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Trade Regulation—Administrative Law—All Writs Act—Power of Court of Appeals to Issue Preliminary Injunction upon Petition of Federal Trade Commission.—*FTC v. Dean Foods Co.*

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press, falls below a high standard of business ethics and completely vitiates the goals of the rule.⁴¹

STEPHEN C. UNSINO

Trade Regulation—Administrative Law—All Writs Act—Power of Court of Appeals to Issue Preliminary Injunction upon Petition of Federal Trade Commission.—*FTC v. Dean Foods Co.*¹—The Federal Trade Commission petitioned the Seventh Circuit to enjoin temporarily the consummation of a merger between the respondents, Dean Foods Company and Bowman Dairy Products. The Commission had issued a complaint against the respondents under Section 7 of the Clayton Act² and Section 5 of the FTC Act,³ but no hearing had been held on the complaint.⁴ The Commission applied for the preliminary injunction on the grounds that it was "probable" that the proposed merger would be found illegal, and that upon consummation of the merger, Bowman would lose its identity as a separate enterprise and the two companies could not then be effectively restored to their original status.⁵ The Seventh Circuit dismissed the petition on the basis that the FTC had no authority to institute proceedings for temporary relief in the court of appeals.⁶ The Supreme Court granted certiorari, and then, in a 5-4 decision, reversed and remanded.⁷ **HELD:** The court of appeals has the authority to grant a preliminary injunction against the consummation of a merger that will probably be found illegal, and the FTC has the authority to apply to the court of appeals for such preliminary relief. The court of appeals derives its power to grant injunctive relief from the All Writs Act.⁸ The Commission has the "incidental power" to petition the court of appeals for injunctive relief under the All Writs Act

⁴¹ The SEC has recently expressed great concern over the fact that, despite compliance with strict disclosure standards, corporate insiders are able to trade on the basis of material information well before it has had time to be adequately disseminated to the public. This, it is felt, "raises serious questions of law and propriety." *Wall Street Journal*, Nov. 17, 1966, p. 2, col. 2 (quoting SEC Chairman M. F. Cohen).

¹ 384 U.S. 597 (1966).

² As amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

³ As amended, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45 (1964).

⁴ Normally, under the procedures of the FTC, a complaint is issued against parties whose conduct is believed to be in violation of the Clayton Act, a hearing is held on the complaint, and a "cease and desist" order is issued if a violation is found at the hearing. See *FTC Enforcement and Procedure*, 3 Trade Reg. Rep. ¶ 9574 (1966). This is the only way the FTC itself can prevent a merger.

⁵ Under the terms of the merger, Dean was to acquire all of Bowman's dairy operations, which Dean was to consolidate into its own. Bowman was to cease to be a dairy business and was to take the form of an investment fund with the name "Bowfund Corporation." The assets of the fund were to be the cash and securities excepted from the sale of the assets to Dean. Brief for Petitioner, p. 8.

⁶ *FTC v. Dean Foods Co.*, 356 F.2d 481 (7th Cir. 1966).

⁷ On remand the Seventh Circuit granted the injunction. No. 15493, 7th Cir., July 18, 1966. Subsequently, the FTC ruled that the merger was illegal. 3 Trade Reg. Rep. ¶ 17,765 (1966).

⁸ 28 U.S.C. § 1651(a) (1964).

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since it has been entrusted with the enforcement of the Clayton Act. The Court further stated that the failure of Congress to enact legislation expressly granting the FTC power to petition for preliminary injunctive relief did not imply that this power did not already exist.

