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FEDERAL PRE-TRIAL PROCEDURE IN AN ANTITRUST SUIT*

by

*B. Thomas McElroy***

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IN this Article the procedural problems likely to be encountered in the trial of an antitrust suit are discussed, with citations to many of the relevant authorities. In addition to general considerations and certain pre-trial motions the following topics are covered: parties; standing; real party in interest; capacity; subject matter and personal jurisdiction; pendent and ancillary jurisdiction; exemptions from antitrust coverage; regulated industries; service of process; venue; nationwide service of process under the Clayton Act; pleadings; discovery; class actions; and multi-district litigation.

I. GENERAL CONSIDERATIONS

Immateriality of Amount in Controversy. Although it is generally understood that antitrust suits are not subject to an amount of money in controversy requirement and also are not dependent upon diversity of citizenship, it may nevertheless be helpful to set out the sources of this state of the law. Section 1337 of United States Code title 28 provides: "[T]he district courts shall have original jurisdiction of any civil action or proceeding arising under an Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."¹ Interpreting the key phrase "arising under an Act . . . regulating commerce" to include antitrust actions, the Supreme Court, in a leading case, has held that no jurisdictional amount of money in controversy requirement exists as to antitrust cases.² Similarly, the normal requirement that there be diversity of citizenship before there is federal jurisdiction has been held inapplicable to antitrust actions.

Immateriality of Diversity of Citizenship. Section 1331 of title 28 provides that "[T]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States."³ Except for the requirement as to the amount

1. 28 U.S.C. § 1337 (1970).

2. *Parker v. Brown*, 317 U.S. 341 (1943). The Supreme Court stated that it was of the "opinion that as the complaint assails the validity of the program under the antitrust laws, 15 U.S.C. §§ 1-33, the suit is one 'arising under' a 'law regulating commerce'; and allegation and proof of the jurisdictional amount are not required." *Id.* at 349.

3. 28 U.S.C. § 1331 (1970).

in controversy, section 1331 and section 1337 apply the same test in determining whether the case "arises under" federal law.⁴

In *Coast v. Hunt Oil Co.*⁵ it was argued that joining a person as a party defendant deprives a federal court of jurisdiction when both the desired party defendant and the plaintiff are citizens of the same state. The court, however, held that "where the action is for the enforcement of rights arising under or created by a federal statute such as the Anti-Trust Act, the court has jurisdiction regardless of the citizenship of the parties"⁶ Recognizing that the preceding jurisdictional requirements are immaterial in antitrust cases, this Article proceeds only to analyze and discuss the jurisdictional factors of parties to the suit, the different types of federal jurisdiction, venue, service of process, and the pleading requirements.

II. PARTIES

Standing to Maintain Action. Although much has been written about "standing" under the federal antitrust statutes, the Supreme Court of the United States first directed its attention to this issue only as late as 1968 in the noted case of *Flast v. Cohen*.⁷ In *Flast* and thereafter, in short order, in four additional cases⁸ the Court determined that the first element which must be met for a plaintiff to establish standing to maintain an antitrust action is an allegation and demonstration that the plaintiff has suffered a wrong. This requirement is derived from article III of the Constitution which restricts the exercise of judicial power to "cases" and "controversies." Therefore, the plaintiff's allegation and demonstration of a wrong, economic or otherwise, must show that he has some personal stake in the outcome of the litigation. Standing does not contemplate what a plaintiff's legally protected interests may be on the merits or whether the controversy is otherwise justiciable, but only "whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue."⁹

The second element necessary to afford standing to bring an antitrust action is determined by "whether the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question."¹⁰ This

4. *Federal Coast Ry. v. Jacksonville Terminal Co.*, 328 F.2d 720 (5th Cir.), *cert. denied*, 379 U.S. 830 (1964).

5. 96 F. Supp. 53 (W.D. La. 1951), *aff'd*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952).

6. 96 F. Supp. at 61.

7. 392 U.S. 83 (1968).

8. *Village of Arlington Heights v. Metropolitan Housing Dev.*, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (where standing concept approved); *Warth v. Seldin*, 422 U.S. 490 (1975); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Servs. Organization, Inc. v. Camp*, 397 U.S. 150 (1970). The Supreme Court in *Warth v. Seldin*, *supra*, held that a homebuilders association lacked capacity to sue and recover money damages on behalf of its members. The Court stated, however, that a trade association could have standing as the representative of its members even in the absence of injury to itself where it alleged that its members were suffering, or threatened with, injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves been parties to the suit. The Supreme Court further said that the association must show that "[t]he nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to the proper resolution of the cause." 422 U.S. at 511.

9. *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

10. *Association of Data Processing Servs. Organization, Inc. v. Camp*, 397 U.S. 150, 153

"zone of interest" test was designed to replace the "legal right" test. The flaw of the legal right test is that it goes to the merits of the case rather than to the *preliminary* issue of standing.¹¹ In the recent Supreme Court case of *Illinois Brick Co. v. Illinois*¹² the Court held that section 4 of the Clayton Act affords a remedy only to persons who purchase directly from the antitrust offender. Proposed legislation in the aftermath of *Illinois Brick* would amend the Clayton Act by adding a new section 41 which would state in effect that in any action under § 4A or 4C the fact that a person or the United States was an indirect purchaser would not bar recovery. The congressional purpose in enacting such legislation, if it is passed, would be to provide consumer protection.

The lower federal courts have also discussed standing to maintain an antitrust action, with such discussions being keyed to the language of section 4 of the Clayton Act.¹³ That section declares the right of private parties to maintain an action for damages because of violations of antitrust statutes as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained"¹⁴

Although the lower courts are talking about the same "standing" that the Supreme Court is, sometimes the elements have been stated somewhat differently. Standing under section 4 has been held to encompass two ingredients: (i) that the plaintiff's interest which is allegedly injured by the defendant falls within the scope of antitrust protection, and (ii) that the defendant's conduct contributed to the plaintiff's injuries.¹⁵ The two criteria to be satisfied before standing is established for a private antitrust suit under section 4 were stated a little differently in *Southern Concrete Co. v. United States Steel Corp.*¹⁶ In *Southern Concrete* the criteria were stated to be: (i) the plaintiff must show that he has suffered injury to his business or property; and (ii) the plaintiff must show that his injuries were incurred by reason of the defendant's illegal activities.¹⁷

Relief in a private action under the antitrust laws cannot, therefore, arise merely from the existence of an antitrust violation. The "gist of the action . . . is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law."¹⁸ Additionally, the

(1970). In this case appears Justice Douglas' often-quoted dictum that "[g]eneralizations about standing to sue are largely worthless as such." *Id.* at 151.

11. *Davis v. Romney*, 355 F. Supp. 29 (E.D. Pa. 1973), *modified*, 490 F.2d 1360 (3d Cir. 1974), *aff'd*, 530 F.2d 963 (3d Cir. 1975).

12. 45 U.S.L.W. 4611 (U.S. June 9, 1977). *See also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 45 U.S.L.W. 4138 (U.S. Jan. 25, 1977).

13. 15 U.S.C. § 15 (1970). *See also* *Las Vegas Sun, Inc. v. Summa Corp.*, No. C-LV 76-77 S.C. (D. Nev. May 23, 1977). *Summa* held that section 4 of the Clayton Act does not provide a publisher standing to sue under section 1 of the Sherman Act nor under section 8 of the Clayton Act. The court stated that the injury found under the circumstances was not the kind of injury which the antitrust laws were designed to protect.

14. *Id.*

15. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir.), *on remand*, 367 F. Supp. 1298 (C.D. Cal. 1973), *aff'd*, 538 F.2d 231 (9th Cir. 1976).

16. 394 F. Supp. 362 (N.D. Ga. 1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976).

17. *Id.* at 368.

18. *Association of W. Rys. v. Riss & Co.*, 299 F.2d 133, 135 (D.C. Cir.), *cert. denied*, 370

following language by the Second Circuit gives a cogent example of the federal judicial reasoning behind the standing requirement:

Standing to sue (under Section IV of the Clayton Act) was not given by Congress to any and every citizen who, motivated by public spirit or possibly some baser reason, would set himself up as a watchdog of business behavior. Congress properly bestowed the right to sue only on such persons as might be injured in their business or property by reason of anything forbidden in the antitrust laws.¹⁹

The United States Court of Appeals for the Fifth Circuit held that for standing to exist in a suit charging antitrust violations plaintiff must demonstrate (i) that injury was caused to his business or property, and (ii) that such injury was the result of defendant's illegal activities.²⁰ Also, in a recent case the court held that a condominium corporation itself had no standing to bring the action, even under the broader Clayton Act section providing for injunctive relief.²¹ Instead, the court held that the required causal connection between the antitrust violation and the injury could exist only with respect to purchasers of the condominium units, not the condominium corporation from which the purchasers had bought their units. This was a case brought against developers of the condominium complex under the first and second sections of the Sherman Act and under the treble damages section of the Clayton Act.²² In the complaint it was alleged that the "tying products" were the residential condominium units and the "tied products"²³ were the recreational facilities and obligations to make rental payments thereon.

Standing to sue in favor of Ralph Nader was found recently by a trial court in a case brought to enjoin allegedly anticompetitive overbooking practices of numerous airlines.²⁴ The court ruled that Nader did not seek merely to vindicate the public interest but had alleged "concrete and particularized personal injuries arising from the alleged antitrust violation."²⁵ The cause was dismissed, however, under the doctrine of primary jurisdiction.

Among the classes of persons which courts have held not to have standing to sue under the federal antitrust statutes are the following: employees of an injured corporation;²⁶ creditors of an injured corporation;²⁷ and persons suffering merely incidental injury, thus placing them outside the target area of a price-fixing conspiracy or other antitrust violation.²⁸

U.S. 916 (1962). See also *Shumate & Co. v. National Ass'n of Secs. Dealers, Inc.*, 509 F.2d 147 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975).

19. *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166, 171 (2d Cir. 1969).

20. *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

21. *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1976).

22. 15 U.S.C. §§ 1, 2, 15 (1970).

23. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), and *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), for a discussion of "tied" and "tying" products.

24. *Nader v. Air Transp. Ass'n of America*, 426 F. Supp. 1035 (D.D.C. 1977).

25. *Id.* at 1038.

26. *Ragar v. T.J. Raney & Sons*, 388 F. Supp. 1184, 1186 (E.D. Ark.), *aff'd*, 521 F.2d 795 (8th Cir. 1975).

27. *Id.*

28. *Carnivale Bag Co. v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D.N.Y. 1975).

In mid-April 1977 the Supreme Court granted certiorari in *Pfizer, Inc. v. Government of India*²⁹ to consider whether foreign governments, claiming to have been injured by Sherman Act violations, have standing to sue in American courts for treble damages. Section IV of the Clayton Act provides that "any person" may sue for treble the amount of damages caused that person by violation of the antitrust laws.³⁰ Section I of the Act defines "persons" to include corporations and associations existing under domestic or foreign laws, but says nothing about governments, either domestic or foreign.³¹ The Supreme Court has held that the Government of the United States is not a "person" entitled to sue for treble damages.³² On the other hand, a state does have standing to maintain suit.³³

As is well known to lawyers working in the antitrust field, many states, private parties, the Federal Trade Commission, and the Justice Department have all maintained lengthy antitrust litigation against American manufacturers of the antibiotic Tetracycline, charging the defendant companies had conspired to monopolize trade, and, thus, had inflated the price of this widely used drug. Now various foreign governments have brought actions. In May 1976 the Eighth Circuit affirmed a district court decision that the governments of India, Iran, and the Philippines are "persons" entitled to sue for treble damages.³⁴

Real Party in Interest. The real party in interest rule, derived from Federal Rule of Civil Procedure 17(a)³⁵ dictates that all actions, to be valid, must be

29. 522 F.2d 612 (8th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3960 (U.S. Apr. 19, 1977).

30. 15 U.S.C. § 15 (1970).

31. *Id.* § 12.

32. *United States v. Cooper Corp.*, 312 U.S. 600 (1941).

33. *Georgia v. Evans*, 316 U.S. 159 (1942).

34. The reasoning of the appellate court was that since Congress intended domestic state governments to have standing to sue for antitrust violations, in view of the Supreme Court decision in *Georgia v. Evans*, 316 U.S. 159 (1942), then "Congress intended other bodies politic, such as a foreign government, to enjoy the same right. There is certainly no indication of a contrary intent in the legislative history." Such reasoning was upheld by the Eighth Circuit sitting en banc. 522 F.2d 612 (8th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3960 (U.S. Apr. 19, 1977). The Supreme Court then sought the Solicitor General's view of the petition submitted by the drug manufacturing companies to review the said Eighth Circuit decision. In reply the Justice Department stated that the petition for writ of the defendant companies should be denied. The Department of State apparently supported this position by making known its view that it anticipated no foreign policy problems would arise from allowing foreign governments to sue under American antitrust laws. But the drug manufacturers claimed in their application for writ that foreign countries have already reaped vast profits from trade combinations such as OPEC and would be very happy to let American courts award them "further chunks" of the American economy as damages. Many foreign countries are today arrayed in trade combinations conflicting with the philosophy of the antitrust laws, which combinations our country has been powerless to prevent. Therefore, the defendant companies urged that if the decision is made to accord standing to such foreign countries to sue in American courts for antitrust violations, such a decision should be made in the first instance by congressional enactment.

35. FED. R. CIV. P. 17(a) provides, in part, that:

Every action should be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest

prosecuted in the name of the real party in interest. This rule was originally intended merely to allow an assignee to sue in his own name; it has, however, also come to protect a defendant against subsequent action by the party actually entitled to recovery and thus insures that a judgment will have the proper degree of finality.³⁶ For example, a defendant's motion to dismiss an antitrust action by a trade association alleging violations of the Sherman Act in connection with the retail sale of gravestones was granted in *Northern California Monument Dealers Association v. Interment Association*,³⁷ in which the court said: "As a trade association whose members have allegedly been damaged by violations of the antitrust laws, plaintiff does not itself have any right to relief for a cause of action, since the association is not the 'real party in interest.'" ³⁸ The court in the *Interment Association* case could as easily have said that the Association lacked standing to sue. Had opposing counsel relied on standing, great consternation would have been caused since standing is not always as well understood and tends to be a confusing concept. Most lawyers, however, are at ease with their understanding of real party in interest terminology.

