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Venue Under the Antitrust Laws: Amenability of Parent Corporations to Suit by Virtue of Their Subsidiarys' Activities

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The courts have developed two tests for determining the proper judicial districts in which corporate defendants in antitrust suits may be sued under section 12 of the Clayton Act. The United States Court of Appeals for the Seventh Circuit applied the less restrictive test in holding that the parent corporation was "transacting business" in the local district through the activities of its subsidiary. The author agrees with the court's application of a totality-of-circumstances analysis in finding that venue was proper but criticizes the court for not having taken the opportunity to inter the more restrictive test.

Tiger Trash, a division of Joe W. Morgan, Inc., was engaged in the solid refuse collection service business. It initiated an antitrust action against Browning-Ferris Industries of Indiana, Inc. ("BFI-Indiana") and its parent corporation, Browning-Ferris Industries, Inc. ("BFI") of Houston, Texas. Tiger Trash alleged that the corporate defendants had engaged in an attempt to monopolize the refuse collection market in violation of section 2 of the Sherman Act.[1] BFI filed a motion to dismiss[2] on the ground that the district court lacked personal jurisdiction over BFI since it was not amenable to suit in that forum under the venue provision of the antitrust laws.[3] The United States District Court for the Southern District of Indiana granted defendant BFI's motion to dismiss. The district

1. 15 U.S.C. § 2 (1976). Plaintiff Tiger Trash also alleged that defendants had violated similar provisions of the Indiana Antitrust Act. IND. CODE §§ 24-1-2-2, -7 (1976). The fourth count of the complaint charged BFI with violating § 7 of the Clayton Act. 15 U.S.C. § 18 (1976).

2. In the same motion, defendant BFI also challenged the in personam jurisdiction of the district court under the Indiana pendent "long-arm" statute, the Indiana Antitrust Act, claiming that it had not supplied or contracted to supply services of any kind in the state.

Defendant BFI-Indiana, in addition to denying the material allegations of plaintiff's complaint and filing counterclaims thereto, moved for summary judgment on alternative grounds. First, BFI-Indiana contended that plaintiff had failed to define properly the relevant service market. Second, summary judgment was proper since there was no dangerous probability that the alleged attempt to monopolize could be successful. BFI-Indiana added that any alleged attempt to monopolize would have no appreciable effect on interstate commerce.

3. Clayton Act § 12, 15 U.S.C. § 22 (1976) (originally enacted ch. 323, § 12, 38 Stat. 736 (1914)). This statute provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

court held that since BFI had not transacted business in the Southern District of Indiana, venue in that judicial district was improper. BFI, the parent corporation of BFI-Indiana, would not be deemed to have transacted business by virtue of its subsidiary's activities because the parent had not consciously exercised control over the subsidiary's day-to-day operations. On appeal, the United States Court of Appeals for the Seventh Circuit, *held*, reversed and remanded: Parent corporations are amenable to antitrust suits in judicial districts in which subsidiary corporations transact business where the parent-subsidiary relationship consists of something more than mere investment holding by the parent.[4] *Tiger Trash v. Browning-Ferris Industries, Inc.*, 560 F.2d 818 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

The Seventh Circuit's decision in *Tiger Trash* is the most recent chapter in the erratic judicial construction of section 12 of the Clayton Act, 15 U.S.C. § 22 (1976). That statute prescribes the judicial districts in which corporate defendants in antitrust suits may be sued. Numerous decisions under section 12 evidence the application of two tests for determining when a parent corporation will be deemed to have transacted business in a judicial district and when it will be amenable to suit in a particular district by virtue of the actions of its wholly or partially owned subsidiary. The more restrictive test[5] requires that for a parent corporation to be sued in a judicial district in which its subsidiary transacts business, the parent must consciously exercise control over the subsidiary's day-to-day operations.[6] The less restrictive test[7] would permit a parent

4. The court of appeals also reversed the district court's grant of summary judgment for defendant BFI-Indiana for lack of subject matter jurisdiction.

