In 1967, International Telephone & Telegraph Corp. (ITT) brought an antitrust action against General Telephone & Electronics Corp. ITT alleged that through numerous corporate acquisitions, General Telephone had become a vertically integrated telephone conglomerate with its telephone operating companies buying almost all their telecommunications equipment from General Telephone's own manufacturing subsidiaries. The district court found that General Telephone's vertical integration had violated section 1 of the Sherman Act and section 7 of the Clayton Act by

21 (1914), it appears that courts have used the same inherent equitable powers under both Acts to grant government divestiture decrees. In fact, in the first major case in which the government obtained a divestiture decree for a section 7 violation, United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326-30 (1960), the Court relied on Sherman Act cases to sustain its use.


   
   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 ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity ... .

5. 5 TRADE REG. REP. (1975 Trade Cas.) ¶ 60,291 (9th Cir. April 25, 1975). The Ninth Circuit is the first federal appellate court to rule on the question. The issue has been considered by a number of district courts and at least one appellate court has commented on it in dicta. See notes 18-45 infra.

6. See *Hearings on Trust Legislation Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess. (1914); notes 52 & 53 infra.

7. 5 TRADE REG. REP. (1975 Trade Cas.) at 66,141.


9. 15 U.S.C. § 1 (1970) provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal ... ."


   No corporation engaged in commerce shall acquire, directly or indirectly, the
effectively foreclosing potential equipment sales by independent manufacturers such as ITT to General Telephone's operating companies. To counter the anticompetitive effects of the acquisitions, the district court ordered General Telephone to divest itself of three manufacturing subsidiaries and eight telephone operating companies.

On appeal, the Ninth Circuit ruled that the record of hearings on the Clayton Act before the House Judiciary Committee indicated that Congress did not intend to grant a private litigant the divestiture remedy under section 16. The court also found that the district court, in computing the market share foreclosed to independent manufacturers by the vertical integration, had erroneously defined the relevant product market by excluding from it potential telephone equipment purchases of the Bell System and other customers which were not operating companies.

The district court was directed on remand to redefine the relevant market and to make new factual findings of illegality for each challenged acquisition. Although the divestiture remedy would be unavailable, the appellate court expressed confidence that injunctive relief directed at the anticompetitive purchasing policy rather than its underlying cause would be adequate to prevent the recurrence of any antitrust violations.

I. LACK OF PERSUASIVE PRECEDENT

A relatively small number of cases have been concerned with whether divestiture is an available remedy under section 16, and little, if any, of whole or any part of the stock . . . of another corporation . . . where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

11. The district court concluded that in 1969 General Telephone controlled 46 percent of the independent market for telecommunications equipment and that approximately 80 percent of General Telephone's telephone business went to its affiliate manufacturers through a "most restrictive inhouse buying policy." 351 F. Supp. 1153, 1198, 1210 (D. Hawaii 1972).

12. Id. at 1242-43.


14. 5 TRADE REG. REP. (1975 Trade Cas.) at 66,141-45.

15. Id. at 66,149-52.

16. Id. at 66,153. The court was also required to reconsider General Telephone's laches defense. See note 60 infra. Various subsidiary issues were involved, including the applicability of the proviso in section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), an ITT claim under the Hawaiian Antitrust Act, HAWAII REV. STAT. §§ 480-7(a) (1968), and the propriety of an award of attorney fees. 5 TRADE REG. REP. (1975 Trade Cas.) at 66,136-57.

17. The court suggested injunctive relief requiring "open purchasing" by General Telephone subsidiaries whereby ITT could compete for each proposed sale. 5 TRADE REG. REP. (1975 Trade Cas.) at 66,144-45.

18. One commentator has suggested that the speculative attraction of the treble dam-
the scant available precedent could be considered persuasive authority for a resolution of the issue. Despite their limited number, the precedents can be distinguished between earlier decisions in which divestiture relief was refused, and later opinions in which a growing judicial willingness to entertain section 16 divestiture actions is demonstrated.

The first judicial opinion on the general issue of the availability of divestiture under section 16 appeared in *Continental Securities Co. v. Michigan Central Railroad Co.*, in which the Sixth Circuit reasoned that since it had never been held that section 16 included the remedy of dissolution for private plaintiffs, such remedy was available only to the government. The court's pronouncement on the availability of the divestiture remedy, however, was dicta, since the court held that the plaintiff-stockholder suing in a representative capacity lacked standing to sue.

Despite its weak precedential value, *Continental Securities* was nevertheless cited 15 years later by a federal district court in *Westor Theatres, Inc. v. Warner Brothers Pictures, Inc.* for the proposition that divestiture was reserved for the government alone, a view in which at least one other district court has concurred. Unfortunately, neither of the district courts offered any legal justification for their argument.


21. 16 F.2d 378 (6th Cir. 1926), cert. denied, 274 U.S. 741 (1927).

22. Id. at 379.

23. Id. The court held that section 16, which confers standing upon “any person . . . against threatened loss or damage” did not extend to the plaintiff, who in suing in a representative capacity as a stockholder, “apprehends no ‘threatened loss or damage’ save that which comes through the damage to his corporation.” Id.

24. 41 F. Supp. 757, 763 n.7 (D.N.J. 1941).


United States District Court for the District of New Jersey also refused to entertain section 16 divestiture suits on the ground that section 16 plaintiffs were only entitled to preventive relief; hence, the courts were powerless to annul consummated transactions. This argument was made in apparent deference to Congress' inclusion in section 16 of common law equity principles which precluded courts from using their injunctive powers to force affirmative actions, such as the sale of stock. The validity of this rationale is doubtful: as early as 1897 the Supreme Court sanctioned the use of mandatory injunctions, and mandatory decrees which compel defendants to continue business relations with plaintiffs when the defendants' refusals or threatened refusals to deal have constituted violations of the antitrust laws are often granted in section 16 judgments.

In 1957, the United States District Court for the Southern District of New York, in Fein v. Security Banknote Co., justified its refusal to allow a section 16 divestiture action with a rationale similar to that advanced by the Westor Theatres and Venner courts. It argued that a consummated stock transaction could not constitute the threatened loss or damage anticipated by section 16 since the harm had already been effected. The invalidity of this argument is apparent; a subsequent Supreme Court holding requires that the threatened injury of section 16 need only take the form of a contemporary

27. See note 4 supra.

28. See Developments in the Law, Injunctions, 78 HARV. L. REV. 994, 1061-63 (1965). The article notes that the distinction between mandatory injunctions which compel affirmative action and prohibitory injunctions which enjoin future acts has been significant primarily for preliminary injunctions, although the notion that a mandatory preliminary injunction could not issue was dispelled by American appellate courts at the turn of the century. The distinction is significant today in that the wording of many mandatory decrees is couched in negative terms, and many courts require a stronger showing for mandatory injunctions.

