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The Shifting Jurisdiction Of The Antitrust Laws

THE SHIFTING JURISDICTION OF THE ANTITRUST LAWS

The United States Supreme Court recently construed the interstate commerce jurisdictional requirement of three antitrust statutes.[1] In *Gulf Oil Corp. v. Copp Paving Co.*,[2] the Court defined the so-called "in commerce" requirement of Robinson-Patman Act § 2(a).[3] Likewise, in *Goldfarb v. Virginia State Bar*,[4] the Court construed the "affecting commerce" requirement of Sherman Act § 1,[5] and in *United States v. American Building Maintenance Industries (ABMI)*[6] the Court considered the "engaged in commerce" standard of Clayton Act § 7.[7] While the holding in *Goldfarb* arguably expanded the jurisdictional scope of Sherman Act § 1, the jurisdictional spheres of Robinson-Patman Act § 2(a) and Clayton Act § 7 contracted under the Court's rulings in *Copp Paving* and *ABMI*.

Rather than correlating these jurisdictional changes to antitrust policy goals, the Court based its recent decisions on the language and legislative history of the individual statutes considered. While the Court's approach may be defensible on a case-by-case basis, the impact of *Copp Paving, Goldfarb* and *ABMI* is not restricted to the particular statutes construed in each case. On the contrary, the shifting jurisdictional status of each statute will alter both the practical details of antitrust litigation and the general effectiveness of antitrust policy.

Robinson-Patman Act § 2(a): The "State Line" Test Applied.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act prohibits price-discrimination in interstate commerce. There are three requirements to establish jurisdiction under Robinson-Patman Act § 2(a).[8] First, the defendant must be "engaged

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[1] The Constitution granted Congress the power to "regulate commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8.

[2] 419 U.S. 186 (1974).

[3] 15 U.S.C. § 13(a) (1970).

[4] 95 S. Ct. 2004 (1975).

[5] 15 U.S.C. § 1 (1970).

[6] 95 S. Ct. 2150 (1975).

[7] 15 U.S.C. § 18 (1970).

[8] Clayton Act § 2(a), 15 U.S.C. § 13(a) (1970), *formerly* ch. 323, § 2, 38 Stat. 730 (1914). The Clayton Act was amended in 1936 by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), *formerly* ch. 592, § 1, 49 Stat. 1526 (1936).

The relevant portion of § 2(a) provides:

in commerce." Second, the particular activity of which the plaintiff complains must be in the interstate portion of the defendant's business. Third, at least one of the items bearing a discriminatory price must be "in commerce." The meaning of the latter requirement was the issue before the Court in *Copp Paving.*[9]

Prior to *Copp Paving,* circuit courts were divided on the meaning of the requirement of Robinson-Patman Act § 2(a) that at least one purchase in a discriminatory pricing arrangement be "in commerce." Several courts had indicated that by enacting § 2(a) Congress intended to reach the fullest extent of its power under the commerce clause. Pursuant to this rationale some courts held that § 2(a) reached purely intrastate transactions provided they affected[10] commerce.[11] The Supreme Court has long held that only the "affecting commerce" test must be satisfied to invoke the jurisdiction of statutes which are a full exercise of Congress's constitutional power to regulate commerce.[12] Other courts, however, took a narrower view in construing § 2(a) and required that at least one item involved in discriminatory pricing activity physically cross a state line. This is

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> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . .

[9] 419 U.S. at 188.

[10] The Court has decided that Congress, in exercising its power to regulate commerce among the states, may also control any activity, no matter how local, if it affects interstate commerce. Therefore, an activity need not be "in" interstate commerce to "affect" commerce and thus be subject to federal control. As the Court stated in *Heart of Atlanta Motel, Inc. v. United States:*

> Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the state of origin and destination, which might have a substantial and harmful effect upon that commerce.

379 U.S. 241, 258 (1964). *See* note 27 *infra.*

[11] The following are examples of cases applying the "affecting" commerce doctrine to § 2(a): Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1949); 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); General Shale Prods. Corp. v. Struck Constr. Co., 37 F. Supp. 598 (W.D. Ky. 1941), *aff'd,* 132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943); Abouaf v. J.D. & A.B. Spreckels Co., 26 F. Supp. 830 (N.D. Cal. 1939). *See also* Note, *Antitrust—The Jurisdictional Requirements of Robinson-Patman Act § 2(a) Clarified: Gulf Oil Corp. v. Copp Paving Co., Inc.,* 32 WASH. & LEE L. REV. 939, 941 n.11 (1975).

[12] *See* note 10 *supra.*

the so-called "state line" test.[13] *Copp Paving* settled the difference among the circuit courts by requiring adherence to the "state line" test.[14]

Due to the nature of the respondent's business, the Court in *Copp Paving* confronted a situation that illustrated the differences between the "state line" and "affecting commerce" tests especially well. Copp Paving Co. manufactured asphaltic concrete, or "black top." The two ingredients of this product were gravel and liquid asphalt. Copp Paving was required to purchase the latter ingredient from a group of petroleum refiners, several of which owned corporate subsidiaries directly in competition with the respondent.[15] Copp Paving alleged two § 2(a) violations: first, that the parent corporations charged their subsidiaries lower prices for liquid asphalt than they did to Copp Paving; and, second, that corporate subsidiaries directly in competition with Copp Paving charged lower prices for asphaltic concrete than those in other geographic markets. The market area in which petitioners and respondent competed was totally within California.[16]

In ruling that Robinson-Patman Act § 2(a) jurisdiction was contingent upon meeting the "state line" test, the Supreme Court relied upon the legislative history and explicit wording of the statute.[17] The

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[13] Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 766 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

[14] The Court thus satisfied a line of lower federal court cases which applied the "state line" test to § 2(a): Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972), *rev'd on rehearing*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 116 (1973); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Hiram Walker, Inc. v. A&S Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) (Black, J. dissenting). *See also* Note, 32 WASH. & LEE L. REV. 939, 942 n.13 (1975).

[15] 419 U.S. at 189.

[16] Due to its great weight and its need to be kept at a high temperature, asphaltic concrete was not a highly mobile product. Therefore, the asphaltic concrete market was divided among numerous local competitors. To be profitable, a plant apparently operated within a delivery radius of about 35 miles. As it was used in large amounts on state controlled construction of interstate highways, it was unlikely that any deliveries would cross a state line. Note, 32 WASH. & LEE L. REV. 939, 943 n.17 (1975).

[17] The Supreme Court rejected an analogy of the Robinson-Patman Act's commerce requirement with the similar requirements of the Sherman Act, 15 U.S.C. §§ 1,2 (1970), and the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1970). In dismissing any comparison with the Sherman Act, the Court relied first on the

Court's interpretation of Robinson-Patman Act legislative history and congressional intent rejected the respondent's argument that § 2(a) should have the same jurisdictional scope as the Sherman Act.[18] Rather, the Supreme Court ruled that Congress intended Robinson-Patman Act § 2(a) to have a narrower jurisdictional requirement than the "affecting commerce" test.[19] The Court also stressed the difference in statutory language between Sherman Act § 1 and Robinson-Patman Act § 2(a),[20] holding that the phrase "in restraint of commerce" is more susceptible to an "affecting commerce" interpreta-

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differences in the statutory language of the two acts. *See* note 65 *infra*. The Court further indicated that the differences in statutory language alone showed that Sherman Act jurisdiction was keyed more to the broader "affecting commerce" doctrine than was the language of § 2(a). 419 U.S. at 194.

