VENUE: THEN OR NOW? SECTION 22 OF THE SHERMAN ACT

Section 22 of the Sherman Act authorizes a plaintiff to bring suit under the antitrust acts against a corporation not only in the judicial district "whereof . . . [defendant] is an inhabitant, but also in any district wherein it may be found or transacts business." [1] The proper construction of this provision was at issue in the recent case of *Eastland Construction Co. v. Keasbey & Mattison Co.*[2]

In *Eastland*, plaintiff filed its complaint a year and a half after defendant had sold its asbestos-cement pipe business and discontinued all business relations within the district. Although defendant was unquestionably "transacting business" in the district at the time of the alleged antitrust violation,[3] the district court dismissed the complaint for improper venue because defendant Keasbey was not transacting business in the district on the date the complaint was filed. On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that the requirements of the Sherman Act venue provision are satisfied if the corporate defendant was transacting business in the district in which suit was filed at the time the cause of action accrued. Thus the court in *Eastland* determined that the phrase "transacts business" refers to defendant's activities at the time the alleged cause of action accrues, not at the time suit is instituted.[4] While there is some authority for each construction of section 22 in prior court decisions, the logic on neither side is compelling.

Several courts have held that the venue provision requires that the defendant be transacting business in the district when suit is instituted. *Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.*[5] is the case most often cited for this proposition; however, the reliance other courts place on this decision [6] is not well-founded. In *Sunbury* the court found that plaintiff had not satisfied the venue requirement because defendant was not "transacting business" in the

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[1] 38 Stat. 736 (1914), 15 U.S.C. § 22 (1964). The entire section reads:
> [A]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found.

[2] 358 F.2d 777 (9th Cir. 1966).

[3] *Id.* at 778.

[4] Clearly, the "time of accrual" construction is broader than the "time of suit" construction. It includes the following case: Plaintiff sues defendant in a district in which the defendant is transacting business at the time of suit although the defendant was not transacting business there at the time of the injury—*i.e.*, the injury was inflicted in another district.

[5] 230 F.2d 511 (3d Cir. 1956).

[6] See, *e.g.*, City of Philadelphia v. Morton Salt Co., 248 F. Supp. 506 (E.D. Pa. 1965); School District v. Kurtz Bros., 240 F. Supp. 361 (E.D. Pa. 1965).

district at the time of suit. But the court went on to conclude that the defendant had waived venue—at the time he had discontinued business in the district—by executing the consent-to-be-sued provision of the certificate of withdrawal required by state law.[7] Because the court posed the issue in terms of waiver of venue, the discussion focuses on defendant's consent to be sued and the scope of its waiver; there is no discussion of why the time of suit is critical for the venue provision. The holding of the case was that where venue is waived, the defendant can be sued in a forum in which he is no longer transacting business.

It is difficult to understand why so many cases have relied on *Sunbury*. While the court clearly assumed that but for the waiver, suit could not have been brought, this assumption was not explained, nor was it necessary for the result in the case. The only cases attempting to give a rationale for the "time of suit" construction reason that, because "transacts business" is couched in the present tense, it applies to the time suit is instituted.[8] This construction of the statute, however, is not compelled. Although the present tense more easily lends itself to the "time of suit" construction, it does not exclude the "time of accrual" construction. Purely as a grammatical matter, the historical present is identical in form to the present tense. The words can reasonably bear either reading. Nor is the "time of suit" construction compelled by the fact that Congress might have laid venue specifically where the injury occurred, as it has done in other venue provisions.[9] There is no indication that in choosing the words it did, Congress specifically omitted that alternative.

