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## Transacting Business as a Basis for Venue Over a Corporation Under the Antitrust Laws

One of the most obvious difficulties to be met before an antitrust statute can offer effective relief to aggrieved parties is the problem that more often than not the litigants will reside in widely separated geographic areas. The question of venue then becomes almost as important as the substantive remedy available. A relief measure which requires the complainant to travel halfway across a continent in order to obtain jurisdiction over his antagonist affords little practical relief. Yet that is exactly the situation which existed under the Sherman Act. Venue for antitrust suits was limited to districts in which the defendant resided or could be found.<sup>1</sup> With the rapid expansion of large scale manufacturing and the development of national markets, the eastern producer could sell in western shops, fresh vegetables from the southwest could be rushed by rail to middle western dinner tables, and economic injuries could be inflicted on competition existing hundreds of miles from any judicial district in which a defendant resided or could be found.<sup>2</sup>

In the first days of vigorous enforcement of the Sherman Act the need for revision became apparent. Too few violators were convicted while too many escaped unscathed, and it looked as if the act itself would soon become what the cynical turn-of-the-century businessman thought it was—a dead letter.<sup>3</sup> However, *laissez-faire* had finally lost its glamour with the shocking disclosures made by the muckrakers

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1. Section 7 of the Sherman Act, as originally enacted, read:

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

An act to protect trade and commerce against unlawful restraints and monopolies (Sherman Act), ch. 647, § 7, 26 Stat. 209, 210 (1890). (Emphasis added.)

2. ALLEN, *THE GREAT PIERPONT MORGAN* 157 (1949); 7 FAULKNER, *ECONOMIC HISTORY OF THE UNITED STATES—THE DECLINE OF LAISSEZ FAIRE* 154 (1951). See TARBELL, *THE NATIONALIZING OF BUSINESS* 91-112 (1936), for a digest of one aspect of the developing view of the country as a single economic territory—in this instance, the consolidation of railroads is discussed.

3. ALLEN, *op. cit. supra* note 2, at 219; 7 FAULKNER, *op. cit. supra* note 2, at 178; TARBELL, *op. cit. supra* note 2, at 215-19. See also, *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (manufacturing not in interstate commerce and therefore not subject to federal regulation).

and the Pujo Committee.<sup>4</sup> The public saw the destructive potential of unbridled competition and clamored for some workable method of subduing the irresponsible, buccaneer businessman. The result was the Clayton Amendment.<sup>5</sup>

As finally passed the Clayton Act had broadened the provisions of the Sherman Act to add an additional, less restricted test of venue applicable only to corporations: the transaction of business generally.<sup>6</sup> The words of the statute, "transacts business," are not, of course, self-explanatory and necessarily require construction.

Legislative history, the usual starting point for a task such as this, is singularly devoid of enlightening comment. When the Clayton Act was first reported out of committee,<sup>7</sup> the venue provision stated simply that a corporation need be an "inhabitant" or be "found" (i.e., be doing business) in the district in which suit was brought.<sup>8</sup> In the course of open debate on the floor of the House, the further proviso "or has an agent" within the district was added as a test of venue.<sup>9</sup> After the bill passed the House, as amended, the Senate committee<sup>10</sup> made further changes. It deleted the words "or has an agent" and substituted therefor the phrase "or transacts *any* business,"<sup>11</sup> its only comment being that, "These sections [sections 10 and 11] relate to venue and issuance of process arising under the antitrust laws. They are proposed to be amended in certain respects, as shown on their face [*sic*], but the amendments require no special explanation here."<sup>12</sup>

The House refused to accept the Senate's changes and a conference

4. See, *e.g.*, JOSEPHSON, *THE ROBBER BARONS* (1934); SINCLAIR, *THE JUNGLE* (1906); TARBELL, *HISTORY OF THE STANDARD OIL CO.* (1904). See generally, REGIER, *THE ERA OF THE MUCKRAKERS* (1932). The "Pujo Committee" was the name generally given to the House Committee on Banking and Currency in the years 1912-13. Its most famous report on the so-called "Money Trust Investigation" was issued as H.R. REP. No. 1593, 62d Cong., 3d Sess. (1913).

5. 38 Stat. 730 (1914). An act amending the existing antitrust laws passed by the second session of the Sixty-third Congress.

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

38 Stat. 730, 736 (1914), 15 U.S.C. § 22 (1958). (Emphasis added.)

7. The original bill, H.R. 15, 567, was assigned to the Committee on the Judiciary for action. 51 CONG. REC. 6714 (1914).