The second ground for the Court's rejection of the analogy of § 2(a) to the Sherman Act was its prior decision that in the Sherman Act Congress "wanted to go to the utmost extent of its constitutional powers." *See* note 27 *infra*. After considering the congressional history of the Robinson-Patman Act, the Court concluded that the Act was not intended to exercise the full federal commerce clause power. This was based on the deletion in 1936 of the phrase "whether in commerce or not" and the substitution of the phrase "in commerce" in § 2(a). H.R. REP. No. 2951, 74th Cong., 2d Sess. 6 (1936). The Court failed to mention that in agreeing to the substitution of "in commerce" for "whether in commerce or not," the conferees stated: "That [the "whether in commerce or not" provision] was omitted, as the preceding language already covers all discrimination, both interstate and intrastate, that lie within the limits of Federal authority." *Id.*

There has not been total accord on the significance of the deletion. It has been suggested that the deletion was merely a defensive reaction to the Court's decision in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Note, *The Commerce Requirement of the Robinson-Patman Act,* 22 HASTINGS L.J. 1245, 1255 (1971). However, the conference committee report that explained the deletion expressed the opinion that the wording already embodied the furthest reaches of federal power. If it was a fear of *Schechter,* Congress could have used the same "in or directly affecting" commerce provision that was approved in *Schechter.* Note, *Robinson-Patman Act—Price Discrimination Between Two Purely Intrastate Sales by a Corporation Engaged in Interstate Commerce Satisfies the Jurisdictional Requirements of Section 1(a) of the Act,* 86 HARV. L. REV. 765, 771 (1973).

Finally, the Court rejected Copp's contention that § 2(a) should be read in conjunction with the Fair Labor Standards Act. The Supreme Court found significant statutory differences between § 2(a)'s "in commerce" requirement and the FLSA coverage of employees engaged "in commerce or in the production of goods for commerce." FLSA, 29 U.S.C. §§ 206(a), 207(a) (1970). The Court decided that the statutory language and congressional history indicated that the "affecting commerce" doctrine had to be rejected, and that the "state line" test was appropriate for § 2(a). 419 U.S. at 200.

[18] 419 U.S. at 200.

[19] *See* note 17 *supra*.

[20] *Id.*

tion than the "in commerce" language of § 2(a). The Court thus concluded that in light of the Robinson-Patman Act's restrictive wording, application of the "affecting commerce" test would only be appropriate if mandated by express congressional intent.[21] Since the Court found no such intent, it held that § 2(a) claims must satisfy the "state line" test.

Several ramifications of *Copp Paving* extend beyond the mere jurisdictional scope of § 2(a). First, the so-called "underwriting" theory enunciated in *Moore v. Mead's Fine Bread Co.* is no longer a basis for § 2(a) jurisdiction.[22] The "underwriting" theory permitted application of § 2(a) when profits derived from interstate transactions were used to finance purely intrastate price-discrimination. By rejecting this theory, *Copp Paving* effectively condones the use of interstate profits in intrastate price-discrimination. Thus, the ability of a large corporation to finance the local price wars of its intrastate subsidiaries will go unchallenged.

A second effect of *Copp Paving* is to give vertically integrated firms increased opportunities to avoid § 2(a). By requiring the very item bearing the discriminatory price to cross a state line, *Copp Paving* limits § 2(a) enforcement to only those price discriminations which proceed from a final sales outlet. Thus, the effects of price-discrimination could be achieved at the manufacturing level with § 2(a) impunity. Likewise, sales outlets could be strategically located to avoid transactions crossing state lines.[23] Conversely, small sales

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[21] 419 U.S. at 198.

[22] The Court's discussion of Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) emphasized the validity of the "state line" test. That case left the courts divided on the § 2(a) "in commerce" test, having never clearly decided the issue. One theory was that it is within section 2(a)'s scope when an interstate company used interstate profits to supply a local price war. This became known as the "underwriting" theory. The Court in *Copp Paving* explicitly labeled this aspect of the *Moore* case dicta. 419 U.S. at 201. The *Copp Paving* Court thus concluded that the only basis for jurisdiction in *Moore* was the single bread truck that carried bread across the state line. 419 U.S. at 201. A troublesome case was thus resolved as the Court enunciated a "state line" test. For a discussion of *Moore* before *Copp Paving,* and a history of circuit court decisions, *see* Salomon, *The Robinson-Patman Act "Commerce" Requirement: The Emasculation of Moore v. Mead's Fine Bread,* 8 U. SAN FRAN. L. REV. 497 (1974).

[23] The ease with which a large corporation can escape § 2(a) liability can be seen in an examination of *Moore v. Mead's Fine Bread Co.* Note, 32 WASH. & LEE L. REV. 939, 953 n.63 (1975). Mead could have successfully waged a price war against Moore in Santa Rosa, New Mexico, by merely shipping the lower priced bread from its plant in Roswell, New Mexico, which was approximately the same distance from Santa Rosa as Clovis, New Mexico, and yet sufficiently far from the state line to make any interstate shipments unlikely. Mead's interstate profits could thus subsidize its price dis-

firms, or the sales outlets of large firms, face increased exposure to § 2(a) liability in areas close to state boundary lines.[24]

In at least two ways, then, *Copp Paving* arguably decreases the effectiveness of § 2(a). By permitting large vertically integrated companies to avoid Robinson-Patman liability while exposing small businesses near state borders to increased liability, the *Copp Paving* Court produced a result that hardly seems consistent with the purpose of a statute designed to effect broad economic policies.[25]

Sherman Act § 1: Formalism Replaces Facts.

Section 1 of the Sherman Act prohibits "contracts, combinations or conspiracies in restraint of trade or commerce among the several States."[26] Traditionally, Sherman Act jurisdiction depended on a showing that the alleged trade restraint had a "substantial effect" on interstate commerce.[27] In *Goldfarb v. Virginia State Bar,* the Su-

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crimination without any fear of § 2(a) violation. This is the end result of *Copp Paving*, yet it is unlikely that this was the intent of Congress.

[24] The Fifth Circuit has mentioned that a § 2(a) suit might meet with success in places such as Texarkana, which stradles the Texas, Arkansas, and Louisiana borders. Cliff Food Stores, Inc. v. Kroger, Inc. 417 F.2d 203, 210 n.4 (5th Cir. 1969). The Supreme Court has disapproved use of the commerce clause power to reach activities in state border town situations. NLRB v. White Swan Co., 313 U.S. 23 (1941). In *White Swan,* the Court expressed doubt whether Congress intended the use of broad "affecting commerce" doctrine statutes on small border town activities. It expressly questioned whether the "affecting commerce" jurisdiction of the National Labor Relations Act in reality extended its broad jurisdiction over local businesses that happen to operate near a state line.

[25] Congress could amend the statute, a practice it has followed before for antitrust law. *See* note 70 *infra.*

[26] Section 1 of the Sherman Act provides:

> 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 . . . .

15 U.S.C. § 1 (1970).

[27] The jurisdictional scope of the Sherman Act has expanded in a constant progression since its inception to the broad scope that exists today. *See* note 30 *infra.* The first Sherman Act case so narrowly construed the Act as to render it useless as effective antitrust law. United States v. E. C. Knight Co., 156 U.S. 1 (1895).

