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Mack A. Player

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## Enterprise Coverage Under the Fair Labor Standards Act: An Assessment of the First Generation

*Mack A. Player\**

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### I. INTRODUCTION

Some thirteen years have passed since Congress created the concept of "enterprise coverage," a concept unique to social legislation. With the appearance of two recent Supreme Court decisions<sup>1</sup> and the passage of the Fair Labor Standards Act Amendments of 1974<sup>2</sup> most of the crucial coverage issues arising under the Fair Labor Standards Act<sup>3</sup> have now been resolved. It is appropriate therefore to review the coverage provisions of this unique and complicated statute, with particular emphasis upon the aspects of "enterprise coverage."

Enacted during the great depression and occasionally characterized as the original "anti-poverty" statute,<sup>4</sup> the Fair Labor Standards Act of 1938 was designed to provide a floor under wages, secure premium compensation for overtime, and regulate child labor. Its minimum wage provisions have tended to lag behind inflation, making them relevant only to the lowest paid strata of the

1. *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973); *Falk v. Brennan*, 414 U.S. 190 (1973).

2. Pub. L. No. 93-259 (April 8, 1974). These amendments made vast changes in the Act. *Inter alia*, they increased minimum wages, extended coverage to most state and federal employees and domestic workers, reduced the maximum dollar volume for retail exemptions, amended age discrimination coverage, and altered numerous overtime exemptions. As the amendments relate to this article, a minor but important amendment to enterprise coverage was made in § 6(a)(5)(A), in which § 3(s) of the existing Act was amended by striking "including employees handling, selling or otherwise working on goods" and substituting "or employees handling, selling, or otherwise working on goods or materials." The net result is that "or" replaced "including" and "materials" was added following "goods."

3. 29 U.S.C. §§ 201 *et seq.* (1970).

4. Donahue, *Underpinning the Poverty Program—The Wage & Hour Act Three Decades Later*, N.Y.U. TWENTIETH ANN. CONF. ON LABOR, 59, 59-61 (1968); Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607 (1972); S. REP. NO. 1487, 89th Cong. 2d Sess. (1966).

nation's workforce.<sup>5</sup> The overtime provisions of the Act, however, require one and one half the "regular rate" of pay, not merely time and a half of the minimum rate,<sup>6</sup> and thus the Act can impose substantial overtime liability upon an unwary employer paying substantial wages. Furthermore, since the Equal Pay Act of 1963 dovetails into the coverage and enforcement provisions of the Fair Labor Standards Act, regulation of wage discrimination based upon sex depends substantially upon the coverage provisions of the latter statute.<sup>7</sup>

In establishing the scope of coverage of the Fair Labor Standards Act, Congress refrained from legislating to the full extent of its constitutional power to regulate commerce.<sup>8</sup> Rather than subjecting all employers "affecting commerce" to the Act,<sup>9</sup> or establishing a minimum number of employees necessary for statutory coverage,<sup>10</sup> Congress set forth a concept more limited than "affecting commerce" and more expansive in some ways than the minimum employee statutes. The resulting coverage provisions of the Act are

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5. As of May 1974 the minimum wage was increased from \$1.60 to \$2.00 per hour. This will be increased to \$2.10 January 1, 1975 and to \$2.30 as of January 7, 1976. Since § 26 of the 1974 amendments authorizes the Secretary to recover back wages and an equal amount in liquidated damages, however, potential liability can be substantial.

6. Section 7(a) of the Act, 29 U.S.C. § 207(a) (1970) establishes a maximum work week of 40 hours and requires payment to covered employees of one and one half times "the regular rate." The purpose of the overtime provision was to make overtime compensation sufficiently expensive so that employers would be induced to hire additional employees rather than to work the same employees more than the maximum hours. S. REP. NO. 2182, 75th Cong. 3d Sess. (1938). This was a compromise to an original proposal to outlaw working employees overtime completely. See S. 2475 as introduced May 24, 1937, 75 Cong. 1st Sess.

7. Section 6(d) of the Act, 29 U.S.C. § 206(d) (1970). The Equal Pay Act of 1963 (77 Stat. 56) was inserted as an amendment to the Fair Labor Standards Act. In short, the Equal Pay Act prohibits discrimination in pay on the basis of the employee's sex. There is substantial duplication between the Equal Pay Act and the provisions of the 1964 Civil Rights Act (42 U.S.C. § 2000(e) (1970)) which prohibits all forms of employment discrimination based on sex. Since the coverage provisions of the 2 Acts are different, however, there will be employers regulated by the Equal Pay Act that are not affected by the Civil Rights Act. Although the Civil Rights Act purports to cover any industry affecting commerce, the Act defines a covered employer as one who has fifteen or more employees. 42 U.S.C. § 2000(e)-1(b) (1970). Since the Equal Pay Act is an amendment to the Fair Labor Standards Act, the coverage and enforcement provisions of the later Act are applicable to the substantive Equal Pay provisions. For reasons to be discussed, an employer with 2 employees, one male and one female, could violate the Equal Pay Act. The Age Discrimination Act (29 U.S.C. §§ 621-34 (1970)) is also enforced by the Secretary of Labor but coverage under that Act is not based on the Fair Labor Standards Act coverage but instead upon number of employees (20).

8. *Kirschbaum Co. v. Walling*, 316 U.S. 517, 522-23 (1942).

9. The 1974 amendments, Pub. L. No. 93-259 (April 8, 1974), declare that domestic employees "affect commerce" and it is on this basis, rather than on any concept of traditional or enterprise coverage, that the Act applies to these employees. See also, Labor-Management Reporting and Disclosures Act of 1959, 29 U.S.C. §§ 402(e), (i), (j) (1970).

10. See Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e) (1970), and Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1970).

complex, not easily subject to definition, and consequently a constant source of litigation.

Prior to 1961 coverage was established solely by reference to the work being performed by the employee, and not by the size or impact of the employer on commerce. Under this "traditional" or "individual" basis for coverage, an employee was covered by the Act if he was "engaged in commerce" or in the "production of goods for commerce," deceptively simple phrases that are in reality complex terms of art with a thick crust of legislative and judicial gloss.

In 1961 Congress added a new basis for coverage under the Act, extending it to employees who are not personally "engaged in commerce" or in the "production of goods" therefor but who are employed by an "enterprise engaged in commerce." In defining "enterprise engaged in commerce" Congress again elected not to utilize the term "affecting commerce" or to rely upon the number of employees at work, but continued to depend largely upon contact with commerce by individual employees. An enterprise would be "engaged in commerce" if it made sales of a particular volume, or was part of a particular industry specifically mentioned in the Act, *and* if the enterprise had individualized employees engaged in commerce or in the production of goods for commerce, "including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce. . . ."<sup>11</sup>

With the introduction of the enterprise concept, individual coverage *per se* no longer plays its once dominant role. Nonetheless, for many reasons it remains important to understand concepts of individual coverage. First, the 1961 and 1966 enterprise amendments did not eliminate traditional coverage. Regardless whether an employer is an "enterprise engaged in commerce," an employee can still claim the benefits of the Act if he establishes that he was personally "engaged in commerce" or that he produced goods for commerce. Secondly, coverage of all the employees of an employer under the enterprise concept may depend upon two or more employees being traditionally covered, keying the newer enterprise coverage in large part to the innumerable traditional coverage decisions

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11. 29 U.S.C. § 203(s) (1970). Since February 1, 1969 the specified "sales made or business done" is \$250,000 per year. The specific industries that can be covered regardless of size are: (a) laundering, cleaning or repairing of clothing or fabrics; (b) construction or reconstruction; and (c) hospitals, nursing homes, schools and colleges. In order to be an "enterprise engaged in commerce" however, all of the above must also have "employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce . . . ." The 1974 amendments substituted "or" for "including" and added "or materials" after "goods," *see* note 2, *supra*.

of the past thirty-five years. The amendments' addition of the phrase "handling goods or materials that have been moved in commerce" to traditional coverage created a third but distinct basis for finding the necessary employee contact with commerce, but without supplanting analysis of the terms "engaged in commerce" or "production of goods for commerce." Thus, in order to understand thoroughly Congress's reasons for introducing this new third basis of employee contact, it is first important to appreciate the limitations of the traditional basis for coverage.<sup>12</sup>

## II. TRADITIONAL INDIVIDUAL COVERAGE

### A. *Engaged in Commerce*

Although in enacting the Fair Labor Standards Act Congress stopped short of regulating all who affected commerce, the Supreme Court has noted that they did intend "to extend federal control . . . throughout the farthest reaches of the channels of commerce."<sup>13</sup> Congress did, however, reserve to the states "purely local" areas of commerce.<sup>14</sup> Mapping the area between the "farthest reaches of commerce" and areas "purely local" was an activity Justice Frankfurter characterized as being "as rewarding as an attempt to square the circle."<sup>15</sup> "Engaged in commerce" has been said not to be a legal phrase, but a practical one; in construing it, courts should be

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12. The statutory scheme provides for 2 classes of exemptions to employers even when employees are covered by the Act. The first exempts totally the employees covered thereby from any coverage under the Act. 29 U.S.C. § 213(a) (1970). Briefly stated, the three major total exemptions are as follows: First, executive, administrative, and professional employee exemption. See *Walling v. General Industries Co.*, 330 U.S. 545 (1947); *O'Mera-Sterling v. Goldberg*, 299 F.2d 401 (5th Cir. 1962); *Craig v. Far West Eng'r Co.*, 265 F.2d 251 (9th Cir. 1959). This exemption is no longer applicable to the Equal Pay provisions of the Act. Pub. L. No. 92-318 (1972). Secondly, employees of retail or service establishments with sales less than \$250,000 per annum are exempt. (Section 8 of the 1974 amendments, however, reduces that maximum dollar amount in stages so that by January, 1977 the exemption will be eliminated.) Section 13(a)(2) of the Act defines in detail "retail and service establishment." See *Kentucky Fin. Co. v. Mitchell*, 359 U.S. 290 (1966); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027 (1957) (per curiam); *Phillips Co. v. Walling*, 324 U.S. 490 (1945). Thirdly, certain well defined agricultural employees are not covered. See *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949). There are numerous other lesser exemptions.

The second exemption removes the protections of the overtime provisions of the Act for covered employees. Briefly stated, the major classes with overtime exemptions are as follows: (a) certain defined agricultural employees, 29 U.S.C. §§ 213(b)(12)-(16) (1970); (b) hotel and restaurant employees, 29 U.S.C. § 213(b)(8) (1970); and (c) employees of carriers, 29 U.S.C. §§ 213(b)(1)-(3),(6)-(7) (1970).

13. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943).

14. *Kirschbaum Co. v. Walling*, 316 U.S. 517, 520-21 (1942).

15. *Id.* at 520.

"guided by practical considerations."<sup>16</sup> Except for those rather useless generalities and some passing references to a similar phrase in the Federal Employers Liability Act,<sup>17</sup> the Supreme Court has provided no guidelines or uniformly applicable system of analysis for determining whether a particular activity is "purely local" or whether it is still within the "farthest reaches of commerce." With such vague criteria, analysis and accurate prediction of results are difficult at best.

1. Actual Movement—Employees such as truckdrivers and railroad engineers are engaged so directly and obviously in the actual movement of commerce that little question exists as to the applicability of the Act. Likewise, telephone, telegraph, television, and radio communications workers fall within the Act's broad definition of "commerce," which includes "transportation, transmission, or communication among the several states. . . ."<sup>18</sup> Even purely "local" activity that begins or ends the interstate movement will be considered engaged in commerce. Elevator operators carrying packages and mail on the last leg of their journey are said to be directly engaged in commerce,<sup>19</sup> as are secretaries who start the journey by preparing and mailing financial reports.<sup>20</sup>

While the term "engaged in commerce" has been judicially interpreted to include those activities "so closely related to interstate transportation as to be in practice and legal relation as part thereof,"<sup>21</sup> it does not include more "indirect assistance" to interstate commerce.<sup>22</sup> Because the area between "a part thereof" and "indirect assistance" is a shaded spectrum with no clear boundaries, one is left with "practical considerations" as his guide.

Mechanics working upon and repairing vehicles of interstate

16. *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1943). *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570 (1943).

17. 45 U.S.C. §§ 51 *et seq.* (1970).

18. Section 3(b) of the Act, 29 U.S.C. § 203(b) (1970), defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." See 29 C.F.R. § 776.10 (1973).

19. *Brennan v. Wilson Bldg., Inc.*, 478 F.2d 1090 (5th Cir. 1973).

20. *Durkin v. Joyce Agency*, 110 F. Supp. 918 (N.D. Ill. 1953), *aff'd* 348 U.S. 945 (1954); *Allen v. Atlantic Realty Co.*, 384 F.2d 527 (5th Cir. 1967). Some courts had attempted to limit "engaged in commerce" coverage by distinguishing between "external" and "internal" communications, the latter not being considered "commerce". See *Stevens v. Welcome Wagon, Inc.*, 390 F.2d 75 (3d Cir. 1968); *Billeaudeau v. Temple Assoc., Inc.*, 213 F.2d 707 (5th Cir. 1954). Recently this distinction has been rejected by the Fifth Circuit, which held that secretaries who prepared three reports that were mailed monthly to two out-of-state officers of the corporation were "engaging in commerce". *Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir. 1972); *accord*, *Beneficial Fin. Co. v. Wirtz*, 346 F.2d 340 (7th Cir. 1965).

21. *McLeod v. Threlkeld*, 319 U.S. 491, 495 (1943).

22. *Id.* at 497.

transportation, pipelines, powerlines, and communication facilities<sup>23</sup> as well as those furnishing the fuel and power<sup>24</sup> for their movement have been held to be sufficiently related to commerce to be a part thereof, as have dispatchers, signalmen, loaders, and ticket salesmen.<sup>25</sup> Even those who provide promotional material, blank tickets and schedules to a travel agency that represents a steamship line have been held to have a sufficient nexus to establish "in commerce" coverage.<sup>26</sup> District of Columbia parking lot employees handling the cars of interstate tourists and interstate commuters aid that interstate travel so substantially that they are a part of commerce.<sup>27</sup> Similar rationales have been used to justify coverage of parking lot attendants at interstate airports<sup>28</sup> and porters, janitors, and maintenance men working in and about transportation terminals.<sup>29</sup> On the other hand, the Supreme Court has held that an independent contractor who prepares food for workers repairing railroad tracks, even though he serves it on the work site, provides only an indirect assistance to interstate commerce.<sup>30</sup>

Although relatively few cases have failed to find coverage in this area, two key elements seem to emerge in distinguishing between "indirect assistance" and "closely related": first, the economic independence of the business from the flow of interstate commerce; and secondly, the degree to which interstate commerce would continue unimpeded without the employee activity.<sup>31</sup> Virtually all of the employee activity discussed above is either economically intertwined with the interstate activity, or interstate movement would

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23. *Morris v. McComb*, 332 U.S. 422 (1947); *Boutell v. Walling*, 327 U.S. 463 (1946); *Wirtz v. B.B. Saxon Co.*, 365 F.2d 457 (5th Cir. 1966); *Slover v. Wathen*, 140 F.2d 258 (4th Cir. 1944); 29 C.F.R. § 776.11(b) (1973).