Mr. Justice Fortas, speaking for the dissenters, labeled the decision of the Court as "totally novel" and unsupported by any prior Supreme Court decision, "either specifically or directly, or by principle or analogy." He argued that the Clayton Act expressly vests the power to grant preliminary relief in the district courts and the power to invoke such relief in the United States attorneys. Further, Congress *by design* did not give these powers to the court of appeals or to the FTC. Both the Commission and Congress have implicitly recognized that no such powers have been granted.⁹

Prior to the ruling in *Dean*, there was a conflict among the circuits as to their authority to enjoin temporarily the consummation of a suspect merger upon petition by an agency charged with enforcing the Clayton Act. The Ninth Circuit upheld this authority in *Board of Governors of Fed. Reserve Sys. v. Transamerica Corp.*,¹⁰ while the Second Circuit specifically denied any such authority in *FTC v. International Paper Co.*¹¹ There was also considerable question within the FTC itself as to its authority to seek prehearing relief in suspect merger cases.¹²

When the Supreme Court in *Dean* finally upheld the power of the court of appeals to issue injunctions to preserve the status quo, its decision was not based upon authority from the Clayton Act, but rather on the authority of the All Writs Act. This act provides, *inter alia*, that "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹³ This use of the All Writs Act raises two immediate questions: (1) does a court of appeals act "in aid of [its appellate] jurisdiction" at the prehearing stages of an administrative proceeding? and, (2) is an injunction to preserve the status quo, under the facts in *Dean*, a writ that is "agreeable to the usages and principles of law"?

The first question actually concerns when an appellate court's jurisdiction arises so that it may issue writs in aid thereof. The classical theory is

⁹ In 1956 the Commission submitted to the 84th Congress legislation that would amend the Clayton Act to empower the Commission to "bring suit in a district court of the United States . . . to prevent and restrain violation of section 7 of this Act." Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 15, at 29-30 (1956). Although the Commission's power was seriously questioned at these hearings, Congress neither enacted nor rejected this or subsequent proposals. The Court has traditionally held that to interpret congressional nonaction is to "venture into speculative unrealities." *Helvering v. Hallock*, 309 U.S. 106, 120 (1940).

¹⁰ 184 F.2d 311 (9th Cir. 1950).

¹¹ 241 F.2d 372 (2d Cir. 1956), 32 N.Y.U.L. Rev. 1297 (1957). "With all due respect to our brethren of the Ninth Circuit, we are . . . constrained to disagree with the conclusion arrived at in the Transamerica case." *Id.* at 374.

¹² See Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 45 (1958).

¹³ 28 U.S.C. § 1651(a) (1964).

that "appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken."¹⁴ This jurisdictional theory, however, has now been superseded by several decisions which have held that appellate jurisdiction arises with the "existence of a right to review . . . and not the prior exercise of that right."¹⁵ According to the latter theory, the appellate court's right to review proceedings arises as soon as the suit has been instituted below.¹⁶ This broader concept of appellate jurisdiction does not require an appeal to be pending for a court of appeals to issue a writ "in aid of [its appellate] jurisdiction."¹⁷ One state court has classified this power of appellate courts to issue pre-appeal original writs as an *inherent* power necessary to preserve the res of the litigation and the status quo of the parties.¹⁸ The Court in *Dean* used this broader concept to grant the court of appeals jurisdiction to issue a writ at the prehearing stage of an FTC administrative proceeding. Appellate jurisdiction was held to arise even before an adjudication by a lower tribunal.

To answer the second question, whether the use of an injunction in *Dean* is in itself "agreeable to the usages and principles of law," it may be helpful to look at the development and previous use of the All Writs Act. The present form of the act as stated in the Judicial Code of 1948 is a combination of three different statutes dating as far back as the Judiciary Act of 1789.¹⁹ These include the original All Writs Statute of the Judiciary Act of 1789,²⁰ a statute involving prohibition and mandamus²¹ (also of the 1789 Judiciary Act), and a later statute involving writs of ne exeat.²² The present form of the act makes "all writs," including mandamus, prohibition, certiorari, injunction, and the auxiliary writ of habeas corpus, available to a federal court when "necessary or appropriate" in aid of its jurisdiction.²³ The more common writs issued under the authority of the act have been those of mandamus and prohibition,²⁴ but injunctions to preserve the status quo have also been issued pursuant to the act.²⁵ Although no reported case, other than *Transamerica*, has been found in which a court of appeals issued

¹⁴ *The Alicia*, 74 U.S. (7 Wall.) 571, 573 (1868).

¹⁵ *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 955 (8th Cir. 1904). Accord, *Board of Governors of Fed. Reserve Sys. v. Transamerica Corp.*, supra note 10, at 315.

