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ANTITRUST

WILLIAM C. HOLMES*

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Several antitrust cases were before the Seventh Circuit Court of Appeals during its 1977 session.¹ This article disses the more significant of these decisions.² It does so from a purposefully pragmatic standpoint: the needs of the practicing attorney. With these needs in mind, the article does not attempt to canvass all possible ramifications of each particular case, nor does it seek to offer sophisticated suggestions as to how the law might be improved. Rather, the article addresses itself to the following three basic questions for each of the decisions discussed: What are the key facts of the case? What did the court decide? How is the decision significant to antitrust practitioners in planning transactions for their clients? It is our hope that practitioners will find our answers to these questions helpful in making more effective use of antitrust law as it now stands in the Seventh Circuit.

BEATRICE FOODS Co. v. F.T.C.

DEFINING A "RELEVANT PRODUCT MARKET" FOR MERGER AND MONOPOLIZATION CASES

Few antitrust issues are more perplexing or frustrating than the problem of defining a "relevant product market" for the purposes of deciding a

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1. The article discusses decisions published by the Seventh Circuit Court of Appeals between the fall of 1976 and the summer of 1977.

2. Other decisions that will not be discussed in this article include the following: *F.T.C. v. Miller*, 549 F.2d 452 (7th Cir. 1977) (the common carrier exemption to the FTC Act not only precludes the FTC from investigating a common carrier but also bars it from subpoenaing the common carrier, even though the result is a regulatory gap); *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325 (7th Cir. 1977) (a district court does not abuse its discretion in severing antitrust affirmative defenses and counterclaims raised by the defendant in a trademark infringement action, and in staying discovery on the antitrust issues, pending resolution of the trademark infringement claim, where the antitrust issues are remote and unrelated to the trademark infringement issues and where the alleged antitrust violations are on their face of questionable legal sufficiency); *United States v. Michigan Carton Co.*, 552 F.2d 198 (7th Cir. 1977) (where a corporate defendant in a criminal antitrust action is merged into a second corporation during the pendency of the grand jury that indicts the merged corporation,

monopolization or a merger case. The latest attempt by the Seventh Circuit to resolve this difficult issue is *Beatrice Foods Co. v. F.T.C.*³

Beatrice Foods has long been a leading producer of food products. During recent years, Beatrice has also diversified into several non-food lines. One such diversification was Beatrice's 1969 acquisition of all of the stock of Tip Top Brush Company. At the time, Tip Top was the nation's third largest producer of combined paint brushes and paint rollers, and the fifth largest producer of paint rollers. Beatrice itself was neither a producer of paint brushes nor a producer of paint rollers.

The following year, 1970, Beatrice additionally acquired substantially all of the assets of Essex Graham Company. Essex, unlike Tip Top, did not produce paint brushes. However, Essex was the nation's eighth largest producer of paint rollers and the thirteenth largest firm in the combined "paint brush and roller" market.

The Federal Trade Commission issued a complaint challenging both acquisitions under section 7 of the Clayton Act.⁴ In relevant part, it was alleged that the Tip Top acquisition had an anticompetitive effect by eliminating Beatrice itself as a "potential entrant" into the paint brush and roller industry.⁵ The Essex acquisition was challenged on the dual grounds that actual competition between Tip Top and Essex in the production of paint rollers had been eliminated, and that Essex had been eliminated as a potential competitor in the production of paint brushes.⁶

The Federal Trade Commission,⁷ following an extensive administrative hearing, adopted the administrative law judge's determination that it had not been proven by either "subjective" or "objective" evidence that Beatrice was a "potential entrant" into the paint brush and roller industry.⁸ As a

and the survivor corporation enters a plea of *nolo contendere* on behalf of the merged corporation, any error in naming the merged rather than the survivor corporation in the indictment is waived by entry of the plea of *nolo contendere*); *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Prod., Inc.*, 545 F.2d 1096 (7th Cir. 1976) (a district court does not abuse its discretion in denying a preliminary injunction to a terminated distributor where the distributor brings an antitrust action after its distributorship has been terminated, making the termination non-retaliatory, and where the distributor has not shown an inability to finance its litigation); *Richard's Lumber & Supply Co. v. United States Gypsum Co.*, 545 F.2d 18 (7th Cir. 1976), *cert. denied sub nom. Richard's Lumber & Supply Co. v. Kaufman & Broad Homes, Inc.*, 97 S. Ct. 1326 (1977) (a covenant not to sue contained in the settlement of an antitrust class action bars later suit by one of the members of the class where the class member received notice of the settlement, including the covenant, and the class was adequately represented).

3. 540 F.2d 303 (7th Cir. 1976), *aff'g* 86 F.T.C. 1 (1975).

4. 15 U.S.C. § 18 (1970).

5. 540 F.2d 303, 306 (7th Cir. 1976).

6. *Id.*

7. Hereinafter referred to in the text and footnotes as the Commission.

8. 86 F.T.C. 1, 65. The administrative law judge's discussion of the "potential competition" issue is well worth reviewing for those practitioners faced with a similar issue. See *id.* at 38-41. See also Dunfee & Stern, *Potential Competition Theory as an Antimerger Tool Under Section 7 of the Clayton Act: A Decision Model*, 69 Nw. U.L. REV. 821 (1975).

result, Beatrice's acquisition of Tip Top was upheld. The Essex acquisition, however, was held to be unlawful since it eliminated both actual competition (paint rollers) and potential competition (paint brushes) between Tip Top and Essex in an industry that already showed a marked trend towards concentration.⁹

Beatrice appealed the Commission's decision to the Seventh Circuit, alleging several arguments for reversal. Only two of these arguments will, however, be discussed in this article. First, Beatrice argued that the Commission had erred in including paint brushes and rollers within the "relevant product market" while excluding aerosols and paint spraying equipment. Second, Beatrice contended that the relevant product market should, in any event, have been divided into two "submarkets": "professional use" and "do-it-yourself use." The court's treatment of these two arguments is discussed in depth in the sections which follow.

The Relevant Product Market

Before turning specifically to the *Beatrice* decision, it would be helpful to digress for a moment and quickly review the leading legal principles that govern how to define a "relevant product market." Undoubtedly, the most frequently cited language on this subject is taken from the Supreme Court's leading decision of *Brown Shoe Co. v. United States*:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. . . . However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such *practical indicia* as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. . . .¹⁰

In *Brown Shoe*, the Supreme Court applied these "practical indicia" to hold that men's, women's and children's shoes were each "relevant submarkets" for purposes of measuring the anticompetitive effects of a shoe manufacturer's acquisition of a chain of retail shoe outlets.¹¹ The Supreme

9. During the period from 1967 through 1969, the top four firm concentration in the brush-and-roller market rose from 36.6% to 41.3%, while the top eight firm concentration rose from 52.8% to 62.5%. 540 F.2d at 306 n.3.

10. 370 U.S. 294, 325 (1962) (citation omitted) (emphasis added). For a general discussion of the "relevant market" issue, see Almstedt, *Relevant Market: The Anlage of Proving an Attempt to Monopolize*, 28 J. Mo. B. 282 (1972); Hale & Hale, *A Line of Commerce: Market Definition in Anti-Merger Cases*, 52 IOWA L. REV. 406 (1966).

11. Specifically, the Supreme Court reasoned that the public itself recognized this distinction ("industry or public recognition"), that each of the shoe lines had "characteristics peculiar

Court refused, however, to further extend this reasoning to draw "price/equality" and "age/sex" distinctions between different shoes within each of the three shoe lines. The Court conceded that some of its "practical indicia" would have supported such further distinctions, but concluded that under the circumstances of the case, these additional distinctions would have been "unrealistic" and "impractical."¹²

Brown Shoe, like *Beatrice*, was a case brought under section 7 of the Clayton Act. Nevertheless, the same concepts developed in *Brown Shoe* and its progeny have been applied in recent monopolization cases brought under section 2 of the Sherman Act.¹³ This "blending" of monopolization and merger cases for purposes of market definition is reflected in recent decisions of the Seventh Circuit itself.¹⁴ While the Supreme Court, as opposed to lower courts such as the Seventh Circuit, has not yet expressly upheld the application of *Brown Shoe* to monopolization as well as merger cases, it certainly seems to have placed its stamp of approval on this line of analysis.¹⁵

Beatrice is the Seventh Circuit's most recent decision in the complex area of market definition. In *Beatrice*, the Seventh Circuit followed the analytical approach established in its earlier comparable decisions.¹⁶ It first paraphrased the "practical indicia" suggested in *Brown Shoe* for determining the "boundaries of a submarket": "These indicia are (1) the industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes,

to itself" that made it unfit for use in the other shoe lines, that "separate plants" were used for the manufacture of each, and that each was directed towards a "distinct class of customers." 370 U.S. at 326-28.

12. *Id.*

13. 15 U.S.C. § 2 (Supp. IV 1974). *See, e.g.*, Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1968); Credit Bur. Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 478 F.2d 1402 (5th Cir. 1973).

14. *See, e.g.*, L.G. Balfour Co. v. F.T.C., 442 F.2d 1, 11 (7th Cir. 1971), *aff'g* 74 F.T.C. 345 (1968) (a monopolization case applying *Brown Shoe*); Cass Student Advertising, Inc. v. National Educ. Advertising Serv., Inc., 516 F.2d 1092 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975) (a monopolization case applying *Brown Shoe*); American Aloe Corp. v. Aloe Creme Laboratories, Inc., 420 F.2d 1248 (7th Cir.), *cert. denied*, 398 U.S. 929 (1970) (a monopolization case applying *Brown Shoe*); Avnet, Inc. v. F.T.C., 511 F.2d 70 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975) (a merger case applying *Brown Shoe*).

15. The Supreme Court stated, in dictum, in *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) that "[i]n § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act (*Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)) there may be submarkets that are separate economic entities." With specific references to the use in monopolization cases of market definition concepts developed in merger cases, and vice versa, the Court reasoned: "We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." 384 U.S. at 573.

16. *See* cases cited at note 14 *supra*.

and (7) specialized vendors.”¹⁷ The court then applied these market indicators to the first of the issues raised in *Beatrice*, *i.e.*, whether the Commission justifiably excluded aerosols and spray equipment in defining the relevant product market to include only paint brushes and rollers. The court, in upholding the Commission’s determination, pointed to the following findings of the administrative law judge which, if considered within the framework *Brown Shoe* test, constitute the “practical indicia” outlined in that case for determining the “boundaries of a submarket:”

First, the Bureau of Census categorizes brushes and rollers in a five-digit S.I.C.¹⁸ category separate from aerosols and spray equipment, and aerosol manufacturers regard themselves as a separate industry (“industry or public recognition”).¹⁹

Second, paint brushes and rollers are generally manufactured and distributed by the same firms to the same buyers, while aerosols and spray equipment are manufactured and sold by different manufacturers utilizing technology, machinery and raw materials substantially different from those used to produce brushes and rollers (“product’s peculiar characteristics and uses,” “unique production facilities,” and “specialized vendors”).²⁰

Third, rollers are far more interchangeable in use with brushes than are aerosols or spray equipment (“product’s peculiar characteristics and uses” and “distinct customers”).²¹

Fourth, the prices and cost of using brushes and rollers are distinctly lower than those for aerosols or spray equipment (“distinct prices”).²²

Fifth, brush and roller manufacturers do not consider the prices of aerosols or spray equipment when setting their prices (“sensitivity to price changes”).²³ Based on these factors, the Seventh Circuit concluded that “the Commission clearly could determine that brushes and rollers constituted a relevant product market.”²⁴

Beatrice is a mechanically correct application of the market guidelines suggested by the Supreme Court in *Brown Shoe*. The decision would, however, have been far clearer if the Seventh Circuit had specifically addressed itself to the question of the significance of these “practical indicia.” A similar criticism can be leveled at the court’s other recent market definition cases.²⁵ These decisions, like *Beatrice*, employ a mechan-

17. 540 F.2d at 308.

18. Standard Industrial Code.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 308-09.

23. *Id.* at 309.

24. *Id.*

25. See note 14 *supra*.

ical application of the *Brown Shoe* market indicators without really explaining why these indicators are competitively significant in the particular markets involved.