Two broad tests have developed for determining subject matter jurisdiction over a substantive Sherman Act claim. They are (1) the "in commerce" test (whether the relevant product market upon which the substantive claims have infringed are geographically interstate), and (2) the "affecting commerce" test (whether the activity has a substantial and adverse effect on interstate commerce though the relevant product market is not interstate in its geographic aspect). The court found that subject matter jurisdiction existed under either of the two tests developed to determine whether subject matter jurisdiction over a substantive Sherman Act claim exists. 560 F.2d 818, 824-27 (7th Cir. 1977). *See generally* Ferguson, *The Commerce Test for Jurisdiction Under the Sherman Act*, 12 HOUS. L. REV. 1052 (1975); 36 LA. L. REV. 1040 (1976); 49 N.Y.U. L. REV. 323 (1974); 21 VILL. L. REV. 721 (1976); 33 WASH. & LEE L. REV. 181 (1976).

5. This test was first stated in Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925).

6. San Antonio Tel. Co. v. American Tel. & Tel. Co., 499 F.2d 349 (5th Cir. 1974) (interconnected communications network of 22 companies coupled with division among companies of revenue obtained from long distance communication held insufficient); O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974) (Japanese corporation sold its products to wholly owned subsidiary in Japan which in turn delivered products in United States, the court finding the corporate separation here to be real as they had in *Cannon*);

corporation to be sued in a judicial district in which its subsidiary transacts business where the parent has the *ability to control* the subsidiary's policy decisions which *might* result in antitrust violations.[8] In reversing the district court's dismissal, the Court of Ap-

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Aro Mfg. Co. v. Automobile Body Research Corp., 352 F.2d 400, 404 (1st Cir. 1965) (defendant, Maryland corporation whose only business was to assign patents and collect royalties from Massachusetts corporation, as assignee of patent and considered to be doing business, would not be dispositive of finding Maryland corporation doing or transacting business in Massachusetts); Williams v. Cannon, Inc., 432 F. Supp. 376, 379 (C.D. Cal. 1977) (use of parent's trademarks (Japanese corporation) by subsidiary, parent's licensing agreements and joint venture with United States companies, sales of parent's securities in the United States and Central District of California, operation of training school run by parent's factory employees in district, and allegation that basic decisions emanate from Japan were insufficient to show control necessary to be considered transacting business in district); *In re* Chicken Antitrust Litigation, 407 F. Supp. 1285, 1297 (N.D. Ga. 1975) (wholly owned subsidiary with common officers and/or directors of the parent held insufficient); Martin-Trigona v. Bankamerica Corp., 1974-1 Trade Cases ¶ 74,916, at 96,113 (D.D.C. 1974) (wholly owned subsidiary acting as agent but not engaged in commercial activity held insufficient; wholly owned subsidiary not under day-to-day control held insufficient); Hayashi v. Sunshine Garden Prod., Inc., 285 F. Supp. 632, 634 (W.D. Wash. 1967) (mere fact that wholly owned subsidiary had some common officers with parent was insufficient in absence of showing that foreign corporation in fact controlled and managed subsidiary), *aff'd*, 396 F.2d 13 (9th Cir. 1968); Global Pub. Corp. v. Grolier, Inc., 273 F. Supp. 637 (D. Mass. 1967) (plaintiff failed to show that parent substantially dominated and controlled subsidiaries and failed to show that subsidiaries were agents, dummies or alter egos of parent); Zwingle v. Tyson's Foods, Inc., 241 F. Supp. 940, 943 (W.D. Okla. 1965) (a wholly owned subsidiary had common directors, purchased products from other subsidiary of parent and parent's prospectus for public offering reported activities of all wholly owned subsidiaries and profits with approval of subsidiary's directors—held insufficient); Fisher Baking Co. v. Continental Baking Corp., 238 F. Supp. 322, 323 (D. Utah 1965) (relying on *Cannon*, the court held that interlocking directorates or officers do not destroy the separation between parent and subsidiary); Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962)(direct shipment of equipment by parent to retailers and customers of subsidiary at subsidiary's direction was held insufficient where goods were sold to subsidiary prior to shipment but the court found that the identities of the two corporations could not be separated and the parent was amenable to suit), *aff'd*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964); Terry Carpenter, Ltd. v. Ideal Cement Co., 117 F. Supp. 441 (D. Neb. 1954) (wholly owned subsidiary's cement plant with considerable overlapping of personnel held to be insufficient).