¹⁶ *Barber Asphalt Paving Co. v. Morris*, supra note 15, at 953.

¹⁷ *Ex parte United States*, 287 U.S. 241, 246 (1932); *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *Whittel v. Roche*, 88 F.2d 366, 370 (9th Cir. 1937).

¹⁸ *Finlen v. Heinze*, 27 Mont. 107, 119, 69 Pac. 829, 833 (1902).

¹⁹ 6 Moore, *Federal Practice* ¶ 54.10[1], at 59 (2d ed. 1965).

²⁰ Rev. Stat. § 716 (1875).

²¹ Rev. Stat. § 688 (1875).

²² Rev. Stat. § 717 (1875).

²³ 6 Moore, *op. cit.* supra note 19, ¶ 54.10[2], at 61-62.

²⁴ *Ibid.* Also, the cases cited in *Dean* as examples of the use of writs in aid of appellate jurisdiction do in fact demonstrate that the most common writ is that of mandamus directed to an inferior court to remove an obstruction to an appeal. See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943); *Ex parte Bradstreet*, 32 U.S. (7 Pet.) 634 (1833); *Ex parte Crane*, 30 U.S. (5 Pet.) 188 (1831).

²⁵ *United States v. Western Pa. Sand and Gravel Ass'n*, 114 F. Supp. 158 (W.D. Pa. 1953).

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an injunction to preserve the status quo,²⁶ its authority to do so in appropriate circumstances has been recognized.²⁷ In addition, the district court has been directed to issue such an injunction when the appellate court has declined to do so.²⁸ District courts have often issued such injunctions, relying on their inherent authority to protect their jurisdiction.²⁹ Thus, it can scarcely be denied that an injunction to preserve the status quo is a writ "agreeable to the usages and principles of law." Once it was assumed that the res of the litigation was about to disappear, the use of an injunction in *Dean* to preserve the res became "agreeable to the usages and principles of law."

The Court cites two cases to illustrate the appropriateness of invoking the All Writs Act under the facts in *Dean*: *Arrow Transp. Co. v. Southern Ry.*³⁰ and *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*³¹ As Justice Fortas emphasized in his opinion for the dissent in *Dean*, neither case is exactly on point.

In *Arrow*, a petition was filed in a federal district court by a private transportation company to enjoin the proposed rate reductions of one of its competitors. The injunction was denied, however, on the grounds that the Interstate Commerce Commission had been granted the exclusive power to suspend rates, and that the federal courts therefore lacked subject matter jurisdiction. The Supreme Court's opinion (affirming) only recognized in a footnote a court's power to preserve the status quo by injunction:

Thus we do not reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action.³²

In *Whitney*, while an appeal from a Federal Reserve Board decision approving a new federal bank was pending, several state banks sought to enjoin the Comptroller of Currency from issuing the necessary certificate. A federal district court granted the injunction and the Fifth Circuit affirmed.³³ The Supreme Court reversed on the theory that primary jurisdiction was in the Federal Reserve Board and not in the district court. The Court also recognized the power of the court of appeals to protect its

²⁶ But see *Public Util. Comm'n v. Capital Transit Co.*, 214 F.2d 242, 251-54 (D.C. Cir. 1954), where an appendix to the court's opinion gives the text of such an injunction which the court had previously issued. Cf. Fed. R. Civ. P. 62(g).

²⁷ E.g., *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962). See *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942).

²⁸ *Public Util. Comm'n v. Capital Transit Co.*, supra note 26, at 250.

²⁹ E.g., *Muskegon Piston Ring Co. v. Gulf & W. Indus., Inc.*, 328 F.2d 830, 831 (6th Cir. 1964).

³⁰ 372 U.S. 658 (1963).

³¹ 379 U.S. 411 (1965).

³² 372 U.S. at 671 n.22.

³³ 323 F.2d 290 (5th Cir. 1963).

jurisdiction by injunction both while considering the appeal from the Board's action and in the event of a remand to the Board.