8. H.R. REP. No. 627, 63rd Cong., 2d Sess. 20 (1914).

9. S. REP. No. 698, 63rd Cong., 2d Sess. 73 (1914).

10. When introduced in the Senate, the bill was assigned to the Committee on the Judiciary for study. 51 CONG. REC. 9929 (1914).

11. S. REP. No. 698, 63rd Cong., 2d Sess. 73 (1914). (Emphasis added.)

12. S. REP. No. 698, 63rd Cong., 2d Sess. 73 (1914).

committee was formed.<sup>13</sup> It joined sections 10 and 11 into a new section 12,<sup>14</sup> and deleted the word "any" from the phrase "transacts any business."<sup>15</sup> This is the language of the section as finally passed<sup>16</sup> and as currently in effect.<sup>17</sup>

Although the scanty legislative comment on the venue provision affords little interpretive aid, it seems obvious that the common and ordinary meaning of the language itself is to govern construction. Further, the deletion of the word "any" from the transacting business provision clearly indicates that the business which is transacted must be substantial or at least of some measurable quantity.

Even though venue is a question of fact, it is the presiding judge who must rule on it.<sup>18</sup> Consequently, the issue is discussed in opinions to a greater extent than would be true if it were left to a jury, and there is, therefore, a body of judicial reasoning from which the applicability of the section to particular situations may be extracted. By and large courts have construed the provision as it was probably meant to be construed, but in so doing they have clouded their opinions by using similar but different terminology<sup>19</sup> without benefit of an explanation.<sup>20</sup>

Two cases regarding venue over a corporation under the antitrust laws have received Supreme Court attention. The *Eastman Kodak Co.* case<sup>21</sup> held that the phrase "transacts business" was to be given its ordinary meaning, qualified by the requirement of substantiality implicit in its wording. Mr. Justice Sanford, speaking for the Court, stated:

[W]e think it clear that, as applied to suits against corporations for injuries sustained by violations of the Anti-Trust Act, its necessary effect was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is "found," but also in any district in which it "transacts business"—although neither residing nor "found" therein—in which case the process may be issued to and served in a district in which the corporation either resides or is "found"; and, further, that a corporation is engaged in transacting business in a district,

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13. 51 CONG. REC. 14,718, 14,737 (1914).

14. S. DOC. NO. 585, 63rd Cong., 2d Sess. 9; H.R. REP. NO. 1168, 63rd Cong., 2d Sess. 7 (1914).

15. *Ibid.*

16. 38 STAT. 730, 740 (1914) (approved by the President on Oct. 15, 1914).

17. 15 U.S.C. 22 (1958).

18. 2 LONGSDORF, FEDERAL PROCEDURE § 375 (1928).

19. *E.g.* United States v. Scophony Corp. of America, 333 U.S. 795 (1948); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

20. *Ibid.*

21. *Eastman Kodak Co. v. Southern Photo Materials Co.*, *supra* note 19.

within the meaning of this section, in such a sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is “found” therein and is amenable to local process,— if in fact, in the ordinary and usual sense, it “transacts business” therein of any substantial character.<sup>22</sup>

Following *Eastman Kodak*, the Court in the *Scophony Corporation* case<sup>23</sup> noted that, “The practical, everyday business or commercial concept of doing or carrying on business ‘of any substantial character’ became the test of venue.”<sup>24</sup> The effect of *Eastman Kodak* then, as stated by the Court, was that:

by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the “found”—“present”—“carrying-on-business” sequence, the Court yielded to and made effective Congress’ remedial purpose.<sup>25</sup>

If “the practical everyday business or commercial concept” is the equivalent of “ordinary and usual sense,” it is clear that the Court has not altered its earlier decision since *Scophony* also contains a requirement that the business transacted be substantial.<sup>26</sup> It is also clear that these decisions promote the intent of Congress if that intent was to do away with the traditional concept of doing business with its rigorous and inflexible tests and to substitute a less restricted basis for venue.

Admittedly, then, the courts have understood the Congressional mandate of section 12 and have attempted to apply it broadly. Further, the very vagueness of the term “transacts business” has allowed the establishment of pliable standards of conduct to be used in determining whether or not enough business is being transacted to satisfy the requirements of the statute. Standards that have been established are applicable to both civil and criminal cases.<sup>27</sup>

When the corporation is an inhabitant of,<sup>28</sup> or is found within a district,<sup>29</sup> of course no problem of standards arises. In addition there are general venue provisions set out in the judiciary act<sup>30</sup> which may

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22. *Id.* at 372-73.