29. In re Lennon, 166 U.S. 548 (1897). The Lennon Court stated:

Perhaps, to a certain extent, the injunction may be termed mandatory . . . .

But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it.

Id. at 556.

30. See, e.g., Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 724 (S.D.N.Y. 1969); Airfix Corp. of America v. Aurora Plastics Corp., 222 F. Supp. 703, 706 (E.D. Pa. 1963); Greenspun v. McCarran, 105 F. Supp. 662, 667 (D. Nev. 1952). In these cases, a mandatory injunction was achieved through the employment of negative language. For example, in Greenspun, the defendants were enjoined "from continuing to refrain and continuing to refuse to tender to plaintiff for insertion and publication in his newspaper . . . advertising . . . ." 105 F. Supp. at 677.


32. Id. at 148.
violation likely to continue or recur, and any existing Clayton Act violation would fall into that category.

In light of the inherent weaknesses in these earlier arguments, some attention must be given to various judicial pronouncements indicating a traditional reluctance on the part of the judiciary to afford private parties the drastic relief of divestiture. The nature of divestiture suggests reasons for this reluctance. It is a remedy which may engender the disruptive breakup of an operating business and its unavoidable effect on the company's employees, customers and suppliers. Additionally, it frequently forces stockholders to sell their shares at a loss. Thus, in protecting the interests of a private plaintiff, a court may adversely affect the economic interests of unrepresented third parties. Recognition of the sweeping nature of the divestiture remedy also contributed to its limited use in government suits.

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34. The Court stated, while discussing the similar propriety of injunctive relief under the Sherman Act, in United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952): All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur. . . . Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue. Id. at 333 (emphasis added).

35. See, e.g., Schrader v. National Screen Serv. Corp., Trade Reg. Rep. (1955 Trade Cas. ¶ 68,217 (E.D. Pa. Dec. 15, 1955), in which the court stated that it has come to be generally recognized that considerations of policy are against decreeing divestiture or the complete destruction of a nationwide business at the suit of an individual in a private action under the antitrust laws, particular [sic] where [the suit] would have a far-reaching and possibly adverse effect upon interests not proved to have participated. Id. at 71,009.

36. Various commentators have recommended limited employment of divestiture because of its drastic nature and its potential to harm third parties, and some commentators also question the ability of the courts to administer the drastic divestiture remedy. See generally Celler, The Trial Court's Competence to Pass Upon Divestiture Relief, 10 Antitrust Bull. 693 (1965); Van Cise, Limitations Upon Divestiture, 19 Geo. Wash. L. Rev. 147 (1950); Comment, Divestiture in Light of the El Paso Experience, 48 Texas L. Rev. 792 (1970).

37. Although divestiture decrees have been granted regularly in government actions against section 7 violators since the Supreme Court's decision in United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961), see note 2 supra, the du Pont opinion cited only two previous decisions in which the Justice Department had been granted such decrees. Id. at 330 n.13, citing Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960); United States v. New England Fish Exch., 258 F. 732 (D. Mass. 1919), modification denied, 292 F. 511 (D. Mass. 1923).

Under the Sherman Act, divestiture, divorcement or dissolution were granted to the Justice Department only 24 times during the first 65 years of its existence. See ATTOR-
A 1955 Justice Department report concluded that the infrequent employment of divestiture decrees under the Sherman Act resulted from a conscious policy decision by the courts to limit their use of this drastic remedy.3

Despite earlier judicial disfavor toward divestiture, a number of courts in recent years have favorably received the argument that section 16 provides for divestiture. The first decision to recognize the availability of divestiture under section 16 was Julius M. Ames Co. v. Bostitch, Inc.,39 in which a federal district court, after noting that there existed no binding precedent on the question and that the statute itself did not distinguish between types of injunctive relief, found that there existed no reason for disallowing divestiture actions.40 Since Ames, the United States District Court for the Northern District of California has similarly suggested that in some actions under section 16 the only appropriate remedy may be divestiture.41

Then, in 1972, the detailed analysis of the issue by the district court in General Telephone was made available. The court noted not only the weakness of precedent and the similar wording of sections 15 and 16,42 but also noted its own ability to achieve divestiture indirectly through a "negative injunction."43 Since the Supreme Court considered divestiture to be the most

NEY GENERAL'S NAT'L COMM'N TO STUDY THE ANTITRUST LAWS, FINAL REPORT 354 (1955).
38. ATTORNEY GENERAL'S NAT'L COMM'N TO STUDY THE ANTITRUST LAWS, supra note 37, at 353-58. The report noted that courts, as a rule, "have refused divestiture in the absence of some clear showing of its necessity to insure effective competition, its practicality and, in light of surrounding circumstances, its basic fairness." Id. at 354.
40. Id. at 526.
41. See Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76, 81-82 (N.D. Cal. 1972); Burkhed v. Phillips Petroleum Co., 308 F. Supp. 120, 126-27 (N.D. Cal. 1970); McKeon Constr. v. McClatchy Newspapers, TRADE REG. REP. (1970 Trade Cas.) ¶ 73,212 at 88,810, 88,817 (N.D. Cal. Nov. 24, 1969). In Burkhed, the court stated: While divestiture would appear to be appropriate only in a limited number of cases where no other form of preventative relief would suffice, one such case where divestiture might be the only adequate and complete remedy would be where, as here, plaintiff alleges a monopoly in restraint of trade which is injuring the plaintiff.
Id. at 127.
42. See notes 2 & 4 supra.
43. International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 351 F. Supp. 1153 (D. Hawaii 1972). The court asserted that the most conservative interpretation of section 16's language allowed it to fashion this "negative injunction." See id. at 1207. While a court can choose to compel affirmative action by wording an injunction in negative terms, see note 30 supra, the "negative injunction" aims at compelling a defendant to do one thing by enjoining him from doing other things.
For example, the decrees entered in United States v. Reading Co., 183 F. 427 (E.D. Pa. 1910), aff'd in part, rev'd in part, 226 U.S. 324 (1912), modified, 228 U.S. 158 (1912); United States v. Standard Oil Co., 173 F. 177 (E.D. Mo. 1909), modified and
effective remedy in similar suits brought by the government, the district court found no reason to refrain from granting divestiture directly rather than engaging in verbal calisthenics to achieve it indirectly. The Ninth Circuit, however, was to find a rationale.