Capacity. Capacity has been defined as "not only the power to bring an action, but also the power to maintain it."³⁹ A good example of the concept of capacity is the United States Court of Claim's holding that a plaintiff corporation had the capacity to bring suit but lost that capacity when it was suspended, under state law, for failing to pay its taxes some twenty days after the complaint had been filed.⁴⁰

Some confusion has existed in the cases between the related concepts of standing, real party in interest, and capacity to sue and be sued. As seen heretofore, standing is a preliminary inquiry of court, not to be judged from the standpoint of the likely outcome of proof following trial on the merits; rather, the question is whether a plaintiff has alleged and is likely to demonstrate that he has sustained a wrong and has a personal stake in the litigation. Further, the wrong suffered must be within the zone of interest sought to be protected or regulated by the antitrust statutes. Finally, the plaintiff must show, under section 4 of the Clayton Act, that the injuries sustained to his business were incurred by reason of defendant's illegal activities. The real party in interest principle serves to identify the person who possesses the right sought to be enforced. This concept directs attention to whether the plaintiff has a significant interest in the particular action he has instituted.⁴¹ Capacity is conceived to be a party's personal right to litigate in a federal court. This issue is supposed to be determined under rule 17(b) and (c)⁴² for all parties to the suit. It is not limited to the plaintiff, as is the real party in interest concept, nor is it dependent upon the character of the specific claim

36. *White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., Inc.*, 387 F. Supp. 1202 (E.D. Pa. 1974).

37. 120 F. Supp. 93 (N.D. Cal. 1954).

38. *Id.* at 94.

39. *Mather Constr. Co. v. United States*, 475 F.2d 1152 (Ct. Cl. 1973).

40. *Id.*

41. C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1542, at 639 (1971).

42. *FED. R. CIV. P.* 17(b), (c).

involved in the litigation. A real party in interest may lack capacity to sue because he has become mentally incompetent or is an infant. Or, a plaintiff may have capacity to sue but, if he has assigned all his interest in the claim, may no longer be the real party in interest.⁴³ Naturally, a plaintiff may be the real party in interest possessing the right sought to be enforced, and may have capacity to sue, not being under any legal disabilities, and, yet, may not have standing because he is outside the zone of interest sought to be protected by the antitrust statutes.

The interrelated concepts of standing, real party in interest, and capacity have been dealt with by courts in a variety of different areas. Often litigated are disputes over whether the following types of relationships between parties either confer standing or capacity on the named plaintiff, or make him the real party in interest: powers of attorney; proxies; trade associations; assignees; and trustees. For example, a naked power of attorney for the purpose of investigating or prosecuting an antitrust action cannot in itself confer standing to sue on the attorney in fact.⁴⁴ Similarly, proxies, appointed for the purpose of litigation only, are not effective to enable the holder to bring an antitrust suit "either as a real party in interest or as a trustee of an express trust."⁴⁵

In a situation involving a trade association the Supreme Court, in *Warth v. Seldin*,⁴⁶ affirmed dismissal of an action by Homebuilders Association which had sought to recover money damages on behalf of its members, holding that:

Homebuilders alleges no monetary injury to itself, nor any assignment of the damage claims of its members. No award therefore can be made to the Association as such. Moreover, in the circumstances of this case, the damage claims are not common to the entire membership, nor shared by all in equal amount. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Homebuilders who claims injury as the result of respondent's practices must be a party to the suit, and Homebuilders has no standing to claim damages on his behalf.⁴⁷

In *Cordova v. Bache & Co.*⁴⁸ a federal district court held that "[a]n association has no standing to assert the rights of its members under the antitrust laws."⁴⁹ Here it was made clear that the standing rule in antitrust cases is not affected by special rules as to standing which may exist in other types of litigations where other legal principles or contexts may be involved. The court took note of the Supreme Court's decision in *NAACP v.*

43. See *Catalano v. Higgins*, 54 Del. 548, 182 A.2d 637, *vacated on other grounds*, 55 Del. 470, 188 A.2d 357 (1962), in which the concepts are distinguished.

44. *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (E.D. La. 1953), *aff'd*, 210 F.2d 653 (5th Cir. 1954).

45. 3A MOORE'S FEDERAL PRACTICE ¶ 17.10, at 401 (2d ed. 1974). See also *John L. Walker Co. v. National Underwriter's Co.*, 3 F.2d 102 (7th Cir. 1924).

46. 422 U.S. 490 (1975).

47. *Id.* at 515-16.

48. 321 F. Supp. 600 (S.D.N.Y. 1970).

49. *Id.* at 604.

*Alabama*⁵⁰ where the Court recognized that certain circumstances may require that an association be permitted to seek vindication of the interests of its members. The court, however, concluded that such rules do not apply in private antitrust cases where standing to sue is governed by the express statutory requirements of section 4 of the Clayton Act.⁵¹

In an older case the District Court for the Northern District of Alabama dismissed the plaintiff association while permitting plaintiffs suing in their individual capacities to continue prosecution of the action.⁵² More recently, the District Court for the Southern District of New York dismissed a complaint filed against various insurance companies by three trade associations on behalf of 1,000 independent insurance agents alleging unlawful terminations and other antitrust violations.⁵³ The court said:

Plaintiffs . . . asked the Court to allow them to bring this suit because of their identity of interest with their members and because they are asserting fundamental rights which should outweigh rules of practice or court administration such as plaintiffs perceive this standing requirement to be However, the rights here raised are not cognizable under Section IV of the Clayton Act, which . . . provides a cognizable claim only to one injured in his business or property by reason of anything forbidden in the antitrust laws. The Association's complaint makes it clear that it is attempting to enforce the rights of its members, not any rights it has or claims on its own behalf.⁵⁴

No appeal was taken from the order dismissing the association's complaint, and, yet, the same three plaintiff associations plus another association brought a subsequent antitrust action which sought relief not only on behalf of their members, but, unlike their earlier action, also sought relief for damages to the associations themselves. Again, motions to dismiss were granted as to the plaintiff associations for failure to satisfy Clayton Act requirements of injury. The court found that:

Plaintiffs . . . pointed to no direct injury suffered as a result of the practices engaged in by defendants, nor have they shown that they were in the target area of the actions by the defendants. Plaintiffs neither do business with the defendant insurance companies nor compete with them. Indeed the only loss alleged by plaintiffs is a decrease in membership and dues as a result of the termination of contracts with certain agents by defendants. This injury is too remote, however, to confer standing under the Clayton Act.⁵⁵

Among the many cases transferred to the United States District Court for the Northern District of Texas and consolidated for pretrial proceedings is the present pending case of *In re Beef Antitrust Litigation*.⁵⁶ In this case the principal plaintiff, an association formed to bring and maintain the suit, has

50. 357 U.S. 449 (1958).

51. 321 F. Supp. at 608.

52. *Alabama Ind. Serv. Ass'n v. Shell Petroleum Corp.*, 28 F. Supp. 386 (N.D. Ala. 1939).

53. *Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Cas. & Sur. Co.*, 345 F. Supp. 645 (S.D.N.Y. 1972).

54. *Id.* at 647-49.

55. *Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir. 1974), affirming the dismissal by the lower court.

56. M.D.L. 248 (N.D. Tex., Dallas Div.).

as its members cattle producers and sellers who claim to have been injured by alleged antitrust violations. In the complaint it is not alleged that the association itself engages in the cattle or beef business or that it has in any way been injured by defendants' alleged conduct. Rather, the association seeks only to enforce the rights of its members, all of whom have given the association a power of attorney in fact, and have created an express trust in the association and its board of trustees to prosecute, as trustee, the action for their individual and collective benefit.

At a hearing before the District Court for the Northern District of Texas argument was made in support of a motion to dismiss the plaintiff association and its trustees for the reason that its lack of injury precluded standing to maintain such antitrust action. The court seemed to recognize that the association could not prosecute the suit for its members under a mere power of attorney authorizing a law firm to bring a suit, but it was argued by plaintiffs' counsel that under applicable state law an express trust had been created in the association to maintain the suit. The court took this matter under advisement although indicating that an assignment of the cause of action to the association would give the association standing, but the matter of an express trust as conferring standing would require further study. A subsequent order overruled defendants' motion to dismiss for lack of standing.⁵⁷

Although at common law the assignee of a cause of action did not hold legal title to it and, therefore, could not qualify as a real party in interest, under present federal rules an assignment passes the title to the assignee who is then the owner of any claim arising from the cause of action and is treated as the real party in interest under rule 17(a), even as to antitrust actions.⁵⁸

In *Momand v. Universal Film Exchanges*⁵⁹ an antitrust suit was held properly brought by a single motion picture exhibitor-assignee, as the assignee of ten corporations, in an action against eight major motion picture producers and distributors. In this case the plaintiff, though an assignee, sued properly in his own right; as the assignee of the total claim of each assignor corporation, the plaintiff-assignee was the real party in interest under rule 17(a), and, therefore, was not suing in a representative capacity. He was not merely a formal party or representative comparable to a trustee of an estate.⁶⁰

An assignee may sue for purposes of collection provided that he holds legal title to the debt and is the real party in interest. He must, however,

57. By order entered May 24, 1977, the judge ruled that the association and its trustees had standing to sue under an express trust valid under applicable state law, and as assignees of the causes of action of the members of the association.

58. 6 C. WRIGHT & A. MILLER, *supra* note 41, § 1545, at 651. The author has several times used valid assignments to transfer causes of action in antitrust litigation. For example, an assignment may be to convey a cause of action from a corporation serving as a retail outlet to the individual owner of the outlet's merchandise in a suit against the manufacturer. Also, an assignment has been used to transfer a cause of action from a small commuter airline corporation to its former shareholders following the sale of its outstanding shares subsequent to the institution of an antitrust action. The shares were sold in order to prevent corporate insolvency.

59. 172 F.2d 37 (1st Cir. 1948).

60. *Id.* at 44-45. This case also involved complex problems of res judicata, collateral estoppel, as well as joinder of causes of action.

account to his assignor for whatever is recovered in the action.⁶¹ In an antitrust action involving an assignment the court ordinarily should be satisfied (i) that the plaintiff-assignee is the real party in interest with regard to the particular claim involved, and does not, for example, hold merely a general power of attorney, and (ii) that the assignment upon which suit has been brought is valid.⁶²

In *Copper Liquor, Inc. v. Adolph Coors Co.*⁶³ a retail liquor store was owned successively by the plaintiff individually, in partnership, and a corporation created by incorporation of the partnership. The corporation was subsequently dissolved and all the assets were distributed except for the antitrust cause of action. Subsequent to dissolution the cause of action was assigned to the plaintiff, and the Fifth Circuit held that the assignment was valid regardless of formalities of state corporation and partnership law regarding the transferring of causes of action.

Rule 17(a) provides that a trustee of an express trust may sue in his own name without joining the party for whose benefit the action is brought. In fact, it is the trustee, and not the trust itself, that must bring suit under the federal rule. In an antitrust action in which one of the plaintiffs named in the complaint was the trust itself, the complaint was dismissed, with leave to amend, on the grounds that the trustee was the real party in interest and should have been named as plaintiff.⁶⁴ The court will ordinarily seek to ascertain whether the trustee of an express trust has actually had some property, right, or title to the subject matter of the suit transferred to him. For a mere agent is not to be confused with a trustee and has no right to bring suit. The federal court looks to *state* law to determine the antitrust trustee's proper status.⁶⁵ In a non-antitrust suit, involving a declaratory judgment as to liability on insurance policies, the law for antitrust cases was nevertheless correctly set forth as follows: "The essential distinction between a trust and agency lies in whether the one who stands in a position of principal or donor parts entirely with the control, possession, and right of disposition of the party involved."⁶⁶

Therefore, as is clear from the foregoing discussion, the nexus between the party bringing the suit and the aggrieved party is closely scrutinized by courts to ensure the necessary interrelationship of interest.

An additional procedural requirement aimed at obtaining all the necessary and appropriate parties for a proper disposition of a cause is that of rule 19 which provides that all parties needed for a just adjudication be joined as parties to the suit.⁶⁷ This procedural rule has had a long, slow judicial evolution in response to amendments by the legislature removing the proper-

61. *Titus v. Wallick*, 306 U.S. 282 (1939).

62. *See generally id.*; *Staggers v. Otto Gerdav Co.*, 359 F.2d 292 (2d Cir. 1966).

63. 506 F.2d 934 (5th Cir. 1975).

64. *Hershel California Fruit Prods. Co. v. Hunt Foods, Inc.*, 119 F. Supp. 603 (N.D. Cal. 1954).

65. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

66. *U.S. Epperson Underwriting Co. v. Jessup*, 22 F.R.D. 336 (M.D. Ga.), *aff'd*, 260 F.2d 355 (5th Cir. 1958).

67. FED. R. CIV. P. 19.

indispensable test. A good example of the judicial trend away from depriving jurisdiction for failure to properly join all parties with an interest is *Robertson v. National Basketball Association*.⁶⁸ *Robertson* held that rule 19 did not require joining the Players Association as a party plaintiff. Under rule 19 as amended in 1966 there is no longer the fear that jurisdiction of a court will be lost by failure to join a claimed indispensable party as party plaintiff, except in those relatively few cases described in the rule where either the absence of the party may make it impossible to accord complete relief among those already parties, or where disposition of the cause in the absence of such a person may impair or impede his ability to protect his interest, or leave persons already parties subject to the risk of incurring double or inconsistent obligations by reason of his claimed interest.