The fact that in *Whitney* a petition for review had been filed *prior* to an injunction highlights the distinctions between *Whitney* and *Dean*. In *Dean*, no petition for review of an administrative proceeding had been filed and, in fact, no administrative proceeding had yet been held. Furthermore, in both *Arrow* and *Whitney*, original injunctions were first sought in district courts, not the court of appeals. Therefore, neither case can be cited as authority for an appellate court's power to issue original writs prior to an appeal. Both cases, however, provide authority for the proposition that an appellate court may issue injunctions to preserve the status quo when that court has jurisdiction to review an administrative proceeding.³⁴ If an appellate court's jurisdiction arises even before adjudication by the inferior tribunal, it therefore follows that the court of appeals does have power to enjoin suspect mergers at the request of the FTC even though no administrative hearing has been held.

There still remains, however, the question of whether Sections 15 and 16 of the Clayton Act³⁵ have impliedly amended the All Writs Act to prohibit its application when the FTC is the petitioner. Section 15 of the Clayton Act provides that:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

Section 16 further provides aggrieved private parties the right to seek preliminary injunctive relief in the district courts if their interests are threatened by a merger suspected of violating the Clayton Act. Nowhere in the Clayton Act is the FTC given any authority to seek preliminary injunctive relief. It can be argued, therefore, that the express scheme of relief set forth in sections 15 and 16, and the exclusion of the FTC from this scheme, imply a congressional intent to restrict the FTC and the circuit courts from respectively seeking and providing temporary injunctions to preserve the status quo. This was the theory adopted by the Second Circuit in *FTC v. International Paper Co.*³⁶

The Court in *Dean* could have easily found such a congressional scheme in the Clayton Act. This would have been analogous to the Court finding, as it often has, a congressional scheme in an area of federal legislation to restrict the power in that area to federal agencies, as opposed to the separate

³⁴ In *Arrow*, this proposition appears to be clearly dictum, but it is arguable that in *Whitney* it is part of the *ratio decidendi*.

³⁵ 38 Stat. 736 (1914), 15 U.S.C. §§ 25, 26 (1964).

³⁶ *Supra* note 11. The court stated that "since the pattern of enforcement adopted by the Congress in the Clayton Act makes clear that the Commission was not intended to have such authority, the 'all writs' section cannot be invoked to circumvent this limitation." *Id.* at 373.

states.³⁷ This is the doctrine commonly known as federal preemption. Finding a scheme to restrict powers in *Dean* differs from finding a general scheme of federal preemption in that the former concerns the division of power between federal agencies and the latter concerns the division of power between federal agencies and the states. Also, federal preemption decisions involve the complex question of federalism.³⁸ In *Dean*, however, there was no such constitutional issue. It should follow that a "preemption" decision in *Dean* would have been easier to make than the federal preemption decisions which the Court has often made. Furthermore, even with the complex constitutional issues involved, the Court has not hesitated in finding federal preemption in the absence of an explicit congressional intent.³⁹ For example, the Court has interpreted Section 10(a) of the National Labor Relations Act⁴⁰ as giving to the National Labor Relations Board exclusive power to hear and decide all cases involving unfair practices under the act.⁴¹ On its face, section 10(a) no more grants the NLRB exclusive power to hear cases than Section 15 of the Clayton Act grants the Justice Department exclusive power to seek injunctive relief.⁴²

The Court, by not construing Sections 15 and 16 of the Clayton Act to bar the FTC from seeking injunctions, has apparently concluded that there was an unintentional gap in the enforcement provisions of the act, although the Court made no direct statement in its opinion to that effect. The FTC and the Justice Department have been given concurrent power to enforce the Clayton Act.⁴³ However, since the FTC lacked power on the face of the Clayton Act to obtain preliminary injunctions, its authority, prior to *Dean*, was actually inferior to that of the Justice Department. Upon finding a "probable" violation of section 7, the FTC could only request the Justice Department to seek a preliminary injunction under section 15, and this would result in certain problems, as set forth by the Antitrust Subcommittee of the House Committee on the Judiciary:

[C]areful scrutiny of the language of section 15 of the Clayton Act empowering the Attorney General to seek injunctions reveals

³⁷ See, e.g., *Garner v. Teamsters Union*, 346 U.S. 485 (1963). See generally Petro, *Federal Pre-Emption—A Comment*, 33 N.Y.U.L. Rev. 691 (1958).