II. ANALYSIS OF LEGISLATIVE INTENT: A NEW FOCUS

In its attempt to resolve the divestiture issue, the Ninth Circuit in General Telephone turned to an examination of section 16's legislative history. Unlike the lower court, the circuit court accorded great weight to the record of hearings on the Clayton Act in determining legislative intent. Although it acknowledged that it was withholding from private parties the simplest and surest form of relief for section 16 violations, the court held that the legislative intent expressed in the hearings precluded private divestiture decrees.

aff'd, 221 U.S. 1 (1911); and Northern Sec. Co. v. United States, 120 F. 721 (D. Minn. 1903), aff'd, 193 U.S. 197 (1904), were negative injunctions obtained by a Justice Department still uncertain of its ability to obtain mandatory divestiture decrees. In those cases, the defendant holding companies were restrained from voting the stock of their operating companies or exercising any control over them, and the operating companies were restrained from paying the defendants any dividends. Hence, the defendants could only recoup their investments by selling their stock. See Peacock, supra note 18, at 73-74.

For examples of the application of negative injunctions in section 16 suits, see American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958) (defendant enjoined from voting its shares of plaintiff's stock, acquiring a seat on the plaintiff's board of directors and making future acquisitions of such stock); Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers, 80 F. Supp. 900 (S.D.N.Y. 1948) (court withdrew divestiture order and issued injunction prohibiting the defendant from collecting royalties on certain motion pictures, an action which rendered worthless the rights the court had earlier ordered divested).

44. See note 2 supra.
45. 351 F. Supp. at 1208.
46. 5 TRADE REG. REP. (1975 Trade Cas.) at 66,141-44. See Hearings on Trust Legislation, supra note 6.
47. The district court was the first court to look at the record of the hearings in considering the divestiture issue, but it stated that the hearing record and any legislative material other than committee reports were of little value in ascertaining legislative intent. 351 F. Supp. at 1207 n.150.
49. 5 TRADE REG. REP. (1975 Trade Cas.) at 66,141-45.
Numerous colloquies during hearings before the House Judiciary Committee indicated that committee members did not intend that the reference in section 16 to injunctive relief include the remedy of dissolution. Several times committee members asked witnesses their views on proposals to broaden the scope of section 16 relief to include private dissolution suits, and during one exchange with an antitrust attorney who favored these suits a committee member remarked that the committee did not intend such a result by section 16. Since these colloquies indicate that the committee viewed dissolution as an equitable remedy distinct from injunctive relief, the court concluded that the committee would have had to broaden the language of section 16 to specifically provide for private dissolution suits if it had intended to allow them. While the court admitted that it was not certain that the entire Congress shared the intent of the committee members, it emphasized that the congressional debates did not indicate otherwise.

The Ninth Circuit also prohibited the district court from attempting, on remand, to circumvent congressional intent by achieving divestiture indirectly through a "negative injunction." Instead, it suggested that the placement of an open purchasing requirement on General Telephone might be appropriate in combatting the anti-competitive purchasing policy engendered by the vertical combination.

50. Committee members and witnesses used the term dissolution rather than divestiture. See note 1 supra. The Ninth Circuit concluded that if the terms had distinct meanings, dissolution was the inclusive term and divestiture a subcategory. See note 3 supra. The court also noted that committee members and witnesses often referred to the dissolution of the Standard Oil Trust, which was in effect a divestiture. See Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911).

51. Hearings on Trust Legislation, supra note 6, at 261, 492, 649-50, 1372-73. These witnesses did not favor affording a private litigant the divestiture remedy.

52. The attorney advocated that section 16 be amended so that an individual could obtain "injunctive and other equitable relief, including an action for dissolution of the corporation." Hearings on Trust Legislation, supra note 6, at 843 (remarks of Samuel Untermeyer).

53. Id. at 842 (remarks of Representative John Floyd). Representative Floyd stated that "[the committee] did not intend by section [16] to give the individual the same power to bring a suit to dissolve the corporation that the Government has . . . . We discussed that very thoroughly among ourselves and we decided that he should not have [it]."

54. 5 TRADE REG. REP. (1975 Trade Cas.) at 66,142.

55. Id.


57. The court noted that this remedy might prove burdensome to the enjoined party, since it would subject that party to the threat of contempt whenever the prevailing party failed to make a proposed equipment sale. The court suggested that General Telephone
By denying to private litigants the remedies of divestiture and the "negative injunction," the Ninth Circuit may have drastically restricted the number of effective remedial options available to corporate plaintiffs who, like ITT, seek relief for their foreclosure from a potential market.\(^5\) Although corporate plaintiffs can obtain preliminary injunctions,\(^6\) such relief might not be feasible, particularly if a number of corporate acquisitions are required to demonstrate the anticompetitive effects of a vertical integration.\(^6\) However, the Ninth Circuit decision leaves these plaintiffs only burdensome and time-consuming injunctive remedies which require plaintiffs to initiate contempt proceedings each time a violation of an injunctive order occurs.\(^6\) As the Supreme Court has noted, such injunctions can hardly be detailed enough to cover in advance all of the many ways in which a parent company might exert improper influence over its subsidiaries to the detriment of the plaintiff.\(^6\)

might stipulate divestiture as an available remedy if it thought such a decree to be too bothersome. \(^5\) TRADE REG. REP. (1975 Trade Cas.) at 66,145. This injunctive remedy, then, might have the same effect as the usual negative injunction.

\(^5\) Among plaintiffs who might be adversely affected by a withdrawal of the divestiture and negative injunction remedies are corporations or their stockholders who bring suit under section 16 to attack the partial takeover of their company by a competitor. If the competitor has already acquired stock in the company or a seat on its board of directors, divestiture or a negative injunction may be the only effective remedy to protect the interests of the plaintiffs. For a more complete discussion of these section 16 actions, see Peacock, supra note 18, at 66-76.

\(^5\) For a discussion of the standards which courts use in determining the propriety of preliminary injunctions under section 16, see Note, "Preliminary Preliminary" Relief Against Anticompetitive Mergers, 82 YALE L.J. 155 (1972); Note, Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act, 40 N.Y.U.L. REV. 771 (1965).

\(^6\) In the present case, ITT attacked acquisitions made by General Telephone over a period of 16 years. See note 8 supra. The Ninth Circuit held that the defense of laches was available to General Telephone and asserted that the four year limitation on Clayton Act private damage actions was long enough to enable plaintiffs to observe the effects of possible antitrust violations and to calculate their potential effects. The court did allow the district court to make exception to the limitation in the traditional exercise of its equity jurisdiction. \(^5\) TRADE REG. REP. (1975 Trade Cas.) at 66,145-48.

Significantly, despite the need for a reasonable length of time to observe the possible legality of a challenged acquisition, even when seeking a preliminary injunction the corporate plaintiff must often demonstrate the anticompetitive effects of a vertical integration. Courts often require proof of an actual violation of section 7 rather than a reasonable probability of being able to prove such a violation at trial before they will issue a preliminary injunction. See YALE L.J. Note, supra note 59, at 157 n.61.