24. *Lewis v. Florida Power & Light Co.*, 154 F.2d 751 (5th Cir. 1946); *New Mexico Pub. Serv. Co. v. Engel*, 145 F.2d 636 (10th Cir. 1944); *Brennan v. Ventimiglia*, 20 Wage & Hour Cas. 1275 (N.D. Ohio 1973); *Hodgson v. Pipeline Oil Co.*, 20 Wage & Hour Cas. 1225 (W.D. Ky. 1972).

25. See *Mitchell v. Railway Express Agency*, 160 F. Supp. 628 (D. Me. 1958); *Walling v. Southwestern Greyhound Lines, Inc.*, 65 F. Supp. 52 (W.D. Mo. 1946). See also 29 C.F.R. § 776.10.11 (1973).

26. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943 (2d Cir. 1959).

27. *Brennan v. S&M Enterprises*, 21 Wage & Hour Cas. 165 (D.D.C. 1973).

28. *Brennan v. Air Terminal Parking, Inc.*, 21 Wage & Hour Cas. 475 (D.S.C. 1973); *Hodgson v. Continental Parking Corp.*, 19 Wage & Hour Cas. 876 (C.D. Cal. 1970); *Jackson v. Airways Parking Co.*, 297 F. Supp. 1366 (N.D. Ga. 1969).

29. *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942); *Hargis v. Wabash R.R.*, 163 F.2d 608 (7th Cir. 1947); *Mornford v. Andrews*, 151 F.2d 511 (5th Cir. 1945); *Walling v. Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E.D.S.C. 1945); cf. *Skidmore v. John J. Casale, Inc.*, 160 F.2d 527 (2d Cir. 1947) (custodian at garage servicing both intrastate and interstate trucks held to have only an indirect connection with commerce).

30. *McLeod v. Threlkeld*, 319 U.S. 491, 495 (1943).

31. *Jackson v. Airways Parking Co.*, 297 F. Supp. 1366 (N.D. Ga. 1969).



eventually come to a halt were it not for the employee work in question. Transportation must have power to move. Passengers and shippers must have schedules, tickets, and bills of lading. Without parking facilities at transportation terminals, interstate travel as we know it would cease. Even though it is obvious that workers must have food, there are many methods for securing it without a catering service, and given the alternative sources, the furnishing of food to workers is not so economically intertwined with the transportation itself, nor so indispensable to the movement of the commerce, that it has a direct impact thereon. These two factors are no more than rules of thumb. While not infallible, they perhaps provide guidelines a bit more helpful than "practical considerations."

2. Interstate Instrumentalities—In addition to direct participation in the stream of commerce, the term "engaged in commerce" also encompasses work on the instrumentalities over which commerce flows. Operation and maintenance of a private toll road entirely within a single state has been held to be "engaged in commerce" because of the movement of interstate travel over the road.<sup>32</sup> Likewise, employees who repair bridges and tracks of a railroad carrying interstate traffic,<sup>33</sup> or who repair and maintain television relay and broadcast apparatus are covered under the Act.<sup>34</sup> Similarly, personnel who operate, maintain or repair vehicles at an interstate transportation facility (airbase) are deemed to be sufficiently related to an instrumentality of commerce so as to be a part of commerce.<sup>35</sup>

Analogizing to the Federal Employer's Liability Act,<sup>36</sup> the courts at one time held that one was not "engaged in commerce" if he was involved in the "new construction" of an instrumentality that had not previously been dedicated to commerce.<sup>37</sup> In *Mitchell v. C.W. Vollmer & Co.*,<sup>38</sup> however, the Supreme Court virtually eliminated this exception by holding that those who worked on the construction of a new lock in the intracoastal waterway were engaged in commerce. The majority indicated that even if the "new construction" exception were viable, it was not applicable where the construction was directly related to the functioning of a total system

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32. *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943).

33. *Pedersen v. J.F. Fitzgerald Constr. Co.*, 318 U.S. 740 (1943).

34. *Mitchell v. Rennekamp*, 251 F.2d 488 (3d Cir. 1958); *Wirtz v. Indiana Cablevision, Inc.*, 18 Wage & Hour Cas. 121 (S.D. Ind. 1967).

35. *Wirtz v. B.B. Saxon Co.*, 365 F.2d 457 (5th Cir. 1966).

36. 45 U.S.C. §§ 51 *et seq.* (1970).

37. *Murphey v. Reed*, 168 F.2d 257, *rev'd*, 335 U.S. 865 (1948) (*per curiam*). *See* 39 GEO. L. J. 156 (1950); 14 VAND. L. REV. 414 (1960).

38. 349 U.S. 427 (1955).

already in operation. The interstate waterway system in *Mitchell* was already in operation and could not continue to function without the new lock, and therefore those who worked on the construction were engaged in commerce. *Mitchell* was followed and expanded upon by a Fifth Circuit decision holding that those engaged in the construction of the Lake Pontchartrain Causeway, a new project entirely within the state of Louisiana, were "engaged in commerce," because the causeway would be a link in the nation's interstate highway system.<sup>39</sup> Any remnant of the "new construction" doctrine was eliminated by the First Circuit in *Compania De Ingenieros y Contratistas, Inc. v. Goldberg*,<sup>40</sup> in which employees were constructing a secondary road within the Commonwealth of Puerto Rico. Obviously neither this road, nor any road in Puerto Rico could be part of an interstate transportation system. Nonetheless, the court reasoned that agricultural products would move over this secondary road under construction to the major road, and on to the port to be shipped out of the Commonwealth. Thus, those employees working on the road were so closely related to commerce as to be "a part thereof." If ever it lived, the doctrine of "new construction" is dead.<sup>41</sup>

Besides extending coverage to field employees actually working on new or existing interstate facilities, the courts have found a nexus between commerce and employees providing goods or services with respect to those facilities but never actually engaging in their actual construction, reconstruction, or repair. In *Mitchell v. Lublin, McGaughy & Associates*,<sup>42</sup> the Supreme Court considered coverage of draftsmen, fieldmen and engineers employed by a firm preparing plans and specifications for repair and construction of such interstate instrumentalities as roads, bus terminals, military bases, and radio and television installations. These employees were considered "engaged in commerce" because without their services in planning and directing the construction, the construction could not possibly take place. Furthermore, the Court held that clerical help providing support to the employees more directly involved were likewise so closely related to commerce as to be considered engaged therein.

If the furnishing of plans and specifications is sufficient connection with commerce to be considered commerce, one would think that employees handling or furnishing materials used in the repair and construction of interstate facilities would similarly have the

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39. *Archer v. Brown & Root, Inc.*, 241 F.2d 663 (5th Cir. 1957).

40. 289 F.2d 78 (1st Cir. 1961); cf. *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 213 (1959).

41. See *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 313 (1960).

42. 358 U.S. 207 (1959).

requisite connection to be a part of commerce.<sup>43</sup> However, in establishing coverage for such employees the Supreme Court did not directly address the issue of whether they were "engaged in commerce," but rather held that they were engaged in the production of goods *for commerce*, thus establishing coverage on the second of the two bases for traditional coverage.<sup>44</sup> Rejecting a narrow construction of the term "for commerce" as limited solely to interstate transportation of the goods themselves, the Court concluded that goods produced for an instrumentality of commerce were produced "for commerce" even though they never left the jurisdiction.

As the Supreme Court indicated in *McLeod v. Threlkeld*,<sup>45</sup> where providing meals to those repairing rail lines was considered too remote from interstate commerce to constitute a part thereof, employees who have an impact on the furnishing of materials used in construction can be too far removed for coverage. In *Mitchell v. H.B. Zachry Co.*,<sup>46</sup> the employees in question were engaged in the construction of a reservoir intended to furnish forty per cent of its water to manufacturers of goods that would move in interstate commerce. It is clear that supplying an "ingredient" of goods "for commerce" is sufficiently connected with commerce to establish coverage.<sup>47</sup> In this case, however, the employees were only building a structure that would supply an ingredient to produce goods that would move in commerce. The Court held that this activity was too far removed from commerce to be classified as anything other than "local." Similarly, a court recently considered a case wherein a private employer under contract with the state of North Carolina sold auto license tags to the motoring public. The license fees were turned over to the state for use in building and repairing state highways. It was argued unsuccessfully that collecting money used in part to finance roads over which interstate commerce would move was closely related to commerce and became a part thereof.<sup>48</sup> Like *McLeod* and *Zachry* this was one step too far removed.<sup>49</sup>

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43. See *Wirtz v. DeQueen Ready Mix Concrete, Inc.*, 18 Wage & Hour Cas. 759 (W.D. Ark. 1969); *Wirtz v. Empire, Inc.*, 18 Wage & Hour Cas. 658 (E.D. Va. 1968).

44. *Alstate Constr. Co. v. Durkin*, 345 U.S. 13 (1953); *Thomas v. Hempt*, 345 U.S. 19 (1953). See also *Mitchell v. Emala & Assoc.*, 274 F.2d 781 (4th Cir. 1960).

45. *McLeod v. Threlkeld*, 319 U.S. 491 (1943).

46. 362 U.S. 310 (1960).

47. *Wirtz v. F.M. Sloan, Inc.*, 411 F.2d 56 (3d Cir. 1969) (local sale of natural gas, eventually sold to manufacturers of goods); *Mitchell v. Jaffe*, 261 F.2d 883 (5th Cir. 1958) (junk used in making steel); *Mitchell v. Mercer Water Co.*, 208 F.2d 900 (3d Cir. 1953) (utilities to manufacturer of goods). Section 3(i) of the Fair Labor Standards Act defines "goods" to include "any part or ingredient thereof." 29 U.S.C. § 203(i). Thus, most of these cases are analyzed under whether the employees are performing a service "closely related or directly essential" to the "production of goods for commerce."

48. *Hodgson v. Hyatt Realty Inv. Co.*, 20 Wage & Hour Cas. 1191 (M.D.N.C. 1973).

49. A distinction can perhaps be drawn between construction of a facility that will

Although one could argue that the channels of interstate commerce would eventually close were it not for the persons collecting the money for the financing of the construction, or building the plants that produce an ingredient that will go into the materials that build interstate facilities, the application of a "but for" rule without modification obviously results in an analysis of "commerce" indistinguishable from the doctrine of "affecting commerce." Some notion of proximate relationship, vague though it is, must be injected to stop the analysis short of Congress's ultimate power, which it did not exercise when legislating in this area.

3. Maintenance of a Free Flow of Commerce.—Channels of commerce cannot be used indefinitely if obstructions are allowed to remain in them. Thus, employees who remove logs and other refuse from navigable rivers are "engaged in commerce,"<sup>50</sup> as are wrecker employees who remove stalled and wrecked automobiles from the highways, even though they never cross state lines and their highway business is minimal.<sup>51</sup> Similarly, assuming that interstate commerce cannot proceed when dead and injured persons are upon the highways, ambulance services that remove these obstructions, as well as the employees who receive and relay the calls to the drivers,<sup>52</sup> are considered a part of commerce.<sup>53</sup>

4. Personally Traveling in Commerce.—An employee is not engaged in commerce for purposes of coverage under the Act simply because for his own convenience he elects to commute across state lines, or because he makes an initial move in commerce in order to accept employment.<sup>54</sup> Even if his job occasionally requires an interstate business trip it is probably not enough to make the work "engaging in commerce."<sup>55</sup> If the employment consists of carrying goods or materials interstate, or if the nature of the business requires regular and recurring interstate travel the employee will clearly be

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provide but an "ingredient" of a good that will be shipped in commerce—*Zachry*—and the construction of a facility that will produce the good actually used "in commerce." *Archer v. Brown & Root, Inc.*, 241 F.2d 663 (5th Cir. 1957), indicated that construction of a plant that would manufacture pre-stressed concrete slabs that would be used in the construction of a bridge was closely related and directly essential to the production of goods for commerce. See also *Walling v. McCrady Constr. Co.*, 156 F.2d 932 (3d Cir. 1946); *Wirtz v. Tessier Sheet Metal Works, Inc.*, 18 Wage & Hour Cas. 5 (D.S.D. 1967).

50. *Tobin v. Pennington-Winter Constr. Co.*, 198 F.2d 334 (10th Cir. 1952).

51. *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652 (9th Cir. 1971); *Crook v. Bryant*, 265 F.2d 541 (4th Cir. 1959); *Brennan v. Parnham*, 21 Wage & Hour Cas. 497 (W.D. Pa. 1973); *Wirtz v. Robinson & Stephens, Inc.*, 20 Wage & Hour Cas. 765 (N.D. Ga. 1972).

52. *Crook v. Bryant*, 265 F.2d 541 (4th Cir. 1959); *Hodgson v. Greenfield Auto Service*, 20 Wage & Hour Cas. 65 (W.D. Pa. 1971).

53. *Wirtz v. A-1 Ambulance Serv., Inc.*, 18 Wage & Hour Cas. 836 (E.D. Ark. 1969); *Duffy v. Oele*, 274 F. Supp. 307 (W.D. Mich. 1967).

54. 29 C.F.R. § 776.12 (1973).

55. *Id.*

considered to be engaging in commerce. Comparative shoppers, buying service employees, circus performers, and musicians fall under the latter basis of coverage.<sup>56</sup>

5. Handling of Goods Within the Channels of Commerce.—As noted earlier, even when transportation is entirely intrastate, the first and the last link in an interstate journey of goods,<sup>57</sup> people,<sup>58</sup> communications<sup>59</sup> or information<sup>60</sup> is still “commerce.” So long as goods are actually moving in an interstate journey those who handle them, enabling them to continue their journey are “engaged in commerce.” At some point, however, the goods will no longer be involved in any journey but will have come to rest, and those who handle them consequently are not “engaged in commerce.” One of the earliest, and clearly the most important case, involving this phase of coverage is *Walling v. Jacksonville Paper Co.*<sup>61</sup> The defendant-employer, a wholesale paper distributor, received goods at a Jacksonville warehouse. Of the three classifications of employees handling these goods, two were clearly covered. The first group, drivers who brought the goods across state lines *to the warehouse*, were “engaged in commerce” because they were the final link of the interstate chain. Drivers and handlers of goods taken *from the warehouse* and destined for delivery *outside* Florida, were involved in the first leg of an interstate journey, and were also “engaged in commerce.” The third and most questionable class of employees included drivers and handlers of goods that had been shipped in interstate commerce, and delivered to the warehouse, but that were destined for delivery *within* the state. The question faced by the

56. *Willmark Serv. Sys., Inc. v. Wirtz*, 317 F.2d 486 (8th Cir. 1963); 29 C.F.R. § 776.12 (1973).

57. *Clougherty v. James Vernor Co.*, 187 F.2d 288 (6th Cir. 1951).

58. *United States v. Capital Transit Co.*, 315 U.S. 357 (1945); *Hayden v. Bowen*, 404 F.2d 682 (5th Cir. 1968); *Airlines Transp., Inc. v. Tobin*, 198 F.2d 249 (4th Cir. 1952); *cf. United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), wherein the Court held that under the Sherman Anti-Trust Act taxicab drivers, who as part of their daily activity carried passengers from their hotels, homes and offices to the railroad station were not “engaged in commerce” because their relationship to commerce was too casual and incidental. It is doubtful whether this can be reconciled with the concept that *de minimis* is inapplicable to coverage under the Fair Labor Standards Act, *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946), and with the Court’s own decision in *Capital Transit*. The *Yellow Cab* decision has not been widely utilized in resolving Fair Labor Standards Act coverage and in all likelihood is of very little current impact in this area. *But cf. Mateo v. Auto Rental Co.*, 240 F.2d 831 (9th Cir. 1957).