The Sherman Act's jurisdiction reached its present broad interpretation by the Court in United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949). Defendant trade association and members claimed to be engaged in purely intrastate commerce. They were charged with inducing jobbers in the women's sportswear industry to employ only association member contractors, all of whom were unionized. The contractors engaged in the sewing on of buttons and other local activities. The Court held that it did not matter that the activities when considered alone were intrastate,

preme Court relaxed the "substantial effect"[28] test for § 1 and adopted a formalistic approach to Sherman Act jurisdiction. Since ruling in *United States v. South-Eastern Underwriters Association* that Congress went to the fullest extent of its commerce clause power in enacting § 1,[29] that section's jurisdiction has been linked to an elastic case-by-case standard.[30] The *Goldfarb* Court[31] held that a state bar minimum fee schedule for real estate title examinations affected interstate commerce and therefore satisfied the jurisdictional require-

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but that the Sherman Act could reach such activities if there was any effect on interstate commerce. The commerce requirement of the Sherman Act was stated as follows:

> Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commece among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

336 U.S. at 464. This has become the classic definition of the "affecting commerce" doctrine. *See also* Burke v. Ford, 389 U.S. 320 (1967) (per curiam); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954). *Goldfarb* can thus be seen as a part of this progression.

[28] The Supreme Court had long recognized that the effect on commerce must be substantial before Sherman Act jurisdiction will be obtained. This requirement of a substantial effect was expressed by the Court on numerous occasions. Burke v. Ford, 389 U.S. 320, 321 (1967); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948). In discussing the full extent of the commerce clause power of Congress, the Court in Wickard v. Filburn, 317 U.S. 111 (1942) stated:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial* effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id. at 125 (emphasis added).

In discussing this requirement in the Sherman Act, the Court in *Mandeville Isand* stated the test:

> [T]he vital question becomes whether the effect is sufficiently *substantial* and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence.

334 U.S. at 234 (emphasis added).

[29] 322 U.S. 533, 538 (1944).

[30] *See* Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282 (1965); Note, *The Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L.J. 1245 (1971).

[31] The district court held that the fee schedule violated the Sherman Act. 355 F. Supp. 491 (E.D. Va. 1973). The court of appeals reversed. 497 F.2d 1 (4th Cir. 1974).

ment of Sherman Act § 1.[32]

Petitioner Goldfarb alleged that the Fairfax County, Virginia, Bar Association minimum fee schedule for real estate title examinations constituted price-fixing, a per se violation of § 1 of the Sherman Act.[33] Even though the entire title examination took place within Virginia,[34] the Supreme Court found that it affected interstate commerce and therefore justified application of the Sherman Act. In so holding, the Court relied on the theory that if the attorney's title examination was part of a larger transaction which affected interstate commerce, the title examination itself also affected interstate commerce for Sherman Act purposes.[35]

The Court considered the attorney's title examination but a part of the entire real estate transaction. Significantly, a large portion of the finance for real estate purchases in the Northern Virginia area came from outside the state. Furthermore, many of the mortgages were guaranteed by federal agencies.[36] The Court ruled that the interstate origin of the investment capital and the federal mortgage guarantees placed the entire real estate purchase within the bounds of the

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[32] The activities involved were found not exempt from the Sherman Act because they involved a "learned profession." In addition, the Court decided that respondents were not exempt under the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943).

[33] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[34] The county bar aruged that the aim of the schedule was local and therefore any restraint could not substantially affect interstate commerce. It further proposed that there was no showing that the fee schedule actually increased attorneys' fees and that even if it did increase the fees, there was no proof that such an increase actually deterred prospective homeowners from buying real estate in the county. The Court dismissed these arguments as irrelevant to its consideration of whether the minimum fee schedules violated the Sherman Act.

The Court's opinion started by declaring the title examination to be an integral part of the interstate real estate transaction. The Court's terse discussion of the effect on commerce relied on United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945) for the proposition that the title examination was not a purely local activity, but rather was "an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." *Id.* at 297, *quoted in* 95 S. Ct. at 2011-12. However this does not answer the question of whether the fee schedule substantially affected the interstate transaction. For the affecting commerce doctrine that the Court actually used, whether the title examination was an integral part of the total transaction was not an issue. The substantiality of the effect of the fee schedule for the examination on the purchase was the issue.

[35] The Court's considering the title examination to be an inseparable part of a larger transaction that in some manner affected interstate commerce has no real bearing on whether the title examination affected interstate commerce. *See* note 34 *supra*.

[36] 95 S. Ct. at 2011.

"affecting commerce" doctrine.[37] Because the title research was but a part of this larger transaction and because the interstate finance and federal guarantees were contingent on certification of title, the title examination itself was held to affect interstate commerce for Sherman Act purposes.[38] The Court did not go beyond this theory to consider the question of whether an attorney's minimum fee schedule actually had a restraining effect[39] on the interstate flow of purchase money capital.[40] Thus, the Court seems to have implied in *Goldfarb* that the mere possibility of an effect on interstate commerce is enough to satisfy the Sherman Act § 1 jurisdictional requirement.

In at least one respect the Court overlooked a traditional aspect of Sherman Act jurisdictional analysis. Specifically, the Court seemed more interested in bringing an acknowledged Sherman Act violation within the purview of the statute than in an objective analysis of jurisdictional facts. Prior to *Goldfarb* a two-step analysis was necessary to establish a Sherman Act violation.[41] The first step was the investigation of jurisdictional facts to determine whether the alleged trade restraint had a substantial effect on interstate commerce.[42] The second step was to ascertain whether the alleged trade

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[37] *Id.* at 2012.

[38] *Id.*

[39] At least one court had no difficulty in finding such an effect. The district court in Mazur v. Behrens, 1974-1 TRADE CAS. ¶ 75,070 at 96,787 (N.D. Ill. 1972) found in a similar situation an effect to be so logical that no proof was needed. The complaint alleged a Sherman Act violation by real estate brokers who allegedly conspired to raise real estate commissions from 6% to 7%. The effect on prospective purchasers was self-evident:

> It is almost self-evident that the increase of a real estate commission from 6% to 7% (a 16% increase) necessarily burdens the movement of persons and their effects from state to state.

Id. at 96,788.

[40] 95 S. Ct. at 2011.

[41] Ford Wholesale Co., Inc. v. Fibreboard Paper Prods. Corp., 493 F.2d 1204 (9th Cir. 1974); Rasmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); Evans v. S. S. Kresge Co., 394 F. Supp. 817 (W.D. Pa. 1975).

[42] In determining the jurisdictional scope of the commerce clause power, the Court is faced with two possibilities. In many instances, such as in Sherman Act § 1, the Court has been given no guidance by Congress as to whether an activity affects commerce. This is different from situations where Congress has already decided that a particular activity affects interstate commerce. Compare the Court's search for an effect on commerce in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) with the Court's acceptance of a congressional determination of an activity's effect on interstate commerce in Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964). *Cf.* United States v. Darby, 312 U.S. 100, 119-20 (1941).

restraint violated the Act.[43] Although the Court recognized the bifurcated nature of these two lines of analysis,[44] *Goldfarb* reversed the order of these steps.[45] By reversing the steps, the Court's jurisdictional analysis relied on facts and precedents relating more to the existence of a substantive violation than to the jurisdictional requiremnt.[46]

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[43] Some restraints of trade will not be per se violations of Sherman Act § 1. The Court must then consider whether the restraint is "reasonable" and therefore not a violation, or unreasonable and a violation of § 1. Chicago Board of Trade v. United States, 246 U.S. 231 (1918). *See* P. AREEDA, ANTITRUST ANALYSIS 343 (2d ed. 1974).