\(^6\) For example, if the district court decided on remand to place an open purchasing requirement on General Telephone, every time that ITT felt it had unjustifiably been denied a sale, it would be required to institute proceedings and prove its case.

\(^6\) United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1960). In \textit{du Pont}, the government had alleged that du Pont's ownership of 23 percent of the com-
In addition to the interests of corporate plaintiffs, the public interest in free competition is at stake in private antitrust actions which are designed to provide deterrence to contemplated antitrust behavior. The Supreme Court's view that the public is entitled to the surer, cleaner remedy of divestiture for section 7 violations, rather than a burdensome injunctive remedy, is no less applicable to private actions. Thus, when divestiture or a negative injunction is unavailable, the interest of the public as well as of the private litigant in these more effective remedies must await prosecution by the Justice Department, whose limited resources dictate that it only prosecute selected cases.

III. CONCLUSION

By utilizing the legislative history of section 16, the Ninth Circuit has advanced a sound argument for withholding the divestiture remedy from private plaintiffs. The result, however, is not favorable for private antitrust enforcement. By its own admission, the court has withheld from private plaintiffs the most effective remedy for combatting the potentially monopolistic abuses spawned by corporate mergers.

If other courts follow the Ninth Circuit's ruling, corporate litigants seeking relief from their foreclosure by a vertically integrated market may well opt to sue for the tangible benefits of treble damages under section 4 of the Clayton Act rather than for the injunctive relief available under section 16. Although the immediate economic interests of private litigants may some-

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63. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), in which the Court stated that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." Id. at 139.


66. 15 U.S.C. § 15 (1970) reads in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."
times be adequately served by a treble damage award, the underlying cause of the antitrust violations—the vertically integrated corporate structure—would remain, with its continuing ability to harm the public as well as individual corporations through its restraint on free competition.

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In their search for greater efficiency and output, modern industry and agriculture have employed vast amounts of chemical substances. Often, this practice has had the secondary effect of causing air, water, or land pollution. The pollution, in turn, has posed imminent health hazards to man. In light of these hazards, courts, administrative agencies, and legislative bodies are requested with increasing frequency to issue bans on the use of offending substances in the environment. Recently, in Environmental Defense Fund, Inc. v. EPA,¹ the United States Court of Appeals for the District of Columbia Circuit was asked to determine whether the continued use of substances whose effects on man and the environment had not been scientifically proven should be permitted. The case addressed the validity of an order issued by the Administrator of the Environmental Protection Agency (EPA) suspending registration and prohibiting the manufacture and sale of the pesticides aldrin and dieldrin.² Contesting the suspension were Shell

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¹ 510 F.2d 1292 (D.C. Cir. 1975).


(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, nematodes, fungi, weeds, and other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the [Administrator] shall declare to be a pest,
Chemical Company, the sole domestic manufacturer of the pesticides; Florida Citrus Mutual, an association of citrus growers; and the Secretary of Agriculture. In addition, the Environmental Defense Fund and the National Audubon Society attacked EPA's decision to allow continued sale and use of existing stocks.

In December 1970, the Environmental Defense Fund petitioned the EPA for immediate suspension of aldrin and dieldrin and the initiation of cancellation proceedings for all existing registrations. The Administrator responded on March 18, 1971, by issuing a notice of intent to cancel, under section 6(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), all products containing aldrin or dieldrin. The notice was based on the finding that a substantial question as to the safety of the chemical existed. If the Administrator had found that the pesticides constituted an "imminent hazard during the time required for cancellation," he might have suspended their registration as well. Instead, he found that on the basis of the available evidence, the case for suspension was too speculative.

4.

7 U.S.C. § 136d(b) (Supp. III, 1973) provides in pertinent part:

If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, the Administrator may issue a notice of his intent either—

(1) to cancel its registration . . . , or
(2) to hold a hearing to determine whether or not its registration should be canceled . . .

5.

This action would be taken under 7 U.S.C. § 136d(c)(1) (Supp. III, 1973), which provides in pertinent part:

If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may, by order, suspend the registration of the pesticide immediately.

6. "The substantial question of the safety of these registrations is primarily raised by theoretical data, while review of the evidence from the ambient environment indicates
the registrants objected to the proposed cancellation, a scientific advisory committee was appointed and public hearings commenced. The Environmental Defense Fund then sought judicial review of the Administrator's refusal to suspend registration of the chemicals. In light of the advisory committee's report, issued on March 28, 1972, the United States Court of Appeals for the District of Columbia Circuit remanded the case for further EPA consideration. After initial review of the report, the EPA issued an order affirming its previous decision. Then, more than one and a half years later, the Administrator issued a notice of intent to suspend and, after public hearings, suspended the registrations on October 1, 1974. Reviewing the suspensions, the District of Columbia Circuit concluded that the EPA's final order was a "rational exercise of discretion . . . supported by the reasoning of the agency, and by substantial evidence in the record."

I. THE DETERMINATION OF IMMINENT HEALTH HAZARD

A. Traditional Proof

In his 1974 Year-End Report, Russell Train, Administrator of the EPA, pointed to a "profound question" which has remained unanswered in environmental affairs: "whether the full presumption of innocence must be extended to . . . products and compounds" that have not been affirmatively shown to be harmless to human life and health. Those wishing to apply the traditional tort liability concept of cause in fact to the environmental area would answer in the affirmative. Under traditional principles, the party bringing suit against the use of a particular substance must produce factual evidence to show that the substance is responsible for bringing about a specific harmful condition. The party alleging the potential or real harm normally
has the burden of proof and must not only demonstrate a direct link between the particular substance and the specific damage, but must also counter assertions by the alleged polluter that his or her challenged conduct is legally justifiable.\(^{15}\)

Environmentalists have argued that existing concepts of cause in fact "place potentially severe constraints on the ability of the legal system to respond to the need to minimize the risks of future environmental injury."\(^{16}\) An example is provided by consideration of the prerequisites for procurement of the most effective and frequently requested remedy in the environmental area, the injunction. Traditionally, the certainty of the hazard must be well proven before a court will issue an injunction; there must be a showing that the threatened harm is both "immediate" and "practically certain to occur."\(^{17}\) Even when a potential health hazard is shown to exist, courts are reluctant to enjoin an activity when the benefits of prohibition are speculative.\(^{18}\)

The reluctance to enjoin potential health hazards was demonstrated in *Reserve Mining Co. v. EPA*,\(^{19}\) in which the United States Court of Appeals

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15. *See McCormick's Handbook of the Law of Evidence* § 337 (2d ed. E. Cleary ed. 1972).  *See also Comment, The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1103, 1113-14 nn.159-62 (1970), in which the author outlines several legal defenses which have been used. In *Brown v. Allied Steel Products Corp.*, 273 Ala. 711, 136 So. 2d 923 (1962), the plaintiff observed the construction of a steel fabricating plant but waited 18 months after it began operating to bring suit to enjoin its operation. The defendant successfully argued that the plaintiff was estopped by laches. The defendant in *Kentucky W. Va. Gas Co. v. Matny*, 279 S.W.2d 805 (Ky. 1955), successfully argued that the plaintiff could not prevail because the five year statute of limitations had run. Another theory used by defendants is assumption of the risk. *See East St. John's Shingle Co. v. City of Portland*, 195 Ore. 505, 246 P.2d 554 (1952), in which the court held that because the municipal sewage dump predated the plaintiff's arrival, the plaintiff had assumed the risk of any inconvenience he suffered because of the dump.