A similar test for venue has been applied to suits brought under the securities laws. *See* Allis-Chalmers Mfg. Co. v. Gulf & Western Indus., Inc., 309 F. Supp. 75, 78 (E.D. Wis. 1970).

7. This test was derived from Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927). *See* United States v. Scophony Corp. of America, 333 U. S. 795 (1948).

8. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262, 317-28 (E.D. Pa. 1975) (judge discussed the cases described below and concluded that the subsidiaries had sufficient intimacy with parent to subject parent to suit in local district); Hitt v. Nissan Motor Co., 399 F. Supp. 838, 843 (S.D. Fla. 1975) (sphere of control exercisable over wholly owned subsidiary by parent, the exchange of officers and employees and the common directors during jurisdictional period were sufficient to find the parent "transacting business" within forum under § 12 of the Clayton Act); Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 372 (D. Md. 1975) (where parent controlls marketing decisions of its subsidiary and views the subsidiary as its marketing arm on the East Coast and parent "controls, markets, and disposes of [subsidiary's] assets as if they were its own," these activities sufficient in

peals for the Seventh Circuit failed to identify this split in authority. On the contrary, the court cited cases employing both the more and less restrictive tests without characterizing them as such.[9] On balance, however, the court's analysis led it to a conclusion consistent with the policy underlying section 12 of the Clayton Act,[10] thereby permitting Tiger Trash to maintain its antitrust action in a more convenient and less costly forum.

Plaintiffs maintaining private antitrust actions must initially concern themselves with the selection of an appropriate forum. Selection of the appropriate court entails an examination of the defendant's contacts with and activities in a judicial district. This examination enables the plaintiff to decide whether the court chosen will have jurisdiction over the person of the defendant and whether the location of the court selected is proper for the suit to be heard. The latter question, whether venue is proper, has special significance in antitrust cases. Oftentimes, the antitrust plaintiff is in a far weaker financial position than the defendant. If the plaintiff must pursue his remedy in a distant forum, that being the only

applying the *Scophony* test); Audio Warehouse Sales, Inc. v. United States Pioneer Elec. Corp., 1975-1 Trade Cases ¶ 60,213, at 65,382 (D.D.C. 1975) (rejected the *Cannon* test and applied the totality-of-circumstances test where employees shifted between parent and subsidiary, directors and officers overlapped, the subsidiary received preferential treatment unlike other corporate entities that dealt with parent, the subsidiary had exclusive use of parent's trademarks and subsidiary operated as marketing arm for parent in the United States); Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F. Supp. 54 (D. Ore. 1973) (parent ignored formal corporate division between it and its subsidiary, becoming directly involved in subsidiary's operations and policy decisions); Luria Steel & Trading Corp. v. Ogden Corp., 327 F. Supp. 1345 (E.D. Pa. 1971) (10 of 28 officers or directors of parent corporation served as officers or directors of the subsidiaries and various types of actions were to be reported to the parent by its subsidiary prior to the taking or approving of such action); Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357 (D. Colo. 1967) (parent of wholly owned subsidiary which maintained contact through directors and investment advisor committee, both capable of profoundly influencing subsidiary, and which had power to determine such policy questions as product prices, exploration, research and selling and advertising prices was amenable to process); Waldron v. British Petroleum Co., 149 F. Supp. 830 (S.D.N.Y. 1957) (the fact that wholly owned subsidiaries performed services in local jurisdiction ordinarily performed by service employees and made sales ordinarily made by sales department was sufficient for finding parent transacting business within local district); *cf.* City of Philadelphia v. Morton Salt Co., 289 F. Supp. 723, 725 (E.D. Pa. 1968) (defendant, a foreign corporation held to be transacting business in forum state by virtue of its carrying on a continuous and direct course of business in the forum district as well as its relationship to resident corporation which distributed its products).