A type of dispute which generates much judicial response regarding the procedural requirements of joining parties to the suit is a stockholder's derivative suit. Brought by a stockholder on behalf of the corporation or fund, these disputes are governed by rule 23.1's requirement that the plaintiff be a shareholder at the time of the complained of transaction. A derivative shareholder suit for antitrust damages may be maintained as an equity action based upon the traditional concept that a stockholder sues on a corporation's right.⁶⁹ In *Kauffman v. Dreyfus Fund, Inc.*⁷⁰ a mutual fund shareholder was allowed to bring a derivative action on behalf of funds in which he was actually a shareholder, but he was not permitted to bring a derivative class action on behalf of other funds similarly situated. The provision of rule 23,⁷¹ requiring the plaintiff to have been a shareholder at the time of the transaction involved in the complaint, has been held applicable to any derivative stockholder suit based on a violation of federal antitrust laws.⁷²

In addition to derivative suits and class actions, dealt with in section VIII of this Article, suits against heirs of alleged antitrust wrongdoers have also provided cogent judicial language concerning the procedural requirements for parties to federal disputes. For example, in *Lee v. Venice Work Vessels, Inc.*⁷³ the Fifth Circuit held that a private cause of action for treble damages under the antitrust laws does not survive against the heirs of an alleged wrongdoer when the suit was brought after his estate had been administered and distributed, and the administrator of the estate had been released. Since the federal statute creating the antitrust cause of action makes no provision for abatement or survival, the Fifth Circuit took recourse in the federal common law, noting that section 2404 of title 28⁷⁴ provides that a civil action for damages by the United States shall not abate on the death of a defendant, but shall survive and be enforceable against his estate. Yet no provision is made for survival or enforcement beyond maintenance of suit against such estate.

68. 389 F. Supp. 867 (S.D.N.Y. 1975).

69. *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953).

70. 434 F.2d 727 (3d Cir. 1970).

71. FED. R. CIV. P. 23.1.

72. *Gottesman v. General Motors Corp.*, 28 F.R.D. 325 (S.D.N.Y. 1961).

73. 512 F.2d 85 (5th Cir. 1975).

74. 28 U.S.C. § 2404 (1970).

A final area which has led to much judicial reasoning on the procedural concepts of standing and capacity is the effect of bankruptcy on potential antitrust claims. In an early suit, the Third Circuit denied standing to a stockholder-creditor of a corporation forced into bankruptcy by the defendant's antitrust violations.⁷⁵ The decision was based upon the lack of any direct injury to the plaintiff and the fact that redress for the defendant's action could be obtained more economically by one suit brought by the corporation rather than actions by "hundreds of thousands of stockholders."⁷⁶ Additionally, it has been held that an antitrust claim alleged to have arisen prior to the plaintiff's filing for bankruptcy belonged to the trustee in bankruptcy and not to the bankrupt.⁷⁷

Having examined the scope and multitude of judicial response to the various concepts of standing, capacity, and real party in interest, this Article analyzes and discusses the requirement of federal jurisdiction in antitrust disputes.

III. JURISDICTION

Subject Matter Jurisdiction. Subject matter jurisdiction ordinarily encompasses diversity jurisdiction,⁷⁸ general federal question jurisdiction,⁷⁹ jurisdiction over laws regulating interstate commerce,⁸⁰ or specific federal question jurisdiction such as antitrust litigation⁸¹ or securities.⁸² In view of the specific constitutional grant of subject matter jurisdiction to federal courts under section 15 of title 15 it is not necessary to seek subject matter jurisdiction elsewhere. It should simply be noted that United States district courts are courts of limited jurisdiction, deriving all their power to hear a case from congressional grant. Without such a grant they would lack subject matter jurisdiction.

A complaint principally alleging antitrust violations, however, may also include causes of action of a non-antitrust nature such as general federal questions or even common law claims for breach of contract or fraud. Courts will then be required to inquire into the other federal statutes pertaining to subject matter jurisdiction to determine whether jurisdiction extends to such additional claims. Indeed, the court may even decide to try the facts and law pertaining to these claims in the absence of expressly granted subject matter jurisdiction, and, rather, apply the complementary doctrines of ancillary or pendent jurisdiction. Therefore, in this Article on federal procedure as affecting antitrust litigation, it would be insufficient merely to cite the specific federal question grant and then proceed to the next topic. Instead, brief mention is made of each of the types of jurisdiction that may arise in the handling of an antitrust case with attendant non-antitrust claims.

75. *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910).

76. *Id.* at 709. *See also Schaffer v. Universal Rundle Corp.*, 397 F.2d 893 (5th Cir. 1968).

77. *Burkett v. Shell Oil Co.*, 448 F.2d 59 (5th Cir. 1971).

78. 28 U.S.C. § 1332 (1970).

79. *Id.* § 1331.

80. *Id.* § 1337.

81. 15 U.S.C. §§ 15-156 (1970).

82. *Id.* § 77v.

The specific grant of jurisdiction over antitrust claims⁸³ provides that suit may be brought in any district court of the United States for an injury to business or property resulting from antitrust violations.⁸⁴ Thus, there is no question as to the existence of subject matter jurisdiction in any federal district court in the country over an antitrust claim, as such jurisdiction is nationwide. A question still remains, however, as to the existence of subject matter jurisdiction over the non-antitrust claims which may be included in a complaint. There still must be personal jurisdiction over the defendant's person, property, or the res that is the subject of the suit, and in the absence of such jurisdiction a valid judgment cannot be entered. Additionally, there must be proper venue, for even though a particular federal district court may have subject matter jurisdiction, and perhaps even personal jurisdiction over a defendant, the action must still have been brought pursuant to venue requirements so that the case will be tried in the district court where the action may properly have been brought. It must be a court in a federal district constituting a convenient forum for the particular action and protecting the defendant against selection by the plaintiff of an arbitrary, remote site for trial. Thus, United States district courts have exclusive jurisdiction over wrongs committed under the federal antitrust laws.⁸⁵

Section 1337 of title 28 establishes subject matter jurisdiction for cases arising under laws regulating interstate commerce. As pointed out in the introductory material of this Article, section 1337 does not require an amount in controversy.⁸⁶ To found jurisdiction on section 1337, it is not necessary that the commerce clause be the exclusive source of federal power, but only that it be significant.⁸⁷ Additionally, courts have held that federal jurisdiction in an antitrust case requires that the interstate commerce involved be more than obliquely or incidentally affected.⁸⁸

Section 1331 of title 28, discussed in the introduction of this Article, provides subject matter jurisdiction for cases "arising under" a general federal question.⁸⁹ A final statutory provision, section 1332 of title 28, provides for diversity jurisdiction whereby the federal district courts are given original jurisdiction over all civil actions where the matter in controversy exceeds the sum of \$10,000 and is between citizens of different states.⁹⁰ As indicated, a complaint containing antitrust charges may also contain allegations of a cause of action between the parties arising out of purely common law principles under circumstances in which the court, already having jurisdiction as to the antitrust claims, may hear additional claims of the complaint founded on diversity jurisdiction.⁹¹

83. *Id.* § 15.

84. *Id.*

85. *Banana Distributors, Inc. v. United Food Co.*, 269 F.2d 790 (2d Cir. 1959). *See also Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499 (E.D. Mich. 1974); *Albert Levine Associates v. Bertoni & Cotti*, 314 F. Supp. 169 (S.D.N.Y. 1970).

86. 28 U.S.C. § 1337 (1970); *see note 2 supra* and accompanying text.

87. *Murphy v. Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609 (2d Cir. 1967); *Esposito v. Schultz*, 366 F. Supp. 1059 (N.D. Cal. 1973).

88. *Marr-Farr Corp. v. Copley Press, Inc.*, 64 F.R.D. 456 (N.D. Ill. 1974).

89. 28 U.S.C. § 1331 (1970); *see note 3 supra* and accompanying text.

90. 28 U.S.C. § 1332 (1970).

91. The Fifth Circuit has recently held that a failure to deny incorporation in the same state as the citizenship of the plaintiff defeated diversity. *McGovern v. American Airlines, Inc.*, 511 F.2d 653 (5th Cir. 1975).

Personal Jurisdiction. The concept of personal jurisdiction was first espoused and developed in the Supreme Court's opinion in *Pennoyer v. Neff*.⁹² In this leading case the Supreme Court stated:

[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced⁹³

The court therefore held that "[n]o state can exercise direct jurisdiction and authority over persons or property without its territory."⁹⁴ It reasoned that the several states were of equal dignity and authority, and independent of one another, thus limiting the degree of power one state may exercise outside its boundaries. It was stated to be an elementary principle "[t]hat the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."⁹⁵ The principle was, therefore, established that, in the absence of a waiver of the defense of lack of personal jurisdiction, the presence of the defendant within the forum state was a necessary prerequisite to a court's exercising personal jurisdiction over him. The Supreme Court further adopted the view that the exercise of personal jurisdiction was subject to constitutional limitations, even though the due process requirement of the fourteenth amendment had not become effective as of the time of *Pennoyer* and was, therefore, inapplicable. The rule of *Pennoyer v. Neff* worked well for scores of years, but as transportation improved and society became more mobile, along with increased industrialization where the products of a manufacturer are sent nationwide, additional grounds for asserting jurisdiction over individuals beyond the territorial limits of the state became necessary.

In the landmark modern case of *International Shoe Co. v. State of Washington*⁹⁶ it was held that due process under the fourteenth amendment requires only that in order to subject a defendant to a judgment in personam when he neither waives process nor is present within the state he must have certain "minimum contacts" with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. In the wake of *International Shoe* there followed *McGee v. International Life Insurance Co.*⁹⁷ and *Hanson v. Denckla*.⁹⁸ In *McGee* it was made clear that personal jurisdiction could be upheld on very minimal contacts, and the case is thought to represent the limits of the new concept of personal jurisdiction. A Texas insurance company was held amenable to service of process by a

92. 95 U.S. 714 (1877).

93. *Id.* at 722.

94. *Id.*

95. *Id.*

96. 326 U.S. 310 (1945).

97. 355 U.S. 220 (1957).

98. 357 U.S. 235 (1958).

California court, although the company never maintained an office or agent in California and the evidence did not show that it ever solicited any insurance business in California other than the one policy over which suit had been brought. The company did mail a certificate of insurance to the insured in California, and the insured mailed his premium payments to the insurance company in Texas. In *Hanson v. Denckla* the Supreme Court showed that there were at least some limits beyond which due process could not extend. The Court did not give weight to the fact that the settlor, the appointees, and the beneficiaries of a trust were all domiciled in Florida. The case was properly analyzed from the standpoint of what the Delaware trustee had himself done that would constitute minimal contacts by him with the foreign state.

State Long-Arm Statutes. The various long-arm statutes provide for jurisdiction over nonresident parties in federal disputes. A representative example is Texas' long-arm statute, article 2031b,⁹⁹ section 4 of which provides that any foreign corporation or nonresident person shall be deemed doing business in Texas by entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this state, or the committing of any tort in whole or in part in this state.¹⁰⁰ Under provisions of section 3 of the Act any foreign corporation or nonresident natural person so doing business in Texas, and not maintaining a place of regular business in this state or a designated agent upon whom service may be made, is deemed to have appointed the secretary of state of Texas as agent for service of process. Following receipt of service the secretary must forward a copy of such service to the defendant by certified mail.¹⁰¹ In *O'Brien v. Lanpar Co.*¹⁰² the Supreme Court of Texas held that if jurisdiction over a nonresident corporation is to be entertained, three basic factors must coincide: (i) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (ii) the cause of action must arise from, or be connected with, such act or transaction; and (iii) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice.¹⁰³ This leading case unfortunately was not concerned with the long-arm statute of Texas, but instead with the long-arm statute of Illinois. The case involved a suit in Texas upon a judgment secured in Illinois, with the supreme court reversing the decisions of lower courts and holding that the Illinois judgment was entitled to full faith and credit in Texas. The *O'Brien* case was followed by the Texas Supreme Court in *U-Anchor Advertising, Inc. v. Burt*.¹⁰⁴ *Burt* held that while the contract in question obligated the

99. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

100. *Id.* § 4.

101. *Id.* § 3. The Texas long-arm statute, art. 2031b, is but one such long-arm statute enacted by the Texas Legislature, following the Supreme Court's decision in *Hess v. Pawloski*, 274 U.S. 352 (1927), wherein the validity of a nonresident motorist statute was upheld. Texas also has such a nonresident motorist statute embodied in TEX. REV. CIV. STAT. ANN. art. 2039b (Vernon Supp. 1976-77).

102. 399 S.W.2d 340 (Tex. 1966).

103. *Id.* at 342.

104. 20 Tex. Sup. Ct. J. 435 (July 13, 1977).

defendant to perform his payment obligations at the plaintiff's office in Texas the defendant was therefore held to have been doing business in Texas under article 2031b; nevertheless, the due process element was held not to have been met, and, thus, jurisdiction was found not to exist. The contract was executed in Oklahoma and it called for the plaintiff to place five advertising displays for the defendant in various locations in Oklahoma. The Texas Supreme Court determined that the exercise of jurisdiction in such a case would offend traditional notions of fair play and substantial justice. The court expressly disapproved of the holding in *Estes Packing Co. v. Kadish & Milman Beef Co.*¹⁰⁵ *Estes* had held that due process would not be violated by the exercise of jurisdiction over the defendant even though his only contact with Texas was the remittance of one check to the Texas seller.

In *Pizza Inn, Inc. v. Lumar*¹⁰⁶ a Texas court of civil appeals properly stated that a determination of whether a Texas court has in personam jurisdiction over a nonresident requires a twofold inquiry. First, the court must determine whether the nonresident defendant is amenable to process under the Texas long-arm statute.¹⁰⁷ The second inquiry is whether the exercise of personal jurisdiction over the defendant is consistent with the requirements of due process according to the "minimum contacts" test of *International Shoe*.¹⁰⁸ In *Cohn-Daniel Corp. v. Corporation de la Fonda*¹⁰⁹ the two-prong inquiry for determining in personam jurisdiction over a nonresident defendant was again stated: inquiry must first be made as to whether the defendant is amenable to process under the Texas long-arm statute; and secondly, a determination must be made as to whether exercise of such jurisdiction over the nonresident is consistent with the requirements of due process of law.¹¹⁰ More than the two-prong inquiry may be required now that rule 108¹¹¹ has been amended effective January 1, 1976. If valid, this rule may in itself create long-arm jurisdiction in Texas, independent of substantive long-arm statutes.¹¹²

105. 530 S.W.2d 622 (Tex. Civ. App.—Fort Worth 1975, no writ).

106. 513 S.W.2d 251 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

107. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

108. In support of its approach the lower Texas appellate court cited two Fifth Circuit opinions pertaining to jurisdiction over nonresident defendants, setting forth the rules for determination of jurisdiction as stated above. *Jetco Electronics Indus., Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); *Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847 (5th Cir. 1966).

109. 514 S.W.2d 338 (Tex. Civ. App.—Eastland 1974, no writ).