³⁸ See generally Flynn, *Federalism and State Antitrust Regulation* 109-38 (1954).

³⁹ See, e.g., *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). See Petro, *supra* note 37, at 694.

⁴⁰ As amended, 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964).

⁴¹ *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957); *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957).

⁴² Section 10(a) provides that "the Board is empowered to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964). Compare *Arrow Transp. Co. v. Southern Ry.*, *supra* note 30 (ICC has exclusive power to pass on the legality of proposed transportation rates); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, *supra* note 31 (Federal Reserve Board has the exclusive power to pass on the formation of bank holding companies).

⁴³ Clayton Act §§ 11, 15, 38 Stat. 734, 736 (1938), as amended, 15 U.S.C. §§ 21, 25 (1964); *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 352 (3d. Cir. 1964).

that its provisions are not sufficient to carry out the intent of Congress in amended section 7. Under the provisions of section 15, if the Attorney General were successful in obtaining an injunction from a district court in aid of the Federal Trade Commission, the court itself would be required to "proceed, as soon as may be, to the hearing and determination of the case." Thus, upon the obtaining of a district court injunction, the administrative proceeding before the Federal Trade Commission would be at an end and the Commission would no longer have any power to hear and determine the case. This would defeat the statutory intent expressed in sections 7 and 11 of the Clayton Act of having the Federal Trade Commission hear and decide merger cases.⁴⁴

Under this interpretation of section 15, the FTC would be deprived of jurisdiction in a large number of merger cases. The Court's use of the All Writs Act to correct this gap indicates a determination that Congress' intent was to give the FTC full power to enforce the Clayton Act.⁴⁵ Providing the FTC with this full power, however, has posed some new problems.

First, there is the question of whether the Commission will be able to conduct an objective administrative hearing on the merits of a case after it has argued for an injunction on the basis that the proposed merger will "probably" be found illegal. Although this problem does not appear to be as great a threat to the equitable administration of the Clayton Act as Mr. Justice Fortas would argue, it is a problem that is inherent in the FTC's new power because of the Commission's nature as an administrative agency. As an agency, the FTC investigates, prosecutes, and rules on suspected violations of the Clayton Act.⁴⁶ Although these activities are carried on within different divisions of the Commission,⁴⁷ it is difficult for one arm of the Commission to ignore what another arm has done. However, there are certain provisions within the FTC rules which would provide at least some assurance of a fair hearing after a preliminary injunction had been issued.

The Commission has a separate office of hearing examiners whose members are involved in neither the investigating nor prosecuting activities of the Commission.⁴⁸ It is their duty to conduct "fair and impartial" hear-

⁴⁴ H.R. Rep. No. 1889, 84th Cong., 2d Sess. 10 (1956). See note 9 supra.

⁴⁵ This theory is supported by the fact that the court of appeals, by issuing an injunction to preserve the status quo at the prehearing stage of an FTC proceeding, acts not only in aid of its own jurisdiction but also in aid of the FTC's jurisdiction. The res of the litigation has also been preserved to allow effective enforcement of a probable FTC "cease and desist" order. From the general tenor of the *Dean* decision, the inference can be drawn that the Supreme Court was more interested in preserving the res for the FTC than for the court of appeals. This would indicate that the Court used the concept of protection of appellate jurisdiction primarily as a means of providing the FTC an effective course of action.

⁴⁶ 3 Trade Reg. Rep. ¶ 9555 (1966).

⁴⁷ Id. ¶ 9556.

⁴⁸ Id. ¶ 9799.08. Cf. Administrative Procedure Act § 5(c), 60 Stat. 240 (1946), 5 U.S.C. § 1004(c) (1964).

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ings on the merits of a case.⁴⁹ Under the Commission's rules of procedure, a party to an FTC action may file a motion seeking removal of an examiner believed to be biased.⁵⁰ There has apparently been no procedure yet established for exercising the Commission's new power to seek preliminary relief. Under the Commission's present organization, the most logical office to file a petition for preliminary relief would be the office of the General Counsel. This office presently defends the Commission's decisions in the courts of appeal.⁵¹ If the FTC's new power is administered in this way, there should at least be no personal involvement on the part of the hearing officers in a petition for a temporary injunction brought before the court of appeals. In any event, it should be no more difficult for the Commission to make an objective decision after a preliminary injunction has been granted than it is for a district court to do so.