One court's analysis of the venue question must be characterized as inconsistent; the court employed a day-to-day control test but specifically emphasized the ability of the parent to influence major decisions of the subsidiary which might lead to antitrust violations. Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 131 (D.N.H. 1975).

9. See cases discussed in Annot., 3 A.L.R. Fed. 120, § 9 (1970).

10. The underlying policy of § 12 of the Clayton Act is to liberalize the restrictive venue provision of the Sherman Act. *See* note 11 *infra.*

appropriate venue, an otherwise meritorious action may be abandoned.

Under the original venue provision of the Sherman Act, defendants in antitrust actions could only be sued in judicial districts wherein they *resided* or could be *found.*[11] This provision proved objectionable, impeding enforcement of the Sherman Act by permitting alleged violators to use the venue requirement as a sword and to escape unscathed;[12] judicial construction of this statute often made it impossible for plaintiffs to institute and maintain an action in a convenient forum.[13] Congress, in an attempt to ameliorate this condition, enacted broad venue provisions to replace the relatively restrictive ones of the Sherman Act.[14]

The broader venue provision of the Clayton Act permits corporate defendants to be sued in any judicial district wherein they are an *inhabitant,* may be *found* or *transact business.*[15] This statute was designed to make it more convenient for plaintiffs to bring suits and conduct trials,[16] thereby removing the often insuperable obstacle created by the original venue provision of the Sherman Act.[17]

The statutory phrase most pregnant with meaning is "transacts business."[18] It is under this rubric that parent corporations have found themselves amenable to suits[19] in judicial districts in which

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11. Section 7 of the Sherman Act, the original venue provision for antitrust actions, provided as follows:

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant *resides or is found,* without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (repealed 1914) (emphasis added).

12. 1962 WASH. U. L.Q. 261.

13. *See* United States v. Scophony Corp. of America, 333 U.S. 795, 808 (1948); Note, *Venue in Private Antitrust Suits,* 37 N.Y.U. L. REV. 268, 270 (1962).

14. Pub. L. No. 63-212, § 12, 38 Stat. 738 (1914); *See* Note, *supra* note 13.

15. Clayton Act § 12, 15 U.S.C. § 22 (1976).

16. United States v. National City Lines, 334 U.S. 573, 581 (1948).

17. *Id. See also* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 374 (1927).

18. There is a split of authority on when the corporation must be transacting business to come within the venue provision—at the time the cause of action arose or at the time the suit is filed. *See* Eastland Constr. Co. v. Keasbey & Mattison Co., 358 F.2d 777, 779 & n.5 (9th Cir. 1966); Phillip Gall & Son v. Garcia Corp., 340 F. Supp. 1255, 1258 & n.2 (E.D. Ky. 1972); cases in Annot., 3 A.L.R. Fed. 120, § 6 (1970).

19. The general venue provisions are also applicable in determining whether a corporation is amenable to suit in a particular forum. 28 U.S.C. §§ 1391-92 (1970). *See* Ballard v. Blue Shield, Inc., 543 F.2d 1075, 1080 (4th Cir. 1976); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 141 (N.D. Ill. 1977); Shires v. Magnavox Co., 74 F.R.D. 373, 378 (E.D. Tenn. 1977); Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., 338 F. Supp. 813,

the only business transacted is by their subsidiaries. The Supreme Court of the United States has had two opportunities to construe the "transacts business" language; therefore, those two cases, *Eastman Kodak Co. v. Southern Photo Materials Co.*[20] and *United States v. Scophony Corp. of America,*[21] must be examined in detail.