[44] 95 S. Ct. at 2009.

[45] The validity of a strict test for jurisdictional purposes and a per se test for substantive violations of Sherman Act § 1 has been questioned. If an activity is a per se violation of Sherman Act § 1, it is anomalous to require a strict jurisdictional showing. United States v. Finis P. Ernest, Inc., 509 F.2d 1256 (7th Cir. 1975); P. AREEDA, ANTITRUST ANALYSIS 122 (2d ed. 1974).

[46] Having decided that commerce was affected for jurisdictional purposes due to the title examination's relation to the loan transaction, the Court's subsequent rulings were predicated upon this decision. Therefore, the Court rejected petitioners' complaint that no showing of any deterrence to home buyers was offered by the respondents, thus avoiding the jurisdictional requirement that an activity substantially affect commerce. It stated that once an effect is shown, magnitude is irrelevant. 95 S. Ct. at 2012. To support this point, *Goldfarb* relied on United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956). However, *Goldfarb* arguably applied a test for a substantive violation of the Sherman Act to determine if jurisdiction existed. Only after jurisdiction is established should a court consider if there is a violation. *See* note 41 *supra*. The position of *McKesson & Robbins* on which *Goldfarb* relied was aimed at the required scope of a restraint after jurisdiction had been established. 351 U.S. at 310. Thus, establishing Sherman Act § 1 jurisdiction was not the concern of the Court in *McKesson & Robbins*.

The Court seemingly argued that if an activity is a per se violation, then jurisdiction automatically attaches. This argument has been emphatically rejected. Page v. Work, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961). In *Page*, quoting from Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 747 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954), the court stated:

> True, a price fixing conspiracy which operates on or within the flow of interstate commerce affects that commerce as a matter of law. But a price fixing conspiracy at a purely local or interstate level does not, as a matter of law, affect the flow of commerce. Whether a purely local or intrastate conspiracy unreasonably restrains interstate commerce is primarily a factual question, i.e., does the local price fixing conspiracy affect substantially the flow of interstate commerce? If the answer is yes, then only are we concerned with the effect of price-fixing under the per se doctrine. In fact, unless there is a finding that the local and intrastate activities complained of and as alleged in the indictment [complaint] substantially affected interstate commerce, there is no jurisdiction in a district court over the alleged Sherman Act violation.

For some time before *Goldfarb*, the Court's movement towards a more formalistic test for Sherman Act § 1 jurisdiction was apparent.[47] In *Burke v. Ford*,[48] the Court relied more on economic principles than on quantitative facts to establish the existence of a substantial effect on interstate commerce. In *Burke*, the alleged restraint was that

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290 F.2d at 331-32. However, the ease with which the Court can find an effect on commerce may make this requirement a mere formality. *See* Wickard v. Filburn, 317 U.S. 111 (1942). *But see* note 45 *supra*.

The Supreme Court also rejected any requirement of proof that the fee schedule actually raised attrorneys' fees, with analysis on this point similar to the analysis used on the issue of deterred real estate purchasers. It relied on Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), which emphasized the necessity of a specific showing that prices were actually affected by the restraint. However, *Apex Hosiery* indicated the Court's concern for some showing of an effect on prices when deciding if a restraint is unreasonable for a substantive violation of § 1 and is not concerned with a jurisdictional showing. *Id.* at 500-01.

[47] In United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949), the Court expressed the reach of the affecting commerce doctrine as applied to intrastate activities. *See* note 27 *supra*. This was the traditional test for Sherman Act jurisdiction. Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 739-40 n.3 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954). Burke v. Ford, 389 U.S. 320 (1967) (per curiam) and United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954) perhaps repudiated the requirement that an actual substantial effect on interstate commerce be shown before Sherman Act jurisdiction is proper. The Ninth Circuit in Doctors, Inc. v. Blue Cross, 490 F.2d 48 (3d Cir. 1973) summarized the jurisdictional concern of the Supreme Court in these two cases:

> There is no discussion of "directness" or of the specific relationship between the interstate goods affected and the local market controlled. Nor is there even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy. Instead, the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce.

490 F.2d at 53 (footnotes omitted). The concern was with the concept that if overall activity in a market declines, it is likely that the flow of supplies allegedly affected will decline. There was no showing of an effect on commerce in either case, merely the hypothesis of such an effect.

This formalistic argument was expressed by the Ninth Circuit in Rasmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973):

> The quantitative effect on the interstate flow of . . . ingredients is not alleged. But it is the nature of the effect that is important: to whatever extent, it is certain that the flow of . . . ingredients into Arizona *will* be diminished . . . .

Id. at 525. Other courts have also discussed the new formalistic approach of the Supreme Court. *See* Hospital Building Co. v. Trustees of Rex Hospital, 511 F.2d 678 (4th Cir.), *cert. granted*, 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975) (74-1452); Doctors, Inc. v. Blue Cross, 490 F.2d 48 (3d Cir. 1973).

[48] 389 U.S. 320 (1967) (per curiam).

Oklahoma liquor wholesalers were dividing sales territories to eliminate competition among themselves.[49] Despite a showing that sales of liquor shipped from out of state had actually increased since the alleged restraint commenced, the Court found Sherman Act § 1 jurisdiction based on the restraint's likely effect on interstate shipments of liquor. On the facts, no substantial effect on commerce could be shown. However, the Court reasoned that "[w]hen competition is reduced, prices increase and unit sales decrease."[50] Thus, in *Burke* as in *Goldfarb*, the Court accepted the primacy of antitrust doctrine over mere showings of fact.[51] The importance of antitrust theory rather than facts is the basis of the post-*Goldfarb* formalistic approach to Sherman Act jurisdiction.[52]

The formalism of the *Goldfarb* Court leads to several consequences for Sherman Act applicability. First, *Goldfarb* would seem to indicate that any transaction financed by interstate loans or guaranteed by federal agencies affects interstate commerce for Sherman Act § 1 jurisdictional purposes.[53] Second, the requirement of a proven substantial quantitative effect which had been applied by some courts to Sherman Act jurisdiction[54] is no longer significant. Essentially, then, *Goldfarb* alters Mr. Justice Jackson's maxim that Sherman Act jurisdiction was invoked by any "squeeze" on trade as long as interstate commerce felt the "pinch."[55] After *Goldfarb,* interstate commerce need scarcely *feel* the "pinch" to trigger jurisdiction.

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[49] A division of markets among competitors is normally a per se violation of Sherman Act § 1. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

[50] 389 U.S. at 322.