23. *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948).

24. *Id.* at 807.

25. *Id.* at 808.

26. *Id.* at 807.

27. “Any suit, action, or proceeding under the antitrust laws against a corporation . . .” 15 U.S.C. § 22 (1958). (Emphasis added.)

28. 15 U.S.C. § 22 (1958).

29. *Ibid.*

30. 28 U.S.C. § 1391(c) (1958).

also apply to such a defendant, obviating any problem of this kind,<sup>31</sup> but these aspects will not be considered here.

The first and primary consideration necessarily is the period during which business was transacted, as related to the time of the violation. *Scophony*<sup>32</sup> held that if the defendant had been transacting business within the district when the alleged violation was committed, venue would properly lie within that district.<sup>33</sup> This certainly seems to be in accord with the purpose of the statute, for otherwise a corporation could inflict an injury and retreat, thereby successfully avoiding the consequences of its action.<sup>34</sup> Other cases have held that venue is proper if the corporation is transacting business within the district at the time of service of process.<sup>35</sup> This is true even when the alleged wrong had been committed in some other judicial district. In other words, a corporation may properly be sued in a district in which the injury had been committed even though it is not transacting business there at the time suit is brought, or in a district in which it is transacting business at the time of service of process regardless of whether or not it was transacting business there at the time of the alleged injury.

Once it has been established that the corporation was present in some form, at a time which would properly establish venue, consideration is directed toward its conduct to determine whether or not it was sufficient to qualify as transaction of business. Its conduct is always considered as a whole<sup>36</sup> and is to be measured in terms of substantiality generally,<sup>37</sup> rather than by degrees such as "a large amount of business in contradistinction to a small amount of business."<sup>38</sup>

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31. See generally *Bertha Bldg. Corp. v. National Theatres Corp.*, 106 F. Supp. 489 (E.D.N.Y. 1952). (The court held that the general venue provision was equally as applicable as 15 U.S.C. § 22 (1958) for alleged antitrust violations.)

32. *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948).

33. *Id.* at 808.

34. See *Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc.*, 140 F. Supp. 401 (E.D. Va. 1954).

35. *Dairy Indus. Supply Ass'n v. LaBuy*, 207 F.2d 554 (7th Cir. 1953); *Abrams v. Bendix Home Appliances, Inc.*, 96 F. Supp. 3 (S.D.N.Y. 1951); *cf. De Golia v. Twentieth Century-Fox Film Corp.*, 140 F. Supp. 316 (N.D. Cal. 1953). (The case held that in cases involving a charge of conspiracy in violating the antitrust laws, if the charge was subsequently proven and further if it was proven that at least one of the conspirators was transacting business within the judicial district, all of the co-conspirators would also be deemed to have done so.)

36. *Riss & Co. v. Association of Am. R.R.*, 24 F.R.D. 7 (D.D.C. 1959); *Metropolitan Theatre Co. v. Warner Bros. Pictures, Inc.*, 16 F.R.D. 391 (S.D.N.Y. 1954); *Abrams v. Bendix Home Appliances, Inc.*, *supra* note 35.

37. *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

38. *Katz Drug Co. v. W.A. Sheaffer Pen Co.*, 6 F. Supp. 210, 212 (W.D. Mo. 1982).

Since no single activity is usually sufficient in and of itself to satisfy the transacting business requirement in the doubtful cases, many activities and many factors must be weighed and balanced. These are, however, qualitative rather than quantitative: they are not simply assigned arithmetic values to be totalled and averaged, but are viewed in the aggregate to determine the substantiality of the activities as a whole.<sup>39</sup>

In *Abrams v. Bendix Home Appliances, Inc.*,<sup>40</sup> for example, the court noted that defendant maintained two bank accounts within the district, that its district sales manager was present there two or three times a month, that its field service supervisor had conducted a five-day training course there, that executives of the company held conferences there, that it advertised extensively within the district, and that three of its five directors resided there. This case is typical of the tendency to view the conduct of the defendant as a whole and not as isolated bits and pieces.<sup>41</sup>

Various activities which have been examined in this connection include sales, deliveries, the presence of subsidiaries, distributors, branch offices, the possession of a license to do business, solicitation of customers and advertising generally. Although any one of these activities, if engaged in on a large enough scale, may be sufficient to establish venue, each one is usually considered as a separate item in the over-all conduct which is the subject of examination.