Ultimately, the purpose of the *Brown Shoe* market guidelines is simply to help define that area of goods or services in which the particular product or service in question effectively competes.²⁶ If there is no effective actual or prospective competition between the particular product in question and some other product, then the latter product is to be excluded from the relevant market. Since the ultimate test is thus one of "effective actual or prospective competition," the Seventh Circuit could have greatly clarified its reasoning in *Beatrice* by making several findings. First, since the equipment, raw materials and technology for producing aerosols and spray equipment differ markedly from those for brushes and rollers, there exist competitive barriers to the conversion of sprayer or aerosol manufacture to brush or roller manufacture—a barrier to "effective prospective competition" by manufacturers of aerosol and spray equipment. Secondly, since aerosols and sprayers are far less interchangeable in use with brushes than are rollers, and are far more costly to use than either brushes or rollers, there exist competitive barriers to the consumer's use of sprayers or aerosols in place of brushes or rollers—a barrier to "effective actual competition" by aerosols and sprayers. And, lastly, the fact that brush and roller manufacturers do not consider aerosol or sprayer prices when setting their prices, while aerosol manufacturers actually consider themselves to be a separate industry, very directly shows that aerosols and spray equipment are not in "effective actual or prospective competition" with brushes and rollers. Certainly, these conclusions are implicit in *Beatrice*. Nevertheless, the decision would have been far clearer if the Seventh Circuit had taken the additional step of expressly spelling them out, rather than simply paraphrasing and then mechanically applying the *Brown Shoe* guidelines.

"Professional" and "Do-It-Yourself" Submarkets

A similar criticism can be directed at the court's treatment of the second issue presented in *Beatrice*, *i.e.*, whether the Commission erred in failing to divide the brush and roller market into separate "professional" and "do-it-yourself" submarkets, due to price and quality distinctions between the two. The issue was a key one, since, as *Beatrice* argued, Tip Top manufactured inexpensive, low-quality brushes that would have fallen within the "do-it-yourself" submarket, while Essex manufactured higher-

26. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5 (1949) (defining the relevant market to be that "area of effective competition" within which defendants operate).

priced, higher-quality rollers that would have come within the "professional" submarket, thereby removing the element of actual competition between the two.

The Seventh Circuit began its analysis of this second issue by first stating:

Prior cases indicate that price/quality distinctions in products may play a role in market definitions where articles are sold in clearly separate price groupings that have little or no price sensitivity between them. See, e.g., *Avnet, Inc. v. FTC*, 511 F.2d 70 (7th Cir.), cert. denied, 423 U.S. 833, 96 S.Ct. 56, 46 L.Ed.2d 51 (1975). Price differentials may also be significant when they are clearly indicative of such quality distinctions that articles of different prices are not interchangeable for particular purposes. See, e.g., *A.G. Spalding & Bros., Inc. v. FTC*, 301 F.2d 585 (3d Cir. 1962).²⁷

The court felt that *Beatrice* did not present such a fact situation. To the contrary, the record showed "substantial price overlap" and "price interaction" between "professional" and "do-it-yourself" materials.²⁸ In addition, the record failed to show that "professional" materials were especially suitable for particular "uses" for which "do-it-yourself" materials were "unacceptable."²⁹ The court bolstered this analysis by further noting that both types of materials are distributed through the same outlets to the "same customers."³⁰ Without further elaboration, the court summarily concluded that the "professional" and "do-it-yourself" distinction therefore had to be rejected as "unrealistic," citing *Brown Shoe*.³¹

The court's treatment of the "professional" versus "do-it-yourself" distinction contains an unfortunate ambiguity that could prove troublesome to practitioners in the future. As already noted,³² the court started its analysis by citing its earlier *Avnet* decision for the proposition that market lines may be drawn between "clearly separate price groupings that have

27. 540 F.2d at 309. In *Avnet*, the Seventh Circuit upheld a market definition that included new automotive electrical units but excluded rebuilt or reconditioned used units, arguing that the following two factors supported such a distinction: "prices for rebuilt or reconditioned used components varied from 25% to 50% below the prices for comparable new items;" and "the absence of any substantial interaction in price between the two lines." 511 F.2d at 77. In *Spalding* (a merger case), the Third Circuit upheld a market definition that included higher-priced, higher-quality athletic goods but excluded low-priced athletic goods, where the higher-priced goods were superior in quality and raw materials and were particularly suitable for use in organized competition. 301 F.2d at 603.

28. 540 F.2d at 310.

29. *Id.*

30. *Id.*

31. *Id.* at 310. See text accompanying note 11 *supra*.

32. See text accompanying note 27 *supra*.

little or no price sensitivity between them.”³³ This “distinct prices/price insensitivity” approach does, indeed, seem to be the one that the court adopted in *Avnet* itself.³⁴ However, when the court went on to discuss the actual facts of *Beatrice*, it described *Avnet* as presenting “clearly separate price groupings *based on quality distinctions*.”³⁵ The addition of the emphasized words is unfortunate, since they suggest that perhaps “distinct prices” and “price insensitivity” are not enough; perhaps “quality distinctions” must also be present, regardless of how strong the showing of price discrepancy and price insensitivity may be. It is doubtful, however, that this was the inference that the Seventh Circuit intended. Rather, it is assumed that the court simply meant to say that “professional” and “do-it-yourself” brushes and rollers are in “effective actual competition” with one another, and should therefore be included within the same relevant market, since there is substantial price overlap and price interaction between the two, “professional” items can be readily put to the same use as “do-it-yourself” items, and both are marketed and sold through the same outlets to the same ultimate customers. Viewed in this light, the court’s conclusion is both mechanically and logically sound.

Significance of Beatrice to Antitrust Practitioners

Beatrice suggests five possible factors for practitioners to consider when advising clients on the wisdom of a particular horizontal merger or acquisition.³⁶ The first three of these factors go to the question of product market definition, while the last two go to the question of how the merger or acquisition is likely to be viewed by the courts or the government in the event of a legal challenge.

First, how does the consumer view the particular products in question? Does the consumer, for example, view the products as being distinct because of actual physical differences between them, differences in the uses to which they are or can be put, or differences in the actual methods or cost of using them? Are these differences reflected in the consumer’s response to price differences between the products? In particular, when the price of one is changed, does this affect the consumer’s purchases of the other product? Considerations of this type go to the question of whether the products are in effective actual competition with one another.

33. 540 F.2d at 309.

34. See note 27 *supra*.

35. 540 F.2d at 310 (emphasis added).

36. It should be noted that the relevant factors may differ for other types of potential Clayton Act, section 7 transactions, such as vertical mergers, product extension mergers, geographic market extensions, pure conglomerate mergers, and joint ventures. See generally 2 VON KALINOWSKI [16A BUSINESS ORGANIZATIONS], ANTITRUST LAWS AND TRADE REGULATION, § 17.01 (1977).

Second, how do producers view the particular products in question? For example, are the products treated together in census data, in marketing research data, in trade journals and other trade publications, and in memberships in trade associations? Similarly, are the products marketed and distributed together? Are they priced alike? Does the pricing of one disregard the pricing of the other? Considerations of this type likewise go to the question of whether the products are in effective actual competition with one another.

Third, assuming some differences between the particular products in question, how feasible is it for the producers of one to switch to production of the other? Relevant considerations here might include technological differences between the methods and processes of producing the products, differences in the facilities and equipment used in their production, differences in the raw materials used for each, differences in the methods of marketing and distributing each, and the capital cost of making the necessary conversion. Considerations of this type, unlike those in the preceding two categories, go to the altogether different issue of whether there is effective prospective competition between the products.

Fourth, once the relevant product market (and relevant geographic market) has been defined, what is the concentration and the trend towards concentration within the industry that serves that market? In *Beatrice*, the Federal Trade Commission stressed the fact that the industry showed a marked trend towards increasing concentration.³⁷ The special significance attached to market concentrations and market concentration trends is reflected not only in leading judicial decisions³⁸ but also in the guidelines used by the Justice Department and the Federal Trade Commission when deciding whether to challenge particular transactions.³⁹

Fifth, what are the market shares of the firms involved in the transaction? How will these change as a result of the transaction? In *Beatrice*, the

37. See note 9 *supra*.

38. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

39. The Justice Department Merger Guidelines (1 TRADE REG. REP. (CCH) ¶ 4510) specify market share figures that will ordinarily trigger a Department challenge. These figures vary, depending upon whether the market: (1) is highly concentrated; (2) is less highly concentrated; or (3) shows a trend towards concentration. Other publications that the practitioner should be aware of include antimerger enforcement policies adopted by the Federal Trade Commission for particular industries (1 TRADE REG. REP. (CCH) ¶ 4515); the Notification Rule adopted by the Commission on August 15, 1974, for mergers or acquisitions involving very large manufacturing or nonmanufacturing corporations (1 TRADE REG. REP. (CCH) ¶ 4540); and the Premerger Notification Rule recently adopted by the Commission and Justice Department under the 1976 Hart-Scott-Rodino Antitrust Improvements Act. (see 1 TRADE REG. REP. (CCH) ¶ 4255). Practitioners should also be aware of the recent decision of the Commission in *The Budd Co.*, 86 F.T.C. 518 (1975), in which the Commission essentially set down guidelines for the types of mergers and acquisitions that it will challenge.

acquisition of Essex was invalidated even though the combined market shares of Tip Top and Essex came to only 9.9% in the brush and roller market and 10.7% in the roller submarket.⁴⁰ The case may seem like an exceptionally extreme one, in light of these minimal market share figures. However, the Supreme Court itself has reached even further in the case of *United States v. Pabst Brewing Co.*⁴¹ In *Pabst*, the High Court struck down an acquisition in which the combined market share was only 4.49% where the industry showed a trend towards increasing concentration.⁴² Moreover, the Court refused to consider evidence purportedly showing that the acquisition would not have anticompetitive effects.⁴³ Therefore, practitioners should exercise considerable caution when gauging the wisdom of even "minor" horizontal mergers and acquisitions.

JOHNSON PRODUCTS Co. v. F.T.C.

RESPONDENTS' RIGHT TO WITHDRAW FROM CONSENT ORDERS AND
CONSENT DECREES FOR CHANGED CIRCUMSTANCES

A major concern of antitrust practitioners is that their clients receive equal treatment from the government. For this reason, practitioners are understandably concerned when their clients seem to have been "singled out" for treatment more harsh than that afforded similarly-situated competitors. *Johnson Products Co. v. F.T.C.*⁴⁴ involved one company's response to such a situation; it tried to withdraw from a negotiated consent order when it appeared that its competitors would not be placed under equally demanding orders.

Johnson arose in the specific context of a "consumer protection" case brought by the Federal Trade Commission. The Seventh Circuit's treatment of the case, however, goes far beyond this narrow context. First, since the issues involved the Commission's consent order process as a whole, anti-trust as well as consumer protection consent orders were ultimately at stake. Secondly, the Seventh Circuit made it quite clear that its analysis of the issues would apply equally to an attempt to withdraw from a Justice Department consent decree: "[T]he procedures of the FTC and Justice Department are similar in those aspects pertinent to the issues raised in this appeal."⁴⁵

In *Johnson*, the Commission investigated the defendant company for allegedly making deceptive representations concerning its hair relaxer prod-

40. 540 F.2d at 306 n.3.

41. 384 U.S. 546 (1966).

42. *Id.* at 550-53.

43. *Id.* at 553.

44. 549 F.2d 35 (7th Cir. 1977).

45. *Id.* at 39 n.5.

ucts. Litigation was avoided, however, when Johnson executed an agreement with the Commission containing a consent order.⁴⁶ The consent order prohibited Johnson from making certain misrepresentations for *any* of its cosmetic products. According to Johnson, it had advised Commission staff during the consent negotiations that if similar restrictions were not imposed on its major competitors (Revlon, Inc. in particular), it would suffer a competitive disadvantage. Johnson further contended that it had signed the order in reliance on Commission staff assurances that the entire industry, including Revlon, would be subjected to equally restrictive orders.⁴⁷

The Commission provisionally accepted the agreement containing the consent order five months after Johnson had executed it. In accordance with both the Commission's rules⁴⁸ and the terms of the agreement, the order was placed on the public record for a period of sixty days for the purpose of obtaining comments from interested members of the public. The Commission was then to have an additional thirty days to consider the public comments and either accept or reject the order. On the last day of the period for public comment, Johnson notified the Commission that it was withdrawing its consent because of " 'unexpected delay in reaching similar agreements with the balance of the industry, and . . . the documentable threat of unfair competition resulting therefrom.' " ⁴⁹ The Commission refused, however, to allow Johnson to withdraw its consent and instead entered a final order based on the consent.⁵⁰ Johnson, following an unsuccessful attempt to persuade the Commission to reconsider the matter,⁵¹ appealed to the Seventh Circuit.

The first issue that faced the Seventh Circuit in *Johnson* was whether Johnson had the right to unilaterally withdraw its consent to the agreement. Johnson contended that contract principles apply to consent agreements, and that under these principles, it was entitled to withdraw from the consent agreement. Specifically, Johnson argued that when it attempted to withdraw, the Commission had not yet "unconditionally accepted" the consent agreement, and that since "mutuality of obligation" was therefore lacking, Johnson was still free to revoke its offer.⁵²

46. The FTC consent order procedures are spelled out in 16 C.F.R. §§ 2.31-.35.

47. 549 F.2d at 40, 42.