[51] *See* note 47 *supra.*

[52] Circuit courts have followed the Supreme Court's trend toward less reliance on specific effects on commerce for Sherman Act § 1 jurisdiction. *See* note 47 *supra.*

[53] A possible objection to this type of analysis is that it does allow the courts to reach almost totally local activities. However, circuit courts have already refused to allow this type of analysis go to extremes. Doctors, Inc. v. Blue Cross, 490 F.2d 48 (3d Cir. 1973); Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964); Page v. Work, 290 F.2d 323 (9th Cir.), *cert. denied,* 368 U.S. 875 (1961). However, establishing uniformity in what type of activity is local and what type is interstate may be difficult. *Compare* Hospital Bldg. Co. v. Trustees of Rex Hospital, 511 F.2d 678 (4th Cir.), *cert. granted,* 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975) (No. 74-1452) *with* United States v. Finis P. Ernest, Inc., 509 F.2d 1256 (7th Cir. 1975).

[54] Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954); *see, e.g.,* Doctors, Inc. v. Blue Cross, 490 F.2d 48 (3d Cir. 1973). The necessity that the effect be substantial may be called the "de minimis" test. *See* note 28 *supra.*

[55] United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949). *See* note 27 *supra.*

Clayton Act § 7: A Jurisdictional Retreat.

Section 7 of the Clayton Act prohibits corporate acquisitions or mergers that may lessen competition or tend to create a monopoly. In order to establish jurisdiction under this statute, both the acquired and the acquiring corporations must be "engaged in commerce."[56] In *United States v. American Building Maintenance Industries (ABMI)*,[57] the Supreme Court considered whether the "engaged in commerce" language of § 7 was susceptible to an "affecting commerce" interpretation.[58] By ruling that the respondent's acquisition

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[56] The pertinent part of § 7 of the Clayton Act provides:

> No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1970), *formerly* ch. 323, § 7, 38 Stat. 731 (1914). Section 7 of the Clayton Act was amended in 1950 by the Celler-Kefauver Antimerger Act, 15 U.S.C. § 7 (1970), *formerly* ch. 1184, 64 Stat. 1125 (1950).

[57] 95 S. Ct. 2150 (1975).

[58] There had been no discernible confusion or conflict over the "engaged in commerce" requirement of § 7 of the Clayton Act. Nor was there an apparent split in the lower courts over whether § 7 can reach corporations whose intrastate activities affect interstate commerce. In general, the issue has been so closed that there is little case law on the subject. The attitude of the court in Page v. Work, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961) apparently is the attitude silently adopted by other courts:

> In our view, the language of Section 18 [§ 7] in no way indicates that Congress intended to apply the provisions of that Act to purely local activities wholly directed to a local intrastate market and relating to a product not in the flow of interstate commerce and where the effects on interstate activities in which the parties engage are insubstantial, inconsequential and fortuitous, if not non-existent.

290 F.2d at 333-34. Other courts and agencies have at least mentioned the "engaged in commerce" requirement, and it has been seen as requiring an "in commerce" test as opposed to an "affecting" commerce test. *See, e.g.*, Treadway Co. v. Brunswick Corp., 364 F. Supp. 316 (D.N.J. 1973); United States v. Citizens Publishing Co., 280 F. Supp. 978 (D. Ariz.), *aff'd*, 393 U.S. 911 (1968); A.B.T. Sightseeing Tours, Inc. v. Gray Lines N.Y. Tours Corp., 242 F. Supp. 365 (S.D.N.Y. 1965); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii, 1964), *aff'd*, 401 F.2d 182 (1968), *cert. denied*, 393 U.S. 1086 (1969); Foremost Dairies, Inc., 60 F.T.C. 944 (1962). For a discussion of the "engaged in commerce" requirement of § 7 of the Clayton Act, *see* 16A J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 16.03[1] (1975). *See also* E. KINTNER, PRIMER ON THE LAW OF MERGERS 201 (1973) which recognizes the "in" commerce requirement of § 7, but states that the restriction is more apparent

of the Benton companies, providers of janitorial services, was not within the jurisdiction of § 7, the *ABMI* Court restricted this statute to its literal meaning and held that the "affecting commerce" doctrine did not apply to it.

ABMI, the acquiring corporation, was one of the largest suppliers of janitorial services in the United States, with branches in over 500 locations. The acquired corporations, the Benton companies, supplied janitorial services to customers in Southern California. Although the Benton companies' service contracts were performed in California, many of their customers were engaged in interstate commerce.[59] Nevertheless, the Benton companies used no national advertising and made only "negligible" use of interstate communications.[60] Moreover, the labor intensive nature of the Benton companies' janitorial service required few interstate products.[61] In fact, the labor required was hired totally from within Southern California.[62] Due to these intrastate aspects of the acquired corporations' business, the Court found them not "engaged in commerce" for purposes of § 7 of the Clayton Act.

In rejecting the government's argument that the Benton companies were "engaged in commerce," the Court ruled that such language required application of the restrictive "flow of commerce"[63]

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than real, for any sales or purchases across a state line will qualify a corporation as "engaged in commerce."

[59] 95 S. Ct. at 2158.

[60] 95 S. Ct. at 2153. The Benton companies had made 10 interstate phone calls worth $19.78 in the 18 months before the acquisition. Approximately 200 interstate letters were sent or received in a similar period, a large number of which were from government agencies such as the Internal Revenue Service. *Id.* at 2153 n.3.

[61] Many of the supplies purchased by the acquired corporations were manufactured out of state, but almost all were bought locally. In the 16 months before the acquisition, the Benton companies had purchased only $140 worth of supplies from out of state sellers. 95 S. Ct. at 2153 n.4.

[62] 95 S. Ct. at 2153.

[63] As in the "state line" test of *Copp Paving,* a "flow of commerce" test requires the sale of a good or service across a state line. However, an activity can be within the flow of commerce and not satisfy the "state line" test. An interstate activity can be a part of a larger interstate flow of commerce without crossing a state line. In United States v. Yellow Cab Co., 332 U.S. 218 (1947), the Court held the service of driving a passenger from one interstate railroad terminal to another as a part of his interstate journey to be an activity in the flow of commerce. *See* Eiger, *The Commerce Element in Federal Antitrust Litigation,* 25 FED. B.J. 282 (1965).

Yellow Cab is an example of an intrastate activity in the middle of a flow of commerce being held within the flow. However, an activity involving either the production of a good on one end or its distribution on the other end of its sale process can also be within the "flow of commerce." *Id. See* 16 J. VON KALINOWSKI, ANTITRUST LAWS

test, rather than the more liberal "affecting commerce test."[64] This conclusion rested upon the Court's finding that the phrase "engaged in commerce" represented Congress's intent to limit the jurisdictional scope of § 7.[65] In addition to the difference between the wording of § 7 and the "affecting commerce" statutes,[66] the inference that Congress intended less than a full expression of its constitutional commerce clause power in § 7 rested on two arguments. First, *Copp Paving* provided a recent precedent for interpreting the phrase "engaged in commerce."[67] The Court therefore argued that the construction given the phrase in *Copp Paving* required a similar construction for § 7.[68]

AND TRADE REGULATION § 5.01[2] (1975). In *ABMI,* the key issue was whether the supplies that the Benton companies purchased in California were within the flow. They were manufactured out of state and sold intrastate by local distributors. If the Benton companies had specifically requested the distributor to order the out of state supplies, the goods would not have completed their intended interstate journey until they reached the corporations. The corporations would thus be engaged in the flow of commerce. However, where goods are ordered by a retailer or distributor for general inventory purposes only and not in response to a specific customer's needs, the goods are held to have come to rest at the distributor and there to lose their interstate nature. Burke v. Ford, 389 U.S. 320 (1967); Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943). This was the holding in *ABMI.*

[64] *See* note 27 *supra.*

[65] 95 S. Ct. at 2156. The Court also dismissed the government's contention that the "engaged in commerce" language should be coextensive with the plenary exercise of the constitutional commerce power as expressed in the Sherman Act and thus reach corporations which affect commerce. The Court found the language of the Sherman Act in § 1 directed to effects on commerce, while § 7 contained no similar concern. 95 S. Ct. at 2155. This is the same type of textual analysis that the Court used to reach the same conclusion relating to § 2(a) of the Robinson-Patman Act. The "restraint of trade" language in the Sherman Act appears to have persuaded the Court that it means a broader scope was intended than merely "trade or commerce among the several States."