110. *Id.* at 342. This case held that personal jurisdiction existed over a nonresident defendant for rehabilitation of an old hotel in Santa Fe, New Mexico. The defendant, however, did receive some of its payments for services by mail in Texas, and preliminary negotiations for the contract began in Texas between the parties. The court cited *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974), an excellent opinion reviewing the law pertaining to personal jurisdiction over nonresident defendants.

111. TEX. R. CIV. P. 108.

112. As recently amended, rule 108, providing for service outside Texas, states that a defendant served with notice under the rule shall appear and answer as if he had been personally served within Texas "to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam." The purpose of the amendment is to expand the acquisition of in personam jurisdiction. But jurisdiction may be a substantive matter beyond the authority of the Supreme Court to formulate rules of procedure.

If the corporation, though incorporated in a foreign state, has a principal place of business in Texas, or has a permit to do business in Texas, then in personam jurisdiction will lie as a matter of course. Such jurisdiction will still attach when the activities constitute doing business under the Texas long-arm statute and when they constitute minimum contacts with Texas such that the assertion of jurisdiction by a Texas federal court will not offend traditional notions of fair play and substantial justice. The so-called two-fold inquiry is for practical purposes equated into the one inquiry as to the extent of minimum contacts since "doing business" and "minimum contacts" are inquiries resolved by consideration of the same activities of the foreign corporation, such as the solicitation of business in the state through local offices, or the use of locally based agents to further the company's sales. Thus, whether a federal court may assert jurisdiction over a nonresident antitrust defendant corporation is resolved by considering state long-arm statutes and any limitations imposed by due process under the minimum contacts test.

The same considerations apply to nonresident individuals as to foreign corporations where the nonresident individuals are engaged in activities within the forum state in their personal right for their own benefit, as, for example, when they may be entering the forum state to negotiate a contract or to secure employment bonuses. A different result, however, is often reached where an antitrust plaintiff, or other plaintiff, seeks to acquire jurisdiction over officers or directors of a defendant corporation. If the named party individual defendants contend that all of their acts within the forum district were carried out solely to further corporate purposes, and that they acted solely as corporate officers or directors, then it would appear that such individuals will not be subject to personal jurisdiction by the corporate shield. This does not seem to be a sound or logical application of jurisdictional principles, particularly when such officers and directors, being brought in a case as named party individual defendants along with the corporate defendants they serve, will presumably have their costs, attorney's fees, and travel and investigation expenses paid by their corporation. Where they have knowledge of and participate in the acts complained of on the part of the corporate defendant whose affairs they are directing, then it seems proper to subject them to in personam jurisdiction. Yet the indication in the cases is to the contrary.¹¹³ It has been held that jurisdiction over an individual cannot be predicated on jurisdiction over a corporation. More particularly, the courts have held that an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over the individual in the foreign state.¹¹⁴

For jurisdiction over individual officers and employees or directors of a foreign corporation to attach, the individuals as named party defendants

In *U-Anchor Advertising, Inc. v. Burt*, 20 Tex. Sup. Ct. J. 435 (July 13, 1977), the Supreme Court of Texas, in a footnote, stated that the purpose of the 1975 amendment to rule 108 was to permit acquisition of in personam jurisdiction to the constitutional limits.

113. *See, e.g.,* *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F. Supp. 798 (S.D.N.Y. 1975).

114. *United States v. Montreal Trust Co.*, 358 F.2d 239 (2d Cir. 1966); *Wagman v. Astle*, 380 F. Supp. 497 (S.D.N.Y. 1974); *Schenin v. Micro Copper Corp.*, 272 F. Supp. 523 (S.D.N.Y. 1967).

must have been engaged in activities within the jurisdiction of the court that would subject them to the coverage of the state's long-arm statute.¹¹⁵ The cases, however, suggest that if it can be shown that a corporation is not viable and that the individuals are in fact conducting personal activities in the forum state while merely seeking to use the corporate form to protect them from potential liability, a court may be justified in piercing such a corporate veil and asserting personal jurisdiction over such individuals.¹¹⁶

The co-conspirator theory has been much discussed in cases and texts, but for purposes of this Article suffice it to say that where personal jurisdiction is obtained over one alleged conspirator, his mere presence has been held insufficient to confer personal jurisdiction over a second alleged co-conspirator.¹¹⁷ On the other hand, if the conspirators are deemed agents of one another and at least one has had sufficient contacts with the forum state to warrant asserting jurisdiction over him, then personal jurisdiction may under some circumstances be obtained under state long-arm statutes over those persons who actually had no physical contact with the state.¹¹⁸

Pendent Jurisdiction. The leading case of *United Mine Workers of America v. Gibbs*¹¹⁹ held that under the doctrine of pendent jurisdiction a federal court having federal subject matter jurisdiction, as in an antitrust case, over one claim is allowed to assume jurisdiction over a second claim between the same plaintiff and defendant not founded on federal subject matter jurisdiction provided the second claim derives from a common nucleus of operative facts such that the plaintiff would ordinarily be expected to try both claims in one proceeding.¹²⁰ Where a valid claim has been alleged under the federal antitrust laws, a federal court is permitted in its discretion to assume jurisdiction over "pendent" claims based on claims of fraud, tortious interference with business relations, state claims of unfair competition, trade defamation, or other state claims.¹²¹

115. *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969); *Miller v. American Tel. & Tel. Co.*, 394 F. Supp. 58 (E.D. Pa. 1975); *Causey v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392 (E.D. Va. 1975). This latter case held that to allow substituted services through the secretary of state of Virginia on California residents on the ground that they derived salaries from an employer that did large amounts of business in Virginia would offend traditional notions of fair play in violation of due process. See also *Path Instruments Int'l Corp. v. Asahi Optical Co.*, 312 F. Supp. 805 (S.D.N.Y. 1970), and *County Maid, Inc. v. Haseotes*, 299 F. Supp. 633 (E.D. Pa. 1969), holding that under the Sherman Act individual defendants, who were officers and management employees of numerous corporations all engaged in one operation, were "transacting business" in Pennsylvania where a corporation had its principal office even though the individuals were nonresidents. This, of course, is not the usual situation here being discussed, where both the defendant corporation and the individual defendants are residents of foreign states.

116. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974). See also *Holfield v. Power Chem. Co.*, 382 F. Supp. 388 (D. Md. 1974); *Alosio v. Iranian Shipping Lines*, 307 F. Supp. 1117 (S.D.N.Y. 1970).

117. *Leasco Data Processing Equip. Co. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

118. *Ghazoul v. International Management Servs., Inc.*, 398 F. Supp. 307 (S.D.N.Y. 1975).

119. 383 U.S. 715 (1966).

120. *Id.* at 725.

121. *Knuth v. Erie-Crawford Dairy Co-op. Ass'n*, 395 F.2d 420 (3d Cir. 1968). See also *Fashion 22, Inc. v. Steinberg*, 339 F. Supp. 836 (E.D.N.Y. 1971). There is presently pending a case in the United States District Court for the Northern District of Texas, Dallas Division, in which former automobile dealers have sued a foreign manufacturer of automobiles alleging antitrust violations, and in addition have urged causes based on state claims of breach of

Ancillary Jurisdiction. The concept of ancillary jurisdiction constitutes an exception to the lack of subject matter jurisdiction and exists to permit a federal court to try a claim over which jurisdiction would not ordinarily lie when such claim is closely related to a cause that is within subject matter jurisdiction. Ordinarily, ancillary jurisdiction attaches to compulsory counterclaims, cross-claims, impleader claims, and intervention claims of right; it often is not, however, applied to permissive counterclaims, plaintiff's claims against an impleaded party, or permissive intervention claims.¹²² In an antitrust action for treble damages in which a counterclaim was filed for defamatory statements, it has been held that there are two causes of action, one being the federal action on the principal claim and the other the non-federal action on the counterclaim. Thus, the question in regard to the counterclaim was one of ancillary jurisdiction rather than pendent jurisdiction, and only the federal cause of action on the principal claim was maintainable in the federal court.¹²³

The distinction between pendent and ancillary jurisdiction is difficult to define, particularly as the usage of the terms by the courts has not always been consistent and clear. To avoid a multiplicity of suits, a federal court is permitted under some circumstances to assume *subject matter jurisdiction* over a claim where such jurisdiction would ordinarily not be found, provided the claim is closely related to another claim over which subject matter jurisdiction undeniably attaches. Pendent jurisdiction was established in *Hurn v. Oursler*¹²⁴ where there were two grounds for a single cause of action, one federal and the other non-federal. It was held that federal jurisdiction would attach. Ancillary jurisdiction, by contrast, was found in *Moore v. New York Cotton Exchange*,¹²⁵ where there were two causes of action: the principal claim and the counterclaim, one of which was federal and the other non-federal. It was held that the federal court would not decide the non-federal counterclaim. Pendent jurisdiction, therefore, usually involves the question of whether, in litigation where there are two grounds for a single cause of action, the non-federal claim is so logically connected to the federal claim, and ordinarily provable out of substantially the same set of operative facts, that a federal court *should* take jurisdiction and adjudicate the entire cause. If ancillary jurisdiction is involved, several questions are presented: whether the counterclaim, cross-claim, or other claim arises out of the same transaction so as to give the court jurisdiction; or, if it does not, whether the counterclaim or other claim presents grounds

contract, fraud, and the selling of defective products. *Stevenson v. Mazda Motors of America, Inc.*, No. CA-3-75-1304-G (N.D. Tex., filed Oct. 22, 1975). The trial court has discretion to exercise jurisdiction over these state claims along with the claims alleging antitrust violations over which it has assured subject matter jurisdiction. Jurisdiction on these non-antitrust claims may further be grounded on diversity of citizenship and the amount in controversy so that subject matter jurisdiction, although of different types, will control the entire litigation. One day, some years from now, federal courts will probably not be burdened with diversity jurisdiction, and then in a case such as *Stevenson* an important question of pendent jurisdiction will be encountered.

122. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523 (1975).

123. *National Bowl-O-Mat Corp. v. Brunswick Corp.*, 264 F. Supp. 221 (D.N.J. 1967).

124. 289 U.S. 238 (1933).

125. 270 U.S. 593 (1926).

upon which a federal court *should* properly take jurisdiction. While distinctions are often made between pendent and ancillary jurisdiction, the two concepts arise from the same purpose and are very similar.

Exempted Industries. Courts have exempted various industries, associations, and governmental business relationships from antitrust scrutiny. Among the most prominent and important areas exempted are agricultural co-operatives, government contracts, small businesses, insurance, conduct of governmental bodies or officials, and organized labor. But the Supreme Court, in *United States v. Borden Co.*,¹²⁶ upheld a Sherman Act indictment charging a dairy co-operative with conspiring with milk processors, distributors, a union, and local health officials to fix milk prices. The Supreme Court stated that the Capper-Volstead Act did not grant agricultural co-operatives an absolute immunity from antitrust laws, but only the right jointly to process, handle, and market their products through a co-operative.

In the domestic insurance industry there has also been a diminishing scope of exemption afforded by the courts. For years this industry had operated in the belief that it was not subject to regulation by Congress, in view of an early Supreme Court decision. Yet, it was nevertheless held in *United States v. South-Eastern Underwriters Association*¹²⁷ that the insurance business was within the regulatory power of Congress under the commerce clause, and a Sherman Act indictment was, therefore, upheld against a large group of insurance companies charged with conspiring through a rating organization to fix fire insurance premiums and to eliminate competition.

The field of organized labor, particularly in the area of professional sports, has likewise been subject to an evolutionary judicial interpretation of the extent of its exemption from antitrust regulation. In the sports area the standing of players to assert antitrust violations, grounded on dictating the terms upon which the sport is to be played, and by dividing the market of professional player talent, has generally been well established. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*¹²⁸ held that conduct by the National Hockey League tending to eliminate competition between competitors for talent was actionable by the players who had been or were likely to be injured thereby. Standing has also been found for hockey players challenging the reserve system,¹²⁹ basketball players challenging the college draft system,¹³⁰ golfers challenging a group boycott,¹³¹ and football players challenging blacklisting following a violation of the reserve clause.¹³² Also, the reserve clause and other intraleague restraints have been subject to federal court review.¹³³

It is now established that as long as a union acts in its self-interest and does not combine with non-labor groups, union activities are protected; but

126. 308 U.S. 188 (1939).

127. 322 U.S. 533 (1944).

128. 351 F. Supp. 462 (E.D. Pa. 1972).

129. *Boston Professional Hockey Ass'n v. Cheevers*, 348 F. Supp. 261 (D. Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972).

130. *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

131. *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973).

132. *Radovich v. National Football League*, 352 U.S. 445 (1957).

133. *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974).

labor unions lose their exemptions from antitrust charges once they aid non-labor groups to create business monopolies and to control the marketing of goods and services.¹³⁴ Generally, therefore, there is no operative labor exemption protecting associations of teams or employers from being sued for antitrust violations. The statutory bases for labor's exemption from the application of the antitrust laws are stated in sections 6 and 20 of the Clayton Act. A concise answer is that the exemption extends only to labor or union activities and not to the activities of employers.

Regulated Industries. Exceptions to the antitrust laws for business conduct in industry subject to federal regulation have been narrowly construed.¹³⁵ Thus, the doctrine of exclusive jurisdiction is sometimes, although infrequently, recognized by a federal court, thereby ousting itself of jurisdiction in a case where jurisdiction of an administrative agency is exclusive and pre-empts application of the antitrust laws in a judicial proceeding.¹³⁶ In *Hughes Tool Co. v. Trans World Airlines, Inc.*¹³⁷ it was held that exclusive jurisdiction was in the Civil Aeronautics Board and, therefore, that limited antitrust immunity existed in a case where the CAB had given prior approval to the acquisition by Hughes Tool of a controlling interest in TWA. Ordinarily the doctrine of exclusive jurisdiction is not appropriate (i) where money damages are sought, and (ii) unless an administrative agency has issued a prior order out of which the controversy has directly arisen.