48. See 16 C.F.R. § 2.34 (1977) prior to amendment effective September 7, 1977.

49. 549 F.2d at 37.

50. *Id.*

51. It should be noted that under 16 C.F.R. § 3.72 (1977), the Commission may, in its discretion, reopen a decision, even after it has become final, for changed circumstances. *Johnson* did not concern such a discretionary reopening, however. Rather, *Johnson* was concerned with whether a respondent can force such a reopening.

52. 549 F.2d at 37. The *Johnson* court found some support for its analysis in decisions of the Supreme Court holding that for purposes of construing the terms of a consent order, normal contract rules of construction are used. See *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-38 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

The Seventh Circuit agreed with Johnson that for certain purposes, contract principles may apply to a consent order or a consent decree.⁵³ However, this will vary depending upon "the particular context in which the issue arises."⁵⁴ Arguing that the consent order process "should not be treated as a mere codification of the contract law of offer and acceptance," the court held that a respondent may not unilaterally withdraw from a Commission consent agreement prior to final agency action.⁵⁵ The court found particularly persuasive the policy considerations underlying the Commission's rules for "provisionally" accepting consent orders while placing them on the public record for comment.⁵⁶ Since the Commission, unlike a private litigant, must act in furtherance of the "public interest," the Commission was fully justified in allowing a sixty day time period for public comment before its final acceptance of a consent order. By allowing for public comment, the Commission enables the public itself to comment on the wisdom of an agreement that would otherwise be entered into by the Commission and the respondent without public scrutiny. Additionally, the Seventh Circuit noted that the consent order process enables both the Commission and respondents to avoid the cost and risk of litigation.⁵⁷ If respondents were able to freely withdraw from their consents, the Commission might be forced to abandon the use of this process and proceed directly into litigation, at greater cost to the Commission and respondents alike. Finally, the court noted that the Commission's time limitations (sixty days and thirty days) were reasonable, so as not to leave the respondent "unilaterally committed for an indefinite period."⁵⁸

The second issue raised in *Johnson* involved a somewhat more difficult question, *i.e.*, whether the Commission's refusal to allow withdrawal or at least to hold a hearing on the matter constituted an abuse of discretion. Johnson alleged two "circumstances" that it felt at least entitled it to a hearing. The first was the "understanding" that it supposedly had with the Commission staff concerning orders against other members of the industry.⁵⁹ The second was the fact that nearly a year after Johnson signed its order, the Commission entered into a less restrictive order with one of Johnson's major competitors, Revlon, Inc.

53. 549 F.2d at 38.

54. *Id.* at 37-38. The court cited as controlling the following statement from *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975): "Consent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders Because of this dual character, consent decrees are treated as contracts for some purposes but not for others." *Id.* at 236-37 n.10.

55. 549 F.2d at 38.

56. See text accompanying note 48 *supra*.

57. 549 F.2d at 39.

58. *Id.* at 40.

59. See text accompanying note 47 *supra*.

The court first noted that the Commission does have the discretionary power to enter an order against one firm, even though the illegal practice is industrywide.⁶⁰ However, that discretionary power is subject to judicial review for "patent abuse of discretion."⁶¹ The court concluded that the "inadequacy of the record" in *Johnson* precluded it from reaching the question of whether the Johnson order, under all the circumstances, should be set aside as an abuse of discretion.⁶² In reaching this conclusion, the court stressed that a consent proceeding, unlike an adjudicated proceeding, simply does not produce the kind of record needed to resolve such an issue.⁶³ The inference, then, was that Johnson was at least entitled to a hearing. However, this question, too, was not actually answered in *Johnson*, for the very simple reason that the Commission unilaterally extended an invitation to Johnson to petition to reopen the consent order proceeding three days prior to oral argument before the court.⁶⁴ The court, therefore, simply remanded the case to the Commission with instructions to hold such a proceeding.⁶⁵

The Seventh Circuit articulated a reasonable and satisfactory opinion on the issue of a respondent's right to withdraw unilaterally from a consent agreement. Unfortunately, its opinion on the second issue of abuse of discretion and right to a hearing, while also well-reasoned, was less satisfactory. The court constructed the analytical basis for a judicial review of government "abuses" in the consent order procedure, but it stopped short of actually conducting such a review because the Commission had voluntarily allowed the respondent to apply for a reopening of the consent order. The Commission's voluntary action did not establish that Johnson had a right to a hearing. Rather, it only established that the Commission was willing to allow a petition for reopening. Thus, the court's result leaves open the issue

60. See the cases cited by the Seventh Circuit at 549 F.2d at 41.

61. 549 F.2d at 41 (citing *Moog Indus., Inc. v. F.T.C.*, 355 U.S. 411, 414 (1958)).

62. In a highly suggestive footnote, the court noted that in addition to judicial review for abuse of discretion, there may be "due process problems" when a consent order is entered over the objection of one of the parties. 549 F.2d at 41 n.12 (citing *United States v. Ward Baking Co.*, 376 U.S. 327 (1964), and *United States v. Armour & Co.*, 402 U.S. 673 (1971)). Unfortunately, neither of the cases cited is particularly illuminating on the scope of "due process" rights in the context of an attempt to withdraw from a consent agreement. *Ward* concerned a district court's entry of a proposed "consent" judgment to which the government had never agreed. The Supreme Court held that the government had a right to trial to prove its factual allegations, rather than be bound by a consent decree to which it had never consented. *Armour* involved an attempt by the Justice Department to enforce a consent decree which the respondent had signed some fifty years earlier. The Supreme Court held that the terms of the consent agreement had to be read narrowly and, therefore, did not reach the specific activities of *Armour*. The Court reasoned that "[b]ecause the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written and not as it might have been written. . . ." 402 U.S. at 682.

63. 549 F.2d at 41 n.13.

64. *Id.* at 42.

65. *Id.*

of whether the Commission's refusal to allow withdrawal or to hold a hearing in a situation similar to *Johnson* would constitute an abuse of discretion.

A similar issue was considered and resolved by the Sixth Circuit in *Ford Motor Co. v. F.T.C.*⁶⁶ In that case, Ford was investigated for alleged misrepresentations concerning the "strength" and "quietness" of Ford automobiles. It agreed to a consent order, however, that covered all performance claims. During the sixty day period for public comment, Ford learned that General Motors may have been allowed a consent order limited only to certain types of performance claims and not covering *all* performance claims. Ford argued that the Commission staff had advised it that *all* such orders were required to cover general "performance" claims, and on the basis of the supposed disparity between the orders given to it and to General Motors, attempted to withdraw from the consent. The Commission refused. On appeal by Ford, the Sixth Circuit held that Ford had no right to withdraw unilaterally from the consent, but further ruled that the Commission had abused its discretion by refusing to allow Ford a hearing as to whether the disparate orders would place Ford at a competitive disadvantage.⁶⁷ The Sixth Circuit then proposed the following three requirements for obtaining a Commission hearing in a *Ford*-type situation:

- (1) [A] major change of circumstances *after* submission of the consent order and *before* the Commission's final acceptance of the order.
- (2) The change of circumstance must be one which respondent could not reasonably have anticipated and over which respondent had no control.
- (3) The change of circumstances must be such as to state a prima facie case of unfair and serious economic disadvantage capable of threatening the competitive position of the respondent in the industry concerned.⁶⁸

Based on the *Ford* criteria, it is not clear that *Johnson* had a right to a Commission hearing on its claim of unfair treatment. *Johnson* would have to make an initial allegation of a "major change of circumstance" after submission of the order but before the Commission's final acceptance. During that period, however, there had been no order entered against *Revlon*—an inactivity which would be unlikely to be considered a "major

66. 1976-1 Trade Cas. ¶ 60,938 (6th Cir.), *modified on other grounds*, 547 F.2d 954 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977).

67. On a motion by the Commission for reconsideration, it cited a previous order entered against General Motors and containing a broad prohibition concerning performance claims comparable to the one against Ford. On the basis of that order, the Sixth Circuit held that the Ford order had not placed Ford at a competitive disadvantage vis-a-vis General Motors respecting the scope of its order. Ironically, then, even in *Ford* a judicially mandated hearing was avoided. Nevertheless, the Sixth Circuit's holding in *Ford* remains intact. Had the Commission not made its eleventh hour proof that Ford was being treated equally, Ford would have gotten its hearing.

68. *Ford Motor Co. v. F.T.C.*, 1976-1 Trade Cas. ¶ 60,938 at 69,117-69,118 (1976).

change of circumstance.” It might be contended on Johnson’s behalf, however, that a “major change” had taken place during the interim between its acceptance of the order and its attempted withdrawal. In *Ford*, the major change of circumstance was allegedly the Commission’s willingness to accept an order which did not encompass all performance claims. Johnson may have an argument that the Commission’s policy had undergone a similar change prior to Johnson’s attempted withdrawal, as the Commission may have either decided not to proceed against Johnson’s competitors or to accept orders less encompassing in their scope. There is no way of knowing whether this argument is correct, however, since there is, ironically, no way of knowing precisely what occurred until a hearing is conducted on the issue.

Significance of Johnson to Antitrust Practitioners

Johnson is important to antitrust practitioners since it, like *Ford*, suggests that companies may, under certain circumstances, be entitled to withdraw their consent orders or consent decrees where competitors have been treated more favorably by the government. The following six hypotheticals will hopefully suggest factors which companies must demonstrate if they are to win in seeking such a withdrawal or at least in getting a hearing on the matter.

First, during consent negotiations, the Commission attorney assures your client that the entire industry will soon be placed under similar restrictions. Your client obtains a written statement to that effect from the Commission and signs the proposed agreement. No similar orders are forthcoming, and before the Commission’s final acceptance, your client notifies the Commission that it is withdrawing its consent. The basic problem in *Johnson* was the lack of a record on which the court could review “abuse of discretion.” By obtaining a written statement from the Commission or at least from the staff attorney,⁶⁹ the respondent would be building such a record for later judicial review. Since, however, both the Commission’s Rules of Practice⁷⁰ and the standard language contained in consent orders state explicitly that no “representation” not contained in the order “may be used to vary or contradict the terms of the order,”⁷¹ it would be wiser yet to have any such assurances entered into the order itself.

Second, your client has signed an order in reliance on Commission staff representations that competitors will be placed under similar restric-

69. Since the Commission itself is not bound by the staff attorney’s consent, it would be advisable to obtain a Commission letter, if possible. See 16 C.F.R. § 2.32 (1977).

70. 16 C.F.R. §§ 0-15 (1977).

71. 16 C.F.R. § 2.32 (1977).

tions. A competitor is allowed a less restrictive order *and* your client does not petition for withdrawal or for a hearing until after the Commission's final acceptance of the order. *Johnson* suggests that since the issue is one of an "abuse of discretion" at the time the order is finally entered, the company would not be entitled to withdrawal or to a hearing. Since any change in circumstances would not have been brought to the Commission's attention by the time the order became final, the Commission would not have abused its discretion by simply assuming that the order was fair when making it final. If withdrawal or a hearing is to be allowed, then it must be under the discretionary power of the Commission to reopen even final orders,⁷² and not of right to the respondent.

Third, your client has signed an order and becomes aware that one of its competitors has signed a less restrictive order. The Commission, however, has taken the added precaution of warning your client that it either may not go against other similarly-situated competitors or may accept less demanding orders from them. *Johnson* argued that Commission staff had assured it that other manufacturers would be treated in a similar manner.⁷³ There was nothing in the record, however, showing that this assurance had been given. If the Commission had included in the agreement itself a clause to the effect that no representation had been made about other manufacturers, the Commission would likely have avoided the necessity of a hearing, since it was precisely because of the absence of a record that the Seventh Circuit suggested that a hearing was needed. When a company has been expressly forewarned that all others may not be treated alike, it cannot, in the words of the Sixth Circuit in *Ford*, argue that any ensuing inequality in treatment was something that it "could not reasonably have anticipated."⁷⁴

Fourth, your client signs an order in reliance on Commission staff representations that competitors will be placed under similar restrictions, but a competitor is allowed a less restrictive order. The disparities between your client's order and the one allowed its competitor are less extreme than those present in *Johnson*. For example, the disparity might involve an order against your client relating to "all hair products," while an order against its competitor involves "all hair straighteners." In *Ford*, the Sixth Circuit stated that in such a situation, it is necessary for the company to show "a prima facie case of unfair and serious economic disadvantage" capable of threatening its competitive position in the industry.⁷⁵ In *Johnson*, the Seventh Circuit did not clearly elaborate what constitutes an "abuse of discretion." However, it suggested at least one relevant factor when it stated

72. See note 51 *supra*.

73. See text accompanying note 47 *supra*.

74. *Ford Motor Co. v. F.T.C.*, 1976-1 Trade Cas. ¶ 60,938 at 69,117-18.