18. *See cases cited notes 19 and 23 infra.*

19. 514 F.2d 492 (8th Cir. 1975).  *Reserve Mining Co.*, a jointly owned subsidiary of Armco Steel Corp. and Republic Steel Corp., mines low grade iron ore taconite and ships it to a beneficiating plant at Silver Bay, Minnesota, where the taconite is concentrated into iron ore pellets and the residue is flushed into Lake Superior. Approximately 67,000 tons of taconite tailings have been discharged daily into the lake since discharge
for the Eighth Circuit recognized that Reserve's emission of asbestos-like fibers into the air and water near Silver Bay, Minnesota "[gave] rise to a reasonable medical concern for the public health."\(^{20}\) Nevertheless, because no harm to the public health had been proven, the court concluded that the danger to health was potential, not imminent or certain.\(^{21}\) The evidence, the court maintained, was "insufficient to support the kind of demonstrable danger to the public health that would justify the immediate closing of Reserve's operations."\(^{22}\) Moreover, the Eighth Circuit reiterated the stand it had taken nine months earlier when, in its first consideration of the case, it stated that "[a]lthough we are sympathetic to the uncertainties facing the residents of the North Shore, we are a court of law, governed by rules of proof, and unknowns may not be substituted for proof of a demonstrable

\(^{20}\) Litigation commenced in 1970, when the state of Minnesota attempted to enforce a stringent effluent standard against Reserve. Reserve Mining Co. v. Minnesota Pollution Control Agency, 294 Minn. 300, 200 N.W.2d 142 (1972). Prior to 1973, the case focused on water pollution abatement. In 1973, however, the federal government introduced evidence that asbestos-like fibers in the discharges constituted a public health hazard and sued to enjoin Reserve's operations. In April 1974, the United States District Court for the District of Minnesota issued an injunction closing Reserve's Silver Bay facility. United States v. Reserve Mining Co., 380 F. Supp. 11 (D. Minn. 1974). Two months later, the Court of Appeals for the Eighth Circuit granted Reserve a stay of the injunction pending appeal, on the grounds that no public health hazard had been proven and, absent such a showing, an injunction would be improper due to the substantial economic harm it would cause. Reserve Mining Co. v. United States, 498 F.2d 1073 (8th Cir. 1974). The initial stay was issued for a period of 70 days. Subsequently, Reserve obtained extensions of the stay until March 14, 1975, when the Eighth Circuit issued its decision. On March 20, 1975, the EPA recommended that the Justice Department not seek Supreme Court review of the Eighth Circuit's decision. 5 ENV. REP. 1867 (1975).

\(^{21}\) 514 F.2d at 520.

\(^{22}\) Id. at 537. The court affirmed the injunction, but directed modification of its terms: Reserve was to be given "a reasonable opportunity and a reasonable time" to abate its pollution. Id.

\(^{22}\) Id. at 507. The evidence relied on by the court in reaching its decision included a series of tissue studies performed on the bodies of recently deceased Duluth residents who had breathed the air and drunk the water near Silver Bay. No asbestos fibers were detected in the body tissues. Thus, in spite of the uncontradicted evidence discussed in the district court opinion which indicated that various diseases associated with asbestos exposure are not apparent until 20, 30 or 45 years after initial exposure, and that among industrial workers handling asbestos no effects from asbestos exposure were detected until after 20 years, the Eighth Circuit found that the results of the tissue studies indicated that no emergency or imminent hazard existed. United States v. Reserve Mining Co., 380 F. Supp. 11, 40 (1974). The appellate court conceded, however, that the negative results did not dispose of the broader issue of whether ingestion of fibers poses some danger to public health justifying abatement on less immediate terms. 514 F.2d at 536.
hazard to the public health."\textsuperscript{23}

Many courts demand a similar high standard of proof to be met before they will act to declare any activity to be an imminent hazard to health. This high standard developed in the 19th century, at a time when natural resources were abundant, technology simple, and industry undeveloped.\textsuperscript{24} The broad policy of the courts at that time was to encourage industrial expansion and economic growth.\textsuperscript{25} An early example of the courts' encouragement is found in Attorney General v. Corporation of Kingston,\textsuperscript{26} in which the English township of Kingston was found to be pouring large quantities of sewage into the River Thames. The court refused to enjoin the activity, finding that plaintiffs had to "establish the existence of an actual immediate nuisance," and not "a case of injury a hundred years hence, when chemical contrivances might have been discovered for preventing the evil."\textsuperscript{27} The risk of future injury to environmental resources was often found to be outweighed by the benefits of present exploitation, since new technology

\textsuperscript{23} 498 F.2d 1073, 1084 (8th Cir. 1974). In a similar case involving coal fumes, City of Chicago v. Commonwealth Edison Co., 24 Ill. App. 3d 624, 321 N.E.2d 412 (1974), the court found that proof of irreparable injury to health was not established with enough certainty to warrant issuance of injunctive relief. The city of Chicago filed a complaint alleging that coal being burned by Commonwealth within one mile of the city limits emitted sulfur dioxide, smoke, particulate matter, dust, fumes, and other poisonous gases harmful to life and property. \textit{Id.} at 626, 321 N.E.2d at 414. The city asked that the burning be enjoined. The trial court denied relief and the appeals court affirmed. In denying the injunction, the court stated that "we are not unmindful of the harsh health effects caused by air pollutants as illustrated by the various studies presented by the City at trial." \textit{Id.} at 632, 321 N.E.2d at 418. However, "the City could not clearly establish that the Edison plant was the direct cause of harmful pollution in Chicago . . . ." \textit{Id.} at 633, 321 N.E.2d at 419.