59. *Mitchell v. Rennekamp*, 251 F.2d 488 (3d Cir. 1958); *Wirtz v. Indiana Cablevision, Inc.*, 18 Wage & Hour Cas. 121 (S.D. Ind. 1967).

60. A firm prepared tax returns and delivered them locally to the customer. The customer, of course, mailed the return to the IRS. Preparation of the return was “engaging in commerce.” *Hodgson v. Kallas*, 20 Wage & Hour Cas. 789 (E.D. Mich. 1972).

61. 317 U.S. 564 (1943).

Court was whether the interstate journey ended with the deposit of goods at the warehouse, or whether it continued through the warehouse until the goods reached the door of their ultimate purchasers and consumers.

To resolve this rather narrow issue the Court classified the goods themselves into three groups: (1) goods ordered and set aside by the wholesaler upon special order of the customer; (2) goods that though not specially ordered, are purchased by the wholesaler in response to an agreement or understanding between the parties designed to meet the ultimate customer's constant or recurring needs; and (3) goods purchased with no particular purchaser in mind, placed in a general common stock for sale and offered to future unknown purchasers who may desire to purchase the product. With these three classes the goods in mind the Court stated:

There is no indication . . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act . . . [i]f the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended.<sup>62</sup>

Thus, the courts must look to the employer in question. If he does not order the goods with a particular customer in mind, but takes them himself as a customer, the journey stops at his place of business; the goods have reached a "state of rest." Any further handling for intrastate customers after they have come to rest is not being "engaged in commerce."<sup>63</sup> On the other hand, if the wholesaler

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62. *Id.* at 567-68.

63. As will be discussed *infra*, even if "at rest" these goods "have been moved in commerce." Although this will not provide individual coverage, it will be sufficient employee contact to establish enterprise coverage for the entire operation.

There is no agreement as to when in the warehouse goods actually come to rest. Although unloading the goods from the truck to the warehouse is deemed engaging in commerce, *Mitchell v. Royal Baking Co.*, 219 F.2d 532 (5th Cir. 1955), one case indicated that the goods come to rest at the loading dock of the warehouse. *Schultz v. National Elec. Co.*, 414 F.2d 1225 (10th Cir. 1969).

The First Circuit has indicated to the contrary, holding that both the employees who unloaded the truck at the dock and the employees that moved the goods from the dock to their place of rest in the warehouse were engaged in commerce. The court held, and it appears correct in so doing, that the temporary pause at the loading dock was not an end to the journey. *Sucrs. de A. Mayol & Co. v. Mitchell*, 280 F.2d 477 (1st Cir. 1960). In the recent case of *Brennan v. Wilson Bldg., Inc.*, 478 F.2d 1090 (5th Cir. 1973), the Fifth Circuit held that mail and packages delivered to an office building did not come to rest at the building, but that elevator operators who carried them within the building were "engaged in com-

is merely a conduit through whom the customers receive goods from an interstate shipment, that interstate shipment does not stop at the warehouse. When goods are specially ordered for a customer to meet his constant and recurring needs, the warehouseman is merely a conduit for the interstate shipment, and the employees who handle the goods are "engaged" in that shipment.

The application of the *Jacksonville Paper* case is well illustrated by its companion case, *Higgins v. Carr Brothers*,<sup>64</sup> in which a wholesale fruit and vegetable dealer received produce from out of state. The dealer's employees took his wares from store to store, his customers purchasing from the commingled stock. The issue was whether the deliverymen for the dealer were "engaged in commerce." In accord with the "state of rest" doctrine of *Jacksonville Paper* the Court held that the interstate journey of the fruit and vegetables stopped when they reached the dealer's warehouse, and consequently the deliverymen who took them from the warehouse for local sale and delivery were not "engaged in commerce." Likewise, employees of a wholesale gasoline distributor have been held to be "engaged in commerce" if they handle petroleum products shipped into state by pipeline, stored in the state, but destined to specific retail distributors within the state.<sup>64.1</sup>

### B. Production of Goods for Commerce

A second basis for establishing traditional coverage is for the plaintiff to prove that an employee was engaged in the "production of goods for commerce." Establishing coverage under this doctrine requires proof of three distinct elements: "production," "goods" and "for commerce."

1. Production.—There are two broad categories of "production" that must be analyzed separately: direct and secondary production. Defined in section 3(j) of the Act,<sup>65</sup> direct production includes "producing, manufacturing, mining, handling, transporting or in any other manner working on . . . goods." This extremely broad definition has been interpreted to include "every kind of incidental operation preparatory to putting goods into the stream of com-

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merce." Cf. *Robertson v. Dailey Elec. Supply Co.*, 21 Wage & Hour Cas. 734 (N.D. Tex. 1974).

As will be discussed *infra* these goods "have been moved in commerce" and, although not providing individual coverage, would be sufficient employee contact to establish enterprise coverage for the entire business.

64. 317 U.S. 572 (1943).

64.1. *Wirtz v. Lunsford*, 404 F.2d 693 (6th Cir. 1968).

65. 29 U.S.C. § 203(j) (1970).

merce."<sup>66</sup> Thus, working on claims, filing forms,<sup>67</sup> drafting plans<sup>68</sup> or handling negotiable instruments<sup>69</sup> is "production," as is handling soft drink bottles that will eventually be filled with liquid refreshment.<sup>70</sup> A mechanic is engaged in production of steel when he removes parts from wrecked cars preparatory to delivering the unusable remains of the car as scrap to the steel mill.<sup>71</sup> Even a truck driver carrying a commodity wholly intrastate is engaged in production, since the Act itself defines "transporting" as production.<sup>72</sup> The second and more difficult category of "production" is "secondary" or indirect production. In addition to the broad definition of "production" given above, the statute also defines the term to include any "closely related process or occupation directly essential to . . . production."<sup>73</sup>

In ascertaining the existence of indirect or secondary production, the first step is to identify and isolate direct production of goods for commerce. The next question is whether the employee in question is performing a task that is either *closely related* or *directly essential* to the production.<sup>74</sup> Underpinning the analysis of this sec-

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66. *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 503 (1945).

67. *Public Bldg. Auth. v. Goldberg*, 298 F.2d 367 (5th Cir. 1962); *Boisseau v. Mitchell*, 218 F.2d 734 (5th Cir. 1955); *Hodgson v. Kallas*, 20 Wage & Hour Cas. 789 (E.D. Mich. 1972).

68. *Craig v. Far West Eng'r Co.*, 265 F.2d 251 (9th Cir. 1959).

69. *Union Nat'l Bank v. Durkin*, 207 F.2d 848 (8th Cir. 1953); *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946).

70. *Hodgson v. Royal Crown Bottling Co.*, 465 F.2d 473 (5th Cir. 1972); *Wirtz v. Pepsi Cola Bottling Co.*, 342 F.2d 820 (5th Cir. 1965); *Stewart-Jordan Distrib. Co. v. Tobin*, 210 F.2d 427 (5th Cir. 1954).

71. *Mitchell v. Jaffe*, 261 F.2d 883 (5th Cir. 1958).

72. *Wirtz v. Ray Smith Transp. Co.*, 409 F.2d 954 (5th Cir. 1969); *Wirtz v. Intravaia*, 375 F.2d 62 (9th Cir. 1967); *Mitchell v. Emala & Associates*, 274 F.2d 781 (4th Cir. 1960). If the transportation is a leg of an interstate movement then, of course, this would also be engaging in interstate commerce. Furthermore, if the transportation is of goods used in an interstate transportation facility it would be production of goods for commerce, "for commerce" being defined to include for interstate transportation or communication facilities. Finally, the transportation might merely be part of the total processing of a product that will be shipped in commerce.

73. 29 U.S.C. § 203(j) (1970).

74. Prior to 1949 the Act covered all those engaged in production of goods for commerce and all occupations "necessary" to the production of goods for commerce. 52 Stat. 1060. Congress believed that this concept of "necessary" tended to suggest "but for" causation that carried the Act into purely local activity having only a "remote or tenuous" relationship to commerce. An example given by Congress was a case in which a local dealer in fertilizer sells the product to a farmer who grows crops that are transported interstate. The fertilizer dealer might be performing a task "necessary" to the production of goods for commerce. *McComb v. Super-A Fertilizer Works*, 165 F.2d 824 (1st Cir. 1948). Congress, however, believed this was too remote to be "closely related." It was clear, however, that the court had already placed limits on that term in *10 E. 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578 (1945) where "necessary" was interpreted to mean more or less "directly necessary." Thus the amendment replacing "necessary" with "closely related" or "directly essential" did little more than codify pre-1949 law. It did not substantially narrow the coverage. *Mitchell v. H.B. Zachry Co.*, 362



tion are four Supreme Court decisions that mark the outer perimeter of secondary production: *A. B. Kirschbaum Co. v. Walling*,<sup>75</sup> *Borden Co. v. Borella*,<sup>76</sup> *10 East 40th Street Building, Inc. v. Callus*,<sup>77</sup> and *Mitchell v. H. B. Zachry Co.*<sup>78</sup>

Those who provide services directly related to production efficiency in or about the premises wherein production takes place are within the scope of the terms "closely related" or "directly essential." In *A. B. Kirschbaum Co. v. Walling*,<sup>79</sup> the employer owned a building housing tenants engaged in the manufacture of clothing for interstate transportation. Given that it is not the employer's business (in this case dealings in local real estate) but rather the employees' connection with commerce that determines coverage, the Court found that custodial, elevator, and watchman services performed to keep the building habitable for production were sufficiently related to production of the clothing to constitute secondary "production" thereof.<sup>80</sup>

*Borden Co. v. Borella*<sup>81</sup> likewise concerned coverage of janitorial and maintenance workers of a general office building owned by the defendant Borden company. While, unlike *Kirschbaum*, there was no direct production of goods for commerce on the premises themselves,<sup>82</sup> Borden did occupy a portion of the premises in which were located corporate and managerial offices. The Court held that these managerial offices of a large interstate firm were obviously closely related and directly essential to the firm's production of goods for commerce. The employees performing the custodial services for these managerial employees were thus sufficiently related to that commerce to be within the meaning of that term.

The third case in this trilogy dealing with custodial employees is *10 East 40th Street Building, Inc. v. Callus*.<sup>83</sup> As in *Kirschbaum*,

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U.S. 310, 317-18 (1960). Pre-1949 cases establishing coverage under the "necessary" language were cited with approval by Congress and are still relied upon by the courts. At most, only fringe areas were affected by the amendment. See H.R. REP. No. 1453, 81st Cong., 1st Sess. 15 (1949) (Mgns. Statement); 95 CONG. REC. 14874-75 (1949); 95 CONG. REC. 11216 (1949).

75. 316 U.S. 517 (1942).

76. 325 U.S. 679 (1945).

77. 325 U.S. 578 (1945).

78. 362 U.S. 310 (1960).

79. 316 U.S. 517 (1942).

80. See also *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Walton v. Southern Package Corp.*, 320 U.S. 540 (1944).

81. 325 U.S. 679 (1945).

82. No doubt the employees of Borden engaging in general management of the corporation were engaged in commerce by utilizing the mails and the telephone. See text accompanying notes 18-20 *supra*. The making of plans, reports, etc. circulated to other offices would be "production of goods for commerce."

83. 325 U.S. 578 (1945).

but unlike the facts in *Borden*, the employer and owner of the building was not himself engaged in commerce. However, similar to *Borden* and unlike *Kirschbaum*, none of the tenants (a miscellany of businesses) were engaged in direct manufacture of goods within the building itself. About forty-two to forty-eight percent of the tenants were, however, engaged in interstate operations at other locations. Thus, with what might be considered the weak points of both *Kirschbaum* (employer simply owns local property) and *Borden* (no actual direct manufacture of goods on the premises) the issue before the Court was whether the maintenance employees in such a building were "closely related or directly essential" to the production of goods for commerce. Responding in the negative, the Court simply commented that the situation "spontaneously satisfies" the understanding that this was a local activity as opposed to "interstate commerce." Thus, both removal of the owner from interstate activity himself, and removal of the tenants from obvious and direct production, sufficiently separates custodial employees from the production of goods for commerce to deny them coverage. If, however, the employer is himself an interstate firm operating on the premises, or if goods are actually manufactured on the premises, then a sufficient nexus will exist to cover custodial employees who indirectly aid the interstate activity.

The Court recognized that it was difficult to reconcile coverage in terms other than a visceral reaction to the facts. In one case the employer himself is engaged in managerial activities on the premises and in another the employer rents to others who engage in managerial activities on the premises. It must be remembered that it is the work of the employees that forms the basis for coverage.<sup>84</sup> In each case the employees performed virtually identical tasks, bearing the same relationship to the movement of interstate commerce. Realistically, then, it was the nature of the employer's business that determined coverage from non-coverage, an approach that violates an axiomatic concept of traditional coverage. Furthermore, the Court ignored the possibility that the managerial employees were either "engaged in commerce" or in "production of goods for commerce" due to their preparation and mailing of plans, reports, and instructions.<sup>85</sup> Thus, when the custodial employees made this

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84. 316 U.S. at 524.

85. The office employees may have been "engaged in commerce." *Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir. 1972). Those who provide supporting custodial service might be so closely related to this commerce as to be a part thereof. See *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207 (1959).

Alternatively, their activity could be classed as "production of goods for commerce." *Allen v. Atlantic Realty Co.*, 384 F.2d 527 (5th Cir. 1967); *Wirtz v. First State Abstract &*

direct production by managerial employees possible, there was but a single step between the direct and indirect production, and the Court's decision in *Kirschbaum* should have controlled.

Another question raised by *Mitchell v. H. B. Zachry & Co.*,<sup>86</sup> discussed above, is the extent to which preliminary construction of a manufacturing plant is closely related or directly essential to the production of goods that will eventually flow from the plant. The employees of Zachry were constructing a reservoir, between forty and fifty percent of whose water would be used by industrial concerns located in Texas, but shipping their products interstate. Although the Supreme Court had previously held that workers on an irrigation project furnishing water to producers of commerce were sufficiently connected with the production to justify coverage of the workers under the Act, *Zachry* was distinguished as follows:

[T]he combination of the remoteness of this construction from production, and the absence of a dedication of the completed facilities either exclusively or primarily to production, persuades us that the activity is not "closely related" or "directly essential" to production for commerce.<sup>87</sup>

Such language implies that had the employees been constructing a manufacturing plant that would distribute goods in commerce, their work would have established a sufficiently close connection for them to be "closely related or directly essential" to the production. While there is some direct support for this position,<sup>88</sup> contrary authority<sup>89</sup> and hints in the 1949 legislative history, have led the Secretary of Labor to indicate in his Interpretative Bulletin that employees of an independent contractor building a new facility that will produce goods for commerce are not closely related or directly essential to the production of goods for commerce.<sup>90</sup>

The Secretary's reading of the Act seems too narrow. It is clearly established that maintenance, repair and even extension of existing manufacturing facilities producing goods for commerce are closely related and directly essential to that production.<sup>91</sup> In the area of "engaged in commerce" the Supreme Court all but obliterated

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*Ins. Co.*, 362 F.2d 83 (8th Cir. 1966); *Public Bldg. Auth. v. Goldberg*, 298 F.2d 367 (5th Cir. 1962); *Craig v. Far West Eng'r Co.*, 265 F.2d 251 (9th Cir. 1959).