The decisions, such as *Eastland*, holding that the time the cause of action accrues is determinative, are no more cogently reasoned. Most of these cases rely heavily on inapposite dictum from *United States v. Scophony Corp. of America*.[10]

Scophony did not really involve the issue raised by the cases which rely upon it. Scophony was a British corporation with an American subsidiary incorporated in New York, where process was served. Although the company was not doing a sufficient amount of business at the time suit was instituted to be "found" in the district

[7] Sunbury had cancelled its Pennsylvania registration to do business before this action was instituted. As required by state law, Sunbury had signed a consent-to-be-sued provision which was part of the application for a certificate of withdrawal of registration. 230 F.2d at 512.

[8] *E.g.*, City of Philadelphia v. Morton Salt Co., 248 F. Supp 506 (E.D. Pa. 1965); Schreiber v. Loew's Inc., 147 F. Supp. 319 (W.D. Mich. 1957).

[9] See Eastland Constr. Co. v. Keasbey & Mattison Co., 358 F.2d 777, 779 n.6 (9th Cir. 1966) (citing the Federal Employers' Liability Act which allows suit in the district "in which the cause of action arose"). For a discussion of the absence of congressional intention to deal with this issue, see text accompanying notes 21-29 *infra*.

[10] 333 U.S. 795 (1948). See, *e.g.*, Sharp v. Commercial Solvents Corp., 232 F. Supp. 323 (N.D. Tex. 1964); R. J. Coulter Funeral Home v. National Burial Ins. Co., 192 F. Supp. 522 (E.D. Tenn. 1960).

within the meaning of the venue provision, it was doing enough to constitute "transacting business," so venue was not a problem.[11] The question before the Court was whether Scophony was "found" in the district within the meaning of the service of process provision, notwithstanding the fact that it was not "found" there within the meaning of the venue provision.[12] The Court held that it was, and upheld the service of process.

The Court was concerned with the situation where a foreign corporation inflicts injury in a district and then, by its own actions, is able to immunize itself from suit by avoiding jurisdiction in the United States. In connection with its solution to this problem, the Court reviewed the congressional intent behind the amendment to the Sherman Act which revised the venue provision and added the service of process provision.[13] It said:

> [In other cases arising under the Sherman Act, this Court has] yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due.[14]

It is this dictum on which the "time of accrual" cases rely. Read in context, however, the above passage is distinguishable from the cases which rely upon it for two reasons. First, the Court was discussing the service of process provision of section 22, not the venue provision. Second, in *Scophony*, the Court was concerned with a foreign corporation which could preclude suit by withdrawal from the district, not with an American corporation which might merely delay suit or make it more expensive.

As noted earlier, venue was held proper in *Scophony*. The issue whether it would also have been proper had Scophony ceased to

[11] The Court, having found venue proper because the defendant was "transacting business" in New York at the time of suit, did not reach the issue whether venue would also have been proper had the defendant been transacting business when the cause of action accrued but not when suit was instituted. In part, the question was mooted by the special circumstances of the case.

Because the defendant in this case was a foreign corporation, if it had broken business contacts with New York entirely, it could not have been reached by service of process in the United States because no court would have jurisdiction over the defendant. The requirement of "transacting business" necessitates such a negligible amount of business activity that a company not fulfilling the requirement would effectively not conduct any business nor have any but ephemeral business contacts with the district. Under such circumstances, the question of venue would never be litigated as the defendant could not be brought into court.

[12] 333 U.S. at 803-04.

[13] 38 Stat. 736 (1914), 15 U.S.C. § 22 (1964).

[14] 333 U.S. at 808.

transact business in the district before suit, was never raised. If anything, the Court seems to assume that venue must be established as of the time of suit. But this assumption does not resolve the issue in *Eastland*, since the "time of accrual" construction was never argued, and was unnecessary to the decision.