### *Sales; Deliveries*

When examining sales within a district, either of two tests may be employed to determine if the substantiality requirement has been met: (1) the number of customers; or (2) the quantity of goods sold.

A single, isolated sale does not satisfy the requirement; there must be an element of continuity shown.<sup>42</sup> Generally, this means that it must be demonstrated that sales are made on a recurring basis.<sup>43</sup>

When there are grounds for employing the tests, they operate harmoniously and are complementary in their application. Two cases, both of them involving mail-order houses, clearly demonstrate this correlation. In the first,<sup>44</sup> only six of over ten thousand customers of

39. See, *e.g.*, *Riss & Co. v. Association of Am. R.R.*, 24 F.R.D. 7 (D.D.C. 1959).

40. 96 F. Supp. 3 (S.D.N.Y. 1951).

41. See, *e.g.*, *Riss & Co. v. Association of Am. R.R.*, 24 F.R.D. 7 (D.D.C. 1959).

42. *Boston Medical Supply Co. v. Brown & Connolly, Inc.*, 105 F. Supp. 175 (D. Mass. 1952).

43. One who invokes the jurisdiction of federal courts has the burden of showing he is properly in court: *Becker v. Angle*, 165 F.2d 140 (10th Cir. 1947); *Pfeiffer v. United Booking Office, Inc.*, 93 F. Supp. 363 (N.D. Ill. 1950).

44. *Dazian's, Inc. v. Switzer Bros., Inc.*, 111 F. Supp. 648 (N.D. Ohio 1951).

defendant resided in the district in which suit was brought. The court sustained defendant's motion to quash service. Although there was no statement of the dollar value of sales made to these six, it is fair to assume from the language of the decision that the amount was small in absolute terms.

The second case<sup>45</sup> also involved a mail-order house allegedly having but six customers within the district. However, these customers purchased over six thousand pounds of ball chewing gum per month, amounting to annual sales of over \$25,000. The court held that venue was proper, and rightly so, since the total sales were substantial when viewed from the ordinary businessman's point of view even though the number of customers was small.

Although cases which require that sales be made on a recurring basis<sup>46</sup> have much to recommend them, the better criterion is substantiality alone, unclouded by secondary considerations.<sup>47</sup> Thus, if the mail-order house in the first case had had a great number of customers in the district, each of whom purchased only small quantities of goods in individual, non-recurring sales, since there is no valid reason to suppose that Congress did not intend this to amount to a transaction of business sufficient to establish venue, an aggrieved customer ought to be allowed to sue such a defendant within that district. Also, a single sale should, under some circumstances, be enough to establish venue if it involved a large enough sum of money.<sup>48</sup>

Similarly, since every sale necessarily involves a delivery, courts have sensibly held that deliveries to a district other than the one in which the sale was made may satisfy the venue requirements.<sup>49</sup> But still the test of substantiality must be met. When applied to the situation of delivery alone, however, substantiality could mean something altogether different than it does in the sales alone situation, and in fact is calculated differently. Two separate measurements have developed for use in delivery cases: (1) the absolute value of the goods delivered in terms of money;<sup>50</sup> and (2) the relative value of the goods

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45. *Green v. United States Chewing Gum Mfg. Co.*, 224 F.2d 369 (5th Cir. 1955).

46. *Boston Medical Supply Co. v. Brown & Connolly, Inc.*, 105 F. Supp. 175 (D. Mass. 1952).

47. *Ibid.* The defendant had sold to the plaintiff only about \$3,000 worth of merchandise.

48. See, e.g., *Mandel Bros., Inc. v. Henry A. O'Neil, Inc.*, 69 F.2d 452 (1934) (single sale amounted to "doing business"); accord, RESTATEMENT (SECOND), CONFLICT OF LAWS § 167, comment *a* (1958).

49. See, e.g., *Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.*, 129 F. Supp. 425 (E.D. Pa. 1955).

50. *Ibid.*

delivered in terms of money as compared to the dollar value of the sales of the business as a whole.<sup>51</sup>

Logically, there is no real reason to apply different tests to a delivery than are applied to a sale. Since a delivery alone is sufficient to establish venue if the merchandise shipped is "substantial" in amount, and since the only way in which sales contracts may be completed is by delivery,<sup>52</sup> the same rules should apply to both situations. To date, no case has attempted to apply the tests used in delivery cases to a sale alone, nor has a test used in the sales cases been decisive in a delivery alone situation, but it seems likely that eventually the two situations will be treated alike.