75. See text accompanying note 68 *supra*.

that “[i]t is the responsibility of the Commission to perform a ‘reasonable evaluation’ of the competitive situation to ascertain whether a particular order would be contrary to the purpose of the laws sought to be enforced.”⁷⁶ In other words, is the disparity such as to cut against competition rather than promote it?

Fifth, your client signs an order in reliance on Commission staff representations that competitors will be placed under similar restrictions, but a competitor is allowed a less restrictive order. Instead of, or in addition to, petitioning for withdrawal or a hearing, your client petitions the Commission to “modify” the terms of the order, in accordance with the Commission’s power under Rule 2.34 to withdraw its provisional acceptance and “take such other action as it may consider appropriate.”⁷⁷ This is a less extreme situation than either *Johnson* or *Ford*, where the companies sought to completely withdraw their consents. Since the company would here be willing to remain bound by the order, and is simply seeking modification of its terms, the Commission might be far more willing to acquiesce, although this remains an as yet untested hypothesis.

Finally, a recent change in the Commission’s rules has possibly created a whole new “hypothetical,” one which is apt to again bring the “unilateral withdrawal” issue before the Seventh Circuit. Under the previous rules, the Commission had thirty days to make a final acceptance of a consent order following the sixty day period for public comment.⁷⁸ The Seventh Circuit relied on the reasonableness of that time limit in rejecting Johnson’s argument that it was entitled to “unilaterally withdraw” its consent, expressly noting that Johnson was not left “unilaterally committed for an indefinite period.”⁷⁹ Effective September 7, 1977, the relevant rule⁸⁰ was changed so as to completely drop the thirty day time limitation. The Commission may now accept or reject an agreed-to order at any time following the sixty day period for public comment.⁸¹ This change in procedure has the result of leaving respondents “unilaterally committed for an indefinite period.” The Commission, far from learning from *Johnson*, seems to have invited another such legal dispute.

TIGER TRASH V. BROWNING-FERRIS INDUSTRIES, INC.
“INTERSTATE COMMERCE” AND CLAYTON ACT
SECTION 12 VENUE

Two issues of importance to antitrust practitioners were involved in the

76. 549 F.2d at 41 (quoting *L.G. Balfour Co. v. F.T.C.*, 442 F.2d 1, 24 (7th Cir. 1971)).

77. 16 C.F.R. § 2.34 (1977).

78. See text accompanying note 48 *supra*.

79. 549 F.2d at 40.

80. 42 Fed. Reg. 39,658 (1977) (to be codified in 16 C.F.R. §§ 2.34-.35, 3.25).

81. *Id.*

case of *Tiger Trash v. Browning-Ferris Industries, Inc.*⁸² The first issue involved the question of how "minimal" the interstate activities of a company can be and still satisfy the "interstate commerce" requirement of section 2 of the Sherman Act.⁸³ The second issue involved the question of when the relationship between a foreign parent corporation and its local subsidiary is such that venue over the parent company under section 12 of the Clayton Act⁸⁴ can be based simply upon the local business transactions of the subsidiary.

Browning-Ferris Industries, Inc.⁸⁵ is a Delaware corporation with its principal office and place of business in Houston, Texas. Since 1969, BFI has attempted to build a nationwide network of solid waste disposal services. BFI is not itself, however, engaged in the waste removal business. Rather, BFI is a non-operating holding company that has acquired several wholly-owned subsidiaries already engaged in the waste removal business in various states. Browning-Ferris Industries of Indiana, Inc.⁸⁶ is one of the subsidiaries that BFI has acquired in this manner. BFI-Indiana is engaged in the business of providing refuse removal service for industry, commercial establishments, and apartments in the Evansville, Indiana, and Henderson, Kentucky, market area.

Tiger Trash competes with BFI-Indiana in the Evansville-Henderson market area. In 1975, Tiger Trash brought suit in the Southern District of Indiana against BFI and BFI-Indiana under section 2 of the Sherman Act and a similar provision of the Indiana Antitrust Act⁸⁷ for allegedly attempting to monopolize the refuse collection business in the Evansville-Henderson market. BFI moved to dismiss the complaint against it on the ground of improper venue, arguing that it had not engaged in any business activity in the Southern District of Indiana that would subject it to personal jurisdiction under section 12 of the Clayton Act. BFI-Indiana moved for summary judgment on the ground that the challenged activities did not involve interstate commerce. The district court granted both BFI's motion to dismiss and BFI-Indiana's motion for summary judgment.⁸⁸ Tiger Trash thereupon appealed both rulings to the Seventh Circuit.⁸⁹

82. 1977-2 Trade Cas. ¶ 61,585 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3453 (U.S. Jan. 16, 1978) (No. 77-705).

83. 15 U.S.C. § 2 (Supp. IV 1974).

84. 15 U.S.C. § 12 (1970).

85. Hereinafter referred to in the text as BFI.

86. Hereinafter referred to in the text as BFI-Indiana.

87. IND. CODE ANN. §§ 24-1-2-2, 24-1-2-7 (1974).

88. *Tiger Trash v. Browning-Ferris Indus., Inc.*, 1976-2 Trade Cas. ¶ 61,141 (S.D. Ind. 1976).

89. A third issue not relevant to this discussion was whether the district court acted improperly in staying discovery pending resolution of the defendant's respective motions to dismiss and for summary judgment.

The "Interstate Commerce" Issue

For section 2 of the Sherman Act to apply, it must be shown that the defendant has monopolized, attempted to monopolize, or combined or conspired to monopolize any part of trade or commerce "among the several States,"⁹⁰ *i.e.*, "interstate commerce" as opposed to purely "intrastate commerce." This jurisdictional language has been held to apply not only to transactions acting directly upon or within the actual stream of interstate commerce (the "in commerce" or "flow of commerce" test)⁹¹ but also to transactions which, although wholly intrastate in character, affect a substantial amount of interstate commerce (the "substantial effect" test).⁹² While both tests are directed at the same ultimate issue of whether the "interstate commerce" requirement of section 2 of the Sherman Act has been met, they are altogether different in their analytical approach to the problem.

In *Tiger Trash*, the district court failed to distinguish between these two tests. Instead, it focused upon the "substantial effect" test to the apparent exclusion of the "in commerce" test, stating that "[t]he law is well settled that in order to invoke the provisions of the Sherman Act, the plaintiff must show that the defendant's alleged violations had an impact which substantially affected interstate commerce."⁹³ Having thus phrased the standard in these restrictive terms, the district court pointed to several factors in support of its conclusion that *Tiger Trash* had failed to satisfy the "interstate commerce" jurisdictional requirement. The court noted that BFI-Indiana had only \$6,000 worth of its refuse containers permanently located in Henderson, Kentucky.⁹⁴ This was less than 1% of the total equipment used by BFI-Indiana, with the remaining equipment being used wholly within Evansville, Indiana. The court similarly noted that BFI-

90. 15 U.S.C. § 2 (Supp. IV 1974). For a general discussion of the "interstate commerce" issue, see Annot., 52 L. Ed. 488 (1926); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L. REV. 323 (1974).

91. See *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905) (purchase of livestock at local stockyards held to be in interstate commerce where cattle were regularly sent to the stockyards from other states with the expectation of sale, and the only interruption in the flow of interstate commerce was the location of an actual purchaser at the stockyards). See also *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949).

92. See *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738 (1976). The court stated: It is settled that the [Sherman] Act encompasses far more than restraints on trade that are motivated by a desire to limit interstate commerce. "Wholly local business restraints can produce the effects condemned by the Sherman Act." *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 189 (1954). As long as the restraint in question "substantially and adversely affects interstate commerce," *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. at 234, the interstate commerce nexus required for Sherman Act coverage is established.

Id. at 743.

93. 1976-2 Trade Cas. ¶ 61,141 (S.D. Ind. 1976).

94. *Id.* at 70,151.

Indiana's estimated annual revenue of \$30,000 from the Henderson area was only 3-4% of its Evansville volume.⁹⁵ The court concluded that these interstate activities were at most "de minimis" and "not sufficient to transform an essentially intrastate business into an interstate business."⁹⁶

On appeal, the Seventh Circuit correctly distinguished between the "in commerce" and "substantial effect" tests,⁹⁷ and noted that Tiger Trash expressly relied on the "in commerce" jurisdictional test. Applying that test, the court found that \$30,000 of interstate sales was sufficient to bring BFI-Indiana's activities within purview of section 2 of the Sherman Act.⁹⁸ In addition, the court further concluded that "[a]lthough the 'substantial effect' test was not relied on by plaintiff, . . . this test is also met."⁹⁹ Having thus determined that both jurisdictional tests had been met, the court held that the

plaintiff has adequately charged that a sufficient part of interstate commerce, namely the Evansville-Henderson market for refuse disposal, was affected. . . . What the proofs will show is another matter, but at least plaintiff must be permitted to show (if it can) that an interstate market, the Henderson-Evansville area, was being monopolized by defendants.¹⁰⁰

Tiger Trash is an extreme illustration of the great lengths that courts have gone to in finding "interstate commerce." If \$30,000 is not de minimis, it is hard to conceive of what would be. Similarly, if \$30,000 is "substantial," it is hard to conceptualize what would be deemed "insubstantial." Review of the case law, however, shows that other courts have been equally as liberal in finding the commerce requirement of section 2 of the Sherman Act to be satisfied, particularly where it has been the "in commerce," rather than the "substantial effect," test that has been involved. Where it is argued that a challenged practice actually and directly acts upon or within interstate commerce itself (the "in commerce" test), even an extremely minimal amount of interstate commerce will suffice.¹⁰¹

95. *Id.*

96. *Id.* at 70,152.

97. 1977-2 Trade Cas. ¶ 61,585 at 72,385-86 (7th Cir. 1977).

98. The court declined to consider the question of whether there is an exception for cases involving only de minimis interstate commerce, since it reasoned that in any event \$30,000 was not de minimis. *See, e.g.,* Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974): "[W]hile a 'substantial quantity' of national advertising is apparently enough to satisfy the 'in commerce' test, . . . isolated and infrequent sales of interstate advertising might not suffice to transform a smalltown newspaper into an interstate business." *Id.* at 395 (citations omitted). *See also* cases discussed in note 102 *infra*.

99. 1977-2 Trade Cas. ¶ 61,585 at 72,386.

100. *Id.* (citations omitted).

101. *See, e.g.,* United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970) (the sale across state lines of a single dishwasher priced at \$10,000 was held to satisfy the interstate commerce requirement of section 1 of the Sherman Act). *See also* Ford Wholesale Co. v. Fibreboard Paper Prods. Corp., 344 F. Supp. 1323 (N.D. Cal. 1972), *aff'd*, 493 F.2d 1204 (9th Cir. 1974), *cert. denied*, 419 U.S. 876 (1974) ("[i]t is true that, if a restraint occurs within the 'flow' of

At some point, the amount of interstate commerce involved presumably may be so marginal as to fall outside the jurisdiction of the Sherman Act.¹⁰² *Tiger Trash* makes it clear, however, that so far as the Seventh Circuit is concerned, the amount of interstate activity involved must be marginal indeed before jurisdiction will be lacking.

The "Venue" Issue

Section 12 of the Clayton Act contains a special venue provision applicable to corporate defendants.¹⁰³ Under section 12, venue is proper in any judicial district in which the corporate defendant is "an inhabitant,"¹⁰⁴ "may be found,"¹⁰⁵ or "transacts business."¹⁰⁶ In several recent antitrust cases, this far-reaching venue provision has been applied to reach foreign parent corporations solely on the basis of the local activities of their wholly-owned subsidiaries.¹⁰⁷ *Tiger Trash* is such a case.

interstate commerce, substantial effect on interstate commerce then follows as a matter of law and there is no need to show that any particular amount of interstate commerce was affected by the restraint." 344 F. Supp. at 1327; *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) ("in the application of the Sherman Act, . . . it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation." *Id.* at 485).

102. See, e.g., *Yellow Cab Co. v. Cab Employers, Automotive & Warehousemen Local 881*, 457 F.2d 1032 (9th Cir. 1972) (the transportation of passengers between California and Nevada and from a local interstate railroad station to a local interstate airport did not satisfy the "in commerce" test because these activities were only \$8,500 or 1/2% of the plaintiff's annual revenues. The Ninth Circuit argued that:

[a]lthough it is true that the courts have held that a small amount of interstate commerce is sufficient to obtain federal jurisdiction, they have done so when the nature of the conspiracy has been *directed against interstate commerce*. . . . Given the minuscule amount of business generated by Yellow Cab's interstate activity, it is readily apparent that intrastate business 'was the subject of the conspiracy.'