86. 362 U.S. 310 (1960).

87. 362 U.S. at 321.

88. *Walling v. McCrady Constr. Co.*, 156 F.2d 932 (3d Cir. 1946).

89. *Parham v. Austin Co.*, 158 F.2d 566 (5th Cir. 1946); *McComb v. Turpin*, 81 F. Supp. 86 (D. Md. 1948).

90. 29 C.F.R. §§ 776.17(c), 776.27(c)(1) (1974).

91. *Roland Elec. Co. v. Walling*, 326 U.S. 657 (1946); materials cited note 90 *supra*; H.R. REP. No. 1453, 81st Cong., 1st Sess. 14-15 (1949) (Mgrs. Statement); 95 CONG. REC. 14875 (1949).

the distinction between repairing or expanding existing facilities and building new ones.<sup>92</sup> As the artificial distinction between repair and new construction has been obliterated when dealing with interstate transportation facilities, so also any such distinction between expansion of existing facilities and construction of new ones for the manufacture of interstate goods should be eliminated.<sup>93</sup>

Interestingly enough the Fifth Circuit has adopted this position in a suit brought by the Secretary of Labor. The employer in *Hodgson v. Ewing*<sup>94</sup> was an independent contractor engaged in the leveling of land. A large portion of the agricultural products harvested from the graded land were shipped in interstate commerce. The court held that the employees engaged in the land leveling were closely related and directly essential to the production of these crops for commerce. It would appear that the builder who erects a manufacturing plant is as close to the production of the goods from that plant as the land grader is to the production of the farmer's crops. A similar conclusion had been reached in the earlier Fifth Circuit case of *Archer v. Brown & Root, Inc.*<sup>95</sup> Here the employer was constructing a bridge and also producing the concrete slabs used in its construction. The court held that the employees who constructed the facility to be used for the concrete slab production were engaged in an activity closely related to the production of goods (concrete slabs) for commerce (interstate facility). The court clearly held that construction of a facility that would be used to produce goods "for commerce" was closely related to the production of goods for commerce.

Thus, it would seem that if the construction in *Zachry* had been of a highway, bridge, or lock dedicated to commerce itself, construction of such an instrumentality would have been "engaging in commerce."<sup>96</sup> Even production of the cement, lumber, or steel used in the structure would have been "production of goods for commerce."<sup>97</sup> Had the system been supplying a need or an ingredient of an interstate producer, the employees who worked on that

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92. *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427 (1955).

93. This need to make those engaged in construction "closely related" to the production of goods for commerce has lessened since the introduction of the enterprise amendments in 1961, as amended in 1966. Coverage will be established for those employed by an enterprise "engaged in the business of construction or reconstruction" without regard to dollar volume of the business if two or more employees handle, sell or otherwise work on goods that "have been moved in commerce." 29 U.S.C. § 203(s) (1970).

94. *Hodgson v. Ewing*, 451 F.2d 526 (5th Cir. 1971).

95. 241 F.2d 663 (5th Cir. 1957).

96. *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427 (1955).

97. *Tobin v. Alstate Constr. Co.*, 345 U.S. 13 (1953); *Mitchell v. Emala & Assoc.*, 274 F.2d 781 (4th Cir. 1960); *Archer v. Brown & Root, Inc.*, 241 F.2d 663 (5th Cir. 1957).

system would have been engaged in a process "closely related and directly essential" to the production of goods for commerce.<sup>98</sup> Had the facility itself been dedicated to production of goods for commerce, dicta from the court in *Zachry*, the recent Fifth Circuit decisions<sup>99</sup> and the demands of logic would indicate that this too would be "closely related" to the production flowing from this facility.<sup>100</sup> However, when none of these factors establishing a direct nexus to commerce are present, the activity is too far removed to justify coverage. For example, the manufacturer of brick that is used in the manufacture of a plant that will produce goods for commerce may be too far removed. Though the brick may be a necessary step in the ultimate production of goods, as a "practical" matter it is simply too far removed from commerce.<sup>101</sup>

With these broad boundaries in mind, perhaps a few lower court decisions will illustrate the extent to which apparently "local" activity can be "closely related or directly essential" to the production of goods for commerce. Expanding on the well established principle that employees serving as guards or watchmen at plants producing goods for commerce are "closely related" to the production,<sup>102</sup> a leading Fifth Circuit case involved a watchman at a local junkyard where mechanics stripped cars for useful parts that were then resold locally to the general public.<sup>103</sup> The stripped hulks, however, were sold locally to a steel manufacturer for use in the manufacture of new steel. Only about 1.67 percent of the junkyard's income was from this sale of scrap. Nonetheless, the watchman at the junkyard was held to be closely related to the production of steel on the grounds that unless the cars were guarded from theft they could not be sold to the steel manufacturer.

Local trashmen who collect refuse from the premises of interstate manufacturers have been held to be engaged in activity directly essential to the operation of the interstate business.<sup>104</sup> Courts, however, may apply the *Callus* limitation to hold that trash collec-

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98. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949); *Mitchell v. Jaffe*, 261 F.2d 883 (5th Cir. 1958); *Lewis v. Florida Power & Light Co.*, 154 F.2d 751 (5th Cir. 1946).

99. *Hodgson v. Ewing*, 451 F.2d 526 (5th Cir. 1971); *Archer v. Brown & Root, Inc.*, 241 F.2d 663 (5th Cir. 1957).

100. Successful litigation of this position is doubtful, given the current status of the Interpretative Bulletin. Section 259 of the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-62 (1970), protects employers who rely in good faith upon such interpretative rulings.

101. See 29 C.F.R. § 776.17(c)(3) (1973).

102. *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Walton v. Southern Package Corp.*, 320 U.S. 540 (1944).

103. *Mitchell v. Jaffe*, 261 F.2d 883 (5th Cir. 1958).

104. *Shultz v. Instant Handling, Inc.*, 418 F.2d 1019 (5th Cir. 1969).

tors who serve a variety of tenants, few of whom actually manufacture goods for commerce, are sufficiently removed from commerce to preclude coverage for their employees.<sup>105</sup>

The production of an ingredient necessary for the production of goods eventually shipped in commerce can still be considered "closely related and directly essential" to final production of those goods. In *Wirtz v. F.M. Sloan, Inc.*,<sup>106</sup> a local natural gas company sold its total output locally to a larger gas distributor, which in turn sold its commingled gas from many sources to local manufacturers of goods for interstate commerce. The employees of the small local gas company were said to be employed in an activity "closely related or directly essential" to the manufacturing processes that were three steps away from their activities.

The coverage of employees providing food or sanitary assistance directly to employees working in a plant that produces goods for commerce has presented some difficulty. If the production employees could receive these goods or services elsewhere, the courts have indicated that the service employees are not "closely related" to production.<sup>107</sup> On the other hand, if the production employees are sufficiently isolated or if the employer has restrictive work rules so that they could not secure necessary alternative services, those who provide necessary auxiliary services will be considered "closely related" to the production activity.<sup>108</sup>

Among other lines, individuals employed to pick up empty bottles and return them to a local bottling plant are closely related to the interstate shipment of bottled drinks.<sup>109</sup> Furthermore, even though they themselves do not perform the mining, individuals who engage in exploring for mineral deposits are considered closely related and directly essential to the mining and interstate sale of such minerals.<sup>110</sup>

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105. *Wirtz v. Modern Trashmoval, Inc.*, 323 F.2d 451 (4th Cir. 1963).

106. 411 F.2d 56 (3d Cir. 1969).

107. See *Tipton v. Bearl Sprott Co.*, 9 Wage & Hour Cas. 620 (S.D. Cal. 1950); *Harlan-Wallins Coal Corp. v. David*, 303 Ky. 84, 196 S.W.2d 881 (1946); 29 C.F.R. § 776.18(h) (1973).

108. *Mitchell v. Anderson*, 235 F.2d 638 (9th Cir. 1955); *Hawkins v. E.I. Du Pont de Nemours & Co.*, 192 F.2d 294 (4th Cir. 1951); *Consolidated Timber Co. v. Womack*, 132 F.2d 101 (9th Cir. 1942); *Tobin v. Promersberger*, 104 F. Supp. 314 (D. Minn. 1952).

109. *Hodgson v. Royal Crown Bottling Co.*, 465 F.2d 473 (5th Cir. 1972); *Wirtz v. Pepsi Cola Bottling Co.*, 342 F.2d 820 (5th Cir. 1965). *Contra*, *Mitchell v. Hygrade Water & Soda Co.*, 285 F.2d 362 (8th Cir. 1960); *Clougherty v. James Vernor Co.*, 187 F.2d 288 (6th Cir. 1951).

110. *Bear Creek Mining Co. v. Wirtz*, 317 F.2d 67 (1st Cir. 1963). *Contra*, *Mitchell v. W.E. Belcher Lumber Co.*, 279 F.2d 789 (5th Cir. 1960), in which the court held that employees who planted seedling trees for a timber company were too remote from the actual harvesting and transportation of the trees to secure coverage. This decision is particularly at odds with the Fifth Circuit's later ruling in *Hodgson v. Ewing*, 451 F.2d 526 (5th Cir. 1971).

Finally, the indefinite character of this entire area can perhaps be best demonstrated by looking at those who provide goods and services to the farmer. As we have seen, the Fifth Circuit recently indicated that a contractor who graded the land to enable a farmer to plant crops was engaging in an activity "closely related" to the farmer's eventual production.<sup>111</sup> Supplying irrigation to farmers has also been held "closely related."<sup>112</sup> Similarly, the Secretary of Labor has indicated that the supplying of seed to the farmer is "closely related" to the production of crops.<sup>113</sup> Congress, however, has clearly indicated that furnishing fertilizer to the farmer is *not* closely related to crop production,<sup>114</sup> and on this basis at least one court has suggested that supplying feed grain to farmers is not closely related to the production of their livestock.<sup>115</sup>

In summarizing the definition of "production," perhaps all that can be said is that when the idea of "closely related or directly essential" to primary production is superimposed upon what seems to be a relatively restricted concept, the Act, albeit not unlimited in its scope, reaches into areas that at first glance appear to be "local" in nature. Measuring this concept is difficult indeed, for how can it logically be stated that grading the land and supplying water are closely related to a farmer's production, but supplying him with fertilizer and feed grain are not?

2. Goods.—The second, and perhaps least controversial, element of "production of goods for commerce" is that the "production" must be of "goods." As might be expected, the definition is expansive. The statute states that "goods" includes "wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof."<sup>116</sup> It is probably not an exaggeration to state that if it can be "produced" within the previously discussed meaning of this term, it will be a "good." The courts have held that drawings, plans, and specifications are "goods,"<sup>117</sup> as are documents, reports, fiscal statements,<sup>118</sup> and negotiable instruments.<sup>119</sup> The Supreme Court has even gone so far as to state that the statutory term "subjects of commerce of any char-

111. *Hodgson v. Ewing*, 451 F.2d 526 (5th Cir. 1971).

112. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949).

113. 29 C.F.R. § 776.19(b)(4) (1973).

114. See materials cited in note 74 *supra*.

115. *Mitchell v. Moore*, 241 F.2d 249 (6th Cir. 1957).

116. 29 U.S.C. § 203(i) (1970).

117. *Craig v. Far West Eng'r Co.*, 265 F.2d 251 (9th Cir. 1959).

118. *Allen v. Atlantic Realty Co.*, 384 F.2d 527 (5th Cir. 1967); *Public Bldg. Auth. v. Goldberg*, 298 F.2d 367 (5th Cir. 1962).

119. *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946).

120. *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502-03 (1944).

acter [includes] ideas, wishes, orders, and intelligence," and that "telegraphic messages are clearly 'subjects of commerce' and hence . . . are 'goods' under this Act."<sup>120</sup> Cattle,<sup>121</sup> and even dirt<sup>122</sup> come within the term. Objects not themselves the subject of commerce, such as boxes and bottles,<sup>123</sup> are also "goods." Ice used by shrimp boats to preserve their catch is a "good," even though consumed entirely for the purpose of preserving the shrimp and not in any way becoming a component part of the product.<sup>124</sup>

As the statute itself provides, objects are "goods" even though they are only ingredients or components of the article actually transported in commerce. Thus, as previously discussed, scrap metal, a small percentage of which eventually reaches finished steel manufactured by another, is still a "good,"<sup>125</sup> as is natural gas eventually consumed by interstate manufacturers in the making of their goods.<sup>126</sup> Buttons sold locally to an interstate clothing manufacturer and lumber used to manufacture furniture are "ingredients" and thus "goods."<sup>127</sup>

Employee activity is usually so closely related or directly essential to another's production of goods that this secondary basis for coverage will suffice. Thus, for example, it is often immaterial to determine whether office workers are producing "goods" when they prepare documents. If they mail the documents they will be "engaged" in commerce; if they do not, their clerical work in most cases will be so closely related to the firm's manufacture of goods that coverage can be based upon activity that is "closely related or directly essential" to the production of goods for commerce.

In short, most factual situations present alternative bases for determining traditional coverage. An employee may himself be engaged in commerce or so directly supportive thereof as to be legally considered a part of commerce. The same tasks may make the employee directly produce goods that are for commerce. Furthermore, the employee's work may so directly aid others in their production of goods for commerce that he can be said to be "closely related and directly essential" to the production of goods for commerce by others.

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121. *Hodgson v. Stockmans Livestock Comm.*, 20 Wage & Hour Cas. 1054 (W.D. Okla. 1972).

122. *Mitchell v. Emala & Assoc.*, 274 F.2d 781 (4th Cir. 1960).

123. *Wirtz v. Pepsi Cola Bottling Co.*, 342 F.2d 820 (5th Cir. 1965); *Enterprise Box Co. v. Fleming*, 125 F.2d 897 (5th Cir. 1942).

124. *Mitchell v. Independent Ice & Cold Storage Co.*, 294 F.2d 186 (5th Cir. 1961). See also *Mitchell v. Standard Ice Co.*, 14 Wage & Hour Cas. 53 (E.D. Ark. 1959) in which ice was sold to interstate railroads.

125. *Mitchell v. Jaffe*, 261 F.2d 883 (5th Cir. 1958).

126. *Wirtz v. F.M. Sloan, Inc.*, 411 F.2d 56 (3d Cir. 1969).

127. 29 C.F.R. § 776.20(c) (1973).



3. For Commerce.—It is not enough that an employee “produce” “goods;” these goods must be “for commerce,” a phrase that has many turns of ambiguity.

First, what is meant by “commerce?” The term is not intended to mean “commercial.” The Act uselessly defines “commerce” as “trade, commerce, transportation, transmission or communication among the several states or between any State and any place outside thereof.”<sup>128</sup> Goods delivered locally to the United States Government to be shipped interstate by the government and ultimately consumed thereby are “for commerce.”<sup>129</sup> Likewise, the activity of a governmental agency itself can be considered to be engaged in commerce or in the production of goods for commerce. Although prior to 1974 governmental employees were not covered by the Act,<sup>130</sup> private employees could secure coverage when they provided services, such as custodial and maintenance, closely related and directly essential to the production of goods “for commerce” by the governmental employees.<sup>131</sup> Similarly, there is some authority that the ultimate interstate shipper may utilize the object himself for his personal enjoyment and still come within the scope of the statutory phrase.<sup>132</sup> The interstate shipper may even be a charitable or religious institution.<sup>133</sup> Finally, as the definition in the Act indicates, the “commerce” involved may be between the United States and

128. 29 U.S.C. § 203(b) (1970).