Second, there is the question of whether a preliminary injunction may cause the proposed merger to be abandoned, whether the merger is actually illegal or not. For example, if a motive in the proposed merger is to gain a tax benefit in a given time period, a delay in the consummation of the merger may frustrate its purpose.⁵² Also, if the merger is delayed, the parties may simply lose interest. However, the problem of a merger being abandoned because of a preliminary injunction is not unique to the type of injunction sanctioned in *Dean*. This problem also exists with preliminary injunctions granted by district courts at the request of the Justice Department or private parties. In fact, in any preliminary injunction there is the inherent danger that an enjoined party will suffer damages before a final determination on the merits of the case. If it is probable that a given merger will be abandoned because of a preliminary injunction, this result will have to be weighed against the public and private damage that may occur if the merger is allowed to go into effect and against the problems of divestiture⁵³ if the merger is subsequently found illegal.⁵⁴ Such an evaluation is made whenever a preliminary injunction is sought.⁵⁵

Third, there is the question of whether the new FTC power to seek preliminary relief will turn the courts of appeal into evidentiary tribunals. These courts are already burdened with heavy calendars and are not equipped to make the fact determinations necessary in preliminary injunctive hearings.⁵⁶ Such hearings usually involve considerable time and testimony.⁵⁷ Furthermore, the strict section 7 policy manifested by the Supreme

⁴⁹ 16 C.F.R. § 3.15(c) (Supp. 1966).

⁵⁰ 16 C.F.R. § 3.15(g)(2) (Supp. 1966).

⁵¹ 3 Trade Reg. Rep. ¶ 9799.06 (1966).

⁵² See Comment, 32 N.Y.U.L. Rev. 1297, 1300-01 (1957).

⁵³ Cf. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

⁵⁴ See generally Note, 79 Harv. L. Rev. 391 (1965); Comment, 40 N.Y.U.L. Rev. 771 (1965).

⁵⁵ E.g., *Carpenter v. Knollwood Cemetery*, 188 Fed. 856 (C.C.D. Mass. 1911).

⁵⁶ Cf. *United States v. Barnett*, 376 U.S. 681, 724 (1964) (Black, J., dissenting).

⁵⁷ See *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), aff'd, 320 F.2d 509 (3d Cir. 1963) (Hearing on petition from Justice Department for preliminary injunction took five days and produced 800 pages of testimony.); *United States v. F.M.C. Corp.*, 218 F. Supp. 817 (N.D. Cal. 1963).

Court in recent years⁵⁸ is an indication that many petitions for preliminary relief will actually be brought before the court of appeals.

A congressional remedy to this problem might be suggested. This may take either of two legislative forms. Congress may explicitly deny to the FTC the power to seek preliminary relief in any tribunal or, as originally requested by the FTC, Congress may explicitly grant to the FTC the power to seek preliminary relief in the district courts rather than in the courts of appeal as per the *Dean* decision. Under the latter solution, injunctive petitions would be heard before tribunals with established facilities for handling complex fact determinations. This would avoid the extra burden placed on the courts of appeal by the Court in *Dean*. Furthermore, Congress could explicitly clarify its actual intent in Sections 15 and 16 of the Clayton Act.

Although there may be some doubt as to whether the result in *Dean* comports with congressional intent, it is consistent with the well-established administrative law doctrine of "primary jurisdiction." That doctrine, as stated by the Supreme Court, establishes that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."⁵⁹ A result contrary to that reached in *Dean* would have deprived the FTC of jurisdiction in any case in which a preliminary injunction was required. In such a case, the FTC would be forced to turn to the Justice Department, and, since the court which hears the Justice Department's petition must then proceed to hear the case on the merits, the FTC would have to be passed over automatically, and the application of the doctrine of primary jurisdiction would be defeated.⁶⁰

Since the Court's decision in *United States Alkali Export Ass'n v. United States*⁶¹ in 1945, the problem of primary jurisdiction has not arisen with

⁵⁸ See, e.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), 8 B.C. Ind. & Com. L. Rev. 163 (1966).