Id. at 1034-1035. See also *J.P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, 1976-2 Trade Cas. ¶ 61,139 (E.D. Pa. 1976).

103. Section 12 of the Clayton Act states: "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." 15 U.S.C. § 12 (1970). For a general discussion of issues involving venue, see Annot., 3 A.L.R. Fed. 120 (1970); Note, *Antitrust Venue: Transacting Business Under the Clayton Act*, 55 GEO. L.J. 1066 (1967); Note, *Venue in Private Antitrust Suits*, 37 N.Y.U.L. REV. 268 (1962); Note, *Transacting Business as a Basis for Venue Over a Corporation under the Antitrust Laws*, 1962 WASH. U.L.Q. 261.

104. A corporation is "an inhabitant" of the state in which it is incorporated. *Winkler-Koch Eng'r Co. v. Universal Oil Prod. Co.*, 70 F. Supp. 77, 78 (S.D.N.Y. 1946).

105. A corporation is "found" in any district in which it is "present" and conducting "continuous local activities." *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F. Supp. 812, 815 (E.D. Pa. 1972).

106. A corporation "transacts business" within a district when, in a "practical, everyday business or commercial" sense, it is "doing or carrying on business 'of any substantial character.'" *United States v. Scophony Corp.*, 333 U.S. 795, 807 (1948).

107. See, e.g., *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838 (S.D. Fla. 1975); *Bottino v. McDonald's Corp.*, 1974-2 Trade Cas. ¶ 75,256 (S.D. Fla. 1974); *Dobbins v. Kawasaki Motors Corp.*, 362 F. Supp. 54 (D. Ore. 1973); *Luria Steel & Trading Corp. v. Ogden Corp.*, 327 F. Supp. 1345 (E.D. Pa. 1971).

In *Tiger Trash*, the district court applied a very narrow standard in determining whether BFI (the parent corporation) could be sued in the Southern District of Indiana solely because of the business transactions of its wholly-owned subsidiary, BFI-Indiana:

The crucial issue is whether or not the parent *controls* the day-to-day operations of its subsidiary The parent must not only have the opportunity to control, it must actually and consciously exercise such control. . . . The control must be such that the parent and subsidiary act almost as a single business entity. . . .¹⁰⁸

Several factors were cited by the district court in support of its conclusion that BFI did not "control the day-to-day business operations" of its subsidiary. Evidence that BFI-Indiana selected the type of services it would offer and the geographical area in which it would operate, set its own prices, conducted its own local promotional efforts, selected and paid its own employees, owned its own assets and equipment, and planned and paid for its own capital improvements¹⁰⁹ convinced the district court that venue in the Southern District of Indiana would be improper.

On appeal, however, the Seventh Circuit stated that "the issue under Section 12 of the Clayton Act is whether BFI exercised sufficient control over its Indiana subsidiary to cause the parent to 'transact business' in Indiana within the special venue provision of the Clayton Act."¹¹⁰ This phrasing dropped any reference to control by the parent over the "day-to-day" operations of the subsidiary which the district court found to be "crucial."¹¹¹ Factors which the Seventh Circuit considered controlling under its phrasing of the test included the fact that some of the officers of BFI-Indiana were also officers of BFI, the use of consolidated financial statements and tax returns, and the use of nationwide advertising and promotional activities that essentially held out BFI and its subsidiaries as a single operation.¹¹² In addition, BFI's assistance in signing up customers, in making basic market development and resource allocation decisions, in providing finances, systems accounting and management supervision, in setting and enforcing return-on-investment standards, and in making its trade names available to the subsidiary were also considered to be controlling by the Seventh Circuit.¹¹³ It was particularly noted that a regional sales manager of BFI had actually entered Indiana and solicited sales for BFI-Indiana.¹¹⁴ Given these factors, the court concluded that there was "enough

108. 1976-2 Trade Cas. ¶ 61,141 at 70,149 (citation omitted).

109. *Id.* at 70,149-50.

110. 1977-2 Trade Cas. ¶ 61,585 at 72,383.

111. 1976-2 Trade Cas. ¶ 61,141 at 70,149.

112. 1977-2 Trade Cas. ¶ 61,585 at 72,383.

113. *Id.*

114. *Id.*

control and direction from parent to subsidiary to make the parent amenable to suit in the Southern District of Indiana."¹¹⁵ Moreover, the court concluded that since a "sufficient level of control" had been shown, it would "not discuss the countervailing facts relied upon by BFI,"¹¹⁶ *i.e.*, the "day-to-day" factors relied upon by the district court in coming to an exactly opposite conclusion.

The contradictory results reached by the district court and the Seventh Circuit in *Tiger Trash* reflect the abstruse nature of venue questions in antitrust cases. As one court has expressed the problem, "[t]he test of venue turns on the facts of each case; generalizations are, for the most part, impossible."¹¹⁷ Nevertheless, a review of the existing case law indicates that the Seventh Circuit was correct in rejecting the narrow "day-to-day control" test of the district court.¹¹⁸ The standard which seems to emerge is whether the parent corporation has influenced "major" decisions of the subsidiary which caused or contributed to the alleged antitrust violations.¹¹⁹ The major policy decisions of BFI-Indiana in which BFI was involved seem to have been of this character, particularly in light of the fact that BFI, as a mere holding company, necessarily operated through its subsidiaries. As the court noted, a strict "day-to-day control" test would enable large American corporations like BFI "to circumvent the antitrust laws by incorporating the many functional parts of the parent into local operations."¹²⁰ Such a result

115. *Id.*

116. *Id.* at ¶ 72,384.

117. *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 371 (D. Md. 1975).

118. *See* cases cited at notes 107 *supra*, and 119 *infra*. *See also* *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519 (S.D.N.Y. 1972). For cases holding that the parent did not exercise sufficient control over the subsidiary, *see O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974); *United States ex rel. Martin-Trigona v. Bankamerica Corp.*, 1974 Trade Cas. ¶ 74,916 (D.D.C. 1974); *San Antonio Tel. Co., Inc. v. American Tel. & Tel. Co.*, 499 F.2d 349 (5th Cir. 1974); *Pfeiffer v. United Booking Office, Inc.*, 93 F. Supp. 363 (N.D. Ill. 1950).

119. *Flink Oil Co. v. Continental Oil Co.*, 277 F. Supp. 357 (D. Colo. 1967) ("*Scophony* [*United States v. Scophony Corp.*, 333 U.S. 795 (1948)] 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." *Id.* at 365). *See also* *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975) ("The key factor, however, in determining venue is the ability of the parent to influence major decisions of the subsidiary which lead or could lead to violations of the antitrust laws." *Id.* at 371). *See also* *Hitt v. Nissan Motor Company, Ltd.*, 399 F. Supp. 838 (S.D. Fla. 1975) (expressly rejecting the "day-to-day control" test and, instead, looking to the degree of "influence and control over those decisions which might involve violations of the antitrust laws." *Id.* at 842).

120. 1977-2 Trade Cas. ¶ 61,585 at 72,384. For a case in which the relationship between parent and subsidiary was viewed in a similar light, *see United States v. Scophony Corp.*, 333 U.S. 795 (1948). The Supreme Court stated that a foreign parent company had created its local subsidiary not merely as an investment but as an alternative means of carrying on its business. Since the parent's ultimate objective remained the same, the Supreme Court disregarded the formalistic parent-subsidiary distinction and held the parent to be subject to local jurisdiction and process under section 12 of the Clayton Act. *See also* *Call Carl, Inc. v. BP Oil*

could greatly undercut the very rationale underlying the permissive venue provisions of section 12. As expressed by the Supreme Court, Congress' "remedial purpose" in enacting section 12 was the following:

[I]t 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.¹²¹

The Seventh Circuit's decision in *Tiger Trash* is both consistent with and in furtherance of this underlying purpose.

Significance of Tiger Trash to Antitrust Practitioners

Tiger Trash is doubly significant to antitrust practitioners with corporate clients engaged in or considering interstate activities. First, the decision holds that even minimal interstate activities may bring a company's entire operation within the reach of section 2 of the Sherman Act.¹²² Thus, for example, once it was concluded in *Tiger Trash* that \$30,000 of activities in Kentucky was a sufficient amount to satisfy the "interstate commerce" jurisdictional requirement, the plaintiff was allowed to challenge not only those minimal activities but another \$750,000 of activities conducted solely within the state of Indiana. Clients who, like BFI-Indiana, do business at or near a state's borders should, therefore, be cautioned of the risk that may result from even minimal activities beyond those borders. They may find themselves subject to suit not only under state law but under federal law as well, even though their overall operation seems to be intrastate in character. If the state law simply tracks the federal law, this risk may seem of limited significance. If, however, the federal law is more far-reaching, the risk may well be one that the client would rather avoid by simply discontinuing its interstate activities.

A similar consideration is raised by the second holding in *Tiger Trash*. Parent corporations cannot shield themselves from "forum shopping" by potential antitrust litigants simply by refraining from control over the "day-to-day" operations of their subsidiaries. So long as the parent continues to exercise control over major decisions of the subsidiary, the parent may be reached for venue purposes through the subsidiary, thereby subjecting the

Corp., 391 F. Supp. 367 (D. Md. 1975) ("Section 12 is a venue provision peculiar to antitrust law. It is meant to provide injured plaintiffs with the opportunity to reach large corporate enterprises which seek to insulate themselves through the proliferation of subsidiaries which undertake the marketing, purchasing and selling functions of the parent in the local jurisdiction where the activities of the subsidiary are guided by the parent." *Id.* at 371-72).

121. *United States v. Scophony Corp.*, 333 U.S. 795, 808 (1948).

122. *See* text accompanying note 101 *supra*.

parent to suit in what may well be a highly inconvenient forum. Clients should, therefore, be forewarned that separate incorporation does not assure separate treatment. If the purpose of operating through local subsidiaries is to protect the parent from antitrust lawsuits in distant, inconvenient forums, then the parent must grant the subsidiaries unfettered control over not only their day-to-day operations, but also their major policy decisions. This is particularly true where the parent is, like BFI, a mere holding company that effectively operates through its local subsidiaries.

ILLINOIS V. SARBAUGH
PLAINTIFFS' ACCESS TO GRAND JURY TRANSCRIPTS
IN PRIVATE TREBLE DAMAGES ACTIONS

A noteworthy case for members of the antitrust bar is *Illinois v. Sarbaugh*.¹²³ In *Sarbaugh*, the Seventh Circuit released grand jury transcripts taken in a prior federal criminal antitrust proceeding to the state of Illinois, the plaintiff in a follow-up treble damages action based on the same alleged misconduct. Although *Sarbaugh* does not pose a "pure" antitrust issue, the decision nevertheless has obvious and considerable significance for antitrust practitioners, since grand jury transcripts can prove a veritable gold mine of valuable information for private litigants. Because of the practical importance of *Sarbaugh*, the decision deserves at least some mention.

In *Sarbaugh*, a criminal action was brought by the Justice Department against nine highway construction contractors who were indicted by a federal grand jury and charged with violating section 1 of the Sherman Act.¹²⁴ The government alleged that the contractors had submitted rigged bids to the state of Illinois and had conspired to allocate contracts let by the state in connection with an interstate highway project. The grand jury took testimony from key employees of the contractors, and transcripts of this testimony were released to the contractors pursuant to rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure.¹²⁵ The criminal action ended, however, when the defendants entered pleas of *nolo contendere*.

Thereafter, the state of Illinois brought a treble damages action against

123. 552 F.2d 768 (7th Cir.), *cert. denied*, 98 S. Ct. 262 (1977).

124. 15 U.S.C. § 1 (1970) provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal"

125. FED. R. CRIM. P. 16(a)(1)(A) provides in pertinent part that where the defendant is a corporation, partnership, association or labor union, the trial court may grant the defendant discovery of relevant grand jury testimony of any witness who (1) at the time the testimony was given, was an officer or employee with the power to legally bind the defendant with respect to the conduct constituting the alleged offense, or (2) at the time the alleged offense was committed, was personally involved in the alleged misconduct and was an officer or employee with the power to legally bind the defendant with respect to the misconduct.

the nine contractors and five other highway construction firms based on the same alleged conspiracy.¹²⁶ As part of this action, the state moved under rule 6(e) of the Federal Rules of Criminal Procedure¹²⁷ for an order requiring the Justice Department to release the grand jury transcripts for use by the state in preparing for the employees' trial or deposition testimony. By this time, approximately four years had elapsed since the grand jury testimony was taken. When the Justice Department did not oppose the motion, the defendants were allowed to intervene, without objection by the state.¹²⁸ The district court denied the motion, holding that the requisite "particularized showing" of "compelling necessity" for disclosure had not been made.¹²⁹ The defendants then appealed to the Seventh Circuit.