129. *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950). An interesting case predating the above *Powell* decision was *Selby v. J.A. Jones Constr. Co.*, 175 F.2d 143 (6th Cir. 1949), indicating that employees engaged in remodeling structures used to construct the atomic bomb were not engaged in the production of goods for commerce because the “bomb” was not “for commerce” but to destroy commerce. Presumably that decision was overruled by the Supreme Court in *Powell*.

130. Section 3(d) of the Act defines “employer” to exclude the United States, and in a limited form, state and local governments. 29 U.S.C. § 203(d) (1970). Section 6(a)(1), (2) of the 1974 Amendments, *supra* note 2, redefine “employer” and “employee” to include nonmilitary federal employees and most state and local employees.

131. *Public Bldg. Auth. v. Goldberg*, 298 F.2d 367 (5th Cir. 1962).

132. *Bodden v. McCormick Shipping Corp.*, 188 F.2d 773 (5th Cir. 1951). *Cf.* the Act’s definition of “goods” excluding goods “after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.” 29 U.S.C. § 203(i) (1970). On this basis it might be said that once delivered into the hands of the “ultimate consumer” although perhaps “for commerce” when produced, they lose their character as “goods.” Thus, purely local activity such as selling food, gasoline or souvenirs, even though the seller has reason to believe the purchaser will transport them out of the state for his personal use is not production of “goods” for commerce. *Dial v. Hi Lewis Oil Co.*, 99 F. Supp. 118 (W.D. Mo. 1951); *Hodgson v. Hyatt Realty & Inv. Co.*, 20 Wage & Hour Cas. 1191 (M.D.N.C. 1973). Of course, if the gasoline or food is a necessary part of the flow of commerce, coverage may be established without resort to the definition of “goods.” *Hodgson v. Pipeline Oil Co.*, 20 Wage & Hour Cas. 1225 (W.D. Ky. 1972). Likewise, if the “ultimate consumer” is himself a “producer” then the restriction on the definition of “goods” has no application. *See Mitchell v. Independent Ice & Cold Storage Co.*, 294 F.2d 186 (5th Cir. 1961).

133. *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954).

foreign nations, and is even applicable to a fishing boat that does not travel between states but simply leaves the state for international waters and later returns to the state without even entering another jurisdiction.<sup>134</sup>

Secondly, the other word in the phrase must be analyzed. The word "for" implies some form of intent, knowledge or desire.<sup>135</sup> The intent, knowledge or desire of the employee is largely irrelevant. Whether a good is or is not "for commerce" is something within the control of the producer-employer, and it is his subjective state of mind that traditionally has been held to control.<sup>136</sup> Ignorance or mistake on the part of the employees as to the destination of "goods" does not deprive them of coverage.

If the producer actually intends or expects the goods to enter commerce, and they do so move, obviously this element of coverage is satisfied. Even if the producer's connection with the product is severed long before the good or its products move via the purchaser into the stream of commerce, coverage still exists for the original producer.

Problems of interpretation can arise, however, if the producer intends or expects the goods to enter commerce, but in fact they do not, and conversely, when the goods actually enter commerce but there is no direct evidence of the producer's actual knowledge or intent that they do so. With respect to the first issue, it could be argued that regardless of a producer-employer's intent, if the goods do not actually reach the channels of interstate commerce there can be no coverage of the producing employees. The Act, as well as the Constitution, require a nexus or relationship to commerce. The limited authority that exists on this question, however, indicates that coverage will be found if there was an intent that the objects reach commerce, regardless of their actual resting place.<sup>137</sup>

A more common, and perhaps more difficult, problem is presented when the goods actually reach the stream of commerce without any direct evidence of the producer-employer's knowledge or intent. The Supreme Court has held that no direct evidence of the employer's knowledge or intention is required.<sup>138</sup> Subjective elements can be established by inferences flowing from objective factors. An employer is held to know the usual routes of his products. Thus, if the employer using his knowledge or reasonable inferences

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134. *Mitchell v. Independent Ice & Cold Storage Co.*, 294 F.2d 186 (7th Cir. 1954).

135. *Schulte v. Gangi*, 328 U.S. 108, 121 (1946); *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 92-93 (1942); *United States v. Darby*, 312 U.S. 100, 118 (1941).

136. *Id.*

137. *Goldberg v. Arnold Bros. Cotton Gin Co.*, 297 F.2d 520 (5th Cir. 1962).

138. *Schulte v. Gangi*, 328 U.S. 108, 121 (1946).

therefrom would have realized that the goods would enter the stream of commerce, he is chargeable with the necessary knowledge.<sup>139</sup> Liability cannot necessarily be avoided by the employer's "transparent claim of ignorance;"<sup>140</sup> once the plaintiff proves that the goods actually reached commerce, the inquiry is whether the defendant knew or should have known the usual routes of his goods. Although knowledge is theoretically a question of fact, and objective factors present only inferences that the fact finder may accept if he so chooses, the courts have tended to treat this element as a question of law to be resolved against the employer any time he has reasonable grounds to anticipate that in the ordinary and normal course of business some part of his production will move into other states.<sup>141</sup>

Having thus surveyed the basic premises of traditional or individual coverage, it might be well to reiterate that *de minimis* is not a concept applicable to coverage under the Act.<sup>142</sup> That a small percentage of the employer's total business is interstate or that only a small percentage of the goods produced are "for commerce" is immaterial. The duty is upon the employer to segregate completely his intrastate from his interstate work. If during a work week an employee is "engaged in commerce" or in the "production of goods for commerce" he is entitled to protection under the Act for that entire work week regardless of the small amount of time that was devoted to interstate work.<sup>143</sup> Thus, under traditional, individual coverage an employee might be covered one week but not the next, depending on what he did or the destination of the goods on which he worked during the week. Similarly, there could be two employees doing virtually identical work, one covered by the Act and the other not, depending on whether the employer had successfully segregated his intrastate from interstate activity. Because it was based solely on employee activity, coverage under traditional concepts thus took on a patchwork appearance, and the desire to right these discrepancies stimulated the appearance of the enterprise concept.

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139. *Mitchell v. Jaffe*, 261 F.2d 883 (5th Cir. 1958); *Tobin v. Celery City Printing Co.*, 197 F.2d 228, 229 (5th Cir. 1952).

140. *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 93 (1942).

141. *See Schulte v. Gangi*, 328 U.S. 108, 121 (1946); *Hodgson v. Callihan*, 21 Wage & Hour Cas. 906 (E.D. Ky. 1974); *Hodgson v. Vallejo Quicksilver Mining Co.*, 20 Wage & Hour Cas. 81, 83 (E.D. Cal. 1971).

142. *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); *Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir. 1972); *Dickenson v. United States*, 353 F.2d 389 (9th Cir. 1966).

143. 29 C.F.R. § 776.4 (1973).

### III. ENTERPRISE COVERAGE

In devising the enterprise concept in the 1961 and 1966 amendments to the Fair Labor Standards Act, Congress was compelled by numerous motives. The first, and most obvious, was that since traditional coverage had depended on the activities of individual employees, a given employer might have some employees covered while others were not. To a large degree, the amendments addressed a need to end this patchwork of coverage and bring within the Act's protections all employees of a particular employer. Secondly, Congress singled out certain industries where previous coverage under the Act had been spotty at best and whose workers were believed to be in particular need of protection.<sup>144</sup> Finally, for reasons to be discussed below, the enterprise concept provided a basis for expanding the total scope of coverage based on employee contact with commerce and brought within the Act an expanded class of employers not previously covered because they had no employees "engaged in commerce" or in the "production of goods for commerce." By indicating that an "enterprise engaged in commerce" included one with employees handling goods that "had been moved in commerce," Congress went far beyond traditional coverage concepts, approaching, if not exceeding,<sup>145</sup> congressional power to regulate all activities that "affect commerce."

In 1961 a bill suggesting an "affecting commerce" basis for coverage was narrowly defeated.<sup>146</sup> In the 1961 amendments this basis was considered and rejected, the majority believing that the enterprise approach to coverage was still short of Congress' full power to regulate commerce;<sup>147</sup> yet the amendments expanded tremendously the number of employees brought within the Act's coverage.<sup>148</sup> Subsequently, the constitutionality of the enterprise approach to coverage was sustained by the Supreme Court in *Maryland v. Wirtz*.<sup>149</sup>

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144. 29 U.S.C. § 203(s) (1970) (construction, laundries, schools and hospitals).

145. S. REP. No. 145, 87th Cong., 1st Sess. 94-96 (1961) [hereinafter cited as S. REP. No. 145].

146. *Id.* at 43.

147. *Id.* at 43-44.

148. It was estimated that the 1961 amendments add 4.1 million employees to the Act's protection. S. REP. No. 145, *supra* note 145. The 1966 amendments were said to give coverage to 7.2 million more employees. S. REP. No. 1487, 89th Cong., 2d Sess. (1966). This gave coverage to over 75% of the privately employed persons in the United States. As the Act provided for gradually reduced dollar volumes necessary for coverage, that percentage of the work force covered by the Act has undoubtedly increased. The enterprise aspects of the 1974 amendments will not increase coverage, but removal of governmental exemption and adding domestic employees will increase the Act's total impact.

149. 392 U.S. 183 (1968). In *Maryland v. Wirtz* two arguments were advanced. The first was that FLSA coverage to state schools or hospitals had such a tenuous relationship to

Analyzing the terms of the statute creating enterprise coverage is a tortuous journey that must begin with the Act's substantive provisions. Sections 6<sup>150</sup> and 7<sup>151</sup> provide minimum wage, equal pay, and maximum hour protection to every employee employed in an "enterprise engaged in commerce or in the production of goods for commerce."

To determine the meaning of the phrase "enterprise engaged in commerce or in the production of goods for commerce," it is necessary to refer to the definition sections of the Act. Section 3(r) defines enterprise as "related activities performed (either through unified operation or common control) . . . for a common business purpose . . ." <sup>152</sup> and describes four situations that conceivably could fall within this general definition but that Congress specifically eliminated from the concept.<sup>153</sup> As the Act was being expanded in 1966 to cover public hospitals, schools, and transit systems, the 3(r) definition, which included a requirement of "business purpose," added a caveat that the operation of these hospitals, schools, and transit systems was for a "business purpose."

The phrase "enterprise engaged in commerce or in the production of goods for commerce" is defined in section 3(s) as an enterprise (as previously defined) that "has employees engaged in commerce or in the production of goods for commerce, *including* [or] employees handling, selling or otherwise working on goods [or materials] that have been moved in or produced for commerce . . ." <sup>154</sup> (emphasized word omitted and bracketed words added by the 1974 amendments). In addition to employee contact with commerce, the definition requires that the enterprise fall into one of the four classifications: (1) having an annual gross volume of sales made or business done of not less than 250,000 dollars; (2) being engaged in laundering, cleaning or repairing of clothing or fabrics; (3) being engaged in construction, reconstruction, or both; or (4) being engaged in the operation of a hospital, school or college. The definition

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commerce that Congress lacked the power to regulate the same under the "commerce clause." Secondly, federal intervention into wages paid by the state to its employees was said to violate the eleventh amendment to the Constitution. Both arguments were rejected.

150. 29 U.S.C. § 206(a) (1970).

151. 29 U.S.C. § 207(a) (1970).

152. 29 U.S.C. § 203(r) (1970).

153. The proviso to § 3(r) indicated that retail establishments under independent ownership shall not be considered part of an enterprise by virtue of an agreement (1) to limit their sale to particularly specified goods, (2) to join others for purpose of collective purchasing, (3) to exclusively deal in specified products, or (4) to occupy premises leased to it by a person who leases premises to other establishments. This specifically removed from the enterprise definition independently owned franchise operations, cooperative purchasing arrangements, and shopping centers. 29 U.S.C. § 203(r) (1970).

154. 20 U.S.C. § 203(s) (1970).

excludes the “mom and pop” store by providing that any establishment employing only the owner or members of his immediate family cannot itself be an enterprise, nor can the volume of sales be included in determining any minimum amount for establishing coverage elsewhere in the enterprise.

To summarize, the method utilized by Congress in establishing an enterprise’s nexus with commerce contained two elements. The first was employee contact: a covered enterprise must have employees either traditionally covered (“engaged in commerce” or in the “production of goods for commerce”) or handling or working on goods that “have been moved in commerce.” The second element for most businesses is minimum size or dollar volume of sales made or business done. However, certain specified industries—laundries, construction, schools, and hospitals—do not have to meet this minimum dollar-volume requirement. Thus, an enterprise engaged in commerce is a “related activity performed through unified operation or common control for a common business purpose” that has employees engaged in commerce, or in the production of goods for commerce, or who are handling or working on goods that “have been moved in commerce;” and which enterprise must have an annual gross income of 250,000 dollars or be engaged in one of the three specified industries. Once established as an enterprise engaged in commerce, *all employees* in the enterprise are given the protections of the Act, including workers with no direct contact with commerce and those who may work at different establishments within the “enterprise.”

#### A. *Enterprise*

The recent Supreme Court decision of *Brennan v. Arnheim & Neely, Inc.*<sup>155</sup> provides a starting point for an analysis of the definition of “enterprise.” The Court there noted that the three main elements of the statutory definition of “enterprise” were: (1) related activities, (2) unified operation or common control, and (3) common business purpose. Although treated separately, these elements involve a considerable amount of similarity and overlap, particularly between “related activity” and “common business purpose.”

1. Related Activities.—The employer in *Arnheim* managed commercial, office, and residential properties in which it had no measurable proprietary interest. At the time of the litigation it had under its management nine such complexes in Pennsylvania, each independently owned. As part of its management duties Arnheim

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155. 410 U.S. 512 (1973).

obtained tenants for the buildings, negotiated leases, collected rents, evicted tenants, and hired, fired and paid the employees at each building. It was on behalf of these employees that the Secretary of Labor brought suit.

The Third Circuit determined that "related activities" referred to the activities of each of the building owners. As the individual owners had no connection between each other, and were in no way engaged in a "common business purpose" among themselves, Arnheim & Neely, as manager of these buildings, was held not to be an enterprise. The court's conception as to whose activities must be "related" is so patently erroneous that it hardly needs comment.

The Fourth Circuit had previously held, and correctly so, that "[i]t is the *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects."<sup>156</sup> Agreeing with this interpretation, the Supreme Court reversed the Third Circuit. Factually, the Court recognized that the buildings' owners were not united in some form of business relationship. The Court, however, correctly recognized the spurious analysis of the Third Circuit and concluded that the absence of a relationship between the defendant-employer's customers was immaterial. It is the activity of the defendant, the business itself, that must be evaluated to determine "relatedness" under the Act. "Enterprise" is not defeated by the fact that the employer is engaged in but a single business.<sup>157</sup> That this business is performed at different establishments owned by different persons was certainly not controlling. An accounting firm may perform its services for and on the premises of many unrelated businessmen, and a construction firm may build structures at different locations for different landowners. Clearly, each of these businesses can itself be an enterprise. In this regard the Supreme Court correctly recognized that the employer's activities of managing real estate were "related," in that they were tied together by a single and common purpose.