In another case, an injunction was denied because actual and immediate harm from the blasting and dust pollution of a limestone quarry, though probable and potential, could not be proven. Green v. Castle Concrete Co., 181 Colo. 309, 509 P.2d 588 (1973).

For cases in which requests for cancellation of a pesticide's registration were denied because it was correctly labelled, despite the fact that the pesticide was frequently misused and caused much human injury, see Stearns Electric Paste Co. v. EPA, 461 F.2d 293 (7th Cir. 1972), and Continental Chemiste Corp. v. Ruckelshaus, 461 F.2d 331 (7th Cir. 1972).

\textsuperscript{24} See Note, supra note 17, at 1025. See also Gelpe & Tarlock, supra note 16, at 384; Horwitz, The Transformation in the Conception of Property in American Law, 1780-1860, 40 U. Chi. L. Rev. 248 (1973). The authors point out how the idea of property underwent a fundamental transformation from a static agrarian conception in which an owner is entitled to undisturbed enjoyment, to a dynamic view of property which emphasizes productive use and development.

\textsuperscript{25} See Note, supra note 17, at 1027.

\textsuperscript{26} 12 L.T.R.(n.s.) 665 (1865).

\textsuperscript{27} \textit{Id.} at 669.
might be developed in the future to eliminate the problem. Thus, a high standard of proof was developed as part of a social policy consistent with the priorities and needs of the early 19th century. Because of the difficulty of meeting the required proof, environmental health hazards often went unabated.

B. Risk-Benefit Analysis

In view of the difficulty encountered by parties attempting to meet the high standard of proof, there arose a need in the legal system to find an alternative way of limiting potential and actual health hazards in the environment. The situation called for a standard which agencies and courts could use to limit emissions based on risk of harm rather than proof of harm. The very concept of harm had to be expanded to include future, as well as immediate, harm. In addition, a shifting of the burden of proof was required.

The United States Court of Appeals for the District of Columbia Circuit pioneered the use of this approach in environmental cases when it applied a risk-benefit analysis to the field of pesticide control. In Environmental Defense Fund, Inc. v. Ruckelshaus, the Environmental Defense Fund petitioned the court for a review of an EPA order denying suspension of DDT during the time needed for cancellation of the product’s license. Immediate suspension of DDT was statutorily permissible if the Administrator found the product to constitute an imminent hazard to human health. The court held that in deciding whether an imminent health hazard exists, the Administrator must consider not only proven harm, but the “magnitude of the anticipated harm, and the likelihood that it will occur.”

28. See Gelpe & Tarlock, supra note 16, at 384. The authors see this as illustrative of 19th century attitudes toward the relationship between technology and social welfare.

29. The burden would be shifted to those parties wishing to continue emitting possibly harmful elements from their offices and factories. See Krier, Environmental Litigation and the Burden of Proof, in LAW AND THE ENVIRONMENT (M. Baldwin & J. Page eds. 1970).

But see Gelpe & Tarlock, supra note 16, at 415-16. The authors argue that because of information not yet proven scientifically, it is impossible for either party to meet a traditional burden of proof. Therefore, the burden of proof concept is inappropriate for use in environmental cases involving unknowns. Instead, the burden of persuasion should be shifted, the authors advise, so that those undertaking an activity would have to establish, as part of their prima facie case, the lack of risk of injury.

30. 439 F.2d 584 (D.C. Cir. 1971).


32. 439 F.2d at 595.
harm might be imminent even if its impact were not felt for many years, the court indicated that FIFRA "leaves room to balance" the benefits of DDT against its risks. Significantly, on the same day that *Environmental Defense Fund v. Ruckelshaus* was decided, the District of Columbia Circuit declared, in *Welloyd v. Ruckelshaus*, that FIFRA confers broad discretion on the Administrator "not merely to find facts, but also to set policy in the public interest."

Later, in *Environmental Defense Fund, Inc. v. EPA* (I), the District of Columbia Circuit was again asked to review a decision by the Administrator to reject suspension of the registration of a group of pesticides during cancellation hearings; the pesticides involved were aldrin and dieldrin. The court upheld EPA's method of reaching a decision by finding the "balance struck between benefits and dangers to the public health and welfare from the product's use." Nonetheless, because the EPA had only mentioned aldrin and dieldrin's major uses and had not discussed the benefits resulting from continued use, the case was remanded for further agency elaboration.

The balancing test for pesticide cancellation orders proposed in *Environmental Defense Fund v. Ruckelshaus* and *Environmental Defense Fund v. EPA* (I) was codified when FIFRA was amended by the Federal Environmental Pesticide Control Act of 1972 (FEPCA). Under the original version of FIFRA, a pesticide manufacturer's only responsibility was to show that the pesticide label truthfully described the product's capabilities and included clear directions for use. Under FEPCA, the manufacturer now

33. *Id.* at 597.
34. *Id.* at 594. Because the Administrator did not articulate the standards he used in his refusal to suspend, the case was remanded. On remand, the Administrator again refused to suspend the chemical, and on appeal, his decision was upheld. *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973).
35. 439 F.2d 598 (D.C. Cir. 1971). The case reviewed the Administrator's decision not to suspend the herbicide 2, 4, 5-T.
36. *Id.* at 601.
37. 465 F.2d 528 (D.C. Cir. 1972). See text accompanying note 8 *supra*.
38. *Id.* at 535. Notice was taken of the Administrator's statement that "the concept of the safety of a product is under evolution and refinement in light of increasing knowledge." *Id.*
39. The court held that "[t]he interests at stake here are too important to permit the decision to be sustained on the basis of speculative inference as to what the Administrator's findings and conclusions might have been regarding benefits." *Id.* at 539.
41. 7 U.S.C. § 135b(a)(1)-(4) (1970) states in pertinent part:

[T]he applicant for registration shall file with the Administrator a statement including—

* * *
must demonstrate that the product can perform its intended functions and be applied according to the most commonly accepted methods without causing unreasonable "adverse effects on the environment." This requirement represents a clear statement of congressional intent to shift regulatory emphasis from mere agricultural effectiveness and product safety to include a more extensive consideration of the potential health and environmental effects of pesticide use. Like the risk-benefit approach which the District of Columbia Circuit employed in limiting chemical emissions, the approach of FEPCA provided for limitation of the use of pesticides based on risk of harm to the environment.

FIFRA has been construed as placing the "burden of establishing the safety of a product requisite for compliance with the labeling requirements . . . at all times on the applicant and registrant." This shift of the burden of proof from the traditional party, the party bringing charges of unsafe conduct, represents a sensitivity to the necessity of protecting against risks to public safety when all information as to a pesticide's effects is not known. Indeed, Judge Leventhal, who wrote the opinion in Environmental Defense Fund v. EPA (II), has pointed to the burden of proof as a concept particularly effective for utilization in this effort.