The doctrine of *primary* jurisdiction requires, when applicable, that prior resort be had to a governmental agency before a federal court determines whether an implied repeal of antitrust laws or immunity therefrom would be necessary to make the regulatory scheme of federal legislation work.¹³⁸ Again, this doctrine is not ordinarily successful in requiring a federal court to give up its jurisdiction since the federal courts, and not governmental agencies, are deemed to have by far the greater expertise in the handling of antitrust charges and violations. Furthermore, the federal courts alone can award money damages in those factual situations where the plaintiff is entitled to monetary relief. Rate-making schedules, in some aspects, but not price-fixing conspiracies or refusals to deal, might in the proper case call for an initial appraisal by an agency. The doctrine of primary jurisdiction has been dealt with by the Supreme Court in *Ricci v. Chicago Mercantile Exchange*¹³⁹ where the Court held that a broker's private antitrust action for damages against the Exchange could be stayed until the broker first sought relief from the Commodity Exchange Commission or the Secretary of Agriculture. The Second Circuit, however, recently rendered a decision resulting in a denial of a motion to dismiss on the grounds of primary jurisdiction in the CAB.¹⁴⁰ Even though only injunctive relief and not money damages

134. *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945).

135. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 412 (1975).

136. *Id.*

137. 409 U.S. 363 (1973).

138. *See Nader v. Air Transp. Ass'n of America*, 426 F. Supp. 1035 (D.D.C. 1977).

139. 409 U.S. 289 (1973).

140. *United States Tour Operation Ass'n v. Trans World Airlines, Inc.*, Nos. 77-7134, -7141 (2d Cir. May 27, 1977).

were sought in the complaint it was held that the doctrine did not require the CAB to consider plaintiffs' claims before a court did.

In particular industries such as banking, securities, communications, and the legal profession the courts have fashioned a theory which clearly evidences the belief that antitrust coverage is necessary. For example, *United States v. Philadelphia National Bank*¹⁴¹ dealt with a merger in the banking industry. The Supreme Court stated that the fact that banking was a highly regulated industry made the plea of competition not less important but more so. In *Silver v. New York Stock Exchange*¹⁴² the Supreme Court held that the New York Stock Exchange's *statutory duty* under securities laws to regulate the conduct of exchange members, including their relations with non-members, did *not* automatically immunize the Exchange and its members from liability under the antitrust laws.¹⁴³ In *Silver* the Exchange had ordered members to terminate wire services to a non-member securities dealer without giving the dealer notice or the right to a hearing.¹⁴⁴

In the communications, energy, and transportation fields the Supreme Court has definitively determined that antitrust coverage is to be extended despite the presence of federal regulatory bodies operating in these areas. For example, in *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*¹⁴⁵ the Court held the communications industry subject to antitrust charges in court proceedings. Also, in *Otter Tail Power Co. v. United States*¹⁴⁶ the Court concluded that regulation by the Federal Power Commission does not exempt an electrical utility from separate enforcement under the antitrust laws. Finally, in *Pan American World Airways, Inc. v. United States*¹⁴⁷ the Supreme Court found that the Civil Aeronautics Board regulation of air carriers was designed to deal with a few antitrust problems but stated that "[t]hose expressly entrusted to it encompass only a fraction of the total," and therefore, "[t]he Board has no power to award damages or bring criminal prosecution."¹⁴⁸

In the legal profession the recent case of *Bates v. State Bar of Arizona*¹⁴⁹ promises to have far-reaching antitrust implications. The Supreme Court of Arizona had censured two lawyers, Bates and O'Steen, for placing an

141. 374 U.S. 321 (1963).

142. 373 U.S. 341 (1963).

143. *Id.*

144. Similarly, The United States District Court for the Northern District of Texas, in *Shumate & Co. v. National Ass'n of Secs. Dealers, Inc.*, C.A. No. 3-4361-C/D (N.D. Tex.), *aff'd*, 509 F.2d 147 (5th Cir.), *cert denied*, 423 U.S. 868 (1975), on preliminary motions not challenged or involved in the subsequent appeal of the cause held that the Maloney Act, 15 U.S.C. § 780-3 (1970), did not give express or blanket exemption to the NASD from antitrust suits; that an exemption would apply, if at all, only where there was a clear conflict with federal antitrust laws, which was not found; that immunity if granted, must be limited to only the minimum extent necessary to make the Maloney Act work; and that even if the NASD were an exempt group from antitrust laws, nevertheless whenever an exempt group agrees, combines, or conspires with non-exempt persons in restraint of trade, the asserted exemption is thereby stripped away. Court orders entered at the trial level did not express the reasons for such orders as fully as just stated herein, but the import of the orders in light of the contending motions and briefs and arguments of the parties was as indicated.

145. 415 U.S. 394 (1974).

146. 410 U.S. 366 (1973).

147. 371 U.S. 296 (1963).

148. *Id.* at 311.

149. 45 U.S.L.W. 4895 (U.S. June 28, 1977).

advertisement in a publication in which they stated that they performed legal services at very reasonable fees, and listed the charges for five specific services. The lawyers were found guilty of violating Disciplinary Rule 2-101(B) of the Code of Professional Responsibility as adopted by the Supreme Court of Arizona as its rule 29(a). The United States Supreme Court held on June 27, 1977, in a five-to-four decision that a total ban upon advertising by private attorneys enforced by an integrated state bar and state supreme court violates the first amendment. But all nine Justices agreed that such a ban, originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court, did not violate the Sherman Act, in view of the state action exemption doctrine of *Parker v. Brown*.¹⁵⁰

Foreign Parent, Domestic Subsidiary. Typical of this type of dispute was an antitrust action brought by motorcycle distributors against the Japanese parent manufacturer, Kawasaki Heavy Industries, Inc., and its American subsidiary, Kawasaki Motors, U.S.A.¹⁵¹ In that case it was held that the Japanese parent company ignored the formal corporate division between it and its American subsidiary and involved itself directly in the subsidiary's operations and policy decisions and accordingly submitted itself by such action to the jurisdiction of the federal district court in which suit had been brought. Moreover, since the parent exerted an inordinate amount of control over its subsidiary, it was held also to have transacted business in Oregon through its subsidiary. Similarly, when American subsidiaries doing business in New York were agents of their Japanese parents under New York law, jurisdictional requirements of the antitrust laws were satisfied for purpose of a suit against the Japanese parents in federal district court in New York.¹⁵² Jurisdiction over a foreign corporation has been upheld based on the existence of an exclusive distributor in this country with sales of about \$1.3 million annually.¹⁵³

International Shoe and Hanson v. Denckla concerned defendants acting in our federal system where the constitutional test is whether the nonresident defendant had the required contacts with the forum state. In an antitrust action against an alien, however, a federally created right is asserted and the required contacts of the alien for jurisdictional purposes must be with the United States and not necessarily with any particular district or

150. The argument for the attorneys was made that the Sherman Act's prohibition of restraint of trade extends to the legal profession under *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and an agreement not to advertise prices is a per se violation of the antitrust Act. *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961). Disciplinary Rule 2-101(B) constitutes such an agreement. The Supreme Court recently narrowed the limits of the *Parker* "exemption" in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Argument for the State Bar of Arizona on the antitrust aspect of the case was to the effect that the court was dealing with an express state enforcement of an express state rule, not with private conduct. Therefore, the Bar argued, the case was put squarely within the rule of *Parker* and rendered *Cantor* inapplicable because the *Cantor* case dealt with actions of private individuals. Further, the argument was made that even if the advertising restriction were not exempt, it would still be a reasonable restraint.

151. *Dobbins v. Kawasaki Motors Corp., United States*, 362 F. Supp. 54 (D. Ore. 1973).

152. *Sunrise Toyota Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519 (S.D.N.Y. 1972).

153. *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*, 1973-1 Trade Cas. ¶ 74,594 (S.D.N.Y. 1973).

forum.¹⁵⁴ On the other hand, if service of process on the alien is made pursuant to a state long-arm statute, the constitutional requirement of minimum contacts with the forum is incorporated by reference.

The American Long-Arm. Similar to the use of state long-arm statutes to extend jurisdiction to out-of-state parties, the United States can often enforce its antitrust requirements against foreign corporations. Ordinarily, the principle of comity, whereby parties make an objective agreement as to which country has the paramount interest and then defer to it, is supposed to control any dispute as to the priority of jurisdiction in a particular case. But comity is not effective where parties and governments do not exercise judicial restraint. The federal antitrust statutes represent the American view that the best economy results from competitive markets. No other government tries so hard through its court system to prevent restrictive trade practices. Nor do other governments strive to bring overseas business activities within the orbit of judicial sanctions. Yet in a world where heavy industrialization transcends national boundaries jurisdictional expansion must follow, even though, for purposes of enforcement, the territorial reach of antitrust law of the United States to economic activities abroad must always be dependent upon the jurisdiction or power that a federal district here can successfully assert over a foreign individual or corporate defendant. Thus, when the United States has the power it may use it.

In *United States v. Aluminum Co. of America*,¹⁵⁵ in an opinion by Judge Learned Hand, the basic guidelines to overseas enforcement of American antitrust laws were first enunciated. The case involved a combination of French, Swiss, British, and Canadian ingot producers, including affiliates of Alcoa, an American company. The combination agreed to allocate production by quotas, with exports to the United States included in the quotas. It was ruled that protection of the national interest required that the Sherman Act apply to restrictive business practices of non-American firms abroad where those practices were intended to affect and did affect the foreign commerce of the United States.

In a recent multi-district case the United States and fifty other plaintiffs sued a British pharmaceutical firm for alleged antitrust violations in exporting antibiotics to the United States.¹⁵⁶ The federal district court ruled that the defense would be subject to a potentially fatal inference for failing to press the British Government to rescind or modify a non-disclosure order pursuant to a 1964 Commercial Documents Act. Although representations by the British Government resulted in the exemption of a small number of confidential documents, the defendants and the British Government finally gave in, and the protective order as to the documents sought by discovery was rescinded. Thereafter, several thousand requested documents were produced, even though under British law such instruments could not have been discovered and would not have been admissible as evidence at trial.

154. Distinctions between jurisdiction over United States corporations and alien corporations are discussed in *Edward J. Moriarity & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381 (S.D. Ohio 1967).

155. 148 F.2d 416 (2d Cir. 1945).

156. *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972).

Other countries are exercising greater restraint than our country in national policy towards jurisdiction and judicial process. England, for example, adheres to a narrowly territorial view of jurisdiction and does not permit extra-territorial discovery in antitrust cases, and the civil law countries of Latin America generally determine matters of jurisdiction on the nationality of individuals and the location of corporate headquarters, rather than on business transactions.

IV. VENUE

Definitions. Venue in antitrust cases is founded on two sections of the Clayton Act and supplementary special venue statutes. Section 4 of the Clayton Act provides that suit may be brought "in the district in which the defendant resides or is found or has an agent."¹⁵⁷ Additionally, section 12 states that any suit 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 where it may be found or transacts business."¹⁵⁸ Courts have held the term "resident" to be synonymous with the term "inhabitant."¹⁵⁹ Also, a natural person is a resident of the district of that state where he has his domicile or permanent home,¹⁶⁰ while a corporation is an "inhabitant" of the state of its incorporation.¹⁶¹

The term "found" as used in the Clayton Act has been held to connote present and continuous local activities within the district.¹⁶² The term "agent" for venue purposes is not controlled by concepts of agency developed for other purposes, and the term as used in the Clayton Act does not subject a person or corporation to suit in any district where he or it has an agent, no matter how limited the purpose of the agency.¹⁶³ "Transacts business" as used in the Clayton Act has been thought to mean conducting business in an ordinary and usual sense.¹⁶⁴ The Supreme Court has defined it to mean the practical everyday business or commercial concept of doing or carrying on business of any substantial character.¹⁶⁵

157. 15 U.S.C. § 15 (1970).

158. *Id.* § 22.

159. *Arrow Mfg. Co. v. Automobile Body Research Corp.*, 352 F.2d 400 (1st Cir. 1965).

160. *Shaw v. Quincy Mining Co.*, 145 U.S. 444 (1892).

161. *C.C.P. Corp. v. Wynn Oil Co.*, 354 F. Supp. 1275 (N.D. Ill. 1973).

162. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252 (E.D. Pa. 1968).

163. *Boston Medical Supply Co. v. Lee & Febiger*, 195 F.2d 853 (1st Cir. 1952); *Goldlawr, Inc. v. Schubert*, 169 F. Supp. 677 (E.D. Pa. 1958), *aff'd*, 276 F.2d 614 (3d Cir. 1960); *Riss & Co. v. Association of W. Rys.*, 159 F. Supp. 288 (D.D.C. 1958).

164. *San Antonio Tel. Co. v. American Tel. & Tel. Co.*, 499 F.2d 349 (5th Cir. 1974).

165. *United States v. Scophony Corp.*, 333 U.S. 795 (1948). *See also* *United States v. National City Lines*, 334 U.S. 573 (1948); *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359 (1927). In *Javelin Corp. v. Uniroyal, Inc.*, 360 F. Supp. 251 (N.D. Cal. 1973), the court held that attendance at industry-wide sales meetings and alleged conspiratorial meetings taking place in the forum district does not constitute transacting of business. This ruling is important because national trade associations tend to bring their member companies together by scheduled meetings attended by company officers, and discussions may often reach the area of subjects affecting competition and potential restraints of trade, such as the fixing of prices or allocation of markets. It has helped many a plaintiff's antitrust case to be able to allege combinations or groupings of defendant companies for anti-competitive purposes where the factual setting was actually organized by a trade association whose existence arose out of an effort to be of service to its members' companies, and who end up being sued for attendance at such association gatherings.