After disposing of this red herring the difficult question arises as to when ostensibly different activities are "related."<sup>158</sup> The legislative history to the 1961 amendments indicates that "related" means the "same or similar,"<sup>159</sup> hardly a helpful or narrowing definition. The Report continues, however, with comments and illustrations that have been repeatedly referred to in subsequent judicial

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156. *Shultz v. Falk*, 439 F.2d 340, 346 (4th Cir. 1971), *rev'd on other grounds*, 414 U.S. 190 (1973).

157. *Brennan v. Hatton*, 474 F.2d 9 (5th Cir. 1973); 29 C.F.R. § 779.204(a) (1974).

158. 29 C.F.R. § 779.208 (1974).

159. S. REP. No. 145, *supra* note 145, at 41.

decisions; specifically, three classes of "related activities" are mentioned. The first is a so-called "horizontal" arrangement, such as individual retail stores in the same business, serving as a chain,<sup>160</sup> or differing departments in a single establishment.<sup>161</sup> Activities are also "related" when they are "auxiliary" or service activities connected with the primary business operation,<sup>162</sup> such as central office support, bookkeeping, auditing, purchasing, or advertising. The final broad classification mentioned by Congress is a "vertical" enterprise wherein different entities manufacture, warehouse, and retail a particular line of products.<sup>163</sup>

Although this scheme aids one in classifying the types of activities, and indicates that Congress did not desire a restricted interpretation, it provides few specifics. Only one example of unrelated activities is mentioned, the operation of retail apparel stores and a lumber business.<sup>164</sup> Congress indicated that these two activities were "unrelated" to each other, and consequently the dollar volume of each establishment could not be added together to reach the necessary amount (although nothing would keep each business, lumber yard, and apparel store from being two separate enterprises should each generate sufficient income).

The legislative history to the 1966 amendments adds a bit more light to the question. Congress indicated that activities would be "related" if they had a "reasonable connection" with each other.<sup>165</sup> The fact that activities were "somewhat different" would not destroy relatedness. Furthermore, the Senate Report indicates quite clearly that independent incorporation, physical separation or some degree of independent management does not keep activities from being "related." Thus, except when dealing with "auxiliary services," Congress seems to view classes of business as being inherently either "related" or unrelated. The courts, however, have not followed any such categorical approach to the definition.

The earliest and most important decision interpreting the ele-

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160. See 29 C.F.R. § 779.204(b) (1974).

161. See 29 C.F.R. § 779.207 (1974).

162. S. REP. NO. 145, *supra* note 145, at 41. The Secretary of Labor also lists as "auxiliary" to a primary business: credit rating; promotional activities such as stamps, prizes, contests; maintenance, repair and decorating; site selection and engineering, guard or protective service; delivery service; parking; recruiting and training of employees; recreation; health, and food service to employees; employee insurance plans; alteration, repair, or servicing of goods sold. 29 C.F.R. § 779.208 (1974).

163. 29 C.F.R. § 779.209 (1974).

164. S. REP. NO. 145, *supra* note 145, at 41. The Secretary of Labor has provided additional examples of patently "unrelated" businesses: Retail grocery store and a construction business; a bank, a filling station and a bank. 29 C.F.R. § 779.211 (1974).

165. S. REP. NO. 1487, 89th Cong., 2d Sess. 7 (1966) [hereinafter cited as S. REP. NO. 1487].



ment of "related" is *Wirtz v. Savannah Bank & Trust Co.*<sup>166</sup> There, the employer was a commercial bank that owned a fifteen story building. The bank itself occupied the first four floors of the building, renting the remaining eleven floors to a miscellany of tenants. There was no question that those who worked in the bank itself were covered by the Act.<sup>167</sup> Similarly, the custodial employees working in the portion of the bank devoted to interstate work would be traditionally covered as employees engaged in activity closely related or directly essential to the production of goods for commerce.<sup>168</sup> The maintenance and custodial staff, however, were rigidly regimented in an effort to avoid total coverage, with one group serving only the rental portions of the bank and never the bank itself. Thus under the *Callus*<sup>169</sup> doctrine these employees would not be subject to traditional coverage under the Act. The Secretary proceeded under the theory that the bank with its banking and real estate leasing operations was a single enterprise, thus providing all employees with coverage. The bank argued, *inter alia*, that operation of a commercial bank and the leasing of commercial office space were not "related activities." Even if some bank employees have the necessary contact with commerce, and gross sales are satisfied, and there is common ownership and control, the employer argued that the two activities of banking and leasing property are nevertheless as unrelated as the congressional example of the lumber yard and the apparel store.

Rejecting this argument, the Fifth Circuit found that the operation of a bank and the rental of commercial office space in the same building were indeed "related." Thus, the bank was a covered enterprise and all its maintenance employees were covered.<sup>170</sup> In finding a "reasonable connection" between the bank and the office rental business, the court mentioned the following factors, all largely keyed to the fact that the two businesses occupied the same location: the bank had provided itself with room to expand; the office building in conjunction with a bank spread the per foot cost of downtown real estate; the bank secured certain tax advantages; the

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166. 362 F.2d 857 (5th Cir. 1966).

167. Bank employees using interstate mails would be engaged in commerce or the production of goods therefor. See *Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir. 1972); *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946).

168. See *Borden Co. v. Borella*, 325 U.S. 679 (1945); *A.B. Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942); *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946).

169. 325 U.S. 578 (1945).

170. This holding was specifically approved by the Report on the 1966 amendments. It stated: "A bank may, either directly or indirectly engage in real leasing activities incidental to or arising from its financial and investment activities." S. REP. NO. 1487, *supra* note 165, at 7.

large complex created a public image of stability and security; and finally, the tenants in the building benefited the bank and were themselves provided with banking services, giving mutual and reciprocal benefits to each activity. Therefore, given the particular factual situation, even businesses as widely separated as banking and real estate rental can be "related."<sup>171</sup> Using similar analysis, the Sixth and Fifth Circuits have also held that the operation of insurance company offices and the rental of office space in the same building are "related."<sup>172</sup>

The concept pioneered by *Savannah Bank & Trust* is indeed revolutionary. Congress had used the term "related" in the sense of outward similarity, but the Fifth Circuit went one step beyond and held that even ostensibly dissimilar activities can be "related" so long as they are united by strongly centralized control directing them to an interrelated "business purpose." Thus, the concept of "common business purpose," itself an element of "enterprise," is used to establish the concomitant element of "relatedness."

In his interpretative guidelines, the Secretary of Labor has also advocated the amalgamation of the two terms: "Generally, the answer to the question whether particular activities are 'related' or not, will depend in each case upon whether the activities serve a business purpose common to all the activities of the enterprise."<sup>173</sup>

It cannot be stated categorically that the operation of a bank or an insurance company is "related" to the leasing of property. Although the two activities are not outwardly similar and thus do not fall within any *per se* classification, under the analysis pioneered by *Savannah Bank & Trust* and adopted by the Department of Labor, they can be related. Ostensibly unrelated activities are examined in a factual context and, given the right combination of circumstances, can become related.

Because of the factual contest, unrelated activities were indeed found to be "related" in a Sixth Circuit case, *Schultz v. Deane-Hill Country Club, Inc.*<sup>174</sup> The business operations involved there were a restaurant, a sports supply shop, rental of sporting equipment, and professional athletic instruction. In the abstract such operations would not seem to be "related," since they are not the "same or similar" in any absolute sense as Congress used the term nor are they necessarily "auxiliary," contributors to a primary business.

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171. *Accord*, *Wirtz v. First Nat'l Bank & Trust Co.*, 365 F.2d 641 (10th Cir. 1966).

172. *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135 (5th Cir. 1970); *Wirtz v. Columbian Mut. Life Ins. Co.*, 380 F.2d 903 (6th Cir. 1967).

173. 29 C.F.R. § 779.206(b) (1974).

174. 310 F. Supp. 272 (E.D. Tenn. 1969), *aff'd*, 433 F.2d 1311 (6th Cir. 1970).

Nonetheless, when brought together in the setting of a country club, the court had no difficulty in correctly holding, that these activities at the same location, directed toward the total service of club members, were "related activities." Similarly, a highway truck or tourist stop that sells petroleum products and automotive parts and accessories, services automobiles, provides wrecker service, operates a motel for families and truckers, has a restaurant, sells novelties, and keeps a ménagerie could be said to be engaged in "related" activities. If each operation were at a separate locale with separate trade names serving separate customers, they would probably be considered unrelated. Clearly, however, if at the same location, they are serving the total needs of a particular class of customers, the interrelationship is so strong that "enterprise" coverage cannot be denied.

The Secretary's guidelines provide additional examples. The operation of a retail establishment and a construction business are conceded, in the abstract, not to be related. "Where, however, the retail and construction activities are conducted for a common business purpose, they may be 'related'. . . . Thus, a retail store enterprise may engage in construction activities as an additional outlet for building materials which it sells . . . . It may act as its own contractor in constructing or reconstructing its own stores."<sup>175</sup>

Some recent Florida decisions illustrate how different products and even different classes of customers do not prohibit different activities from being "related." In one case, separate firms engaged in land planning and development, in renting apartments, and in furnishing water and sewage utilities to a community were found to be "related."<sup>176</sup> This relationship was established because the community wherein all of this activity took place was a planned community being developed by the defendant-employer. The fact that all of these apparently unrelated activities related to the development and maintenance of this community was sufficient. Similarly, in another case the construction, sale, and maintenance of such diverse structures as luxury apartments, condominiums, a medical clinic, a clubhouse, and a gourmet food store were held "related" when they were part of an integrated real estate development.<sup>177</sup>

Thus, "relatedness" can turn on the goal of the businessman. Although the single goal of profit is not sufficient to unite diverse activities into related ones, the courts have correctly recognized that a particular class of customers or a single integrated business scheme composed of diverse economic units can be "related." Yet

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175. 29 C.F.R. § 779.206(b) (1974).

176. *Hodgson v. Davis M. Woolin & Son, Inc.*, 20 Wage & Hour Cas. 91 (S.D. Fla. 1971).

177. *Hodgson v. Leeco Gas & Oil Co.*, 20 Wage & Hour Cas. 958 (M.D. Fla. 1972).

this concept can be carried too far. In *Hodgson v. Veterans Cleaning Service*,<sup>178</sup> a particular employer was engaged in commercial cleaning and maintenance, residential cleaning through a "rent-a-maid" service, and in operating a "roto-rooter" sewer service. Although commercial and residential cleaning might be ostensibly "similar," sewer service is hardly "similar" to the two other cleaning services. "Relatedness," if it exists, must be found in a united "common purpose" of these three operations. On such a basis the district court found these three activities "related." Rather than concentrating on the abstract "relatedness," on the service of particular customers, or even on a unified business goal, the court found persuasive the total integration of the business operation. A single family operation with a central office and warehouse, it held itself out to the public under a cleaning service banner. Whereas other cases have concentrated primarily upon external manifestations (i.e., what goods or services the business performed and for whom), this court focused internally upon the business organization. This approach is dangerous. While in certain cases a high degree of integration might help prove or disprove the "relatedness" of the activities performed, or might establish the "auxiliary" nature of certain activities, Congress clearly did not desire internal decentralization to defeat otherwise "related" activities. Conversely, internal centralization does not equal relatedness. Something more than integration should be required.<sup>179</sup>

Faced with an even more extreme case than that in *Veterans Cleaning Service*, a Texas court refused to find coverage.<sup>180</sup> An employer operated an air conditioning company, a small commercial airport, and performed services in oil and gas drilling. The court referred to the legislative history and indicated that the only common denominator for these activities was the owner's desire to make a profit, an element not sufficient to establish relatedness. The court did not allow the total centralization of management in the person of the defendant to lead it into a conclusion that these obviously diverse activities were "related."

Courts should not allow an evolution where in the single element of central control dominates the other elements of "enter-

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178. 20 Wage & Hour Cas. 984 (M.D. Fla. 1972).

179. "Common ownership standing alone does not bring unrelated activities within the scope of the same enterprise." 29 C.F.R. § 779.211 (1974).

180. *Hodgson v. Hatton*, 348 F. Supp. 895 (S.D. Tex. 1972), *rev'd on other grounds*, 474 F.2d 9 (5th Cir. 1973). The court of appeals held that each of the employees was engaged in the air conditioning business, and since this fell within the statutory definition of "construction," no dollar volume was necessary to establish coverage for these employees.

prise." If economic centralization is given undue weight in determining "relatedness," virtually every multi-faceted business operated by a single entity would fall within the definition of "enterprise." In generically similar activities, however, centralization of organization and promotion, or lack thereof, might be relevant in determining "relatedness" and in close cases it could tip the scales. Unified operation of even apparently dissimilar activities directed to a common goal could make such activities "related." Nevertheless, in generically diverse operations with no unifying goal, internal centralization cannot be controlling.

Thus, in summary, it can be seen that courts have relied upon centralized management, physical juxtaposition, appeal to similar customers, mutually supportative public image, and auxiliary support toward a single goal and ultimate business scheme, to unite seemingly dissimilar business activities into a "related activity."<sup>181</sup> The question next arises whether the converse is true. May business operations that are ostensibly quite similar be ruled "unrelated" simply on the basis of decentralized management, physical separation, appeal to different customers, or distinct public images? As indicated earlier, Congress stated that "related" meant "same or similar,"<sup>182</sup> a definition with illustrations carrying implications of absoluteness. Viewed without a surrounding context, an apartment house and a motel would appear "similar," since both are multi-unit dwelling complexes for short term noncommercial use by individuals. Nonetheless, a recent Tenth Circuit decision, *Hodgson v. University Club Tower, Inc.*,<sup>183</sup> indicates they may not be legally "related." The court pointed to the separate locations to the two operations, the nonintegrated nature of their operation and management, and the absence of any apparent public connection between them. Finally, the court relied heavily on the fact that they served

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181. The Secretary of Labor has particularly emphasized the importance of physical location. For example, where a retail store accepts payments of utility bills, provides a notarial service, sells stamps, bus and theater tickets, the Secretary has concluded; "These and other activities may be entirely different from the enterprise's principal business but they may be performed on the same premises and by the same employees or otherwise under such circumstances as to be part of the enterprise." 29 C.F.R. § 779.210(a) (1974).

Where in such a case the activities are performed in a physically separate "establishment" from the other business activities of the enterprise and are functionally operated as a separate business, separately controlled, with separate employees, separate records, and a distinct business objective of its own, they may constitute a separate enterprise. Where, however, such activities of the enterprise are intermingled with the other activities of the enterprise and have a reasonable connection to the same business purpose they will be part of the enterprise. 29 C.F.R. § 779.210(b) (1973).

182. S. REP. No. 1487, *supra* note 165.

183. 466 F.2d 745 (10th Cir. 1972).

different customers and furnished different products: one provided temporary quarters for transients, while the other provided more or less indefinite living accommodations.

This analysis is subject to the criticism of a failure to differentiate between the two elements of "related activities" and "common business purpose." The court erroneously concluded that because a common purpose was lacking, the activities of operating a motel and an apartment were necessarily unrelated.

Activities can become "related" in two ways. As Congress specified, they can be ostensibly the "same or similar." Or, as the courts have indicated since *Savannah Bank & Trust*, activities can be united by centralized management and a particularly focused "common business purpose." If "related" because they are generically the same or similar, they will not become unrelated simply because they are not directed toward a "common business purpose." Thus, the Texas court may have been correct in concluding from all the factors that the businesses did not have a common purpose, and hence that they could not be an "enterprise." The court was incorrect, however, in its conclusion that because they lacked a common purpose they could not be "related."