[66] *Compare* Sherman Act § 1 *with* Clayton Act § 7. *See* notes 26 & 56 *supra.*

[67] The Court did not reach the "in commerce" jurisdictional issue of § 7 in *Copp Paving* because no showing was made of any effect on commerce. The Court was firm on the scope of its opinion in regard to the commerce requirement of § 7. "In any event, this case does not present an occasion to decide the question." 419 U.S. at 202. Having defined only the jurisdiction of § 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Court thus created interest in the question of whether the decision applied to all sections of the Clayton Act.

[68] The language in the two statutes is not the same, and any analogy, therefore, is suspect. The jurisdictional requirement of Robinson-Patman Act § 2(a) in question in *Copp Paving* was whether any of the purchases involved in the discrimination were "in commerce." The Court was not concerned with whether any corporation was "engaged in commerce," the first jurisdictional requirement.

The second argument the Court used to justify restricting § 7 to the "flow of commerce" test was related to the use of that phrase as a term of art. When § 7 was amended in 1950[69] the phrase "engaged in commerce" had previously been construed for § 5 of the Federal Trade Commission Act (FTCA)[70] in *FTC v. Bunte Bros., Inc.*[71] In that case, the Supreme Court limited the jurisdiction of FTCA § 5 to activities "in" commerce, and specifically excluded those which merely "affected" commerce.[72] In *ABMI,* the Court ruled that *Bunte Bros.* transformed the phrase "engaged in commerce" into a term of art with a clearly defined meaning.[73] Pursuant to this premise the

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[69] Prior to 1950, § 7 only prohibited stock acquisitions by corporations. Section 7 was amended to prohibit acquisitions by purchasing the assets of another company. The section was also amended to make it clear that § 7 was to reach beyond the Sherman Act to potential lessenings of competition. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). The House and Senate reports make it clear that a major concern in amending § 7 was to emphasize that § 7 should reach incipient Sherman Act violations. The Senate report is definite on this point:

> The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.

S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950). The Congress was thus interested in the very area at issue here, the scope of the effectiveness of § 7 of the Clayton Act. For a thorough legislative history of § 7, *see* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226 (1960); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act,* 61 COLUM. L. REV. 629 (1961); Note, *Section 7 of the Clayton Act: A Legislative History,* 52 COLUM. L. REV. 766 (1952).

[70] The pertinent at the time of *ABMI* provided:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

Federal Trade Commission Act § 5, ch. 311, § 5, 38 Stat. 719 (1914), *as amended,* 15 U.S.C. § 45 (1970). Pub. L. No. 93-637, § 201(a) (Jan. 4, 1975) amended § 5 to read:

> Unfair methods of competition *in or affecting* commerce and unfair or deceptive acts or practices *in or affecting* commerce, are hereby declared unlawful.

Id. (emphasis added).

[71] 312 U.S. 349 (1941). The Court stated that this comparison was valid as both acts were passed by the Sixty-Third Congress and both were designed to deal with the same problem—the protection of free competition in the marketplace.

[72] FTCA § 5 was limited by its terms to unfair methods of competition "in commerce." *See* note 70 *supra. Bunte Bros.* held that this limited the jurisdiction of § 5 to activities "in" commerce and rejected the "affecting commerce" doctrine. However, as with reliance on Robinson-Patman Act § 2(a), an analogy with § 5 is suspect. FTCA § 5 refers to unfair methods of competition, *i.e.,* particular activities, "in commerce," not corporations "engaged in commerce." *See* note 68 *supra.*

[73] Whether "engaged in commerce" was a term of art is debatable. If it is to be

Court concluded that the drafters of the Celler-Kefauver amendment to § 7 must have been aware that the words "engaged in commerce" had only the meaning given them in *Bunte Bros.*[74] The *Bunte Bros.* case thus became the basis for the *ABMI* Court's conclusion that Congress intended to restrict § 7's jurisdictional scope. In effect, the Court reasoned that *Bunte Bros.* notified Congress that the words "engaged in commerce" had a special meaning.[75] Although the *ABMI* opinion referred to statutes passed prior to 1950 as evidence that Congress recognized the significance of the "engaged in commerce" language,[76] the Court had no positive evidence that Congress in fact considered *Bunte Bros.*[77] while drafting the Celler-Kefauver amendment.[78] Therefore, the causal nexus between *Bunte Bros.* and the

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considered a term of art, it should not, theoretically, be compared with other similar yet not identical phrases such as "in commerce," as used in § 2(a) of the Robinson-Patman Act. If "engaged in commerce" is to be regarded as a term of art, then application of the Court's reasoning in *Copp Paving* with the phrase "engaged in commerce" in § 7 is inappropriate. The same would be true for comparisons to § 5 of the FTCA which also refers to "in commerce" and not "engaged in commerce."

[74] The Court's statement in *Bunte Bros.* was direct, demanding a "clearer mandate from Congress." 312 U.S. 349, 355 (1941). When Congress altered the commerce language in § 5, effectively overruling *Bunte Bros.*, it showed a congressional recognition of the difference between "in" and "affecting" commerce. However, as § 5 of the FTCA was not amended until 1975, Congress cannot be charged with awareness of the difference until 1975, not in 1950 as the Court claimed in *ABMI.*

[75] The Court looked to the commerce requirement language in congressional acts passed prior to 1950 and decided that Congress had been aware of the difference. For example, § 10(a) of the National Labor Relations Act, 49 Stat. 453, *as amended,* 29 U.S.C. § 160(a) (1970), speaks of preventing unfair labor practices "affecting commerce." Similarly, the Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72, provided for certain regulations of transactions, "in or directly affecting interstate commerce in bituminous coal." *Id.* at 76.

However, these Acts only show that Congress had at best constructive notice of the Court's different treatment of "in" and "affecting" commerce. Nowhere in the legislative history of § 7 is there a statement that reflects actual notice or awareness of the commerce requirement's scope as it was being used in that section. Arguably not only was Congress not aware of it, Justice Douglas was not aware of it in Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954). *See* note 79 *infra.* In fact, if the Court itself had taken an unambiguous stand on the reading of the words "engaged in commerce" *Copp Paving* might never have arisen. *See* note 11 *supra.*

[76] Cases such as Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) enunciated the principle that different jurisdictional tests would apply depending on the commerce language used in an act. However, the validity of referring to the history of § 5 of the FTCA may be questioned. *See* note 74 *supra.*

[77] *See* note 75 *supra.*

[78] Congress's awareness of the difference between "in" and "affecting" commerce is measured in terms of its recognition of the difference in 1950. When Congress

wording of § 7 was not a factual one. Rather, the *ABMI* Court appears to have concluded that Congress should have been aware that *Bunte Bros.* gave the phrase "engaged in commerce" a special meaning.[79] This position, in effect, held Congress to a standard of constructive notice.