The supplementary venue statutes which are utilized in antitrust cases are as follows:

(a) 28 U.S.C. § 1391(b) which provides that a civil action not founded totally on diversity may be brought in the judicial district "where all the defendants reside, or in which the claim arose"166

(b) 28 U.S.C. § 1391(c) which provides that a *corporation* may be sued in any judicial district in which it "is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of the corporation for venue purposes."¹⁶⁷

(c) 28 U.S.C. § 1391(d) which provides that "an alien may be sued in any district."¹⁶⁸

(d) 28 U.S.C. § 1392 which provides that any civil action against defendants "residing in different districts in the same state" may be brought in any of such districts.¹⁶⁹

The term "in which the claim arose" is sometimes used by plaintiffs to bring actions in the districts of their residence since they are not favored with this right under section 1391(b), as are diversity plaintiffs under section 1391(a). For a claim to arise in a district there must be sufficient venue facts to satisfy the "weight of the contacts" test.¹⁷⁰ The district must be one where the contacts weigh heavily in that significant sales took place to cause substantial injury, or some other overt acts, pursuant to conspiratorial meetings, took place in the forum district constituting a substantial element of the offense. Conversely, if only a few insignificant sales were made in the forum district or meaningless meetings of conspirators took place there, venue would not lie in such district. A claim may arise in more than one district, but venue is not proper simply wherever any part of the claim, however small, arose.¹⁷¹ The question of where a "claim arose" for purposes of venue is to be decided by state law.¹⁷²

The Fifth Circuit has held that the venue provisions of section 1391(c) under title 28 are not applicable to corporations suing as plaintiffs. The effect of the statute is that a corporation *may be sued* in any judicial district where it is incorporated, licensed to do business, or is doing business. Under any of these circumstances the *defendant* corporation is considered a resident of the judicial district for venue purposes.¹⁷³ Further, the Fifth Circuit has held that a partnership or unincorporated business association "resides" or has a "residence" for Jones Act venue purposes¹⁷⁴ in a district in which it is doing business, even though the district is not the location of the principal office of the defendant or the district where its owner-partners live.¹⁷⁵

166. 28 U.S.C. § 1391(b) (1970).

167. *Id.* § 1391(c).

168. *Id.* § 1391(d).

169. *Id.* § 1392.

170. Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252 (E.D. Pa. 1968), tests reformulated, 309 F. Supp. 1053 (E.D. Pa. 1969).

171. Honda Associates, Inc. v. Nozawa Trading, Inc., 374 F. Supp. 886 (S.D.N.Y. 1974).

172. Geodynamic Oil & Gas, Inc. v. United States Silver & Mining Corp., 358 F. Supp. 1345 (S.D. Tex. 1973).

173. Carter-Beveridge Drilling Co. v. Hughes, 323 F.2d 417 (5th Cir. 1963).

174. 46 U.S.C. § 688 (1970).

175. Penrod Drilling Co. v. Johnson, 414 F.2d 1217 (5th Cir. 1969). The Fifth Circuit relied on Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967), in which the

In a suit against a foreign corporation licensed to do business in a multi-district state, venue will lie in all districts of the licensing state regardless of the lack of activities in certain of the districts.¹⁷⁶ Numerous cases have held that where a corporation is incorporated or licensed to do business in a state, such licensing embraces all districts within the state, and, hence, all districts are "residences" of the corporation for venue purposes under section 1391(c). This section provides that a corporation may be sued in any judicial district in which it is incorporated, licensed to do business, or is doing business. Such a judicial district is to be regarded as the residence of such corporation for venue purposes.¹⁷⁷ On the other hand, authorities have held that a corporation which is incorporated or licensed in a multi-district state is a "resident" only of the district in which it actually does business.¹⁷⁸ A Texas federal district court, in *Energy Resources Group, Inc. v. Energy Resources Corp.*,¹⁷⁹ stated that it saw nothing practical nor reasonable about requiring a corporate defendant to defend itself in the Southern District of Texas where it had never done business, and when all its witnesses and records were located 480 miles from Houston in the Midland-Odessa Division of the Western District of Texas. The venue statutes were devised to achieve two basic purposes: to lay venue in a place having a logical connection with the parties to the litigation, and to afford the defendant some protection against the hardship of having to litigate in some distance place. Such laudable ends could not be served by laying venue in the Southern District of Texas in such a case, and, therefore, the motion of the defendant to dismiss for improper venue was deemed well-founded.¹⁸⁰

Transfer to Proper Venue or Dismissal. Section 1406(a) of the Judicial Code provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."¹⁸¹ Under the language regarding transfer, it is plain that whether venue is proper or improper, the case may be *transferred* to a district where it might have been brought. Furthermore, the court's disposition of a motion to transfer a case for improper venue is not appealable as a final order.¹⁸²

In the important case of *Goldlawr, Inc. v. Heiman*¹⁸³ the Supreme Court

Supreme Court reaffirmed the proposition that for venue purposes a defendant unincorporated association should be suable as an entity and that the critical factor was the residence of the entity, rather than of its individual members; it therefore, for the first time, proceeded to hold that an unincorporated association should be analogized to a corporation.

176. *Energy Resources Group, Inc. v. Energy Resources Corp.*, 297 F. Supp. 232 (S.D. Tex. 1969).

177. *See, e.g.*, *Baksay v. Rensselaer Polytech Institute*, 281 F. Supp. 1007 (S.D.N.Y. 1968); *DeGeorge v. Mandata Poultry Co.*, 196 F. Supp. 192 (E.D. Pa. 1961).

178. *See, e.g.*, *Joscar Co. v. Consolidated Sun Ray, Inc.*, 212 F. Supp. 634 (E.D.N.Y. 1963); *Johnson v. B.G. Coon Constr. Co.*, 195 F. Supp. 197 (E.D. Pa. 1960).

179. 297 F. Supp. 232 (S.D. Tex. 1969).

180. *Id.* at 234.

181. 28 U.S.C. § 1406(a) (1970).

182. *Garner v. Wolfenbarger*, 433 F.2d 117 (5th Cir. 1970). Transfer may in the proper case, however, be reviewable by extraordinary writ. *Hoffman v. Blaski*, 363 U.S. 335 (1960) (cause transferred back to the Fifth Circuit).

183. 369 U.S. 463 (1962).

resolved a sharp conflict among the lower courts by holding that section 1406(a) of title 28 is broad enough to authorize a transfer "whether the court in which it was filed had personal jurisdiction over the defendants or not."¹⁸⁴ To the many advocates of the contrary position there simply seemed no justifiable basis on which the court could presume to issue a valid order, even only for a transfer, without personal jurisdiction first having been established over the defendant parties affected by such order. It is recognized, however, in some complex cases that the interests of justice are best served by such handling. One reason sometimes justifying a transfer rather than a dismissal of a cause not brought in the proper district is found where the statute of limitations has run so that dismissal would otherwise bar a new suit by the plaintiff.

In a pending multi-district case¹⁸⁵ in which many cases have been transferred to the Northern District of Texas for pre-trial purposes, numerous orders have been entered by the presiding district judge as to the problems here under discussion. Where the district court judge found venue to be improper, and he so found many times, he elected in all instances to transfer or provide for transfer by agreement of counsel to a new district upon the completion of pre-trial, rather than to dismiss any of such actions. The possibility of the bar of the statute of limitations was present in some of the situations involving improper venue before the court, and unnecessary filing and refileing of causes, with further service of process, seemed to the court not to be required or to serve a useful purpose under the circumstances before him.

V. SERVICE OF PROCESS

Rule 4 of the Federal Rules of Civil Procedure provides for service of process in suits in federal courts.¹⁸⁶ It does not affect jurisdiction or venue since the federal rules were not intended to deal with these matters. Instead, the function of rule 4 is to provide the procedural means for bringing notice of the filing of a suit to the attention of the defendant and to provide for the assertion of jurisdiction over the action. But underlying the question of the manner of service of process is the validity of issuance, by a particular court, of a summons on a defendant for a court appearance regarding the claim being directed against him. Lack of proper service, however, is not jurisdictional, and is no longer a factor in a case where there is a waiver or voluntary appearance by the defendant.

Nationwide Service of Process Under Section 12 of the Clayton Act. It is often said that in an antitrust suit service of process is "nationwide." What is meant, of course, is that where venue is properly laid under section 12,¹⁸⁷ service of process may then be made at the principal place of business of a corporation or at the office of the registered agent of a defendant in its state of incorporation.¹⁸⁸ Naturally, this service of process depends on the suit

184. *Id.* at 466.

185. *In re Beef Industry Antitrust Litigation*, M.D.L. 248 (N.D. Tex., Dallas Div.).

186. FED. R. CIV. P. 4.

187. 15 U.S.C. § 22 (1970).

188. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

being filed in a district specified by section 12; that is, a district where the defendant is an inhabitant, where it may be found, or where it transacts business. Service may also ordinarily be had pursuant to state long-arm statutes, as such service is an alternative provided by federal rule 4. Since venue may be properly laid not only under section 12 of the Clayton Act but also under section 1391(c) of the general venue statutes,¹⁸⁹ the process which then must be served will ordinarily reach the defendant and be effective wherever the defendant may be found.

It has been stated that in order to obtain personal jurisdiction over a party in an antitrust proceeding the party must be amenable to service of process and must be properly served, not simply by delivering a copy of the summons to a clerk or janitor but only upon a person suitable for acceptance of process.¹⁹⁰ Three basic ways are recognized in which personal jurisdiction over an antitrust defendant can be secured. First, the plaintiff can lay its venue in one of the judicial districts described by section 12 of the Clayton Act and then by virtue of the provisions of that section can serve the defendant at his home office or wherever it may be found. Second, the plaintiff may sue in a district where the defendant has an agent authorized to accept service of process and serve its summons on that agent. Third, the plaintiff may obtain service through the applicable long-arm statute of the forum state.¹⁹¹

Service of Process upon Alien Corporations. Rule 4 also provides for service in a foreign country. It has been held that service on an alien corporation found outside the United States can properly be made, assuming venue is properly established.¹⁹² Further, it has been held that a defendant corporation was properly served under the New York long-arm statute by registered letter service at the Italian headquarters of defendant and by personal service on the general manager of defendant in Italy by a court-designated Italian attorney.¹⁹³ The court concluded that personal service in Italy was valid under section 12 of the Clayton Act as well as under rule 4 of the Federal Rules of Civil Procedure.¹⁹⁴ As has been demonstrated by the preceding discussion of the venue requirement, provisions of the Clayton Act and the supplementary general venue statute have widespread application and importance in antitrust disputes. This Article now focuses on the matters and issues involved with the federal pleading requirements in an antitrust context.

VI. PLEADINGS

Unlike state court pleading in Texas, where no rule of procedure requires that the court's jurisdiction be specifically pled, federal rule 8(a)(1) provides

189. 28 U.S.C. § 1391(c) (1970).

190. FED. R. CIV. P. 4.

191. See discussion in 4 C. WRIGHT & A. MILLER, *supra* note 41, §§ 1061-75 (1969); ABA ANTITRUST SECTION, *supra* note 132, at 360-61.

192. *Intermountain Ford Tractor Sales Co. v. Massey-Ferguson, Ltd.*, 210 F. Supp. 930 (D. Utah 1962).

193. *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

194. *Id.* at 79-80.

that a pleading which sets forth a claim for relief shall contain "a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it."¹⁹⁵ Therefore, it is mandatory practice that all subject matter jurisdiction be affirmatively pled with specific reference to the federal jurisdictional statute providing power for the court to go forward with the action. United States district courts are of limited jurisdiction, with their authority to hear a case wholly dependent upon congressional enactment of one of the Constitution's grants of subject matter jurisdiction.¹⁹⁶

Under the early view of proper pleading in federal courts the facts constituting the antitrust violations were required to be alleged in substantial detail.¹⁹⁷ Under the modern view of pleading in federal litigation, such as in an antitrust action, only a short and plain statement of the claim for relief is required under rule 8(a).¹⁹⁸ *New Home Appliance Center, Inc. v. Thompson*,¹⁹⁹ for example, held that the liberal rules of pleading are as applicable to antitrust cases as to any other and that it is sufficient if the complaint contains a general allegation of the facts constituting the claim for relief. Additional cases hold that there are no special rules of pleading for antitrust cases and that notice pleading is sufficient, whether the case is complex or not.²⁰⁰

It has been held that an allegation of public injury is no longer required.²⁰¹ The Supreme Court has held that to state a claim under which relief can be granted under section 1 of the Sherman Act, allegations sufficient to show a violation and resulting harm to the plaintiff are all that is required. No harm to the general public need be alleged.²⁰² The Fifth Circuit, however, appears to adhere to the earlier view,²⁰³ holding that it is not enough for a plaintiff in seeking recovery under a restraint of trade claim to show only a violation of the antitrust laws and damage to himself. Plaintiff, in the view of the Fifth Circuit, should further plead and prove that the restraint tends or is reasonably calculated to prejudice the public interest. The plaintiff is not, however, required to shoulder the more onerous burden of proving specific economic injury to competition.

195. FED. R. CIV. P. 8(a)(1).

196. 4 C. WRIGHT & A. MILLER, *supra* note 41, § 1063, at 202-03 (1969).

197. *Bales v. Kansas City Star Co.*, 336 F.2d 439, 443 (8th Cir. 1964); *Alexander v. Texas Co.*, 149 F. Supp. 37 (W.D. La. 1957); *Baim & Blank, Inc. v. Admiral Corp.*, 132 F. Supp. 412 (S.D.N.Y. 1955).

198. FED. R. CIV. P. 8(a).

199. 250 F.2d 881 (10th Cir. 1957).

200. *Clausen & Sons v. Theo. Hamm Brewing Co.*, 284 F. Supp. 148 (D. Minn. 1967). *See also Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957). In the *In re Beef Antitrust Litigation*, currently pending before the United States District Court for the Northern District of Texas, Dallas Division, many of the complaints number only about eight pages, yet the relief sought in this complex litigation, on a trebled basis, is said to be in the area of six billion dollars. In one amended pleading, presented by a great number of individuals, 28 pages are used in stating the names and identities and connections with the litigation of the parties, plaintiff and defendant; yet, only six pages are used to describe the nature of trade and commerce involved, the offenses charged, fraudulent concealment as to the existence of the combination or conspiracy being complained of, injury to the plaintiffs, a consumer retail price fixing claim, and the restraint of trade claim pertaining to wholesale meat producing operations.

201. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961).

202. *Id.* at 659-60.