In *Eastman,* plaintiff, a dealer in photographic materials and supplies in Georgia, charged that defendant, a manufacturer of such materials, had engaged in a combination to monopolize the interstate trade of photographic materials and supplies.[22] The first question addressed by the Court was whether the venue of the suit was properly laid in the district court.[23]

The defendant corporation, Eastman Kodak, was a resident of and had its principal place of business in New York. Although it had sold and shipped photographic materials from New York to dealers throughout Georgia, Kodak was not registered in Georgia as a nonresident corporation for the purpose of doing business in that state, nor did it have any office, place of business or resident agents in Georgia. Kodak obtained its Georgia business through solicitation of orders by traveling salesmen; orders were transmitted by the salesmen to New York for acceptance or rejection. To promote demand for its goods, Kodak also employed "demonstrators." These demonstrators traveled throughout Georgia several times each year, exhibiting and explaining the superiority of Eastman Kodak products to photographers and other users of photographic materials. Although not soliciting orders for defendant's goods, demonstrators did take retail orders from photographers which were turned over to local dealers.[24]

The Court initially observed that under the old venue provision of the Sherman Act[25] the suit could not have been maintained in the Georgia district because the defendant was not resident or found in said district. Thereafter, the Court proceeded to find venue proper under section 12 of the Clayton Act, concluding that the defendant had transacted business in Georgia within the meaning of the new venue provision.[26] The Court remarked that the necessary effect of section 12 was to enlarge the local jurisdiction of the district courts.

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815 (E.D. Pa. 1972); 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3818, at 109-10 (1976).

20. 273 U.S. 359 (1927).
21. 333 U.S. 795 (1948).
22. 273 U.S. at 368.
23. *Id.* at 370.
24. *Id.* at 370-71.
25. *See* note 11 *supra.*
26. 273 U.S. at 374.

"Transacts business" was defined in an "ordinary and usual" sense to mean the transaction of business of any substantial character[27] by a defendant corporation in the judicial district.[28] With regard to section 12, the Court found that:

> [T]his section supplements the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be "found"—often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by service of process in a district in which it resides or may be "found."[29]

Twenty-one years later the Court would reaffirm this position in *United States v. Scophony Corp. of America.*[30]

In *Scophony,* the Court was presented with the question of whether the defendant, a British television equipment corporation with its offices and principal place of business in London, England, transacted business in the Southern District of New York, within the meaning of section 12 of the Clayton Act, so that it could be sued there for alleged violations of the Sherman Antitrust Act.[31]

With the outbreak of World War II and the imposition of restrictions by the British government on the export of currency, Scophony found itself in a financially weak position, unable to develop the commercial sale of television equipment in England. After failing to exploit the American market on its own, Scophony looked to commercial interests in the United States as a source of capital to promote the utilization of its television patents and inventions. As a means of achieving this goal, Scophony entered into an agreement with several American motion picture and television interests. This agreement provided for the formation of a Delaware corporation, American Scophony. Scophony's capital stock ownership in the American subsidiary enabled it to elect three of American Scophony's five directors and its president, vice president, and treasurer. Under this agreement, Scophony also transferred to American

27. *See* cases discussed in Annot., 3 A.L.R. Fed. 120, § 5 (1970).

28. 273 U.S. at 372-73.

29. *Id.* at 373-74.

30. 333 U.S. 795 (1948).

31. *Id.* at 796. Plaintiff had alleged that Scophony and the other defendants had monopolized, attempted to monopolize, and conspired to restrain and monopolize interstate and foreign commerce in products, patents and inventions useful in television and related industries. *Id.* at 796-97.

Scophony all of its equipment in the United States as well as all of its patents and inventions.

The district court had previously granted defendant Scophony's motion to dismiss the complaint on the ground that venue was improper under section 12 of the Clayton Act. In reversing the district court's order of dismissal and remanding the matter for further proceedings, the Court held that Scophony was amenable to suit in the Southern District of New York because, in the ordinary and usual sense, it had transacted business therein of a substantial character.[32] Scophony's activities were characterized as a "continuous course of business" in the Southern District of New York "to salvage and resuscitate Scophony's whole enterprise from the disasters brought upon it by the war."[33]

The *Scophony* Court reaffirmed the broad principles enunciated in *Eastman*. In particular, highly technical distinctions previously engrafted upon the "found" or "carrying on business" test of prior venue statutes were to be discarded.[34] Instead, courts were to view each case from a practical, commercial perspective in determining whether the corporate defendant had transacted business of any substantial character in the judicial district in which plaintiff had commenced the suit.[35]

> Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the "found"—"present"—"carrying-on-business" sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due.[36]

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32. *Id.* at 810.