In the past few years, some decisions and new legislation in environmental areas other than pesticide control have recognized the importance of protecting against risks to public safety when information about a product's effect on the environment is not complete. The Federal Water Pollution Control Act Amendments of 1972 provide that the maximum daily loads for certain pollutants be set at a level "with . . . a margin of safety which takes into account any lack of knowledge concerning the relationship between

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3. a complete copy of the labeling accompanying the economic poison and a statement of all claims to be made for it, including the directions for use.


43. See Comment, supra note 40, at 297. The new statute leaves unclear, however, how much effect is required before a situation becomes "adverse" and what weight the varying factors will command in the balancing process.


46. See Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509 (1974), in which the author states:

It is my feeling that the burden of proof concept will be relied on increasingly . . . by courts which are reluctant, on the one hand to interfere with an agency's expert manipulations of test data and, on the other, to defer blindly to whatever methodology an agency puts forth in support of its predictions.

Id. at 536.

47. See notes 49-56 infra.

effluent limitations and water quality."  Similarly, the 1970 Clean Air Act establishes air quality standards which allow for a margin of safety sufficient to protect the public health.

A similar concern for unproven health hazards was displayed by the United States Court of Appeals for the District of Columbia Circuit in *AMOCO Oil Co. v. EPA.* In that case, oil companies sought review of those EPA regulations which prohibited the use of leaded gasoline in automobiles fitted with catalytic converter devices and which required widespread retail marketing of at least one grade of unleaded gasoline. The court rejected the contention that sufficient findings, as required under the Clean Air Act, were not made. Distinguishing administrative agency regulations which turn on factual issues from those which turn on policy, the court held that it would not require policy decisions to be based on "'findings' of the sort familiar from the world of adjudications." When scientific unknowns and the risk of health hazard were involved, the court found that it was not necessary to prove cause or harm in order to regulate a particular substance.

49. Id. Section 1313(d)(1)(C) (Supp. III, 1973) states in pertinent part:
   Each State shall establish for [water] . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with . . . a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.


51. Id. Section 1857c-4(b)(1) (1970) indicates that "[n]ational primary ambient air quality standards [shall be] based on such criteria and allowing an adequate margin of safety [as are requisite to protect the public health]."

52. 501 F.2d 722 (D.C. Cir. 1974).

53. Because auto exhaust emissions of hydrocarbons, carbon monoxide, and oxides of nitrogen may be hazardous to health, the Clean Air Act requires catalytic converters to be installed on many 1975, and most 1976, cars. 42 U.S.C. § 1857f-1(b) (1970). Lead in gasoline in these cars would render inactive the catalytic converters. 501 F.2d at 726.


55. 501 F.2d at 741.

56. Id. The District of Columbia Circuit dealt with this problem in an occupational context in *Industrial Union Dep't, AFL-CIO v. Hodgson,* 499 F.2d 467 (D.C. Cir. 1974), stating: "Where existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information."  Id. at 474-75 n.18. The court concluded that "in addition to the currently unresolved factual issues, the formulation of standards involves choices that by their nature require basic policy determinations rather than resolution of factual controversies."  Id. at 475.

In another case concerning auto emission standards, *International Harvester v. Ruckelshaus,* 478 F.2d 615 (D.C. Cir. 1973), the court reviewed EPA's denial of a request
II. RISK-BENEFIT ANALYSIS AS A METHOD OF JUDICIAL DECISIONMAKING IN ENVIRONMENTAL PROTECTION LITIGATION

Environmental Defense Fund, Inc. v. EPA (II)\textsuperscript{57} represents a victory within the District of Columbia Circuit for risk-benefit analysis over requirements of traditional proof, a victory due in part to provisions of FIFRA, as amended, and in part to the interpretation given to the relevant statutory provisions by a court sympathetic to the balancing approach in environmental matters.\textsuperscript{58} FEPCA requires the suspension of the registration of aldrin and dieldrin if EPA should find that the pesticides present an imminent hazard to the public during the time required for cancellation.\textsuperscript{59} Environmental Defense Fund v. EPA (I) determined that an imminent hazard existed not only under crisis conditions, but when "there is substantial likelihood that serious harm will be experienced during the year or two required in any realistic projection of the administrative process."\textsuperscript{60} This criterion for suspension was imputed from provisions of FIFRA. The statute confers broad discretion on the Administrator to "find facts and to set policy in the public interest";\textsuperscript{61} places the burden of establishing that a product is sufficiently safe to comply with the labelling requirements "at all times on the applicant and registrant";\textsuperscript{62} and defines the scope of judicial review of EPA orders made after public hearings so that the order of the Administrator will be sustained if supported by substantial evidence when considered on the record as a whole.\textsuperscript{63}

Having decided that aldrin and dieldrin registrations must be suspended if

by International Harvester and three major auto companies for a one year suspension of the 1975 emission standards prescribed by the Clean Air Act for light duty vehicles. See 42 U.S.C. § 1857f-1(b)(5)(B) (1970). The court noted two principal considerations: the grave economic consequences which would ensue if a suspension were not granted and the auto companies could not meet the emission standards on time, and the possibly irretrievable ecological damage which might occur if suspension were granted and if the Administrator's prediction of feasibility were achievable in 1975. \textit{Id.} at 633. The process involved was termed a "balancing of risks." \textit{Id.} at 641. In this case, the risk of erroneous denial of suspension was found to outweigh the risks of an erroneous grant.

\textsuperscript{57} 510 F.2d 1292 (D.C. Cir. 1975).

\textsuperscript{58} See Leventhal, \textit{supra} note 46, at 536. Judge Leventhal states that, in the public interest, predictions must be made in environmental cases because more conservative study might "squander so much time as to generate irreversible damage to the environment." \textit{Id.}


\textsuperscript{60} 465 F.2d at 540.

\textsuperscript{61} \textit{Id.} at 534.

\textsuperscript{62} \textit{Id.} at 532.

there existed a substantial likelihood of harm during the cancellation process, the *Environmental Defense Fund v. EPA* (II) court was confronted with the crucial question of whether or not a substantial likelihood of harm existed. In contrast to the suspension hearing, which was limited to consideration of whether the pesticides presented a cancer hazard to man, the court upheld the Administrator's finding of imminent hazard on the basis of test results gleaned from studies on mice and rats. Shell attacked this reliance on grounds that extrapolating results from mice to men was too speculative and that the data collected from the tests on rats was contradicted by other scientific evidence.