203. *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 699 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Capacity. Rule 9(a) of the federal rules makes it unnecessary to plead the legal existence, authority, or capacity of a party.²⁰⁴ Because of this rule it is not necessary to plead that the plaintiff or defendant is a corporation, partnership, administrator, trustee, or other representative. It is good practice, however, to state allegations of capacity, both in the caption and in the allegations of the pleading itself.²⁰⁵ In only one instance is the pleader expressly required by rule 9(a) to allege capacity or a legal existence in the complaint, and that is when such allegation is necessary to show the jurisdiction of the court. When jurisdiction is founded on the presence of a federal question, the claimant must allege those facts relevant to capacity that are needed to show the existence of the federal claim. Rule 9(a) requires that a party desiring to raise an issue as to the legal existence or capacity of a party must do so "by specific negative averment."²⁰⁶ Capacity, therefore, cannot be raised as an issue merely by general denial. In fact, in *Marston v. American Employers Insurance Co.*²⁰⁷ it was held that rule 9(a) requires not only that a defendant deny each and every averment in a complaint but also that the denial must include "such supporting particulars as are peculiarly within the pleader's knowledge."²⁰⁸

Separate Paragraphs and Separate Counts. Rule 10(b) of the Federal Rules of Civil Procedure appears to require pleading in separate paragraphs and separate counts.²⁰⁹ However, as to the requirement of rule 10(b) that pleading be divided into numbered paragraphs, courts have denied motions to direct plaintiff to subdivide allegations in an antitrust action in two numbered paragraphs in view of the multiplicity of facts involved in a charge of violation of antitrust laws.²¹⁰ Additionally, despite the second sentence of rule 10(b) mandating that each claim founded upon a separate transaction or occurrence be stated in a separate account, it has nevertheless been held that a series of acts allegedly violative of antitrust laws need not be separately stated.²¹¹

VII. DISCOVERY

Prior to the adoption of the Federal Rules of Civil Procedure in 1938 and the Texas rules in 1941, cases were tried on the basis of what witnesses said, and, when settled prior to trial, were settled on the basis of what attorneys for the parties *thought* the witnesses would say if trial were had. With promulgation of federal and state rules attorneys began taking oral depositions of opposing parties. Often written or oral statements would be taken of potential witnesses. More recently, discovery processes have become more and more common, so that today discovery takes up by far the greatest

204. FED. R. CIV. P. 9(a).

205. See 5 C. WRIGHT & A. MILLER, *supra* note 41, § 1292 (1969).

206. FED. R. CIV. P. 9(a).

207. 439 F.2d 1035 (1st Cir. 1971).

208. *Id.* at 1041.

209. FED. R. CIV. P. 10(b).

210. *United States v. Columbia Gas & Elec. Corp.*, 1 F.R.D. 358 (D. Del. 1940).

211. *Michigan Gas & Elec. Co. v. American Elec. Power Co.*, 41 F.R.D. 462 (S.D.N.Y. 1966).

amount of time of all pre-trial procedures combined. The burden on lawyers is that their preparation is as hard, or harder, than the actual trial of a case. The burden on the judges is that they are called upon to determine questions such as relevancy prior to a trial on the merits so that they do not always have the benefit of the predicate necessary for proper resolution of the question. Additionally, more and more time of the courts is being required to rule on discovery motions and possible sanctions when discovery orders do not appear to have been fully complied with. It is now commonplace to observe that procedure prior to trial has advanced from the state of use of discovery to abuse of the process. Undoubtedly some tightening of the free discovery reins must be accomplished, at first informally, and perhaps in one federal jurisdiction at a time, and then finally in some new formal expressions in amendments to the discovery rules. The pendulum has swung too far on the side of free use of discovery techniques, and every litigant, attorney, and judge familiar with the pre-trial scene today knows the imbalance must be soon corrected. The precise manner of revising the rules has not yet been determined. Some may suggest that each party initially be limited to a certain number of questions ("Twenty Questions"?) with any additional interrogatories to be filed only upon approval of the court after motion and good cause have been shown. Others advocate the abolition of interrogatories altogether. There could also be a time limitation on the fact-finding period of pending litigation, with appropriate sanctions for failure of cooperation. Briefly, in the headings that follow, there will be a tracing of developments pertaining to discovery up to the present, along with references to a few of the important rules and cases.

Scope of Discovery Under the Federal Rules. Rule 26(b)²¹² provides that parties may obtain discovery for any unprivileged, relevant matter. It has been the source of much litigation as the courts have grappled with the determination of the proper limits to place on discoverable subject matter. As stated in the famous "work product of an attorney" case, *Hickman v. Taylor*,²¹³ deposition-discovery rules are to be accorded a broad and liberal treatment. "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."²¹⁴

What is "relevant" to the subject matter, under rule 26(b), is difficult to define. No doubt the requirement of relevancy should be and has been

212. FED. R. CIV. P. 26(b), which provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, or location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

213. 329 U.S. 495 (1947).

214. *Id.* at 507.

construed liberally. In fact, "it is not too strong to say that a request for discovery should be considered relevant if there is *any possibility* that the information sought may be relevant to the subject matter of the action."²¹⁵ A determination of relevancy is not even limited to the issues joined by the current pleadings then on file.²¹⁶ Finally, as to privilege, generally federal law as to privileged matter controls, except in cases where state law governs under the *Erie* doctrine.²¹⁷

Abuses of Burdensome Discovery. In the *Beef Industry Antitrust Litigation* previously referred to, there is presently on file a first set of plaintiffs' joint consolidated interrogatories comprising 176 pages. The 155 numbered interrogatories are subdivided into about 1,800 separate parts. Because of extensive cross-referencing among the interrogatories, the total number of questions posed for the defendants runs into the tens of thousands. Some interrogatories, for example, each ask thirty-five questions about eleven different beef products. Thus, these interrogatories actually represent over 12,000 separate questions. Further, the interrogatories cover the time span of the last fourteen years. In some cases information is sought dating back to the year 1940 and even back to the early years of the century. In one interrogatory the defendant is asked to "identify" each and every telephone call made or received by its employees since 1963 while the particular defendant, engaged in the business of publication of news concerning the meat industry, was about its work in gathering such industry news. Another interrogatory even demands identification of all personnel of the defendant company since the year 1940, whose spouse or other relatives within the second degree, as defined by civil law, have held stock in, made loans to, or have served as an officer, director, or employee of another company in the beef industry.

This type of discovery has forced the Supreme Court to express growing concern over discovery techniques that are getting out of hand and, if unchecked, will undoubtedly ruin and make totally unusable what would otherwise have been a step forward toward justice in the administrative process. Thus, in *Blue Chips Stamps v. Manor Drug Stores*²¹⁸ the Court first observed that extensive and liberal discovery which produces relevant evidence useful in determining the merits of the claims is discovery to be encouraged. On the other hand, the Supreme Court said, "[b]ut, to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit."²¹⁹

A judge of one of the federal district courts for the Northern District of Texas in a recent case rather eloquently stated his recognition of the abuses

215. 8 C. WRIGHT & A. MILLER, *supra* note 41, § 2008, at 46-47 (1970).

216. *Stevenson v. Melady*, 1 F.R.D. 329 (S.D.N.Y. 1940).

217. *Hyde Constr. Co. v. Koehring Co.*, 455 F.2d 337 (5th Cir. 1972).

218. 421 U.S. 723 (1975).

219. *Id.* at 741.

of present discovery practices and his determination to use sanctions where necessary in correcting such unwarranted practices. The court stated:

This case makes abundantly clear that the supposedly self-executing federal discovery rules are being abused. Apparently my prior policy, which included a reluctance to use Rule 37 sanctions, has not worked. Henceforth, I will embark on a different course liberally using the full range of Rule 37 sanctions in appropriate circumstances. My aim is to achieve maximum discovery with minimum involvement of this court.²²⁰

Protective Orders in Relief of Burdensome Discovery. Rule 26(c) of the federal rules provides that upon motion and for good cause shown a forum court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.²²¹ Such an order may provide that discovery not be had, or may be had only on specified terms and conditions, including a designation of the time or place for discovery. It may also provide that discovery may be had only by a method of discovery other than that selected by the party seeking discovery. For example, in the *Beef Industry Antitrust Litigation*, regarding portions of the first set of interrogatories propounded to one of the defendants, it was agreed by the parties, pending court decision on a motion for protective order, that oral depositions would be taken of certain officers and employees of the defendant rather than seeking to compel the defendant to answer the numerous and complex interrogatories to which it objected. Further, a protective order may be entered that certain matters not be inquired into, or that discovery be conducted with no one present except persons designated by the court, or that a deposition after being sealed may be opened only by order of the court. A protective order may provide that a trade secret or other confidential development not be disclosed. A court may further order that parties simultaneously file specified documents or information to be opened as directed by the court. A protective order that discovery not be had at all is regarded as an unusual and unfavorable means of preventing abuse in view of the power of the court to control the details of time, place, and scope for the protection of the parties.²²² Alternatively, it is not uncommon that a protective order be entered that the party seeking burdensome discovery pay expenses or costs of research.²²³

Not all abuses of the discovery rules are, by any means, caused because a party files so much material that a case is made unnecessarily complex. On the contrary, equally offensive are the numerous practices of evasion by a party served with interrogatories. For example, in the *Beef Industry Antitrust Litigation*, plaintiff's first interrogatories asked the defendant to itemize "fixed expenses," for a period of time in processing and selling choice or equivalent grade beef, hamburger beef, and all other beef. In the

220. *SCM Societa Commerciale S.p.A. v. Industrial & Comm. Research Corp.*, 72 F.R.D. 110 (N.D. Tex. 1976) (Hon. Robert Porter, United States District Judge).

221. FED. R. CIV. P. 26(c).

222. *Investment Properties Int'l, Ltd. v. Ios, Ltd.*, 459 F.2d 705 (2d Cir. 1972).

223. *Associated Radio Serv. Co. v. Page Airways, Inc.*, No. CA-3-7838-F (N.D. Tex., filed Oct. 26, 1977) (discovery expenses charged against attorneys rather than parties).

following interrogatory, the plaintiff asked that the defendant itemize "variable expenses" for the period defined in processing and selling the same type of beef. The defendant responded by objecting to such interrogatory for *failing to define* the terms "fixed expenses" and "variable expenses." Further objections were made on the grounds that such interrogatories were not relevant to the subject matter of the suit, nor reasonably calculated to lead to discovery of admissible evidence, and for other grounds. In view of the approach taken by the plaintiffs to define and set exact boundaries to the scope of answers desired, there may well have been no other course for the defendant to follow, unless, of course, the defendant were simply to have set out all possible data in rather bulk fashion, with the plaintiffs then to sift through the information. In any event, the court may be called upon to consider the propriety of entering an order compelling discovery under rule 37(a).²²⁴ Ultimately, if definitions and terms are cleared up, the court may deem an evasive or incomplete answer as a failure to answer, and may grant a motion for relief including an award of reasonable expenses incurred in the obtaining of such an order, including attorney's fees. For failure to comply with an *order* compelling discovery, the sanctions of rule 37(b)²²⁵ may be very severe. For example, the failure may be considered a contempt of court, and an order may be entered refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters in evidence.

The proper limits to which discovery is to be allowed have occupied the courts' attention in many antitrust disputes. For example, discovery is permissible as to acts and events transpiring *subsequent* to those giving rise to the cause of action where there is a possibility that the information sought may be relevant to the subject matter of the pending action.²²⁶ But in *Delaware Tool Steel Corp. v. Brunner & Lay, Inc.*²²⁷ defendant's interrogatories as to relationships between plaintiff and defendant's predecessor corporations and the status of plaintiff's business in the years before the alleged violations were held not relevant. Similarly, documents to which a defendant stock exchange could discover policies of the Antitrust Division of the United States Department of Justice and the SEC concerning the defendant's anti-rebate rule were discoverable unless otherwise privileged.²²⁸ Finally, in an action in which an automobile dealer alleged antitrust violations by an automobile manufacturer in the establishment of sales incentive programs which effectively precluded plaintiff's participation, the defendant was compelled to answer interrogatories requiring identification and description of the five most recent documents relating to the result of any sales incentive program conducted in any metropolitan area in the United States.²²⁹

224. FED. R. CIV. P. 37(a).

225. *Id.* 37(b).

226. *Goldfinger v. Boron Oil Co.*, 60 F.R.D. 562 (W.D. Pa. 1973).

227. *Delaware Tool Steel Corp. v. Brunner & Lay, Inc.*, 19 F.R.D. 375 (D. Del. 1956).

228. *Thill Secs. Corp. v. New York Stock Exchange*, 57 F.R.D. 133 (E.D. Wis. 1972).

229. *Tosa Chrysler-Plymouth, Inc. v. Chrysler Motors Corp.*, 55 F.R.D. 41 (E.D. Wis. 1972).

By no means should it be thought that the preceding cases evidence an uninterrupted trend towards expanding the limits of permissible discovery. Many cases propound the judiciary's belief that there are proper limits to be placed. For example, in an antitrust suit involving a conspiracy to deprive plaintiff's theater of second-run films, the court held that inquiries on a nationwide scale were not relevant and interrogatories would have to be limited to the specific locality involved.²³⁰ In another case information was sought by interrogatories as to total purchases from 1920 to 1948 of tires and tubes, as original equipment, purchased by an automobile company from a tire company and the tire company's competitors. The court held the questions relevant to proof of conspiracy and restraint of trade, but separation of statistics into classes of tires and tubes, and to divisions or subdivisions of the automobile company was held to be irrelevant.²³¹

The cases discussed above, and a plethora of others, show the increasing judicial awareness to the problems inherent in blind adherence to the belief that everything "relevant" is discoverable. There should be and are proper limits to what is discoverable where the scope of the case tends to be massive. Class action suits in antitrust matters compose an area holding many recent decisions of interest and this Article now focuses its attention on the problems involved in maintaining such actions.

VIII. ANTITRUST CLASS ACTIONS: SOME RECENT DECISIONS OF INTEREST

Determining Whether Action is Maintainable as a Class Action. Rule 23 of the federal rules does not specify when a court must determine whether an action sought to be maintained as a class action may be so certified. The rule does, however, say that the determination is to be made "as soon as practicable after the commencement of an action brought as a class action."²³² This language has been given wide and varying interpretation, and it is not at all uncommon for a complex case to be pending far longer than a year before entry of a court order denying or granting class action status. This is probably a matter requiring attention in a future revision of the rule. Also, the rule itself is not specific as to the manner or scope of limited class action discovery, so prevalent today, wherein discovery on all issues other than the class action issue may actually be stayed pending resolution of the form of class action order. This results in extending greatly the time a case is held pending prior to trial on the merits. The present practice can doubtless be improved upon, as it seems an unwarranted doubling of time and expense for attorneys and witnesses to have their depositions arranged for and taken twice in the same case simply because counsel for one party or the other may be able to insist, under the present state of the rule, that the scope of the depositions should be limited the first time around. Also, a future revision of the class action rule should undoubtedly have some language

230. *William Goldman Theatres, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 54 F.R.D. 201 (E.D. Pa. 1971).