Nevertheless, three of the principle cases cited by *Eastland* rely, at least in part, on this dictum. In *Sharp v. Commercial Solvents Corp.*,[15] defendant had withdrawn from the district before suit was instituted, but the court held that it had waived venue by complying with the state registration statute. In the alternative, the court held that, in the spirit of *Scophony*, "The statute should be deemed flexible enough to retain . . . [its] force . . . from the venue standpoint for a reasonable period of time after a defendant has committed any acts violative of the antitrust laws." [16] Such a resolution, even if the reliance on *Scophony* were correct, is unjustifiable. Besides the fact that it would entail an involved factual determination of whether the case at bar involved a "reasonable time," there is absolutely no warrant in the statute for such a flexible interpretation. The statute clearly means one of two things.[17] It is not a vehicle for judicial creativity.

In the other two cases cited in *Eastland*, *R. J. Coulter Funeral Home, Inc. v. National Burial Ins. Co.*,[18] and *Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc.*,[19] the courts relied heavily on *Scophony* and on a superficial analysis attributing to the venue provision the purpose of expanding the plaintiff's choice of forum.[20] Neither case grapples with the question of how far Congress intended to extend that choice. In addition, *Ross-Bart* stressed the significance of the allegation that the defendant was a member of a conspiracy to violate the antitrust acts, but the court did not state why this fact should affect the result.[21]

The legislative history of the 1914 amendment to section 22 provides no better answer as to the proper construction of the phrase "transacts business" than do the cases attempting to interpret it. Prior to the amendment of section 22 in 1914, suit was allowed where the defendant was an inhabitant or was found, and there was no separate provision for service of process. Before the final version of the amendment was adopted, various proposals were suggested and discussed.[22] These proposals focused on the choice of forum that would be made available to the plaintiff. Although the history clearly indicates that Congress intended to broaden the number of places in

[15] 232 F. Supp. 323 (N.D. Tex. 1964).
[16] *Id.* at 329.
[17] See text accompanying notes 1-4 *supra*.
[18] 192 F. Supp. 522 (E.D. Tenn. 1960).
[19] 140 F. Supp. 401 (E.D. Va. 1954).
[20] See text accompanying notes 21-22 *infra*.
[21] 140 F. Supp. at 402.
[22] Most of the pertinent legislative history of the amendment is summarized in United States v. National City Lines, 334 U.S. 573 (1948).

which the plaintiff might bring suit, the question remains *which* additional forums it intended to permit; *i.e.*, did it intend to permit suit in the district where the defendant was transacting business at the time the alleged cause of action accrued, or must the defendant have been transacting business there at the time of suit? The time issue was apparently raised only at an early stage of the amendment's progress through Congress. A bill on the floor of the House proposed amendment of the original venue provision by the addition of the phrase "or has an agent." [23]

In the House discussion of the "or has an agent" proposal, Representative Sumners suggested that the phrase "or where the cause of action or any part thereof arises" also be added.[24] The only argument against Mr. Sumners' addition was offered by Representative Webb, the sponsor of the "or has an agent" proposal. Mr. Webb opposed the addition on two grounds. First, he thought that such liberalization of the venue provision would necessitate the enactment of an additional provision for a service of process clause to meet the notice requirements of due process.[25] Second, he argued that the situation suggested by Mr. Sumners—a case where a defendant would inflict injury and then immunize himself by leaving the district before suit was instituted—was so unlikely as not to be worth the risk of having the "or has an agent" amendment defeated.[26] The tone of his remarks, however, indicates that he did not think Mr. Sumners was raising a case not covered by his own suggestion. He did not really meet Mr. Sumners' points, probably because he thought that his proposal met the problem as he saw it.[27]

The House defeated Mr. Sumners' proposed addition,[28] although it is unclear whether it thought that this situation was already covered by the "or has an agent" amendment, or whether it was rejected because there was adversity to additional liberalization of the venue provision. Even if the latter were the case, Mr. Webb's argument cannot be considered a conclusive expression of the intent of Congress—if such intent ever exists—for two reasons: although sponsor of the bill, Mr. Webb spoke only for the House; and the bill which

23 51 CONG. REC. 9607 (1914). The "transacting business" terminology was developed at a joint committee conference later in the proceedings. The separate service provision also originated in that conference.