This area of "related activities" can perhaps best be summarized by examining a recent case arising from within the Fifth Circuit involving an employer who operated three businesses: the sale and servicing of automobiles, the sale and servicing of farm equipment, and the sale of automobile casualty insurance.<sup>184</sup> On the surface, one probably would conclude that selling automobiles and farm equipment might be sufficiently similar to be "related activities" whereas selling insurance has perhaps only a tenuous similarity to the two other business operations. In the particular context in which the case arose, however, the court reached the opposite conclusion. The selling of automobile insurance was held "auxiliary" to the automobile business, because the availability of immediate insurance coverage was advantageous to the car buyer and provided a unique market to the car and insurance seller. When analyzing the relationship between the farm implement business and the automobile business, however, the court could not find a sufficient nexus. Emphasizing the separate physical locations of the two businesses, their lack of integration of management and support services, and the fact that neither contributed to the image or operations of the other, the court indicated that this lack of a symbiotic

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184. *Hodgson v. Harvey Motor Co.*, 20 Wage & Hour Cas. 493 (W.D. Tex. 1971), *aff'd without opinion*, 461 F.2d 847 (5th Cir. 1972).

relationship kept two relatively close classifications of business from being "related."

Again, as the Tenth Circuit did in *University Club Tower*, this court failed to distinguish between the two distinct elements "related activities" and "common business purpose," instead treating the two as a single integrated unit ("related activities for a common business purpose"). Though ostensibly unrelated, the mutually supportive nature of the insurance and car sales business, their physical location, and the common customers shared by both might easily combine to make these ostensibly unrelated businesses "related" by a common purpose. Although automobile and farm equipment sales may or may not be sufficiently similar to be considered "related" *per se*, that issue need not be argued. If they are sufficiently removed from each other in location, management, and public identification, the court should have held simply that they did not satisfy the element of "common business purpose."

Thus, a single firm may manage residential and commercial real estate at many locations. While the duties at each location may differ, the essence of the business of each is identical—management.<sup>185</sup> The activities are "related" because they are identical. Similarly, a single owner may control three corporations, the first operating a wholesale grocery business, the other two operating retail grocery outlets, but all three dealing with identical goods—groceries. Although not identical, the activities are so similar that no question can be raised as to their relatedness.<sup>186</sup> Furthermore, the wholesale activity is a support or "auxiliary" service directed toward a primary retail activity. An employer who provides protective guard services and investigative detective work has but a single enterprise.<sup>187</sup> Again, the nearly identical form of work would compel the court to conclude that investigative work and protective service are "related," notwithstanding the requirement imposed by law for separate licensing.

The above examples of "relatedness" are not defeated by a subsequent showing that these activities are directed toward different business purposes. Of course as a factual matter the more identical the products or services, the more likely it will be that a "common business purpose" will exist. As the business activities become

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185. *Brennan v. Arnehim & Neely, Inc.*, 410 U.S. 512 (1973); *Shultz v. Falk*, 439 F.2d 340 (4th Cir. 1971), *rev'd on other grounds*, 414 U.S. 190 (1973).

186. *Wirtz v. Barnes Grocer Co.*, 398 F.2d 718 (8th Cir. 1968). This case incidentally provides an excellent example of combining vertical (wholesale-retail) and horizontal (retail-retail) relatedness.

187. *Hodgson v. Arlington Protective Agency, Inc.*, 20 Wage & Hour Cas. 666 (E.D. Va. 1972).

less similar to each other, however, it becomes increasingly possible that the activities will be directed to different business purposes. Rather than quibbling over whether somewhat distantly related activities are "similar" and thus "related," the courts should concede the relatedness of the activities and analyze whether or not they are sufficiently focused toward a "common business purpose."

Congress probably envisioned a test of "relatedness" that focused largely on the outward similarity or dissimilarity of the business activities. By going beyond that objective concept and finding "relatedness" in the existence of a common or closely interrelated business objective, the courts may have extended coverage of the Act beyond the initial expectations of Congress. It is likely that the legislature conceived of three relatively independent elements: (1) activities outwardly similar (or supporting a primary business as an auxiliary activity), (2) activities under centralized control, and (3) activities having a common business purpose. No enterprise would exist unless all three elements were present. When the courts allowed the term "related activities" to be satisfied by proof of a "common purpose," the Act's coverage necessarily was given more breadth than a literal reading of the terms would suggest. Yet this does not mean that the courts were acting completely without legislative support. Congress probably had no clear conception of what it meant by these terms or exactly how far coverage under the enterprise concept should extend. Moreover, the draftsmen did not clearly state that the elements of enterprise could not be interrelated. In fact, in defining "related activities" the 1961 Report talked of "auxiliary services" that would have little outward similarity to each other but that would definitely relate to the "common purpose." With only the vaguest concept in mind, Congress left a large uncharted area for judicial exploration, and apparently it has not been particularly displeased with the performance of the courts. Specific cases that expanded coverage were cited with approval in the report of the 1966 amendments, and the 1974 Congress amended and expanded coverage with no word of disapproval that the courts had gone too far or too fast.

Like other legal terms, "enterprise" is one that is recognized when seen, but incapable of precise definition. Ideas of "relatedness," "common control," and "common business purpose" generally will be elements apparent in most businesses that "spontaneously satisfy" the abstract notion of an "enterprise." Not infrequently, however, a business operation will spontaneously satisfy the notion of "enterprise," yet each of the elements will not fit neatly into the definition contrived for the concept. In these cases



the courts can either ignore the concept and apply the literal requirements of the Act, or apply the underlying thrust of the legislation using the concept that Congress was attempting to express with the definitional terms. The three elements would thus be viewed as guidelines only, rather than rigid requirements. Utilizing their historic interpretive function the courts would find coverage when the business activity fell within the general class of business operations that Congress desired to regulate.

The courts have been generally faithful to the underlying congressional purpose. When the businesses have been identical, or closely similar, the courts have recognized this fact and have found that they are united in a "common business purpose." When properly united, even widely dissimilar businesses have been held "related." The courts have faltered, however, in their failure to use "common business purpose" as an independent element when business activities are somewhat similar. Similar businesses are, by congressional definition, "related." To use the lack of a unifying purpose to declare arguably similar businesses "unrelated" eliminates "common business purpose" as a viable analytical element. This does not mean that results would be changed. Because all three elements are necessary for enterprise coverage, holding that similar businesses are "unrelated" is roughly the same as saying they are not united by a "common business purpose." Nonetheless, such analysis blurs an understanding of the relationship of the three elements, and should be avoided.

2. Unified Operations or Common Control.—As the Fifth Circuit recently stated, the employer "is not exempt from the Act's requirements solely because it is engaged in only one business."<sup>188</sup> Neither is there much question of "unified operations or common control" where a single person, partnership or corporation conducts multiple operations at numerous establishments.<sup>189</sup> The problem of "unified operations or common control" arises when two or more corporate or legal entities each operate one or more establishments. The Senate Report on the 1966 amendments makes it clear that "[t]he fact that the firms are independently incorporated or physically separate or under the immediate direction of local management . . . is not determinative of this question."<sup>190</sup> On the other hand to remain outside the broad net of "enterprise coverage" the

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188. 474 F.2d at 11.

189. *Shultz v. Falk*, 439 F.2d 340 (4th Cir. 1971), *rev'd on other grounds*, 414 U.S. 190 (1973); *Brennan v. Arnheim & Neely*, 410 U.S. 512 (1973); *Wirtz v. First Nat'l Bank & Trust Co.*, 365 F.2d 641 (10th Cir. 1966); 29 C.F.R. § 779.204(b) (1974).

190. S. REP. NO. 1487, *supra* note 159, at 7.

statute itself imposes some limitations upon particular types of business relationships. Independently owned retail or service establishments are not considered unified operations or under common control solely on the basis of the existence of one of the following factors:

(1) Exclusive dealing agreement between the retailer and manufacturer restricting the buyer's choice of products or the seller's choice of customers. The franchise is a common example of this exclusion.

(2) Agreement among establishments in the same industry to participate in collective or group purchases. This type of group activity is common in the grocery industry. Congressional comments extend such agreements to common advertising, and perhaps to additional forms of mutual cooperation.<sup>191</sup>

(3) Occupation of premises leased to the retail or service establishment by a person who also leases premises to other such establishments—the typical shopping center arrangement.<sup>192</sup>

Thus, Congress again has defined the outer boundaries of each extreme. Although "enterprise" is not defeated by separate incorporation or management of establishments, mere contracts between separately owned and controlled manufacturers and retailers does not necessarily establish a vertically integrated enterprise. A bona fide automobile dealer is not part of the manufacturer's enterprise. Nor will a horizontal enterprise result from independent businessmen in a single industry cooperating through purchasing, advertising, insurance plans, and unified labor relations.<sup>193</sup> Finally, having a common lessor will not in itself tie independent businesses together into a single enterprise. Beyond these examples Congress expected the courts to make a case-by-case evaluation.

Congress has suggested that control is a factual issue to be resolved in a case-by-case evaluation of "[w]ho receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit."<sup>194</sup>

The earliest major case interpreting the element of "common

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191. S. REP. No. 145, *supra* note 147, at 42.

192. 29 U.S.C. § 203(r).

193. 29 C.F.R. § 779.229 (1974).

194. S. REP. No. 145, *supra* note 145, at 42; for a more complete discussion of when the permissible franchise evolves into sufficient "control" for enterprise coverage, see 29 C.F.R. §§ 779.229-.232 (1974).

control" was *Wirtz v. Hardin & Co.*,<sup>195</sup> in which the Fifth Circuit followed the congressional suggestion of a purely factual evaluation whether control was being centrally exercised. The facts involved a horizontal retail food chain of six Piggly Wiggly stores largely owned by a single entity. Each store was independently incorporated, with each manager having a share of the corporate store he managed, and exercising a large amount of managerial responsibility at his store. Even though the ultimate control of each store obviously rested with a single controlling entity, the court concluded that there was sufficient independent management and control to remove each store from the enterprise concept. Thus, this early approach largely ignored the legal relationship between the operational entities and the centralized power of control, and instead concentrated upon whether or not, as a factual matter, common control was being exercised. Although the approach in *Hardin & Co.* has not been expressly overruled by later Fifth Circuit decisions, it was substantially destroyed by implicit congressional disapproval in the 1966 Senate Report<sup>196</sup> and today stands alone among various judicial interpretations of "common control."

In *West v. Wal-Mart, Inc.*,<sup>197</sup> three separately incorporated discount stores were held to be under common control by virtue of the existence of a single entity with the power to hire and fire individual managers. The Eighth Circuit reached a similar conclusion where a single individual controlled three corporations.<sup>198</sup> One corporation controlled a wholesale grocery business, one a single retail grocery outlet, and the third operated two other retail outlets. The power of control over the three corporations, coupled with the interlacing of the wholesale business with the retail outlets, led the court to hold that the whole operation was under "common control."

The Fifth Circuit itself almost completely undercut its previous decision in *Hardin* when it clearly announced a "power of control" test in *Schultz v. Mack Farland & Sons Roofing Co.*<sup>199</sup> The court began by distinguishing the facts in *Hardin*, pointing out that the managers there had almost complete control of their individual stores and were not subject to summary removal. In contrast, the court noted that here, although the different managers under Farland exercised a degree of independent managerial judgment and

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195. 253 F. Supp. 579 (N.D. Ala. 1964); *aff'd*, 359 F.2d 792 (5th Cir. 1966).

196. S. REP. NO. 1487, *supra* note 165, at 7.

197. 264 F. Supp. 158 (W.D. Ark. 1967); *accord*, *Wirtz v. Wornom's Pharmacy, Inc.*, 18 Wage & Hour Cas. 365 (E.D. Va. 1968).

198. *Wirtz v. Barnes Grocer Co.*, 398 F.2d 718 (8th Cir. 1968).

199. 413 F.2d 1296 (5th Cir. 1969).

the corporate affairs of the two roofing companies were scrupulously maintained, nonetheless, the power to control these managers and the decisions of the two corporations were in Farland's hands. The court then concluded that the requirement was the power of actual control, not the exercise of that power.<sup>200</sup>

The Tenth Circuit recently followed the "power of control" test in a situation where one corporation operated a motel and was a wholly owned subsidiary of another corporation that owned two apartments.<sup>201</sup> There was no evidence of the parent's exercise of actual control over the operations of the subsidiary corporation or its motel management. Nonetheless, citing the *Mack Farland* decision, the court found "common control," ruling that it was the power of actual control that was determinative, not the exercise of that power.

Notwithstanding congressional indications in 1961<sup>202</sup> that "common control" was a purely factual question, the rule is now well established that the first point of inquiry is whether centralized legal control is being exercised. It is not necessarily who sets wages, working conditions, prices, or business policy that is of threshold importance; it is the entity that has the ultimate power to act in these areas that is determinative. If the power to control these elements is centrally held, the courts need go no further.

When the element of common *legal* control is eliminated, however, and the courts are dealing with independently owned establishments, factual elements of common control become very relevant. A recent Tennessee district court case<sup>203</sup> illustrates the interplay of the power to control and factual control. The son of a manufacturing firm's chief shareholder operated a retail outlet primarily dealing in the manufacturing firm's products. The son had a large, but far from controlling, share in the manufacturing firm and had, in times past, been on its board of directors. Nevertheless, the court failed to find a "power of control" in either the father (over the son's retail business), or in the son (over the father's manufacturing business). Although tied together by a common product and family relationship, the two business operations were held to be so rigidly independent that factually they could not be considered "unified

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200. *Id.* at 1301. See also *Shultz v. Morris*, 315 F. Supp. 558 (M.D. Ala. 1970), *aff'd sub. nom. Hodgson v. Morris*, 437 F.2d 896 (5th Cir. 1971), in which the court in facts virtually indistinguishable from *Hardin*, involving as did *Hardin* the Piggly-Wiggly Stores, applied the "power of control" test to find independently incorporated stores subject to control by a single entity were under "common control."

201. *Hodgson v. University Club Tower, Inc.*, 466 F.2d 745 (10th Cir. 1972).

202. S. REP. NO. 145, *supra* note 145, at 42.

203. *Brennan v. Electronics Corp.*, 21 Wage & Hour Cas. 1042 (W.D. Tenn. 1974).

operations" or under "common control." As a further example, one can imagine a dealer who is so restricted by a manufacturer as to price, service, hours of operation, minimum purchase quotas, labor relations policy, and other matters that all elements of independent decision have been removed by the contractual relationship. In such a situation common control would exist not by virtue of ownership but of control imposed by contract in spite of independent ownership. Similarly, horizontal control among independently owned establishments could exist if the individual owners created a cartel limiting individual decision-making to an absolute minimum.<sup>204</sup>

Thus, if a number of businesses are under the legal control of a single entity, so that the power to establish policy and make decisions is centralized, this alone will establish "common control" regardless of the factual exercise of that power. When establishments are independently owned, they can constitute an enterprise only if their interrelationship factually reduces to a substantial degree an individual establishment's power to make the day-to-day decisions commonly made by independent businessmen. Congress gave clear examples in the Act itself where some limitation of individual decision-making power is permissible without creating an enterprise. At some point, to be determined as a question of fact, however, independence can be supplanted by sufficient "common control," resulting in the existence of an enterprise.