Nevertheless, while different methods of measuring substantiality remain, they must be recognized and, assuming that they may soon be adapted to all cases of sale or delivery, they must be clarified as much as possible. Essentially, two factors must be considered, either one of which may control: first, the number of customers dealt with within the district;<sup>53</sup> second, the quantity of the goods sold or delivered. When measuring quantity, however, any one of several methods may be employed. First, it may be measured in absolute terms, either in money<sup>54</sup> or by mass (*e.g.*, tonnage).<sup>55</sup> Then, if measured by mass, the

51. *Austad v. United States Steel Corp.*, 141 F. Supp. 437 (N.D. Cal. 1956).

52. *Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.*, 129 F. Supp. 425 (E.D. Pa. 1955).

53. *Green v. United States Chewing Gum Co.*, 224 F.2d 369 (5th Cir. 1955); *Boston Medical Supply Co. v. Brown & Connolly, Inc.*, 105 F. Supp. 175 (D. Mass. 1952); *Dazian's v. Switzer Bros., Inc.*, 111 F. Supp. 648 (N.D. Ohio 1951); *Abrams v. Bendix Home Appliances, Inc.*, 96 F. Supp. 3 (S.D.N.Y. 1951); *Lechler Labs., Inc. v. Duart Mfg. Co.*, 35 F. Supp. 839 (S.D.N.Y. 1940). Upon analysis of the cases on this point it appears that the number of customers with which a corporation deals is the weakest criterion to use in determining if the corporation is transacting business.

54. *Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904 (8th Cir. 1960) (Defendant A had sales within the district of \$1,313,947; defendant B had sales of over \$446,000 and defendant C had sales of over \$142,000, and in the case of all three, the sales shown were substantial.); *Green v. United States Chewing Gum Co.*, *supra* note 53 (Defendant had sales of over \$25,000 annually, the amount shown was substantial enough to say that the defendant transacted business.); *Reid v. University of Minn.*, 107 F. Supp. 439 (N.D. Ohio 1952) (Total sales over the years of only \$6,439 showed that the business conducted within the district was insubstantial.); *Boston Medical Supply Co. v. Brown & Connolly*, *supra* note 53 (Defendant's sale in the case amounted to only \$3,000, which was clearly insubstantial within the terms of 15 U.S.C. § 22.); *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784 (S.D.N.Y. 1936) (A showing of over \$4,000,000 of sales per year was substantial.).

55. *Austad v. United States Steel Corp.*, 141 F. Supp. 437 (N.D. Cal. 1956). (Delivery of less than 300 tons of steel during the year to any purchaser in the district was so insubstantial as to be able to say that the defendant was not transacting business.)

volume may be viewed either from within<sup>56</sup> or without<sup>57</sup> the context of the industry. That is, it may be viewed absolutely, apart from any considerations of type of article, quantity ordinarily sold, or volume consumed or produced by the industry or its customers as a whole. Or, it may be viewed relatively to the facts of economic life within the industry of which it is a part. Viewed in a vacuum, absolutely, quantity becomes a matter of observation, subject to objective considerations only, and this approach would certainly seem in conformity with an intent to simplify the test for venue as much as possible. On the other hand, such a mechanical approach is unrealistic in a highly complicated industrial society and may work more injustice than it cures.<sup>58</sup> The ultimate decision must be one of policy and is more properly within the realm of the legislature than of the judiciary.

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56. *Austad v. United States Steel Corp.*, *supra* note 55. (The ordinary and common man standard of the industry was the guide to be used by the court.) Many cases have discussed the defendant's contention of its relatively low percentage of sales, or deliveries within a district. The courts have always when possible reduced the relative figures to absolute quantities. *Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904 (8th Cir. 1960) (Defendants contended that since their sales were only 1.72%, .7% and 1.5% respectively for A, B, and C that that proved the sales were not substantial. The court rejected their contention and the result was based on the absolute dollar volume of their sales. See note 54, *supra*); *Austad v. United States Steel Corp.*, *supra* (Defendant claimed its transaction of business was small since only 6/100 of 1% of its production was delivered into the district. The court reduced this to 300 tons, and decided that the amount was insubstantial. See note 55, *supra*); *United States v. Gerber*, 86 F. Supp. 175 (E.D. Pa. 1949) (Court held that since an agent was present in the district who transacted 3.8% of the defendant's business and that this 3.8% represented over 80% of the business from the district, that that would be sufficient to allow venue. The basis of the case is obscure, but probably the court was never presented with the absolute quantities involved, hence could not decide on the aforementioned basis.); *Hansen Packing Co. v. Armour & Co.*, 16 F.2d 784 (S.D.N.Y. 1936) (Defendant claimed its sales were insubstantial within the district, because the sales within the district were only 2.49% of its sales. The court said that the sales amounted to over \$4,000,000 with the result that the court held the defendant subject to venue.).