The court responded by performing a classic risk-benefit analysis. Where the risk involved was so great as to create the strong possibility that the substance causes cancer, and the registrant had the burden of proving the safety of his product, the Administrator would not be required to prove facts that scientists had been unable to prove. The court noted that extrapolation of data from mice to men was sufficient to show substantial likelihood of harm in light of existing conditions. Because there was "virtually universal contamination" of humans by residues of aldrin and dieldrin, making it impossible to establish an uncontaminated human control group, it would be equally impossible to obtain meaningful test results on humans. In addition, the court recognized that there were difficulties in obtaining scientific proof created by features of environmental conditions such as time lag, broad spatial effects, and buffering. Ethical considerations, as well,

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64. 510 F.2d at 1298.
65. Id. at 1298-99.
66. Brief for Petitioner at 31, *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975). Shell charged that a finding of "imminent hazard" to man solely on the response in mouse livers "represents an unexplained and scientifically unwarranted departure from prior administrative practice, both at EPA and at all other agencies." *Id.* In addition, Shell stated that although the 1958 Delaney Amendment to the Food, Drug, and Cosmetic Act contains a provision requiring immediate elimination from the marketplace of food additives found to have caused cancer in a single appropriate test animal, see 21 U.S.C. §§ 321(s)(1), 348(c)(3)(A) (1970), there is no similar provision in FIFRA. Brief for Petitioner at 35, *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975).
67. 510 F.2d at 1298.
68. Id. at 1299.
69. Id.
70. See Gelpe & Tarlock, *supra* note 16, at 396. One of the most common problems, time lag, arises when effects are remote in time from their causative agents. A good example of this was presented in *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 40 (D. Minn. 1974), in which it was shown that some diseases caused by exposure to asbestos do not appear until 40 years after exposure.
would rule out direct human testing.\textsuperscript{71} Just as the court in \textit{International Harvester}, which had balanced the "costs of a wrong decision . . . against the gains of a correct one,"\textsuperscript{72} the court in \textit{Environmental Defense Fund v. EPA (II)} realized that because of the enormity of the health menace which would be created if aldrin and dieldrin were carcinogenic, its decision should allow for a margin of safety.\textsuperscript{73}

The rat data was held acceptable because three tests were run and at least six witnesses reviewing the results found either a certainty or a strong possibility that aldrin and dieldrin had produced cancer in rats.\textsuperscript{74} Because the record contained substantial scientific authority supporting the Administrator,\textsuperscript{75} the court stated that the rat data was sufficient even if controverted by respectable scientific authority. In response to Shell's charges of lack of causal connection between implantation of the pesticides in the soil and ingestion of pesticide residues by humans, the court pointed to evidence which indicated that aldrin and dieldrin in the soil were absorbed by plant roots and transported to the upper parts of plants which were, in turn, fed to farm animals and consumed by humans.\textsuperscript{76}

The court concluded that no benefit outweighed the human health risks which would result from registered use of aldrin and dieldrin during completion of the cancellation period.\textsuperscript{77} In arriving at this determination, the court was clearly acting as a policymaker.\textsuperscript{78} Instead of the judicial concern for economic and industrial growth displayed by 19th century courts\textsuperscript{79} and even many courts today,\textsuperscript{80} the District of Columbia Circuit showed concern

\textsuperscript{71} 510 F.2d at 1299.
\textsuperscript{72} 478 F.2d at 641.
\textsuperscript{73} See notes 48-51 \textit{supra} for statutes which also allow for a margin of safety.
\textsuperscript{74} 510 F.2d at 1300.
\textsuperscript{75} \textit{Id.} at 1298, \textit{citing} 465 F.2d at 537.
\textsuperscript{76} 510 F.2d at 1300-01. The District of Columbia Circuit was not convinced of the safety of ingestion of aldrin or dieldrin by Shell's contention that in the past, ingestion of aldrin and dieldrin by humans—which is declining—has always been at or below the level which the World Health Organization and the Food and Agriculture Organization regard as the amount which can be safely consumed every day over a lifetime. Brief for Petitioner at 45, \textit{Environmental Defense Fund, Inc. v. EPA}, 510 F.2d 1292 (D.C. Cir. 1975).
\textsuperscript{77} 510 F.2d at 1301.
\textsuperscript{78} Even if the court had tried to limit itself to a determination of simple cause in fact, "matters of policy and estimates of factual likelihood become hopelessly interwoven with each other." Malone, \textit{Ruminations on Cause-In-Fact}, 9 \textit{Stan. L. Rev.} 60, 72 (1954).
\textsuperscript{79} See notes 24-27 & accompanying text \textit{supra}.
\textsuperscript{80} \textit{See, e.g., Reserve Mining Co. v. EPA}, 514 F.2d 492 (8th Cir. 1975). The court found that in the absence of proof of the existence of imminent or actual harm,
for preserving human life. Resolving the uncertainties in favor of concern for possible harm to the environment and public health, and not for immediate economic advantage, the court rejected the policy considerations of another era.

III. CONCLUSION

*Environmental Defense Fund v. EPA* (II) represents a decisive victory for the use of risk-benefit analysis in environmental cases where the existence of physical phenomena remains unproven. Insistence on traditional standards of proof has heretofore meant that numerous potential health hazards may be left unchecked by the courts. The use of risk-benefit analysis recognizes that it is not in the best interest of the public to demand impossible proofs. In the face of serious probable or potential health hazards to the public, risk-benefit analysis allows for a margin of safety. Using this analysis, a court can ban the emission of a substance into the environment on the evidence of the probability, but not conclusive proof, that the substance is the cause of a hazard to human health.

*Environmental Defense Fund v. EPA* (II) should be a powerful weapon for those who wish to do battle in the courts in order to protect remaining natural resources from the effects of industrial and agricultural pollution. By its solid endorsement of the risk-benefit analysis, the United States Court of Appeals for the District of Columbia Circuit may well encourage other courts to abandon traditional standards of proof in environmental cases. By focusing on policy considerations other than immediate economic advantage, it may suggest to the courts that there are other factors, in addition to those of an economic nature, which warrant their careful attention.

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“a legal standard requiring immediate cessation of industrial operations will cause unnecessary economic loss, including unemployment . . . .” Id. at 537.

81. *See* cases cited notes 19 & 23 *supra*.

82. The reasoning employed in *Environmental Defense Fund v. EPA* (II) was closely followed by the EPA when, on July 30, 1975, Administrator Train announced EPA’s intent to suspend the registrations of the pesticides chlordane and heptachlor. The Administrator chose this procedure rather than cancellation because he felt that the eighteen month period needed for the cancellation procedure was too great in light of the probability that the two chemicals caused cancer in man. This probability was extrapolated from laboratory tests on mice and rats; the tests on the animals were called “reliable indications” that there is a “human cancer hazard.” *ENV. REP.* 550. *See* Washington Post, July 31, 1975, at A1, col. 1.