On appeal, the Seventh Circuit was faced with two key issues.¹³⁰ The first of these issues was whether the defendants had standing to intervene and oppose discovery in a proceeding to compel disclosure of grand jury testimony brought by the plaintiff against the Justice Department, rather than against the defendants. In an earlier per curiam opinion, the Third Circuit held that defendants in an analogous case lacked such "standing" and, therefore, could not object to an order directing the Justice Department to produce grand jury testimony for use by private litigants.¹³¹ The Seventh Circuit, however, rejected the position taken by the Third Circuit and argued, quite logically, that disclosure of the grand jury transcripts would adversely affect the defendants.¹³² Moreover, the defendants were "likely to be the only ones to object to an order for disclosure."¹³³ The court reasoned that if a proceeding to determine the need for disclosure was to have any real

126. 552 F.2d at 771.

127. FED. R. CRIM. P. 6(e) provides for disclosure of matters before the grand jury "only when so directed by the court." The rule is construed to be a continuation of the common law rule of grand jury secrecy. See, e.g., *In re Grand Jury Proceedings*, 309 F.2d 440 (3rd Cir. 1962).

128. 552 F.2d at 771.

129. The requirement of a "particularized showing of compelling necessity" is found in such leading cases as *Dennis v. United States*, 384 U.S. 855, 869-72 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399-400 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-83 (1958). In *Procter & Gamble*, the Supreme Court suggested the type of delicate balance that must be achieved in cases of this type. On the one hand, the trial court must give due consideration to the reasons that underlie the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." 356 U.S. at 681. On the other hand, the court must consider the interests served by discovery as a means of making the trial "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Id.* at 682. To achieve this balance, the burden is on the party seeking discovery to show a "compelling necessity" for disclosure and to make this showing "with particularity." *Id.* For a general discussion of discovery of grand jury testimony, see 2 F. WHARTON, CRIMINAL PROCEDURE § 384 (12th ed. 1974).

130. A third, less significant issue was whether the district court's order was final and appealable. The Seventh Circuit held that it was, even though the order allowed for later discovery if and when a showing of "particularized need" was made. 552 F.2d at 773-74.

131. *United States v. American Oil Co.*, 456 F.2d 1043, 1044 (3d Cir. 1972).

132. 552 F.2d at 773.

133. *Id.*

substance as an adversary proceeding, the defendants should be allowed to appear.¹³⁴ As a result, the defendant's intervention was upheld.¹³⁵

The second key issue confronting the Seventh Circuit in *Sarbaugh* was whether the defendants should have been allowed access to the grand jury transcripts. In deciding this issue, the court applied a balancing test, balancing the need for secrecy of grand jury testimony against the need for disclosure.¹³⁶ It reasoned that the "level of need" for disclosure that must be shown diminishes "as the reason for preserving secrecy becomes less compelling."¹³⁷ Since the original criminal case had long since ended, the court argued that the sole remaining reason for secrecy was protection of the grand jury witnesses from retaliation by their existing or prospective employers.¹³⁸ This reason, however, had been substantially undercut by disclosure of the transcripts to those most likely to retaliate—the witnesses' own employers.¹³⁹ The need for secrecy had been further eroded, the court continued, because at least one of the original criminal defendants had already released the transcripts to one of the five newly-added defendant companies.¹⁴⁰ Given these factors, the court concluded that any remaining interest in grand jury secrecy was "residual" at best.¹⁴¹

Turning next to the need for disclosure, the court argued that the state had a legitimate need for the transcripts in order to prepare for the witnesses' trial or deposition testimony.¹⁴² This need was heightened by the unfairness of releasing the transcripts to some of the defendants while denying them to the state,¹⁴³ and by the considerable amount of time that had elapsed between the time of the grand jury proceedings and the state's civil action.¹⁴⁴ The court further reasoned that this need could not be adequately protected by an *in camera* review by the trial judge for any inconsistencies between the grand jury transcripts and the witnesses' trial or deposition testimony.¹⁴⁵ The court concluded that the transcripts should have been

134. *Id.*

135. The court also held that any right that the state might otherwise have had to object to the defendant's intervention was waived when the state failed to object on this ground in the district court. 552 F.2d at 772. Not stopping here, however, the court went on to hold that, in any event, the defendants were entitled to intervene.

136. See note 129 *supra*.

137. 552 F.2d at 774.

138. *Id.* at 775.

139. *Id.* For other possible factors favoring grand jury secrecy, see those suggested in *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958). See also 1 F. WHARTON, CRIMINAL PROCEDURE § 221 (12th ed. 1974); 1 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 6:118 (1966); Annot., 127 A.L.R. 272 (1940).

140. 552 F.2d at 775.

141. *Id.*

142. *Id.* at 777.

143. *Id.* at 776.

144. *Id.* at 776 n.12.

145. *Id.* at 776-77.

released to the state, but imposed protective limitations to protect the remaining residual interest in secrecy.¹⁴⁶

Sarbaugh is a well-organized, well-reasoned decision that seems to logically extend principles laid down in earlier decisions of the Supreme Court.¹⁴⁷ Nevertheless, it appears to reach a result contrary to that reached by the Fifth Circuit in a similar and contemporaneous case, *Texas v. United States Steel Corp.*¹⁴⁸ In that case, the Fifth Circuit reversed a district court order granting the state of Texas access to grand jury transcripts which had been released to the witnesses' employers in an earlier criminal antitrust case against the employers.¹⁴⁹ It would seem that the two cases can be reconciled on their facts. In *Sarbaugh*, the transcripts had already been shared with a co-defendant who was not involved in the earlier criminal case,¹⁵⁰ while in *United States Steel*, there was no such sharing of the transcripts.¹⁵¹ The logic underlying the two decisions cannot, however, be so reconciled.¹⁵²

Significance of Sarbaugh to Antitrust Practitioners

Sarbaugh is significant to antitrust practitioners not so much because of what it holds as it is for what it suggests. The decision suggests that at least the following six factors are relevant when deciding whether a particular party, like the plaintiff in *Sarbaugh*, is entitled to access to grand jury materials:

First, who is making the request? In *Sarbaugh*, the requesting party was the state of Illinois.¹⁵³ What if, however, the request had been made by an actual or prospective employer of the grand jury witness? The Seventh Circuit expressly recognized that even in the *Sarbaugh* fact setting, a

146. *Id.* at 777. Copying was prohibited, the transcripts were to be returned when no longer needed, the defendants were allowed to object to the release of any irrelevant material, and the transcripts were released to a single attorney representing the state, who was directed to keep detailed records of those using them.

147. See note 129 *supra*.

148. 546 F.2d 626 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3238 (U.S. Oct. 11, 1977) (No. 76-1710).

149. The Fifth Circuit stressed two arguments. First, the court analogized the situation to one in which an individual witness has testified to the grand jury. The fear of retaliation by others will remain even if the witness obtains the transcripts of his own testimony, so that release of the transcripts should be denied, absent a showing of "particularized need." When the witness' corporate employer obtains the transcripts, "it acts in a capacity little different from an individual defendant who seeks his own transcript." 546 F.2d at 629-30. The second argument stressed by the Fifth Circuit was that automatic release of the grand jury transcripts would unduly restrict the corporate defendant's use of the criminal defense tool provided by FED. R. CRIM. P. 16(a)(1)(A). 546 F.2d at 630.

150. See text accompanying note 141 *supra*.

151. 546 F.2d at 628.

152. Compare the discussion of *Sarbaugh* in the text accompanying notes 136-46 *supra*, with the discussion of *United States Steel* at note 149 *supra*.

153. See text accompanying note 127 *supra*.

“residual” interest in grand jury secrecy remained, *i.e.*, protecting the witness from retaliation by actual or prospective employers.¹⁵⁴ Does this mean that had the request been made by such a party, the request would have been denied? If so, who is a “prospective” employer of the witness? These are difficult questions that the Seventh Circuit will no doubt have to face, assuming that *Sarbaugh* itself is not overturned by the Supreme Court.

Second, what is the purpose of the request? In *Sarbaugh*, the plaintiff requested the grand jury materials to aid it in preparing for deposition and trial testimony of specific witnesses.¹⁵⁵ What if, however, the request were made by a member of the press who wished to discuss the criminal case or by a competitor of the defendant who simply wanted input on the feasibility of bringing a lawsuit? At least one court has held that only three groups are entitled to grand jury materials: attorneys for the government; the criminal defendant upon a proper showing; and third parties in conjunction with actual judicial proceedings.¹⁵⁶ In other words, it appears that the purpose must, at the very least, be to facilitate an actual judicial proceeding and not a mere general interest in the matters covered by the grand jury. Query, however, how this conclusion is affected by the Freedom of Information Act,¹⁵⁷ a question not before the Seventh Circuit in *Sarbaugh*.¹⁵⁸

Third, to whom is the request directed? In *Sarbaugh*, the materials were requested from the Department of Justice.¹⁵⁹ What if, however, the request had been directed at the defendants themselves? Apparently, the case would then have been treated no differently, since the Seventh Circuit specifically stated that it saw “no significance” in the distinction between a request addressed to the prosecutor and one directed at the criminal defendants.¹⁶⁰ What if, however, the request had been directed at the actual grand

154. See text accompanying notes 141, 146 *supra*.

155. See text accompanying note 127 *supra*.

156. *United States v. Crolich*, 101 F. Supp. 782, 784 (D. Ala. 1952).

157. 5 U.S.C. § 552 (1970).

158. The District Court for the Southern District of Alabama was particularly troubled by this issue in the recent case of *Chamberlain v. Alexander*, 419 F. Supp. 235 (S.D. Ala. 1976). The court there exempted a grand jury transcript from FOIA disclosure by holding that the transcript qualified as an exempt investigatory record (5 U.S.C. § 552(b)(7) (1970)), but in so holding said, “[i]nasmuch as the court . . . finds the plaintiff is not entitled to disclosure of the Grand Jury testimony on a factual basis, the court does not deem it wise nor necessary to determine the effect of a possible conflict of FOIA and F.R. Crim.P. # 6(e) [*sic*].” 419 F. Supp. at 239. The solution to the court’s quandary is probably found in 18 U.S.C. § 3771 (1970). Under that statute, the Federal Rules of Criminal Procedure, including rule 6(e), are proposed by the Supreme Court and “adopted” by Congress. *Davis v. United States*, 411 U.S. 233, 241 (1973). As such, rule 6(e) arguably qualifies as “statutorily exempt” from FOIA disclosures under 5 U.S.C. § 552(b)(3) (1970). Note, however, that this is merely an argument and is not patently clear on the face of the statutes themselves. Obviously, then, it will be interesting to see how the issue is resolved once a court is forced to squarely address it.

159. See text accompanying note 127 *supra*.

160. “The Fifth Circuit [in *United States Steel*] attached no significance to the fact that the

jury witness? Full disclosure without regard to rule 6(e) of the Federal Rules of Criminal Procedure would then presumably have been permitted, since the rule of grand jury secrecy does not apply to grand jury witnesses themselves.¹⁶¹

Fourth, what is being requested? In *Sarbaugh*, the plaintiff requested transcripts of the testimony of particular grand jury witnesses.¹⁶² What if the request had been for documents? Since the rule of grand jury secrecy applies to documents as well as testimony presented to a grand jury,¹⁶³ a request for documents would presumably have been treated no differently. What if, however, the request had been for the actual grand jury minutes, showing the deliberations of the grand jury itself? Such a request would seem to go beyond the "need" to prepare for the testimony of particular witnesses recognized as valid in *Sarbaugh*, and, presumably, would therefore fall outside the scope of that decision.

Fifth, when is the request made? In *Sarbaugh*, several years had elapsed between the time of the grand jury proceeding and the time of the request.¹⁶⁴ What if the criminal case were still pending? The normal considerations favoring grand jury secrecy would surely then have precluded disclosure of the requested materials.¹⁶⁵ What if, however, the request had been made shortly after the criminal case was closed but while the witnesses' recollection of what they had said before the grand jury was still "fresh"? An argument could then be made that the plaintiff could learn all that it needed to know from the witnesses themselves, so that release of the grand jury transcripts would add nothing.