231. *United States v. E.I. DuPont de Nemours & Co.*, 13 F.R.D. 98 (N.D. Ill. 1952). Further, discovery was refused altogether as to questions regarding the financial arrangement between plaintiff and counsel in *Bogosian v. Gulf Oil Corp.*, 337 F. Supp. 1228 (E.D. Pa. 1971).

232. FED. R. CIV. P. 23.

pertaining to the type of hearing necessary for the class action motion, whether entirely in the form of factual affidavits or witnesses in open court. Mini-hearings on the merits, as in a typical trial, seem to be the approved form for proceeding at this time, but if facts are to be resolved by the in-court appearance of witnesses, one wonders why a jury would not be appropriate, and if not, then why the hearing should not be confined to affidavits and depositions as on motions for summary judgment. For example, in *Ralston v. Volkswagenwerk A.G.*²³³ nine days of testimony were presented at a class action hearing. Unfortunately, it is not unusual for such a "mini-hearing" in the federal districts of Texas to last several days.

Statute of Limitations. The problems involved with defeating the bar of limitations in antitrust class actions is a hurdle that poses serious problems to plaintiffs in such actions. Recent cases have propounded the general rule regarding the tolling of the statute during class actions. It has been held that the statute of limitations is tolled during the pendency of the class certification motion.²³⁴ Most lawyers active in the antitrust field are familiar with the decision of the United States Supreme Court in *American Pipe & Construction Co. v. Utah*²³⁵ where it was held that commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the action been permitted to continue as a class. The purported class action under section 1 of the Sherman Act had been brought eleven days before the end of the limitation period provided for in the Act. The Court later found the suit inappropriate for class action because of a failure to demonstrate the required numerosity of class members; thus, the Court held that those persons previously prospective members of the class had an additional eleven days in which to move to intervene in the existing suit or file their own causes of action.

Notice and Costs. These requirements and burdens pose particular problems in class action suits. Case law dealing with these two issues reveals the extent to which they can become a crucial factor in the litigation of an antitrust suit. For example, defendant proposed, in *In re Arizona Bakery Products Litigation*,²³⁶ that the notice to be sent to the class by the plaintiff representative refer to the possibility of discovery interrogatories against individual members of the class. The court rejected the request. Similarly, in *Love's Wood Pit Barbeque, Inc. v. Bell Brand Foods, Inc.*²³⁷ a defendant's request was denied. The defendant requested that a notice to prospective members of the class include the possibility that they would be taxed for costs if the suit were lost and further that counterclaims might be brought against them individually. Also, courts have entered orders that require notice to be given by direct mail to the last known address of class members.²³⁸ A fairly unique "piggy-back" style of notice was approved by the

233. 61 F.R.D. 427 (W.D. Mo. 1973).

234. *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975).

235. 414 U.S. 538 (1974).

236. 1975-2 Trade Cas. ¶ 60,556 (D. Ariz. 1975).

237. 1974-1 Trade Cas. ¶ 74,905 (S.D. Cal. 1973).

238. *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

court in *In re Arizona Dairy Products Litigation*.²³⁹ There the court approved notice to members of the class where such notice was printed on the sides of milk cartons delivered during a sixty-day period. Plaintiffs were required to reimburse defendants, however, for costs of this form of notice. Finally, in *Foster v. Maryland State Savings & Loan Ass'n*²⁴⁰ it was held that the cost of notice to be paid by the plaintiff included postage, stuffing, and mailing, but not the cost of supplying the names and addresses of the class, which may otherwise have been the greater part of the cost to the plaintiff. Certainly in some cases this would be a large portion of the costs, for example, in brokerage cases where many members of a class have held their stocks in "street name" and their individual names are not readily available but may be in files placed in storage.

Dismissal and Compromise. Settlements and compromises obviously result in dismissals of a great number of antitrust disputes, with the aggrieved party often getting the financial remuneration necessary to compensate for the damages suffered. Because of the effect that these settlements have on other parties in the industry, courts have often dealt with the requirements for a valid settlement. In *Sunrise Toyota, Ltd. v. Toyota Motor Co.*²⁴¹ the court set forth the requirements for a finding of fairness as to a settlement proposal. Courts have also held that notice of settlement mailed nineteen days prior to the hearing complied with due process and rule 23 requirements.²⁴² Further, it has been determined that such notice was not intended to be a complete source of settlement information to members of the class and that there was no requirement that the text of the settlement agreement had to be included in the mailed notice.²⁴³ In *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*,²⁴⁴ the often-cited case on standards for awards of counsel fees, the court set forth factors it considered to be of prime importance in the awarding of fees for attorneys successful in obtaining a class fund for distribution to class members. The factors were hours spent and rate therefor, the contingent nature of the employment, and the quality of the attorney's work, which in part would be reflected by the benefit to the class.²⁴⁵ In addition to the recent development of the law pertaining to class actions, antitrust disputes have also led to the development of a very new method of federal procedure, the multi-district federal litigation.

IX. MULTI-DISTRICT LITIGATION

Background Giving Rise to M.D.L. Cases. In the 1960's federal courts, following successful criminal antitrust prosecution of a number of electrical equipment manufacturers, were faced with disposing of more than 1,800

239. 1975-2 Trade Cas. ¶ 60,555 (D. Ariz. 1975).

240. 1974-2 Trade Cas. ¶ 75,277 (D.D.C. 1974).

241. 1973-1 Trade Cas. ¶ 74,398 (S.D.N.Y. 1973).

242. *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

243. *Id.* at 122.

244. 487 F.2d 161 (3d Cir. 1973).

245. *Id.* at 166-67.

separate civil damage actions filed in thirty-three different federal district courts. Cooperation by the judges and attorneys involved in the cases resulted in these time-saving procedural steps: (1) coordinated pre-trial discovery proceedings; (2) national depositions with lead counsel for plaintiffs and defendants; (3) a document depository containing over one million documents available to all parties. By 1968 all of the actions had been terminated, with judicial economy and convenience to the parties and courts.²⁴⁶ Based on such experiences in the electrical equipment cases the judicial conference proposed the enactment of a new venue provision that became our present section 1407 of title 28.²⁴⁷ This new venue statute became law in 1968. It provides that:

[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfer shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.²⁴⁸

Under subsection C of this section the specific provision is made for the judicial panel of multi-district litigation to transfer an action upon its own initiative.

Although section 1407 contemplates that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated,"²⁴⁹ in actual practice the transferee court for pre-trial purposes may often do otherwise. Either on motion of a party or on the judge's own initiative, at the close of pre-trial, the judge may transfer the case to himself for all purposes under section 1404(a) for the convenience of parties and witnesses, and in the interest of justice, thus giving the transferee court the right to conduct the trial on the merits.²⁵⁰ Such a transferee judge, through the knowledge and expertise acquired by him during the pre-trial proceedings, may often be in the best position to try the cases correctly and expeditiously.²⁵¹ In *Pfizer, Inc. v. Lord*²⁵² the transferee court, following the denial of a writ of mandamus sought by the non-settling defendants, ordered all the actions transferred to Minnesota for trial under section 1404(a). In most instances the transferee court would, as indicated, have become the preferable court for trial on the merits in view of the countless

246. See Neal & Goldberg, *The Electrical Equipment Antitrust Cases; Novel Judicial Administration*, 50 A.B.A.J. 621 (1964).

247. 28 U.S.C. § 1407 (1970).

248. *Id.*

249. *Id.*

250. *Id.* § 1404(a).

251. See *In re Penn Central Securities Fraud Litigation*, M.D.L. 56 (E.D. Pa. 1976), where the author was the court-appointed class action counsel for the Great Southwest Corporation Shareholders. Had the various cases transferred to the Eastern District of Pennsylvania for consolidated pre-trial proceedings not been settled at the end of pre-trial, it is likely that on motions of the parties or on the court's own initiative such causes would have been transferred to such transferee court for trial on the merits.

252. 447 F.2d 122 (2d Cir. 1971).

proceedings that it would have ruled on during the course of pre-trial matters.

X. CERTAIN PRE-TRIAL MOTIONS

Motion to Prohibit Communications with Potential Class Members. By order entered February 27, 1970, the United States District Court for the Northern District of Texas adopted local rule 4 to prevent potential abuse of class actions.²⁵³ In this order all parties and their counsel in any potential or certified class action under rule 23 were expressly forbidden to communicate with any potential or actual class member not a formal party to the action without court approval. Communications forbidden by local rule 4 included, but were not limited to, the following: (a) direct or indirect solicitation of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees, expenses, and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the action; (c) formal parties' solicitation of class members to opt in or out of the class action; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes, effects of the action, or court orders.²⁵⁴ This rule did not contain the important proviso included in the form of order set forth in the manual for complex litigation.²⁵⁵ This proviso excepted, inter alia, communications between an attorney and a prospective client initiated by the prospective client. From time to time the rule would be modified in cases in the Northern District of Texas so that in effect attorneys would be bound only by the portion thereof already amply covered by the Code of Professional Responsibility.²⁵⁶ In *Rodgers v. United States Steel Corp.*²⁵⁷ a district court rule applicable to class actions, similar to local rule 4, which required prior judicial approval of communications between plaintiffs and their attorneys and third parties, was held outside the statutory authority of the district court and possibly unconstitutional under the first amendment to the Federal Constitution, although the constitutional issue was not determined. Local rule 4 was then rescinded following motions and hearings in the *Beef Industry Antitrust Litigation* currently pending in the Northern District of Texas.

Motion for Preservation of Documents and Non-Destruct Order. In *United States v. International Business Machines Corp.*²⁵⁸ the court addressed itself to the question of whether a particular document's preservation order, entry of which had not been opposed, had been violated by one of the parties. The

253. N.D. TEX. LOCAL R. 4 (Misc. 688).

254. *Id.*

255. The manual for complex and multi-district litigation was promulgated in 1968 by the coordinating committee for multiple litigation of the United States District Court. Techniques and methods suggested by the manual are not mandatory and some federal judges use the manual extensively while others employ it sparingly. It is designed to apply not only to multi-district cases but to any complex case and in the foremost rank of cases designated by the manual as typically requiring special handling are the antitrust suits.

256. *Stevenson v. Mazda Motors of America, Inc.*, No. CA-3-75-1304-G (N.D. Tex., filed Oct. 22, 1975).

257. 508 F.2d 152 (3d Cir. 1975).

258. 66 F.R.D. 189 (S.D.N.Y. 1974).

question was raised as to whether the strict standards governing the issuance of restraining orders and injunctions must be observed under rule 65 of the federal rules.²⁵⁹ Naturally, no court wants to sit idly by while relevant written materials are destroyed or mislaid. Often the relevancy of such materials cannot be determined before a predicate is laid for their admission at actual trial. Therefore, courts in complex cases will frequently provide for document depositories. In the *Penn Central Securities Fraud Litigation*²⁶⁰ over a million documents were maintained in a depository in Philadelphia. Upon final settlement of all controversies involved in the litigation there was an application for the costs of maintaining such document depository which ran into tens of thousands of dollars. How much utility the depository actually served in view of the settlement is questionable; in event of trial on the merits, however, the depository would surely have been useful.

Motion for Partial Summary Judgment Under Statutes of Limitation. Frequently, defendants will assert the statute of limitations to bar plaintiffs from asserting causes of action accruing prior to four years before the complaint was filed in an antitrust suit. The four-year limitations period was enacted by Congress in 1955 and is set out in section 4(b) of the Clayton Act. Opposition to the application of the statute of limitations is often phrased under the doctrine of fraudulent concealment; the argument is that a wrongdoer who has affirmatively acted to conceal a cause of action from an injured party should not, as a matter of equity, be entitled to benefit from such conduct by asserting the statute of limitations as a bar when the cause of action has finally come to light.²⁶¹ In the *Beef Industry Antitrust Litigation* plaintiffs argued that they did not know of their cause of action until a favorable judgment was entered under section 1 of the Sherman Act in 1974 in Federal District Court in the Northern District of California.²⁶² The order of the trial court implied the existence of genuine issues of material fact: first, concealment by defendants of plaintiffs' cause of action, and secondly, whether due diligence on the part of plaintiffs would have resulted in discovery of their cause of action.

Motion for Judgment on the Pleadings. Defendants in the *Beef Industry Antitrust Litigation* filed such a motion based on the recent decision of the United States Supreme Court in *Illinois Brick Co. v. Illinois*.²⁶³ *Illinois Brick Co.* held that section 4 of the Clayton Act affords a remedy only to persons who purchase directly from an antitrust offender, even though the brunt of antitrust injuries may be *passed on* to indirect purchasers who are often the ultimate consumers of a product. The majority opinion stated that because

259. FED. R. CIV. P. 65.

260. M.D.L. 56 (E.D. Pa. 1976).

261. *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962).

262. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851 (N.D. Cal. 1975). Actually, settlement was made by Safeway and Kroger, and the suit proceeded to trial and judgment was entered only against the one defendant, The Great Atlantic & Pacific Tea Company, Inc. The action was brought by a number of cattlemen charging violations of antitrust laws in that the defendants in combination with themselves and others conspired to regulate prices which plaintiff cattlemen received for their beef.

263. 45 U.S.L.W. 4611 (U.S. June 7, 1977).

*Hanover Shoe, Inc. v. United Shoe Machinery Corp.*²⁶⁴ was found dispositive under stare decisis, “[w]e do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge for purposes of section 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under Section 4.” One dissent, however, made significant references to standing, likening the concept of “target area” to that of “proximate cause” in tort law, and finding liability of an antitrust wrongdoer to anyone injured in the defendant’s “chain of distribution.”²⁶⁵

XI. CONCLUSION

Most of the critical questions of federal procedure affecting antitrust litigation are of a traditional nature and are well under control, with sound judicial decisions clearly outlining the course for counsel to follow. In the area of discovery and class actions, however, much further study is needed and a sharpening of pre-trial requirements must be had to assure uniformity of decision, sound administration, and justice.

264. 392 U.S. 481 (1968).

265. *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611, 4618 (U.S. June 7, 1977) (Brennan, J., dissenting). Numerous other pre-trial motions are of course encountered in every complex case, including motions to compel answers to interrogatories, motions for protective order, motions to dismiss based on res judicata, and many other types of motions too numerous to examine in detail.

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