⁵⁹ *Far E. Conference v. United States*, 342 U.S. 571, 574 (1952). See generally 3 Davis, *Administrative Law* §§ 19.01-09 (1958).

⁶⁰ The Commission has used this argument in its requests for legislation granting it the right to petition for injunctions. The dialogue between Mr. Paul Rand Dixon (then Counsel to the Senate Antitrust Subcommittee) and Mr. John W. Gwynne (then Chairman of the FTC) at the Senate hearings in 1958 illustrates the attitude of the Commission:

Mr. Dixon. Has the Commission ever requested the Department of Justice, in any section 7 case, to seek an injunction in its own behalf?

Mr. Gwynne. You mean in Justice behalf?

Mr. Dixon. No, on behalf of the Federal Trade Commission suit?

Mr. Gwynne. I do not know of any such case. The difficulty with that—we thought of it, talked about it—the only way we could do that would be, as I understand it, to turn the case over to Justice.

Mr. Dixon. You would surrender your jurisdiction if you did that?

Mr. Gwynne. That is right.

Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 47-48 (1958).

⁶¹ 325 U.S. 196 (1945).

respect to the FTC.⁶² In *Alkali*, the Supreme Court recognized the power of the Department of Justice to institute antitrust suits in the federal courts without initial recourse to the FTC.⁶³ However, this power was recognized only as an answer to *Alkali's* motion to dismiss a Justice Department complaint on the ground that the FTC had primary jurisdiction.⁶⁴ The question has yet to be answered as to who will be granted primary jurisdiction when the FTC issues a complaint at the same time that an action is instituted in a district court. *Dean* would indicate that the Supreme Court may now favor the FTC in such a conflict. Since the Court in *Dean* went out of its way in using the All Writs Act to grant to the FTC powers equal to those of the Justice Department, it would seem unreasonable to predict that the Court would place the FTC in a position inferior to the Justice Department in a primary jurisdiction fight. Furthermore, *Dean* required an implicit decision on the relative powers of the FTC and the Justice Department, since *Dean* effectively granted to the FTC full power to hear all merger cases within its jurisdiction without prior recourse to the Justice Department. This same type of decision, though in a different context, will have to be made to determine whether the FTC or the district courts have primary jurisdiction. There is no apparent reason why the Court will not again favor the FTC.

There is no doubt that the Court in *Dean* did show a favorable attitude toward the FTC. Although there was sufficient precedent for the Court to invoke the All Writs Act prior to an adjudication by a lower tribunal, the Court could have easily distinguished *Dean* from these previous cases on the basis of both *Dean's* unique fact situation and the implications of Sections 15 and 16 of the Clayton Act. The fact that the Court did not choose to do so, but provided the FTC with more extensive power, reaffirms the strict anti-merger policy the Court has demonstrated in recent years.

JAMES A. CHAMPY

Trade Regulation—Concerted Refusal to Deal—Association's Exclusion of Licensed Realtor from Listing Pool—*Grillo v. Board of Realtors*.¹— Defendants in this action are a nonprofit corporation² and its individual member realtors. The corporation operates a "listing pool" in the Plainfield, New Jersey area. The "listing pool" is a system whereby any residential

⁶² 3 Davis, Administrative Law § 19.05, at 23-24 n.1 (1958).

⁶³ During the twenty-eight years between the enactment of the Sherman Act and the passage of the Webb-Pomerene Act, the plenary authority and settled practice of the Department of Justice to institute antitrust suits, without prior proceedings by other agencies, became firmly established. A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may be appropriately brought, would require a clear expression of that purpose by Congress.

325 U.S. at 205-06.

⁶⁴ *Id.* at 198.

¹ 91 N.J. Super. 202, 219 A.2d 635 (1966).

² The defendant board is a member of the National Association of Real Estate Boards and is affiliated with the New Jersey Association of Real Estate Boards.