Sixth, who already has copies of the material requested? In *Sarbaugh*, the requested transcripts had been disclosed not only to the actual defendants in the prior criminal proceeding but to a third party as well.¹⁶⁶ As already noted, this additional disclosure distinguishes *Sarbaugh* from the Fifth Circuit's conflicting holding in *United States Steel*.¹⁶⁷ Does this mean that the Seventh Circuit might have decided the case differently had this additional disclosure not occurred? This, too, is a question that the court will no doubt have to face if its decision is left standing by the Supreme Court.

materials were sought from the defendants in the civil case rather than the prosecutor in the criminal case. Nor do we." 552 F.2d at 777 n.14.

161. *Bast v. United States*, 542 F.2d 893, 896 (4th Cir. 1976) ("[W]e recognize that Fed. R. Crim. Pro. 6 imposes no condition of secrecy on the witness. . . .")

162. See text accompanying note 127 *supra*.

163. *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960).

164. See text accompanying note 144 *supra*.

165. See note 139 *supra*.

166. See text accompanying note 141 *supra*.

167. See text accompanying note 150 *supra*.

STATE ACTION, EXCLUSIVE JURISDICTION, AND
PRIMARY JURISDICTION: ANTITRUST DEFENSES

The Seventh Circuit considered two cases during the 1977 term which involved the newly defined¹⁶⁸ "state action exemption"¹⁶⁹ to the antitrust laws. *Kurek v. Pleasure Driveway & Park District of Peoria*¹⁷⁰ involved the important question of when the state action exemption applies to actions of local governmental units, as opposed to actions of the state itself.¹⁷¹ *City of Mishawaka v. Indiana & Michigan Electric Co.*¹⁷² was doubly significant, since it involved not only the scope of the state action exemption but the question of when the "exclusive jurisdiction" and "primary jurisdiction" doctrines apply to activities regulated in part by both state and federal agencies.

Kurek v. Pleasure Driveway & Park District of Peoria:
Applicability of "State Action" Exemption to
Local Governmental Units

The plaintiffs in *Kurek* were five professionals who had been employed by the Peoria Park District to manage five municipal golf courses in Peoria, Illinois. Each plaintiff had been granted the right by the park district to operate a golf pro shop selling golf equipment at his golf course, for which each paid the park district 1 1/2% of his gross receipts as a concession fee. In the fall of 1973, the park district allegedly¹⁷³ devised the following scheme to obtain greater revenues from its golf pro shop concessions. It agreed with a company called Golf Shop Management¹⁷⁴ that GSM would submit a "sham" bid of \$90,000 a year to the park district for the concession rights for all five golf courses. The park district then drew up public

168. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Parker v. Brown*, 317 U.S. 341 (1943) (as clarified and narrowed in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)).

169. *Parker* did not actually announce a rule of antitrust "exemption." It concluded, rather, that Congress simply had not intended the Sherman Act to apply to state-required actions. This article will use the term "exemption" as a short-hand reference to that determination.

170. 557 F.2d 580 (7th Cir. 1977), *petition for cert. filed*, No. 77-440 (U.S. Sept. 19, 1977).

171. See *City of Lafayette v. Louisiana Power & Light Co.*, 98 S.Ct. 1123 (1978). Unfortunately, the decision in *Louisiana Power & Light* was reached too late to be incorporated into this article. Suffice it to say, then, that the Court's plurality decision concluded "that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State, as sovereign, or, by its subdivisions, pursuant to a state policy to displace competition with regulation or monopoly public service." *Id.* at 1137. That decision comports with the reasoning in *Kurek*.

172. 1977-2 Trade Cas. ¶ 61,587 (7th Cir. 1977).

173. The case was before the Seventh Circuit on the plaintiffs' appeal from the lower court's dismissal. In that posture, the Seventh Circuit assumed the truth of the "well-pleaded facts alleged in the plaintiff's complaint." 557 F.2d at 584.

174. Hereinafter referred to in the text as GSM.

bidding specifications for the purpose of entertaining bids, tailored exclusively for GSM's bid. The park district, however, never formally met to consider the bids. Rather, it attempted to use the GSM bid as a lever to increase its revenues from the plaintiffs. Each plaintiff was instructed by the park district that he should increase his prices for golf equipment by 5% and that the concession rate would be raised from 1 1/2% to 5%. When the plaintiffs refused to raise their prices, the park district cancelled their concessions and awarded an exclusive concession to GSM.¹⁷⁵

The plaintiffs thereupon brought an antitrust action against the park district, GSM and others, alleging in relevant part a conspiracy to fix the retail prices of golf equipment at the five golf pro shops and to grant a monopoly for the golf course concession to GSM.¹⁷⁶ The district court dismissed the plaintiffs' antitrust claims as to the park district on the basis of *Parker v. Brown*.¹⁷⁷ The claim as to GSM was also dismissed.¹⁷⁸ The plaintiffs appealed from these rulings.

Kurek's Treatment of "State Action" Exemption

Since *Kurek* involved the activities of a municipal park district, the court first considered whether the "state action exemption" protects the activities of local, as opposed to state, governmental bodies. However,

175. 557 F.2d at 585-86.

176. *Id.* at 586.

177. 317 U.S. 341 (1943). See text accompanying note 179 *infra*.

178. The plaintiff's claim as to GSM was dismissed on the basis of *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). This article will not discuss GSM's asserted "Noerr defense." Some reference to the Seventh Circuit's treatment of this issue is, however, warranted, since the issue is one that at least some practitioners may similarly confront. *Noerr* involved allegations by the plaintiff trucker's association that the defendant railroad association had mounted an extensive advertising campaign directed at promoting legislation against the plaintiff. The Supreme Court held in *Noerr* that the defendants' activities should not be subject to the antitrust laws for three reasons. First, the Court stressed that the Sherman Act was not intended to regulate political activity, because there was an "essential dissimilarity" between agreements usually held to be violative of the antitrust laws and lobbying activity. Second, the flow of information to a governing body would be impaired by a finding of antitrust liability for this type of activity. Finally, antitrust regulation directed at lobbying activities would raise serious constitutional problems. The Court concluded that such political activity should usually be exempt; however, it added that "there may be situations in which a publicity campaign . . . directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

In *Kurek*, the Seventh Circuit held that GSM's activities were not protected by *Noerr*. It first noted that, unlike the lobbying activities in *Noerr*, GSM's activities in conspiring to fix prices were not "essentially dissimilar" from the type of activity proscribed by the antitrust laws. 557 F.2d at 593. Secondly, since the park district was not empowered to levy what amounted to a sales tax, it did not have a need to obtain the information from GSM. *Id.* The court additionally noted that it had trouble applying the constitutional right to petition the government to GSM's activities. *Id.* at 593-94. Finally, the court reasoned that GSM's concession bid could, in any event, be viewed as a mere "sham," and clearly outside the scope of *Noerr*. *Id.* at 594.

before turning specifically to the Seventh Circuit's treatment of this issue, it would be helpful to first summarize the general principles governing this exemption, as laid down in the leading decisions of the Supreme Court. *Parker v. Brown*¹⁷⁹ involved a state-mandated program to prorate raisin production in the state of California. The program had, in accordance with state legislation, been adopted and enforced by a state agency after first being devised and proposed to the agency by a group of raisin producers. The Supreme Court upheld the program as a legitimate exercise of state power, despite its obvious antitrust overtones.¹⁸⁰ The Court's reasoning was that Congress, in enacting the Sherman Act, simply had not intended to "restrain state action or official action directed by the state."¹⁸¹ This exclusion is what has loosely come to be referred to as the "state action exemption."

The Supreme Court's two most recent pronouncements on the state action exemption have somewhat narrowed the scope of this doctrine. *Goldfarb v. Virginia State Bar*¹⁸² involved a claimed defense of "state action" on the part of the Virginia state bar association to a charge of price-fixing involving the association's minimum fee schedules. The state bar association had been established under the rules of the Supreme Judicial Court of Virginia, but the judicial branch had not itself enacted rules relevant to fee schedules. Rather, the state bar association had adopted, and enforced, such fee schedules. The Supreme Court held that the state action exemption was not applicable, since the state bar was engaging in an activity not "compelled by direction of the State acting as a sovereign."¹⁸³

The state action exemption was again examined by the Supreme Court in *Cantor v. Detroit Edison Co.*¹⁸⁴ In *Cantor*, an electric utility regulated by the state of Michigan operated a program which provided "free" light bulb service to electricity customers, the expense of the program being funded by the general rates for the electricity. In its defense to a charge of illegal tying of light bulbs to electricity, the utility contended that its light bulb program was state-sanctioned because the general utility rate had to be approved by a state regulatory agency.¹⁸⁵ The Supreme Court rejected that defense.¹⁸⁶ The Court's majority,¹⁸⁷ while acknowledging that the state agency had approved the general rate, stressed that the agency's approval did not "imple-

179. 317 U.S. 341 (1943).

180. *Id.* at 352.

181. *Id.* at 350-52.

182. 421 U.S. 773 (1975).

183. *Id.* at 791.

184. 428 U.S. 579 (1976).

185. *Id.* at 592.

186. *Id.* at 598.

187. The Court's opinion, written by Justice Stevens, was joined in whole by Justices Brennan, White, and Marshall and in substantial part by Chief Justice Burger.

ment any statewide policy relating to light bulbs," nor did the state policy suggest that such a program should or should not be adopted.¹⁸⁸ *Cantor*, like *Goldfarb*, thus found the "state action exemption" inapplicable to activities that are not, in the words of *Goldfarb*, "compelled by direction of the State."¹⁸⁹

In *Kurek*, the Seventh Circuit began its analysis of the *Parker-Goldfarb-Cantor* exemption by emphasizing that those cases concerned state activities, while *Kurek* involved the actions of a subordinate governmental unit.¹⁹⁰ The court noted that the state action exemption can still be invoked by a subordinate governmental unit, but only when the challenged activities of the subordinate unit are mandated by the state, either through explicit language in a state statute or through inference "from the nature of the powers and duties given to a particular governmental entity."¹⁹¹ The park district was empowered under the relevant state statute¹⁹² to maintain golf courses, with the implicit power to contract for their maintenance. The court held, however, that nothing in the implicit contractual power of the park district or in the Illinois statutory provision could "even remotely suggest that Illinois has authorized, let alone compelled, park districts to attempt to enrich themselves by coercing horizontal retail competitors . . . to fix retail prices" ¹⁹³ That conclusion was strengthened by the plaintiffs' contention that the park district was, in effect, attempting to impose a 5% sales tax on the golfing public of Peoria. Under the applicable Illinois statutes,¹⁹⁴ such a sales tax would be beyond the power of the park district, thus clearly establishing that the action was not mandated by the state and, hence, not protected by the state action exemption.

The Seventh Circuit concluded that the state action exemption did not support the district court's dismissal of the complaint and remanded the case to the district court. As to the state officials named as defendants, the Seventh Circuit noted that it might be possible for each of the officials to establish a "good faith" defense, but that neither the facts nor legal argument in support of such defenses were before the court.

City of Mishawaka v. Indiana & Michigan Electric Co.:
The Doctrines of Exclusive and Primary Jurisdiction

The state action exemption was again before the Seventh Circuit in the

188. 428 U.S. at 585.

189. See text accompanying note 183 *supra*.

190. 557 F.2d at 587-90.

191. *Id.* at 590 (quoting *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975)).

192. ILL. REV. STAT. ch. 105, §§ 8-1(a)-10, -16, 9-1-1 (1975).

193. 557 F.2d at 590.

194. ILL. REV. STAT. ch. 105, §§ 6-1 to -6, 8-1(h) (1975).

case of *City of Mishawaka v. Indiana & Michigan Electric Co.*¹⁹⁵ In addition, *Mishawaka* involved the scope of the doctrines of “exclusive” and “primary jurisdiction,” two doctrines developed by the courts to reduce the friction that might otherwise result between judicial proceedings and the regulatory activities of an administrative agency concerning a particular matter.¹⁹⁶ As applied to antitrust law, the doctrine of exclusive jurisdiction precludes the courts from applying the antitrust laws to activities which, either expressly or by implication, have been statutorily “removed” from antitrust scrutiny and “reserved” for exclusive treatment by a federal agency.¹⁹⁷ The doctrine of primary jurisdiction has a lesser impact. With respect to antitrust law, this doctrine simply stays an antitrust lawsuit on a matter pending proceedings by an administrative agency on that same matter.¹⁹⁸ The court is not “ousted,” however, from jurisdiction.