24 *Id.* at 9608.

25 Mr. Webb contemplated an amended provision under which possible venue forums were coextensive with forums in which service could be effected. See text accompanying note 22 *supra*.

26 51 CONG. REC. 9608 (1914).

27 *Id.* at 9607-08 *passim*. Although Mr. Webb's remarks are apparently inconsistent with the analysis of the basis for his arguing against the addition, see text accompanying notes 24-25 *supra*, this conclusion is justified by the record. In context, it seems clear that whatever Mr. Webb argued to Mr. Sumners, Mr. Webb was summarily dismissing the issue, most likely because he thought the case suggested was already covered. He did not consider the possibility of a company transacting business in a district without having an agent there.

28 51 CONG. REC. 9608 (1914).

finally emerged from the joint committee was a very different bill from that which Mr. Webb proposed. The words chosen were different from the "or has an agent" proposal, and the bill included a separate service of process provision which Mr. Webb thought would be necessitated only by passage of the "where the cause of action arises" language.

At most, the exchange between Representatives Sumners and Webb shows the existence—at one point—of some specific House opposition to allowing the plaintiff to bring suit where the cause of action arose. It does not elucidate the intention of the two Houses in jointly passing the final bill. The conference committee might well have neglected consideration of the issue entirely.

There is no record of any proposal to add the term "where the cause of action arose" in the Senate or at any later stage of the proceedings. In the Senate, a bill proposing the "or has an agent" amendment went to the Judiciary Committee and emerged with the phrase "or transacts any business." The Senate Judiciary reports [29] do not explain the change. This Senate bill and the House "or has an agent" proposal went into conference committee; the bill reported out contained the "transacts business" terminology and a separate provision for service of process. The conference committee reports state merely that "the entire provision is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." [30] If this statement has any substantive meaning, it merely indicates Congress' intent to increase the number of forums. It does not indicate anything about which forums were added.

Viewing the legislative history in its entirety, then, the more rational assumption is that Congress did not express any intention as to the time issue. Thus the ambiguity of the "transacts business" clause must be resolved through consideration of the substantive policy behind the statute in which the venue provision is found.[31]

Private civil suits have two purposes within the framework of the antitrust laws. They act as a deterrent to violations by punishing those offenders against whom suit is brought. They further serve to recompense small companies which are injured by the defendant's unlawful activities. The maximum potential of both functions can be realized only if the bringing of such a suit is facilitated for small plaintiffs. Recognition of this fact is clearly expressed by a number of other provisions of the antitrust laws. The successful plaintiff is awarded treble damages and the cost of bringing suit.[32] Further, when the government brings a suit against the same defendant, the statute of

[29] SEN. REP. No. 698, 63d Cong., 2d Sess. 73 (1914).
[30] H.R. REP. No. 627, 63d Cong., 2d Sess. 20 (1914).
[31] See generally MISHKIN & MORRIS, ON LAW IN COURTS 331-35, 360-72 (1965).
[32] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

limitations is tolled in the civil suit for a year beyond the final judgment in the government suit.[33] This is done so that the plaintiff will have time to take full advantage of the government's case, with adequate opportunity to study the evidence and prepare his own case from it. In addition, evidence of the judgment in the government's case is admissible in the civil suit, and is prima facie evidence of liability.[34]

Thus the statute as a whole reveals a design to give the plaintiff every possible opportunity to win a civil suit when he has been injured. The statutory scheme indicates congressional recognition that the small plaintiff often will not have the financial ability to succeed on his own, and will lack the incentive to bring suit where costs, inaccessibility of evidence or great distances between plaintiff's home and the locus of proper venue[35] tax his financial capacity. The provisions outlined above indicate a definite legislative desire to minimize these disincentives and to encourage private suits.