33. *Id.*

34. *Id.* at 807.

35. *Id.*

36. *Id.* at 808 (footnote omitted). Defendant Scophony's argument, rejected by the Court, was that its activities in New York were solely the creation and protection of an investment and not the transaction of business. As authority for its position, Scophony relied upon prior decisions interpreting "found" under the former antitrust venue provision, § 7, and similar cases dealing with manufacturing and selling companies. One case cited by defendant Scophony, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925), was subsequently employed by lower courts in fashioning a restrictive construction of the "transacts business" provision of § 12. *See* notes 42-46 *infra* and accompanying text.

Defendant Scophony had argued that its activities in New York were merely the creation and protection of an investment and not the transaction of business. The Court found this contention inconsistent with the nature of Scophony's relationship to its American subsidiary. The contractual arrangements among the corporate shareholders of American Scophony called for "continuing exercise of supervision over and intervention in" the subsidiary's affairs.[37] In retrospect, this may be characterized as the genesis of the control test. The Court found that a foreign parent corporation, Scophony, transacted business within a judicial district and was amenable to suit therein because of the control it was to have exercised over its partially owned subsidiary, American Scophony. The erratic manner in which the control test has developed is the center of the discussion which follows.

It is generally agreed that mere ownership of stock in a subsidiary corporation transacting business in a judicial district does not make venue proper for antitrust suits against a parent corporation.[38] The additional factor which must be present to make the parent corporation amenable to suit is a control relationship over its subsidiary. The concept of control is a shorthand method of determining whether the ownership of the subsidiary is a mere investment or is an alternative means of transacting business by the parent corporation.[39] If a subsidiary is merely another channel through which a parent corporation does business,[40] it would be consistent with the remedial purpose of the antitrust laws[41] to subject the corporate defendant to suit in a judicial district in which its subsidiary transacts business. Many courts, however, have adopted a contrary view. Rather than examining the parent-subsidiary relationship from a practical, commercial perspective,[42] several courts have held that parent corporations do not transact business in a judicial district by virtue of their subsidiaries' activities so long as the formal corporate indentities of the two corporations are maintained. The two corporations become one, in the view of these courts, only when the parent consciously exercises control over the day-to-day affairs of the subsidiary. Courts employing the "day-to-day" control test[43] have usually sought support for their conclusions from a case

37. 333 U.S. at 814.
38. *See, e.g.*, O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974).
39. *See* Hitt v. Nissan Motor Co., 399 F. Supp. 838, 841 (S.D. Fla. 1975).
40. City of Philadelphia v. Morton Salt Co., 289 F. Supp. 723, 725 (E.D. Pa. 1968).
41. *See* notes 16-17 *supra* and accompanying text.
42. *See* note 35 *supra* and accompanying text.
43. *See* cases cited in note 6 *supra*.

outside the antitrust area, *Cannon Manufacturing Co. v. Cudahy Packing Co.*[44]

In *Cannon*, the district court dismissed a diversity, breach of contract action on the ground that the defendant, a foreign corporation, was not subject to the in personam jurisdiction of the court. Plaintiff asserted that defendant, a Maine corporation, was doing business within state of North Carolina because of the business conducted by the defendant's wholly owned subsidiary. The Supreme Court of the United States affirmed the district court's dismissal. Although the Court admitted that the parent corporation controlled the subsidiary to the same extent it controlled the departments or branches of its business not separately incorporated, the formal corporate indentities were not to be ignored in determining the existence of jurisdiction.[45] Justice Brandeis, delivering the opinion of the Court, reasoned that the corporate separation must have been adopted to secure for the defendant-parent corporation some advantage under local law, *e.g.*, not subjecting itself to the jurisdiction of local courts.[46] Therefore, the Court was unwilling to go beyond the formal corporate separation, at least in the absence of a congressional enactment making a corporation of one state amenable to suit in a federal court in another state, in which the plaintiff resides, where the foreign corporation employs a subsidiary corporation to transact business in the plaintiff's state.