The essential facts of *Mishawaka* can be briefly summarized. Indiana & Michigan Electric Co.¹⁹⁹ is a vertically integrated electric power company which generates and markets electric power to wholesale and retail customers in Indiana and Michigan. The plaintiffs were municipal electric power companies operating in Mishawaka, Indiana, that purchased electric power wholesale from I & M and then competed with it in marketing the power to retail customers. The plaintiffs found themselves caught in a “cost-price” rate squeeze that threatened to drive them out of business when I & M began charging them a wholesale rate *higher* than the retail rate it charged its direct-buying retail customers.²⁰⁰ However, the wholesale rate, after first

195. 1977-2 Trade Cas. ¶ 61,587 (7th Cir. 1977).

196. A further argument that could certainly have been in issue in *Mishawaka*, but which the defendant apparently failed to raise, concerns the Supreme Court's decision in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). In *Pennington*, the Supreme Court construed *Noerr* (See note 178 *supra*) as barring an antitrust suit based on an alleged conspiracy between a labor union and a group of large employers to squeeze smaller employers out of the industry by petitioning the Secretary of Labor to impose an unreasonably high wage requirement. In so holding, the Court said

Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

381 U.S. at 670. Taken literally, this language would seem to squarely apply to I & M's activity in *Mishawaka*, *i.e.*, petitions for rate determinations by public bodies. However, the Supreme Court added in a footnote to *Pennington* that evidence of such a petition, if relevant, may nevertheless be used to prove some *other* transaction subject to antitrust scrutiny. *Id.* at 670 n.3. Arguably, the rationale behind this footnote covers the situation in *Mishawaka*. Since the activity in *Mishawaka* was directed at something outside the province of either the federal or the state agencies, *viz.* the rate squeeze, *Noerr*, as interpreted in *Pennington*, does not apply.

197. See *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

198. See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). See also *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973).

199. Hereinafter referred to as I & M.

200. 1977-2 Trade Cas. ¶ 61,587 at 72,389.

being formulated by I & M, had been approved by the Federal Power Commission, while the retail rate, again after being formulated by I & M itself, had been approved by state regulatory agencies.²⁰¹

The plaintiffs reacted by bringing an antitrust action against I & M alleging monopolization and attempted monopolization in violation of section 2 of the Sherman Act.²⁰² I & M moved to dismiss the complaint for lack of subject matter jurisdiction or for failure to state a claim and, in the alternative, to stay the proceeding pending a then on-going proceeding of the Federal Power Commission involving a wholesale rate request made after the filing of the lawsuit.²⁰³ The case came to the Seventh Circuit on interlocutory appeal after the district court denied I & M's motions.²⁰⁴

I & M's challenge to the complaint involved a three-pronged attack that blended the doctrines of state action, exclusive jurisdiction, and primary jurisdiction. The retail rate, I & M argued, was exempt from antitrust scrutiny under the state action exemption since expressly approved by state regulatory bodies.²⁰⁵ Similarly, the wholesale rate was protected from antitrust attack by the exclusive jurisdiction doctrine, since approved by the Federal Power Commission.²⁰⁶ In any event, the defendant further contended, antitrust proceedings should be stayed pending the on-going proceeding of the Federal Power Commission, since the commission itself was supposed to consider the "cost-price" squeeze when deciding upon the reasonableness of a proposed wholesale rate.²⁰⁷

The court's treatment of these issues is somewhat hazy. Nevertheless, it seems to boil down to the following argument. Even assuming that the state action and exclusive jurisdiction doctrines would have precluded a direct attack on I & M's wholesale and retail rates, neither doctrine applied to the rate squeeze, since this squeeze fell between and *outside* the effective jurisdiction of each of the agencies involved. The state agencies could fix the retail rates but could not control the interstate wholesale rates.²⁰⁸ Simi-

201. *Id.* at 72,390.

202. 15 U.S.C. § 2 (1970).

203. 1977-2 Trade Cas. ¶ 61,587 at 72,390.

204. *Id.* at 72,391.

205. *Id.* at 72,390.

206. *Id.*

207. When the action was originally brought, the Commission was not required to consider "cost-price" squeezes that might result from proposed wholesale rates. Rather, the Commission had simply inquired into whether the proposed wholesale rate was within a "zone of reasonableness." After the district court in *Mishawaka* had handed down its opinion, however, the Supreme Court specifically held that "cost-price squeezes" between wholesale and retail rates should be considered by the Commission when setting the wholesale rates. *Federal Power Commission v. Conway Corp.*, 426 U.S. 271 (1976). Since I & M had, subsequent to the initiation of the *Mishawaka* lawsuit, petitioned the Commission for a new wholesale rate, I & M argued that the issue of the squeeze would necessarily be dealt with by the Commission, so that the court should at least stay its proceedings pending this agency action.

208. 1977-2 Trade Cas. ¶ 61,587 at 72,392.

larly, even though the Federal Power Commission was supposed to consider the retail rates when passing upon the wholesale rates, it still had to set the wholesale rates within a "zone of reasonableness." To the extent that the retail rates fell below this range, even the Commission was powerless to eliminate the squeeze.²⁰⁹ Indeed, the only party with the effective power to avoid the squeeze was I & M itself, since it had freely chosen to create the problem in the first instance by submitting wholesale rates to the federal agency that were higher than the retail rates submitted to the state agencies.²¹⁰ The rate squeeze, unlike the individual rates, was thus something that fell outside the mandate of the respective agencies, making both the state action and the exclusive jurisdiction doctrines inapplicable.

The court further bolstered its holding that the exclusive jurisdiction doctrine did not apply by analogizing the state action case of *Cantor v. Detroit Edison Co.*²¹¹ to the doctrine of exclusive jurisdiction. The court first interpreted *Cantor* as suggesting "two geneses to such an exemption:" first, the unfairness of holding a private citizen liable for "conduct imposed by the direct command of the sovereign;" and second, avoidance of a direct clash between a particular application of the antitrust laws and a particular regulatory scheme.²¹² The court concluded that the first of these factors did not apply, since the rate squeeze resulted from I & M's own actions and not from an agency mandate.²¹³ With respect to the second factor, the court noted that although the Commission has the power to fix rates for future application, it cannot reopen the book on past rates, let alone award relief to parties injured by past erroneous rates.²¹⁴ The court therefore concluded that there was no apparent conflict between the plaintiffs' backward-directed antitrust case and the Commission's forward-directed regulatory scheme.²¹⁵

Turning next to the question of primary jurisdiction, the court considered the following factors when deciding whether to stay the plaintiffs' antitrust action pending completion of the Commission's on-going administrative action: avoiding possible inconsistencies between the antitrust action and the Commission's regulatory scheme; the possibility that the Commission's findings might resolve the question of I & M's claimed antitrust immunity; and the benefits to be gained by using the Commission's expertise in resolving particular types of issues.²¹⁶ In holding that these factors did

209. *Id.*

210. *Id.* at 72,393.

211. 428 U.S. 579 (1976). See the discussion of *Cantor* in the text accompanying note 184 *supra*.

212. 1977-2 Trade Cas. ¶ 61,587 at 72,392.

213. See text accompanying note 210 *supra*.

214. 1977-2 Trade Cas. ¶ 61,587 at 72,393.

215. *Id.* at 72,392.

216. *Id.* at 72,394.

not apply to the case, and that the Commission therefore did not have primary jurisdiction, the court utilized essentially the same reasoning that it had used to strike down the exclusive jurisdiction argument. It again noted that the forward-directed thrust of the Commission's regulatory scheme is not inconsistent with the type of relief the plaintiffs were seeking.²¹⁷ Even if the plaintiffs obtained damages and an injunction ordering I & M to end the rate squeeze, this would simply mean that I & M would have to file a new wholesale rate with the Commission.²¹⁸ Similarly, the court again noted that the Commission's regulatory emphasis is on setting a "reasonable" wholesale rate and not necessarily on avoiding a rate squeeze.²¹⁹ The Commission's more limited expertise, therefore, would not "materially advance the district court's fact-finding capacity or aid the district court's determination of the extent of any possible antitrust immunity."²²⁰ Primary jurisdiction being inapplicable, the district court could continue its probe into the matter.

Significance of Kurek and Mishawaka

Read together, *Kurek* and *Mishawaka* suggest three factors for practitioners to consider when trying to develop, or defend, a case in which regulatory action by a federal or state agency is arguably involved.

First, what type of agency is involved: federal or state? If the concerned agency is a state agency, then the state action exemption may be an issue in the case. If the agency is federal, the possibly relevant defenses would be based on the doctrines of exclusive jurisdiction and primary jurisdiction. *Kurek* and *Mishawaka* indicate that this distinction may, however, be primarily a matter of labeling. *Kurek* noted that the state action considerations in *Cantor* involved "factors akin to those used to determine whether federal agency regulation of a business produces an implied anti-trust immunity."²²¹ Similarly, *Mishawaka* considered *Cantor*, a state action case, at length in evaluating a claim of exclusive jurisdiction of a federal agency.²²² Both *Kurek* and *Mishawaka* thus suggest that the doctrines are premised on similar bases.

Second, was the alleged anti-competitive activity commanded by the regulatory agency or voluntarily entered into by the defendant? *Kurek* and *Mishawaka* make it clear that if either the state action exemption or the exclusive jurisdiction doctrine is to apply, the challenged activity, in the words of *Cantor*, must have been "imposed by the direct command of the

217. *Id.* at 72,395.

218. *Id.*

219. *Id.*

220. *Id.* at 72,396.

221. 557 F.2d at 589.

222. See text accompanying note 211 *supra*.

sovereign." If the challenged activity was instead something over which the defendant itself had discretionary control, and which the concerned agency did not or could not command it to do (for example, the "rate squeeze" involved in *Mishawaka*), then neither doctrine will shield the activity from antitrust scrutiny.²²³

Third, is the regulatory agency actively engaged in regulating activities of the type being challenged? In *Mishawaka*, the Seventh Circuit argued that one of the bases under *Cantor* for implying an antitrust exemption is that Congress may not have intended to superimpose the antitrust laws as an additional—and potentially conflicting—regulatory scheme, if the concerned state or federal agency is actively engaged in regulating the area.²²⁴ *Mishawaka* emphasized that this potential conflict does not exist when the regulatory agency's remedial powers cannot fully protect the rights of the injured parties. It is therefore critical to ask just what the agency can and cannot do, as well as what it has actually chosen to do, in implementing its regulatory scheme. If the challenged activity falls within an area expressly or impliedly reserved by state law to a state regulatory agency, and that agency has actually "commanded" the activity, then the state action exemption will apply. Similarly, if federal legislation expressly or impliedly places the matter within the regulatory power of a federal agency, and the agency has shown an actual willingness to exercise that power,²²⁵ then the doctrine of exclusive jurisdiction will apply. Finally, if the matter is one which may be reached by an on-going proceeding of a federal regulatory agency, so that the agency may either itself resolve the matter or at least provide administrative expertise useful to the judiciary in handling the problem, then the doctrine of primary jurisdiction will apply. If, however, the matter is one over which the concerned agency has no effective power, none of these doctrines will be applicable.

CONCLUSION

Several antitrust cases were before the Seventh Circuit during its 1977 session. This article has discussed the more significant of these decisions, involving the following quite diverse substantive and procedural issues: (1)

223. See text accompanying notes 208-210 *supra*. Note, however, the possible applicability of the *Noerr-Pennington* doctrine where the defendant, having such discretionary control over the activity, has petitioned a government agency to approve part of all of the activity. See notes 178 and 196 *supra*.

224. See text accompanying note 212 *supra*.

225. See *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975). In *Gordon*, the Court implied that an important factor in determining the applicability of the exclusive jurisdiction doctrine is the regulatory agency's willingness to exercise its power as demonstrated through the agency's actions.

definition of a "relevant product market" for merger and monopolization cases;²²⁶ (2) respondents' right to withdraw from consent orders and consent decrees in actions brought by the Federal Trade Commission or the Justice Department;²²⁷ (3) definition of the "interstate commerce" jurisdictional requirement of the Sherman Act;²²⁸ (4) venue over foreign parent corporations based upon activities of their local subsidiaries;²²⁹ (5) plaintiffs' right to obtain grand jury transcripts for use in private treble damages actions;²³⁰ (6) definition of the "state action" doctrine;²³¹ (7) definition of the "exclusive jurisdiction" doctrine;²³² (8) definition of the "primary jurisdiction" doctrine.²³³

Each of the issues has been approached from the pragmatic standpoint of how best to help the practitioner. Thus, the discussion of each of these issues closes with a list of probing questions and answers that antitrust practitioners will hopefully find helpful in making more effective use of the law as it now stands in the Seventh Circuit.

226. See text beginning at note 3 *supra*.

227. See text beginning at note 44 *supra*.

228. See text beginning at note 82 *supra*.

229. *Id.*

230. See text beginning at note 123 *supra*.

231. See text beginning at note 169 *supra*.

232. *Id.*

233. *Id.*