While relying most heavily on the literal meaning of § 7, the precedent of *Copp Paving,*[80] and the constructive notice given by *Bunte Bros.,*[81] the Court in *ABMI* also rejected the government's

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amended the section in 1950 it should have been aware of how the Court then would interpret the language, and draft the section accordingly.

[79] In light of the Court's implied consideration of "in commerce" as a term of art in *ABMI,* the equivocal nature of its decision in Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) is of interest. The hesitancy and vague language of the Court in *Moore* did not settle the question of the scope of "in commerce" as used in § 2(a) of the Robinson-Patman Act. If, as the Court argued in *ABMI,* Congress and the Court were supposed to have recognized "in commerce" as a term of art by 1950, the Court could have relied on this fact clearly to decide the issue in *Moore.* Instead of using an argument based on this "known" meaning of the "term of art," they presented an opinion that was not finally comprehended until after *Copp Paving.* Why it did not rely on this theory in 1954 to decide *Moore* was not explained, yet the Court used this theory in *ABMI* to charge Congress with knowledge of the meaning of "in commerce" in 1950.

[80] Relying on *Copp Paving,* the Court asserted that "engaged in commerce" is not satisfied by the broad "affecting commerce" doctrine. 95 S. Ct. at 2154. The Court in *Copp Paving* held that "in commerce" required more than an "effect" on commerce, but rather involved interstate markets and distribution. However, as *Copp Paving* construed a different statutory phrase than *ABMI,* total reliance on *Copp Paving* is suspect. *See* note 68 *supra.* Furthermore, the decision in *Copp Paving* was not without some criticism. Justice Douglas dissented in *Copp Paving* on the meaning of "engaged in commerce" in § 2(a) and said that the same reasons held for his dissent in *ABMI.* 95 S. Ct. at 2159. The chief defect in the dissent is that it failed to counter the Court's arguments. Justice Douglas referred to the legislative intent of § 7 but never reached the real commerce requirement issue. The broad reading he urged was to comply with the intended broad scope of the Act, which was to reach incipient Sherman Act violations. However, the Act by its terms can reach incipient violations of the Sherman Act, and thus achieves its intended purpose.

[81] The Court's comparison of § 7 with § 5 of the FTCA is arguably inappropriate for consideration in light of the Court's emphatic refusal to consider an analogy between § 2(a) of the Robinson-Patman Act and the FLSA in *Copp Paving.* If a common purpose is sufficient to allow an analogy, then this same argument should permit analogy of § 7 to Sherman Act § 1. Section 7 of the Clayton Act was enacted to supplement the Sherman Act and reach incipient violations. S. REP. No. 1775, 81st Cong., 2d Sess. (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. (1949). As § 7 is to supplement the Sherman Act, the purpose of each act is the prevention of restraints on competition in commerce. The analogy should thus be valid.

The logic the Court used to justify the analogy of § 5 of the FTCA to § 7 of the Clayton Act also would suggest that the proposed analogy of § 1 of the Sherman Act to § 2(a) of the Robinson-Patman Act in *Copp Paving* should have been accepted.

argument that limiting § 7 to the "flow of commerce" test would reduce its effectiveness. That both the FTC and the Government had previously prosecuted only those acquisitions in which both the acquired and the acquiring corporations were directly engaged in commerce proved to the Court that its holding in *ABMI* would not frustrate the remedial purpose of § 7. In finding no precedent for extending the scope of § 7 beyond the "flow of commerce" doctrine,[82] however, the Court at least arguably neglected one of its own earlier rulings. In *United States v. Penn-Olin Chemical Co.*[83] the Court held a joint venture corporation not yet in operation to be within the scope of § 7 due to its probable participation in interstate commerce.[84] Even though the acquired corporation was not literally "engaged in commerce" the *Penn-Olin* Court held that § 7 applied to the stock acquisition. Both parent corporations were engaged in commerce and the Court therefore found that the acquired joint venture was designed to compete in interstate markets. In order to accommodate what it found to be Congress's purpose in enacting § 7, the *Penn-Olin* Court was willing to expand the "engaged in commerce" formula beyond the limits of the "flow of commerce" doctrine. The rule of *ABMI* ignored *Penn-Olin* as precedent for a liberal interpretation of the phrase "engaged in commerce."

While the government's main argument in *ABMI* was that § 7 permitted an "affecting commerce" analysis, it also argued that the particular characteristics of the Benton companies placed them within even the restrictive "flow of commerce" test. This argument was premised on the fact that the Benton companies derived eighty to ninety percent of their revenue from interstate concerns.[85] The Court dismissed the argument, however, stating that to be "engaged in commerce" the acquired corporation itself must be directly in-

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Arguably, both Acts aimed at the same goal—the prevention of discrimination which restrains commerce.

[82] The Government relied on United States v. Von's Grocery Co., 384 U.S. 270 (1966) as an example of a § 7 challenge to an acquisition of local corporations that only affected interstate commerce and was thus "engaged in commerce." However, according to the Supreme Court, the district court had expressly found that the acquired grocery stores were directly in commerce as each purchased more than 51% of its supplies from out of state. 95 S. Ct. at 2157 n.8.

[83] 378 U.S. 158 (1964).

[84] 378 U.S. at 168. However, the Court stated that as the acquired corporation was at the time of trial "engaged in commerce," jurisdiction was present. Thus, the Court arguably based jurisdiction on the corporation's activities at the time of trial and not at the time of the acquisition.

[85] 95 S. Ct. at 2158 n.9.

volved in the production, sale, or acquisition of goods or services in interstate commerce. Because the labor intensive nature of their service product insulated them from interstate markets, *ABMI* held that the Benton companies were not "in the flow of commerce" for § 7 purposes,[86] even though they might have had an effect on interstate commerce.

Beyond casting doubt on the rule of *Penn-Olin, ABMI* would seem to have three effects on § 7's ability to restrain undesirable mergers. First, the policy of stopping undesirable stock or asset acquisitions in their incipiency[87] might be less effective. Section 7 of the Clayton Act prohibits acquisitions which "might tend" to lessen competition. An acquisition, then, need not directly lessen competition to violate § 7, but must only have a tendency to do so. Consequently the mere size of the acquired corporation is not necessarily a valid index of its market significance. Small corporations may become market leaders through the exertion of vigorous entreprenurial skill or the possession of unique and valued patents. In spite of their size and the number of their interstate transactions, such independent market leaders are essential to an open and competitive market.[88] At least at their incep-

[86] The Court used Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) as an example of a flow of commerce test. In *Mandeville,* the Court found a restraint on the sale of sugar beets to be a restraint on the interstate sale of refined sugar, as it was a restraint on a portion of a long, continuous interstate transaction. The Benton companies' sales of services to the interstate corporation, however, are not such a part of one long transaction. While the janitorial services may affect the corporation's interstate dealings, they are not a part or process of the production or sale of any goods or services.