The continuing vitality of *Cannon* as a precedent for determining the existence of in personam jurisdiction must be questioned[47] in light of the minimum contacts test enunciated by *International Shoe Co. v. Washington*[48] and recently expanded in *Shaffer v. Heitner.*[49] At least one lower court, however, has found that *Cannon* was untouched by *International Shoe,*[50] and courts have continued to rely upon *Cannon* for the proposition that a parent corporation does not transact business in a judicial district within the meaning

44. 267 U.S. 333 (1925).

45. *Id.* at 335.

46. *Id.* at 336. The action had been removed by defendant from the state court in which plaintiff had initiated the action. *Id.* at 334.

47. *See* Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 362-63 (D. Colo. 1967).

48. 326 U.S. 310 (1945).

49. 433 U.S. 186 (1977).

50. Frito-Lay, Inc. v. Proctor & Gamble Co., 364 F. Supp. 243, 248 n.3 (N.D. Tex. 1973). The court's conclusion was drawn from a view that in *Scophony* (decided after *International Shoe*), the Supreme Court had not modified the *Cannon* rule. The court recognized that the acts of ownership and voting of majority stock might eventually lead to the sustaining of jurisdiction over the nonresident corporation. The court, however, did not feel that it was in a position to overrule or modify decisions of the Supreme Court. *Cf.* Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 373 (D. Md. 1975) (*Scophony* held to have laid *Cannon* to rest).

of section 12 of the Clayton Act by virtue of its subsidiary's activities unless it consciously exercises control over the subsidiary's day-to-day affairs.[51] As suggested above,[52] this approach appears inconsistent with the remedial purpose underlying the enactment of section 12 of the Clayton Act. Several cases have specifically rejected the day-to-day control approach enunciated in *Cannon*.[53] One such case is *Flank Oil Co. v. Continental Oil Co.*[54]

In *Flank Oil,* the court described the *Cannon* decision as placing emphasis on formal matters such as separate charters, bylaws and accounts, while discounting the importance of such factors as the business or investment purpose of the parent in creating the subsidiary.[55] This approach was criticized as exalting form over substance[56] and as leading to virtual immunity from the antitrust laws, especially where a large holding company withdraws from the control of the daily activities of its numerous subsidiaries.[57] The court in *Flank Oil* found that the more accurate guide was *Scophony's* construction of section 12, a broader test for venue than the restrictive "presence" theory applied in *Cannon's* jurisdictional analysis.

> *Scophony* teaches that the parent need not control day-to-day activity of the subsidiary as a prerequisite to jurisdiction. Rather the important test in that case appears to be whether the parent's control is sufficient to influence and control those decisions which might involve violation of the antitrust laws.[58]

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51. *See* cases cited note 6 *supra.*

52. *See* text accompanying notes 38-44 *supra.*

53. Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 131 (D.N.H. 1975); Audio Warehouse Sales, Inc. v. United States Pioneer Elec. Corp., 1975-1 Trade Cases ¶ 60,213, at 65,832 (D.D.C. 1975); Hitt v. Nissan Motor Co., 399 F. Supp. 838, 843 (S.D. Fla. 1975); Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 372 (D. Md. 1975), *cert. denied,* 98 S. Ct. 400 (1977); Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 361-65 (D. Colo. 1967).

54. 277 F. Supp. 357 (D. Colo. 1967).

55. *Id.* at 362.

56. *Id.*

57. *Id.* at 364.

58. *Id.* at 365. One lower court decision found that there are several factors that should be examined in determining whether a corporation, though specifically absent from a judicial district, is in fact transacting business there through a subsidiary corporation: (1) performance of business activities by the subsidiary that would be performed directly by the absent corporation through branch offices or agents in a less elaborate corporate scheme; (2) partnership in a worldwide business competition between the absent corporation and the corporation that is present in the district; (3) the capacity of the absent corporation to influence decisions of the subsidiary that might result in antitrust violations; (4) the part the subsidiary corporation plays in the overall business activity of the absent corporation; (5) the existence of an integrated sales system involving manufacturing, trading and sales corporations; (6) the status of the subsidiary as a marketing arm of the absent corporation; (7) the use by the subsidiary of a trademark owned by the parent; (8) the transfer of personnel back and forth between the parent and subsidiary corporations; (9) the presentation of a common marketing