57. *Metropolitan Theatre Co. v. Warner Bros. Pictures, Inc.*, 16 F.R.D. 391 (S.D.N.Y. 1954). (Court held that the test to be applied was the practical everyday view of the aggregate within the district. Presumably the court meant not necessarily within the context of the industry.)

58. See generally, *Green v. United States Chewing Gum Mfg. Co.*, 224 F.2d 369, at 371-72 (5th Cir. 1955), where the court said:

It will not do to deny substantially [*sic*] by replying, as said defendant does in its President's affidavit, that " \* \* \* the gross business of U.S. Chewing Gum Mfg. Co. \* \* \* represented by shipments to these two customers \* \* \* is a very small part of the total business of my company," for if that were the rule, we would have different tests of substantiality applying to different corporations according to their size; a large corporation could, with impunity, engage in the same acts which would subject a smaller corporation to jurisdiction and venue.

One further observation should be made regarding sales. When the sale is of a service which is to be performed in interstate commerce, the plaintiff faces an additional burden in terms of proof: he must show that some portion of the service is to be performed within the judicial district in which he is seeking to establish venue.<sup>59</sup> Once having shown this, he is no longer subject to the objection that his action unduly burdens interstate commerce. Although no case has specifically held that the quantum of service to be performed must be substantial, this would seem to follow naturally.

### *Subsidiary Corporations*

Different problems arise when the business is being transacted through a subsidiary company. For a long time, the transaction of business by a wholly-owned subsidiary corporation was insufficient to establish venue for an action against the parent if the two firms maintained their separate corporate identities.<sup>60</sup> This general rule was reversed in the most recent case<sup>61</sup> in which it was discussed. The court in *Waldron v. British Petroleum Co.*<sup>62</sup> placed great reliance upon the *Scophony*<sup>63</sup> case and held that venue was proper notwithstanding the maintenance of separate corporate identities by the parent and its subsidiary. Although the same defendant had been able to escape

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59. *McManus v. Capital Airlines, Inc.*, 166 F. Supp. 301 (E.D.N.Y. 1958). Compare *Green v. Chicago B. & Q. R.R.*, 205 U.S. 530 (1907). (The court said that sales of services in interstate commerce which were not to be used within the district did not constitute "doing business" sufficient to be a basis of venue; however, the court said it was obvious that the defendant was doing some business.) See also, *Boston Medical Supply Co. v. Lea & Febiger*, 195 F.2d 853 (1st Cir. 1952). (The First Circuit said that a consignment for resale contract was not sufficient to hold that the consignor was transacting business, since to hold otherwise would be to unduly burden commerce.)

60. *Austad v. United States Steel Corp.*, 141 F. Supp. 437 (N.D. Cal. 1956); *Terry Carpenter, Ltd. v. Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954); *Pfeiffer v. United Booking Office, Inc.*, 93 F. Supp. 363 (N.D. Ill. 1950); *Lawlor v. National Screen Serv. Corp.*, 10 F.R.D. 123 (E.D. Pa. 1950). The tests that have been particularly useful in the courts for determining that a parent is transacting business, because its subsidiary is, are: the existence of an agency—*Mecco Realty Holding Co. v. Warner Bros. Pictures, Inc.*, 45 F. Supp. 340 (D.N.J. 1942); a general commingling of activities—*Northern Ky. Tel. Co. v. Southern Bell Tel. Co.*, 54 F.2d 107 (E.D. Ky. 1931); rendering of advisory services for a fee coupled with fact that one made purchases for the other—*Exhibitors Serv. Inc. v. Abbey Rents*, 135 F. Supp. 112 (W.D. Mo. 1955); and finally, when a subsidiary's personnel performs services for the parent under the latter's supervision—*Hansen Packing Co. v. Swift & Co.* 27 F. Supp. 364 (S.D.N.Y. 1939).