[87] This is the recognized policy of Clayton Act § 7. Brown Shoe Co. v. United States, 370 U.S. 294, 333-34 (1962). While a small acquisition may not be a present restraint on commerce, and hence not be a Sherman Act violation, it can be a § 7 Clayton Act violation. Section 7 only requires a possible lessening of competition. "[T]he very wording of § 7 requires a prognosis of the probable *future* effect of the merger." 370 U.S. at 332 (footnote omitted). *See* S. REP. No. 1775, 81st Cong., 2d Sess. (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. (1949); Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts,* 59 MICH. L. REV. 821, 825 (1961).

[88] Judge Learned Hand stated in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945):

> Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

148 F.2d at 429. The Supreme Court also recognized that the Celler-Kefauver Amendment was to protect small locally owned businesses even if it resulted in higher prices. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

tion such small corporations are unlikely to have extensive interstate connections. The effect of *ABMI* is thus to place purely intrastate corporations beyond the protection of § 7 whether or not their acquisition by a larger competitor would limit competition. Thus, if it is not "engaged in commerce" within the *ABMI* definition, a small market leader could be acquired with § 7 impunity.[89]

The second effect of *ABMI* is to exempt labor intensive service industries from § 7 protection. In addition to the janitorial service industry, industrial maintenance firms, accounting firms, nursing homes, engineering firms, secretarial supply services and hospitals, among others, will find no legal protection against a competitor's take-over bid. Thus, *ABMI* arguably facilitates entry into local service industry markets by either large competitors or financial conglomerates.

A third conspicuous result of *ABMI* is to create different jurisdictional standards for the two types of acquisitions prohibited by § 7. Clayton Act § 7 prohibits both stock and asset acquisitions which tend to lessen competition. While stock acquisitions are within the jurisdictional scope of § 7 only when both the acquired and acquiring corporations are "engaged in commerce," in the case of asset acquisitions, § 7 jurisdiction is proper if the acquiring corporation is "subject to the jurisdiction of the Federal Trade Commission."[90] Since the FTCA has recently been amended to adopt the "affecting commerce" doctrine,[91] an acquiring corporation need only affect interstate commerce to come within the purview of § 7. The combined effect of

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[89] This fear may be exaggerated. Over the years, courts have been able to label a business "in commerce" with relative ease where it has been desired. Any retail outlet that buys from out of state will be easy prey for an "engaged in commerce" label. United States v. Yellow Cab Co., 332 U.S. 218 (1947); Page v. Work, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); Treadway Co. v. Brunswick Corp., 364 F. Supp. 316 (D.N.J. 1973); A.B.T. Sightseeing Tours, Inc. v. Gray Lines N.Y. Tours Corp., 242 F. Supp. 365 (S.D.N.Y. 1965). However, a certain tempering of the doctrine that a purchase in interstate commerce makes the buyer "in commerce" was voiced by the court in Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964). In *Lieberthal*, the court refused to find that the incidental flow of supplies into an intrastate enterprise makes that enterprise interstate in character:

> It has frequently been held, however, that the incidental flow of supplies in interstate commerce, . . . [does] not in themselves suffice to transform an essentially intrastate activity into an interstate enterprise.

Id. at 271 (citations omitted). Thus, there is some sentiment for a substantiality test, as was found in cases relating to § 1 of the Sherman Act. *See* note 28 *supra*.

[90] Clayton Act § 7, 15 U.S.C. § 18 (1970).

[91] *See* note 70 *supra*.

ABMI and the amended FTCA, therefore, makes asset acquisitions more susceptible to § 7 challenges than stock acquisitions. Since there is no basis in the history of § 7, or antitrust policy, for this distinction, it must be treated as an anomaly.

Thus, *ABMI* restricts the effectiveness of § 7 while it gives that statute confusing and anomalous jurisdictional tests. In light of these results, congressional action would appear not only desirable but highly probable.

Conclusion

In *Copp Paving, Goldfarb* and *ABMI,* the Supreme Court expanded the jurisdictional scope of one antitrust statute while contracting the jurisdictional range of two others. Such changes in jurisdictional tests may cause practical complications for enforcement of the antitrust laws. These court-made changes in the jurisdiction of the antitrust statutes complicate the plaintiff's burden of deciding what facts must be alleged to satisfy the demands of a particular statute. Furthermore, the lack of uniformity among the jurisdictional standards for the several antitrust statutes might force a plaintiff to choose a statute for the certainty of its jurisdiction rather than the precision of its application to the facts of his case. If some overriding antitrust policy were served by separate jurisdictional tests for the different statutes, the complexity produced by *Copp Paving, Goldfarb* and *ABMI* could be more easily rationalized. However, the Court did not attribute such changes to antitrust policy considerations. Rather, the Court preferred to examine each case on its facts and reach its decisions with little discussion of the practical ramifications of each holding.[92] As a result, the expanded Sherman Act jurisdiction is unrelated to the gaps created in the jurisdiction of § 2(a) and § 7.[93]

By disregarding antitrust policy as a factor in its rulings, the Supreme Court has created lacunae in the pattern of antitrust enforcement. The holding in *Copp Paving* appears to encourage the use of interstate profits to support intrastate price wars. This effectively gives financial size rather than entrepreneurial skill a competitive

[92] *See* text accompanying notes 22-24, 52-55 & 87-91 *supra.*

[93] Section 1 of the Sherman Act can prevent a merger if it can be proved to be a restraint of trade or an attempt to monopolize. However, the Sherman Act requires proof of a present restraint, while Clayton Act § 7 requires merely a possible future lessening of competition. *See* note 87 *supra.* Thus, while a merger could violate either Act, the evidentiary requirements make the Sherman Act less effective. The Senate Report emphasized this difference in evidentiary requirements. *See* note 69 *supra.*

advantage. Furthermore, by strategically locating sales outlets away from state boundary lines, interstate corporations can engage in price discrimination without satisfying the jurisdiction of § 2(a).

Likewise, the ruling in *ABMI* has created fissures in antitrust law. The incipiency standard of Clayton Act § 7 has been rendered ineffectual in cases of corporations which "affect" commerce but are not "in" commerce.[94] Prior to *ABMI,* small innovative market leaders were protected by § 7 due to their potential effect on interstate markets. However, *ABMI* permits such corporations to be absorbed by acquisition or merger before they can become a competitive influence in the interstate marketplace. In addition, labor intensive corporations are also more susceptible to acquisition.

Section 2 of the Clayton Act[95] encourages one to think in terms of a unified body of antitrust law. Yet "antitrust law" is a mixture of diverse and complicated statutes. The cumulative effect of *Copp Paving, Goldfarb* and *ABMI* increases the confusion surrounding the jurisdiction of these supposedly similar statutes. The Court's failure to consider antitrust policy in these recent decisions is a partial cause of the increasing diffraction of antitrust jurisdictional tests. Without a major congressional overhaul of the "antitrust laws," however, this unfortunate trend appears likely to continue.[96]

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[94] There is little doubt that § 1 of the Sherman Act will not reach the small, cumulative acquisitions that § 7 was designed to combat. It is § 7's ability to reach the small individual lessenings of competition that sets it apart from § 1 of the Sherman Act. *See* note 87 *supra.*

[95] 15 U.S.C. § 12 (1970).

[96] Section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), is a statute that may be subject to the narrow jurisdictional tests that the Court set out in *Copp Paving* and *ABMI.* Whether *Copp Paving's* holding applied to § 3 was left undecided by the Supreme Court. 419 U.S. at 201.