Several cases have followed *Flank Oil* in rejecting the day-to-day control test set forth in *Cannon*.[59] As suggested by one court, the *Cannon* test has little validity and does not comport with the remedial purpose of the antitrust laws in the present era of multinational corporations and worldwide corporate empires.[60]

> A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of saying that a corporation which has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees, or making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction, particularly when the entire corporate set-up of the defendant shows that it is designed to operate to a substantial degree through separate corporate entities responding to the wishes and directions of the parent and providing the revenues sought by the parent. We would be exalting fiction over fact if we were to conclude that under those circumstances the parent company was not in fact transacting business in this District through the instrumentality of its wholly owned subsidiaries.[61]

The Seventh Circuit's conclusion in *Tiger Trash* that BFI transacted business in the Southern District of Indiana is consonant with the less restrictive tests articulated by *Flank Oil* and those cases rejecting *Cannon*. The only objection to the court's opinion in *Tiger Trash* is that it fails to articulate sufficiently a generalized test for "transacts business." The court was correct in performing a totality-of-circumstances analysis;[62] however, it never clearly identified the

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image by the related corporations; and (10) the granting of an exclusive distributorship by the absent corporation to its subsidiary. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262, 327-28 (E.D. Pa. 1975).

Each of these factors may also be deemed evidence of a purpose by the absent parent corporation to employ the subsidiary as a means of transacting business in a particular district. If this in fact is the purpose underlying the existing corporate arrangement, it should follow that the parent corporation will also have the ability to control basic policy matters of its subsidiary. Hence, each factor listed above can also be evidence of the ability to control such decisions. The crucial point to remember is that the totality of circumstances in each case is to be examined to determine if the subsidiary is transacting business "for the parent."

59. *See* cases cited note 8 *supra*.

60. Audio Warehouse Sales, Inc. v. United States Pioneer Elec. Corp., 1975-1 Trade Cases ¶ 60, 213, at 65,832 (D.D.C. 1975).

61. Waldron v. British Petroleum Co., 149 F. Supp. 830, 835 (S.D.N.Y. 1957).

62. The court looked to many aspects of BFI-Indiana's relationship with BFI in concluding that venue was proper.

> Development of the ability to provide a single source of reliable waste services for companies with a number of geographically dispersed plants is an integral part of BFI's corporate policy. BFI officers, some of whom are officers of BFI-Indiana, assist the subsidiary through national marketing programs, signing up customers,

one element that must be present to attribute the business activities of a subsidiary corporation to its parent.

That element is a purpose on the part of the parent to transact business through its subsidiary. The court hinted at such a test when it agreed that a parent-subsidiary relationship consisting of mere investment holding by the parent would not be sufficient to bring it within section 12 of the Clayton Act.[63] The court was also correct in ascertaining that the degree of control exercised over a subsidiary corporation by its parent is evidence of the parent's purpose to conduct business through the subsidiary. Unfortunately, the court did not see fit to give the *Cannon* line of cases the burial they so justly deserve.[64] The opportunity for interment was also rejected by the Supreme Court.[65] One can only hope that *Tiger Trash* marks a movement away from the restrictive venue test which frustrates the remedial policies underlying the antitrust laws.

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making basic market development decisions and assisting in supervising the subsidiary by allocating financial resources, providing finances, systems accounting, management supervision and examination and setting standards for return on capital investment from the subsidiary. If a subsidiary's rate of return does not meet BFI standards, BFI imposes corrective action. Also, BFI-Indiana licenses and utilizes the parent's trade names without complying with [IND. CODE ANN. § 23-15-1-1] which requires registration of a trade name.

560 F.2d at 823.

63. 560 F.2d at 823.

64. *See* Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367, 373 (D. Md. 1975). *See also* United States v. Scophony Corp. of America, 333 U.S. 795, 812-13 & n.23, 814-18 (1948).

65. Defendant BFI's petition for certiorari was denied. 434 U.S. 1034 (1978).