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

62. *Ibid.*

63. *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948).

prosecution in two earlier cases<sup>64</sup> on the ground that the separate entities precluded the establishment of venue over the parent, the court felt free to look behind the corporate fiction in search of legitimate business reasons for the use of a subsidiary, and finding none, held venue proper, pointing out that:

A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of saying that a corporation which has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees, or making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction, particularly when the entire corporate set-up of the defendant shows that it is designed to operate to a substantial degree through separate corporate entities responding to the wishes and directions of the parent and providing the revenues sought by the parent. We would be exalting fiction over fact if we were [*sic*] to conclude that under those circumstances the parent company was not in fact transacting business in this District through the instrumentality of its wholly owned subsidiaries.<sup>65</sup>

The importance of this decision cannot be over-emphasized. Now that niceties of corporate law and subtleties of organization will not be allowed to defeat the premise of *Scophony*<sup>66</sup> that Congress intended to destroy the "hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence,"<sup>67</sup> the myriads of national companies which transact local business through subsidiary corporations can be subjected to full-scale prosecutions at any level by an aggrieved party in spite of the fact that they are not physically present within the district. When this rationale is employed, due process problems are avoided by using the *International Shoe Co. v. Washington*<sup>68</sup> rule that "minimum contact" is sufficient to satisfy the due process requirements of *Milliken v. Meyer*.<sup>69</sup>

Although the rule has not been applied to any other situation, it is clearly the most sensible approach to the problem and will no doubt be followed in subsequent cases, not only because it avoids the technical difficulties of the older rule<sup>70</sup> but also because the premise is sound and the reasoning logical.

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64. *Winkler-Koch Eng'r Co. v. Universal Oil Prods. Co.*, 70 F. Supp. 77 (S.D.N.Y. 1946) (action under the antitrust laws); *Amtorg Trading Corp. v. Standard Oil Co.*, 47 F. Supp. 466 (S.D.N.Y. 1942) (action in admiralty).

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

66. *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948).

67. *Id.* at 808.

68. 326 U.S. 310 (1945).

69. 311 U.S. 457 (1940).

70. See also *United States v. Watchmakers of Switzerland Information Center Inc.*, 133 F. Supp. 40 (S.D.N.Y. 1955).

*Local Distributors; Local Offices*

When a company engages the service of a local firm to act for it, further complications arise. The typical case is where a manufacturing concern sells its produce through a local distributor. Before the corporation can be said to be transacting business in that area, it must be shown either that: (1) the sales or deliveries of its good to the distributor are substantial;<sup>71</sup> (2) it exercises substantial control over the distributor through supervision,<sup>72</sup> or, in areas which do not follow the *Waldron* case, (3) the distributor is a subsidiary of the corporation but that separate identities have not been maintained.<sup>73</sup>

The reason for holding that the presence of a distributor within a district will, when coupled with any one of the other requirements listed above, satisfy the venue requirements is fairly obvious: first of all, the very existence of the distributor within the district raises an inference of continuity. Then once it is shown that the corporation's conduct fits any of the three listed categories, substantiality will be presumed since the distributor himself is transacting business there.

Maintenance of an office within the district presents different problems, especially as concerns the time factor. The simplest case was one in which the defendant corporation had maintained a branch sales office within the district for over twenty years.<sup>74</sup> This office was staffed by eleven sales personnel and seven stenographers, and although the sales contracts were not final until accepted at the company's home office, over three million dollars of merchandise a year were sold through it. The court thought that the defendant had really been "found" within the district, and was certain that it had been transacting business there under any test which might be applied.<sup>75</sup>

In *Dairy Indus. Supply Ass'n v. La Buy*,<sup>76</sup> the situation was a little more complicated. The Association, a trade group with over four hundred members, had its home office in Washington, D.C. When suit was brought in the Northern District of Illinois, practically the entire staff of the group was in Chicago at an exposition. The Seventh Circuit found venue proper since "practically the entire business of DISA was being transacted in Chicago."<sup>77</sup> Thus even a temporary sojourn may serve as a basis for establishing venue.

Similarly, the leasing of office space staffed by a single employee,

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71. See cases cited in notes 54, 55, 56 & 57 *supra*.

72. *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corp.*, 46 F.2d 623 (1st Cir. 1931).

73. See note 60 *supra* and accompanying text.

74. *Haskell v. Aluminum Co. of America*, 14 F.2d 864 (D. Mass. 1926).

75. *Id.* at 869.