If one adds to this legislative scheme the "substantive" construction of the "transacts business" clause which the Supreme Court has enunciated, the time issue assumes new dimensions. In *Scophony*,[36] the Supreme Court indicated that the substantive requirements of the "transacts business" clause are satisfied by a minimal amount of commercial activity. At the time of suit in that case, the American subsidiary of Scophony was in precarious economic straits. Half of the Board of Directors had resigned, although the by-laws under the agreement establishing the subsidiary required at least a majority-plus-one of the directors to be present before any business could be conducted. After suit was instituted, a Scophony agent with power of attorney had arrived in New York, in part to put Scophony's interests in order, and in part to defend the suit.[37] Under those circumstances, involving apparently no real conduct of business in a commercial sense, the Supreme Court found Scophony to be "transacting business" within the meaning of the venue statute.[38] It is hard to imagine a case in which a company is conducting less business than Scophony appears to have been, short of complete withdrawal from the district.

A "time of suit" construction of the venue provision, which would give the erring defendant the option of cessation of business within the district to avoid suit, undercuts the advantages which Congress

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[33] 69 Stat. 283 (1955), 15 U.S.C. § 16(b) (1964).

[34] 38 Stat. 731 (1914), 15 U.S.C. § 16(a) (1964).

[35] Even the "time of suit" construction recognizes this factor but not in as many cases as the "time of accrual" construction does.

[36] United States v. Scophony Corp. of America, 333 U.S. 795 (1948).

[37] *Id.* at 800-01.

[38] The minimum contacts necessary to constitute "transacts business" should not be confused with the minimum necessary to constitute "doing business" where the ability of a state to exercise jurisdiction over a party is at issue. Section 22 of the Sherman Act does not raise the problem of the jurisdiction of the federal courts.

has expressly designed for the benefit of the small plaintiff. This is especially true in light of the specific type of cases in which such a construction of the statute would be necessary for the defendant to prevail.

Once the Supreme Court announces either construction as correct, the rule will be significant only in those cases where defendant is doing an insubstantial percentage of its business in plaintiff's district. In other cases, it is not likely that defendant will cease transacting business between the time the cause of action accrues and the time of suit. If, however, a small percentage of defendant's business is capable of doing enough damage to the plaintiff that the latter believes that he can carry his burden of proof, the plaintiff must be a very small firm, or the defendant a very large one, or both. While the large plaintiff may be able to incur the expense of bringing suit outside the district where the injury occurred, the small plaintiff may be unable to do so. It is the small plaintiff which Congress sought to protect.[39]

The above analysis strongly favors the "time of accrual" construction. The only policy consideration favoring a "time of suit" construction is the possibility of vexatious suits against a defendant who has never done much business in the plaintiff's district, or who has not done any business for several years. The motivation for such suits could be the likelihood of settlement by a defendant corporation which would find the expense of defending the suit, possibly at a great distance from its home office, prohibitive. This consideration does not seem sufficient, however, to overrule the congressional determination that small plaintiffs require significant incentives if wide scale private enforcement of the antitrust laws is to be effected. Moreover, "transacting business" requires so little business activity that cessation of business may not significantly increase the inconvenience to the defendant.

Finally, it is not unreasonable that a company which has come into a district and sought to profit by its associations and activities in the district be held liable for any injury it inflicts while there—subject, of course, to the statute of limitations. Many states have passed "long-arm" statutes for tort cases. These provide not only for venue, but also for jurisdiction over a defendant, although the defendant was never a resident of the state and might have received no benefit from the state other than traveling across its roads or selling its products to the state's consumers.[40] Surely the equities of the antitrust suit make an analogous argument even more persuasive. Unlike the tort actions, the antitrust legislation is *premised* on the assumption that there is a great disparity between the size and means of the plaintiff and defendant. Furthermore, only venue is a hurdle in the antitrust case.

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[39] See text accompanying notes 31-34 *supra*.

[40] *E.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); N.Y. CONSOL. LAWS ch. 8, § 302 (McKinney 1963).