76. 207 F.2d 554 (7th Cir. 1953).

77. *Id.* at 557.

“partially, if not largely, for the convenience of its licensees and customers”<sup>78</sup> and used as a meeting place and conference room for officers and directors was sufficient evidence to support a finding that a corporation had been transacting business within the district.<sup>79</sup>

As in the distributor cases, then, not much need be shown in order to convince the courts that business is in fact being transacted when the defendant has an office within the district. There is a close correlation of reasoning in both situations: continuity and substantiality can safely be presumed.

### *Local Licenses*

Another situation in which the elements appear from the facts alone is the case in which the defendant holds a license from some local governmental authority to do business in that area. It is clear that this will subject the corporation to suit<sup>80</sup>—including an action for alleged violation of antitrust laws—under the judiciary act now in force.<sup>81</sup>

A recent decision which discusses this type of case from the transacting business point of view involved three corporations, all national liquor distributors which had obtained liquor licenses from the state of Missouri in order to sell to local wholesalers.<sup>82</sup> The court held that the license and subsequent actions in accordance with its provisions *pro tanto* constituted the transaction of business.<sup>83</sup> The license and compliance with its terms were “not to be considered in isolation.”<sup>84</sup>

Thus, the possession of a license amounts to irrebuttable proof that business is being transacted. This being the case, it might be that an unretracted registration to do business, for example, without anything more and without a showing that any business was actually done, could amount to an admission by the defendant sufficient to establish venue. As far as burden of proof and need for substantiating evidence are concerned, license cases are the easiest of all for the plaintiff.

### *Solicitation and Advertising*

When the only action being done by a defendant is the solicitation of business, the rule generally is that local courts have no jurisdiction

78. *Winkler-Koch Eng'r Co. v. Universal Oil Prods. Co.*, 70 F. Supp. 77, 84 (S.D.N.Y. 1946).

79. *Winkler-Koch Eng'r Co. v. Universal Oil Prods. Co.*, 70 F. Supp. 77 (S.D.N.Y. 1946).

80. See note 31 *supra*.

81. 28 U.S.C. § 1391(c) (1958).

82. *Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904 (8th Cir. 1960).

83. *Id.* at 910.

84. *Ibid.*

over him.<sup>85</sup> Nevertheless, mere solicitation has been held to be sufficient to establish venue under the transacting business clause of the Clayton Act.<sup>86</sup> However, the method used in the solicitation can be extremely important. For instance, a cooperative corporation which solicited members by advertising only and made no personal canvass was held to be exempt from suit in the district in which the advertising was circulated.<sup>87</sup> Also, a non-profit corporation which published advertising in its magazine which was circulated within the district was not subject to venue.<sup>88</sup> Since the basis for this decision was that to hold otherwise would be to place too great a burden on fraternal and service societies,<sup>89</sup> this case must be limited to its facts, and a corporation which is neither a fraternal nor a service organization might be subject to local courts in areas in which it circulates advertising to any great extent.

The fact of advertising alone has never been used in and of itself to establish venue. Nevertheless, it is clear that advertising is one of the elements which may properly be considered when viewing a defendant's over-all activities.<sup>90</sup>

### *Conclusion*

The preceding are the considerations which enter into any decision on the transacting business issue when raised in antitrust cases. The clause was added to the venue provisions in order to broaden the bases on which antitrust actions could be brought, and as interpreted, it has accomplished quite a bit. From all indications, the trend is to broaden the net of venue still further, and as the volume of prosecutions for antitrust grievances increases, it is almost certain that other considerations will take their places among those listed. And that is the strength of the clause. Although it does present some difficult problems, it is flexible enough to be useful, it is adaptable to the economic situation and it can catch the otherwise uncaught.

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85. *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914) (jurisdiction proper on other grounds).

86. *Adolf Meyer, Inc. v. Florists' Tel. Delivery Ass'n*, 16 F. Supp. 783 (S.D.N.Y. 1936). *Cf. United States v. Asbestos Corp.*, 34 F.2d 182 (S.D.N.Y. 1929).

87. *Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n*, 102 F. Supp. 649 (D. Minn. 1951).

88. *Wentling v. Popular Science Publishing Co.*, 176 F. Supp. 652 (M.D. Pa. 1959).

89. *Id.* at 657.

90. See *Wentling v. Popular Science Publishing Co.*, 176 F. Supp. 652 (M.D. Pa. 1959); *Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904 (8th Cir. 1960).