3. Common Business Purpose.—The final element necessary for the creation of an "enterprise" is that the "related activities" under "common control" be for a "common business purpose." In expressing the intent that the term mean "for profit," Congress sought to eliminate eleemosynary, religious, and other similar non-profit organizations except to the extent that schools, hospitals, and similar institutions were specifically covered by the Act.<sup>205</sup> It would appear, however, that ultimate profit for shareholders is not necessary for the "business purpose" requirement to be satisfied. In *Shultz v. Deane-Hill Country Club, Inc.*<sup>206</sup> the district court found

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204. When Congress was illustrating the factual elements that were to be considered in resolving "common control" it was addressing a situation wherein the businesses were independently owned, and ostensibly independent in their control. What Congress was apparently trying to do was to prevent common franchising, exclusive dealing contracts, and mutual cooperation from uniting otherwise independent businessmen into an enterprise. It was not really addressing businesses under common legal control, as the 1966 history makes much clearer.

It must be remembered, however, that these trying relationships must go beyond the franchise, joint purchasing and advertising, and common rental that Congress placed in the Act as being outside the concept of "common control." See 29 C.F.R. § 779.232 (1974).

205. S. REP. No. 145, *supra* note 145, at 41.

206. 310 F. Supp. 272 (E.D. Tenn. 1969), *aff'd* 433 F.2d 1311 (6th Cir. 1970).

a private country club to be covered by the enterprise provisions of the Act. Admittedly, the court did not analyze the problem of "business purpose." A distinction can be drawn, however, between purely charitable organizations that perform services not paid for, and organizations that sell goods and services above cost, but do not return a total profit to investors. The former purely charitable organizations are not impressed with a "business purpose;" the latter, although returning nothing to investors, are still sufficiently similar to a "business" to establish coverage. Furthermore, the Secretary has indicated that even eleemosynary or religious organization activities that enter the realm of ordinary commercial activities, such as operating a printing plant, or engaging in publishing activities, will be treated the same as any other business enterprise.<sup>207</sup>

Although the legislative history emphasizes the "business" part of the definition, Congress must have intended the word "common" to have some independent meaning. Related activities must have a "common purpose" beyond the desire to make a profit.<sup>208</sup> Interestingly enough, the courts and the Secretary of Labor have not given any particular attention to the phrase, but as examined above have analyzed it under the guise of "relatedness" as though it were a part of that term rather than an independent element of the enterprise definition.

The two phrases "related activities" and "common purpose" clearly overlap. Activities that are outwardly quite similar and performed under common control will almost automatically be performed for a "common purpose." Business activities that are outwardly dissimilar can be related by a unifying thread of a "common purpose," which in turn brings them under the Act's coverage. Common purpose takes on importance only when the activities are "related" because they are outwardly the same or similar but are directed toward different goals. The courts have failed to make the necessary distinction and have tended to treat "related activities for a common business purpose" as a single element, denying that similar activities are "related" when they lack a common purpose. As discussed earlier, this unwarranted amalgamation of the elements has resulted, not necessarily in erroneous results, but in confusing analysis.

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207. 29 C.F.R. § 779.214 (1974).

208. *Hodgson v. Hatton*, 20 Wage & Hour Cas. 549 (S.D. Tex. 1972), *rev'd sub. nom. Brennan v. Hatton*, 474 F.2d 9 (5th Cir. 1973); *Hodgson v. University Club Tower, Inc.*, 466 F.2d 745 (10th Cir. 1972).

### B. *Enterprise Engaged in Commerce*

Once it is established that all the elements of an "enterprise" are present, it is still necessary that the "enterprise" have the necessary contacts with commerce. Section 3(s) of the Act<sup>209</sup> provides that before an enterprise can be "engaged in commerce" two broad elements must be satisfied: (1) the nature or the size of the business and (2) employee contact with commerce. If both basic elements are present, the enterprise will be considered "engaged in commerce" and all of those employed therein will receive the protections of the Act.

1. Nature or Size of the Business.—a. Specified Businesses to Which the Act Applies Regardless of Dollar Volume.—The Act specifies three industries wherein enterprises with the necessary employee contact with commerce will be covered regardless of the dollar volume of business done: (1) laundering, cleaning, repairing clothing or fabrics; (2) construction, reconstruction, or both; (3) hospitals, institutions primarily engaged in the care of sick, aged, mentally ill or defective persons residing on the premises; schools for mentally or physically handicapped; pre-school,<sup>210</sup> elementary, and secondary schools, and public, private, profit or non-profit colleges.<sup>211</sup>

Although these terms are largely self explanatory a brief comment upon each might be helpful:

(1) Laundries.—The Secretary of Labor indicated in an interpretive ruling that coin-operated automatic laundries and dry cleaning establishments were within the meaning of the statutory term. An industry association sought and obtained judicial review of this determination, but the District of Columbia Court of Appeals agreed with the Secretary's ruling holding that coin-operated laundromats and dry cleaning establishments were "engaged in laundering, cleaning or repairing clothing . . ." <sup>212</sup> In additional official opinions interpreting the statute, the Secretary has indicated that linen supply<sup>213</sup> and carpet and upholstery cleaning<sup>214</sup> services come within the Act's coverage.

209. 29 U.S.C. § 203(s) (1970).

210. 29 U.S.C.A. § 203(s)(4) (1974 Supp.), *amending* 29 U.S.C. § 203(s)(4) (1970).

211. 29 U.S.C. §§ 203(s)(2)-(4) (1970). The necessary effect on commerce by these industries was recognized by Congress, and its constitutional power to enact this legislation was sustained in *Maryland v. Wirtz*, 392 U.S. 183 (1968).

212. *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971). *See also* *Hodgson v. Keller*, 20 Wage & Hour Cas. 1093 (N.D. Ohio 1973); *Wirtz v. Washeterias*, 304 F. Supp. 624 (D.C.Z. 1968).

213. 6 LAB. REL. REP. 91:1161-62a (Feb. 3, 1967, Mar. 30, 1967, May 3, 1967).

214. 6 LAB. REL. REP. 91:1162b (May 31, 1967).

(2) Construction.—The term “construction” has not been modified by any requirement that the completed structure must be for immediate sale to third persons. An employer may be engaged in “construction” even if the construction is for his personal use or benefit.<sup>215</sup> It can safely be said that all of the so-called building trades will be “construction,” for example: general carpentry,<sup>216</sup> bricklaying,<sup>217</sup> plumbing,<sup>218</sup> heating and air conditioning,<sup>219</sup> tile setting and floor installation,<sup>220</sup> electrical contracting<sup>221</sup> and painting<sup>222</sup> have all easily been held to be “construction.” Less obviously, a court recently held the drilling of water wells to be “construction.”<sup>223</sup> The Secretary of Labor considers carpet installation, at least in new buildings,<sup>224</sup> and landscape business done in conjunction with new construction<sup>225</sup> to be covered by the term. However, architectural firms, surveyors, and draftsmen who perform these services as independent contractors and who are not themselves physically engaged in on the site construction will not be considered engaging in “construction.”

(3) School, Hospitals, and Similar Institutions.—Again the statute is largely self-explanatory. The Secretary of Labor has indicated that hospitals are institutions “primar[il]y engage[d] in the offering of medical and surgical services to persons who generally remain at the establishment overnight, several days, or for extended periods.”<sup>226</sup> Thus, while outpatient clinics are not considered hospitals,<sup>227</sup> homes for the blind are apparently considered sufficiently related to care of illness to fall within the classification.<sup>228</sup> All forms

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215. *Wirtz v. Allen Green & Associates, Inc.*, 379 F.2d 198 (6th Cir. 1967).

216. *Wirtz v. Melos Constr. Corp.*, 408 F.2d 626 (2d Cir. 1969).

217. 6 LAB. REL. REP. 91:1020r-s (May 15, 1967).

218. *Shultz v. Cove Plumbing Co.*, 18 Wage & Hour Cas. 869 (W.D. Tex. 1969).

219. *Brennan v. Hatton*, 474 F.2d 9 (5th Cir. 1973); *Shultz v. Hartin & Sons, Inc.*, 428 F.2d 186 (4th Cir. 1970).

220. *Shultz v. Architectural Interiors, Inc.*, 19 Wage & Hour Cas. 496 (D. Conn. 1970).

221. 6 LAB. REL. REP. 91:1020g (Oct. 29, 1962).

222. *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658 (4th Cir. 1969).

223. *Brennan v. Journey*, 21 Wage & Hour Cas. 775 (N.D. Miss. 1974).

224. 6 LAB. REL. REP. 91:1020p (Aug. 25, 1967).

225. 6 LAB. REL. REP. 91: 1020q-r (Apr. 23, 1968); 6 LAB. REL. REP. 91:1020p-q (Mar. 7, 1968). There are many bases under which employees of an architectural firm could be covered. For example, they may be individually covered if they work on plans or specifications that are mailed in interstate commerce. Such employees are “engaged in commerce” or in the “production of goods for commerce.” Other clerical and maintenance employees are probably engaged in occupations “closely related and directly essential” to the production of goods for commerce. Finally, if the firm has more than \$250,000 per year of sales made or business done, and has two or more employees with commerce the firm will be an “enterprise engaged in commerce” under § 3(s)(1) of the Act.

226. 6 LAB. REL. REP. 91:1156p (May 12, 1967).

227. 6 LAB. REL. REP. 91:1156e-f (Jan. 18, 1967).

228. 6 LAB. REL. REP. 91:1156z (June 16, 1967).



of schools are within the statute itself, including those for the mentally or physically handicapped or gifted, pre-school, elementary, or secondary schools, or institutions of higher education, regardless of their public, private, profit or non-profit status.

Of course, in order for there to be coverage solely by virtue of the enterprise being engaged in the operation of a hospital or school, any operation not "related" to the institution in question would not be part of the enterprise. For example, recently an issue arose as to whether employees of a municipal power plant that provided the sole source of power to two municipal hospitals were within the hospital enterprise.<sup>229</sup> If these employees were not within the hospital enterprise they would be municipal employees specifically exempted at that time from coverage by Section 3(d) of the Act.<sup>230</sup> The court concluded that the power plant employees were indeed part of the hospital enterprise and thus entitled to protection under the Act.

Even if performed within a defined enterprise operating a school or hospital, certain services might be considered "retail" in nature and subject to that limited exemption found in section 13(a)(2) of the Act.<sup>231</sup> This question might well arise in a hospital that operates a gift store on the premises, or in a school that operates a cafeteria. If maintained separately, even though these operations may be sufficiently "related" to be part of the "enterprise," their separateness may be enough to make them "establishments" qualifying for a retail exemption.<sup>232</sup>

Finally, it is important to note that for purposes of the minimum wage and overtime provisions of the Act, many school and hospital employees will be subject to the administrative and profes-

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229. *Brennan v. City of St. Louis*, 21 Wage & Hour Cas. 628 (E.D. Mo. 1974).

230. 29 U.S.C. § 203(d) (1970). The 1974 amendments would probably bring coverage to the employees of the power plant regardless of whether they are in the hospital enterprise.

231. 29 U.S.C. § 213(a)(2) (1970). The retail exemption herein provided does not apply to any establishment engaged in laundering, or in the operation of a school or hospital. The idea of "establishment," however, is narrower than "enterprise." Thus, an "establishment" may be within a larger "enterprise" and if this "establishment" has a retail concept, has a dollar volume not exceeding \$250,000 per year (reduced by the 1974 amendments), and 75% of its goods and services are not for resale, this establishment would be able to claim an exemption for all of its employees. This is true even if the larger enterprise is covered by the Act.

232. *Hodgson v. Crotty Bros. Inc.*, 450 F.2d 1268 (5th Cir.), *rehearing denied en banc*, 450 F.2d 1282 (5th Cir. 1971). This case involved a food service operation run by a company at a boarding school. This independent company providing the food service was alleged by the Secretary of Labor to be so intimately a part of the school that it could not claim status as a separate "establishment." The court held that it could have separate establishment status and thus could qualify for the retail exemption.

sional exemption provided by Section 13(a)(1).<sup>233</sup>

b. Remainder of the Businesses: Minimum Size Requirements.—Aside from those three categories of industries described above wherein size is irrelevant, all other businesses must have annual “sales made or business done” in excess of 250,000 dollars. In enacting this standard Congress made it clear that by fixing a dollar volume test it was not concerned with profit, but with impact on commerce measured by inflow of money. In the 1966 amendments Congress abandoned its 1961 attempt to utilize the volume of goods actually crossing state lines as a relevant factor and instead legislated on the assumption that any business having 250,000 dollars worth of sales must necessarily “affect” commerce.<sup>234</sup>

The “dollar-volume” test is based upon “sales made or business done,” with the Act defining “sale” as any “sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”<sup>235</sup> Given this broad definition extending to arrangements differing from the retail sale of goods, the courts faced various problems in construing the term. Quite early the courts held that the rental of property was a “sale” of that property.<sup>236</sup> The 1966 amendments confirmed this interpretation and indicated also that loaning money or leasing any type of property would fall within the broad terms of the amended statute.<sup>237</sup> Problems quickly arose when the person who was not the owner of the property was making the disposition thereof, the example of course being a rental or commission agent. In *Wirtz v. First National Bank & Trust Co.*,<sup>238</sup> a bank owned an office building. Rather than directly renting the offices itself, the bank formed a management company. The management corporation was a wholly-owned subsidiary that collected the rents, deducted a management fee and remitted the balance to the bank. The Tenth Circuit indicated that since the management company marketed the property that was under its control this was a “disposition” allowing the amount of rent collected, rather than the man-

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233. 29 U.S.C. § 213(a)(1) (1970). The statute empowers the Secretary of Labor to establish by regulation the particular definition of executive, administrative, and professional employee. Those regulations, found at 29 C.F.R. §§ 541 *et seq.* (1974), have the force and effect of law. Needless to say, administrators, professors, teachers, staff physicians, professional nurses, and many others will satisfy the Secretary's definition.

234. S. REP. NO. 1487, *supra* note 165, at 7, 26; S. REP. NO. 145, *supra* note 145, at 5. See also 107 CONG. REC. 5842 (1961) (Staff Report of Labor Subcommittee).

235. 29 U.S.C. § 203(k) (1970).

236. *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857, 862-63 (5th Cir. 1966).

237. S. REP. NO. 1487, *supra* note 165, at 7-8.

238. 365 F.2d 641 (10th Cir. 1966).

agement fee received from the bank, to be the basis for the dollar-volume test.

The problem of measuring dollar volume to determine the applicability of the retail exemption surfaced in *Wirtz v. Jernigan*,<sup>239</sup> in which a restaurant owner also sold Greyhound bus tickets. Including the gross income received from the passengers for the tickets would cause sales to exceed the amount necessary for a retail and service exemption. If, however, the restaurant owner was allowed to include only his commissions from the Greyhound company for the ticket sales, his total sales would be within the dollar-volume limits established for the exemption. The Fifth Circuit held that the total amount received for the tickets sold to the customers must be calculated, reasoning that this amount received measured the size of the business more accurately than would the commission paid to the businessman for the sale of the tickets alone.

Relying on *Jernigan* and *First National Bank & Trust Co.*, the Fourth Circuit held in *Schultz v. Falk*<sup>240</sup> that when a property rental and management firm rented premises owned by others, it was the amount of the rent collected from the tenants, not the amount of management fees received from the building owners, that was to be used in assessing the dollar-volume test. On certiorari, and without citing or distinguishing the supporting authority from the Fifth and Tenth Circuits, the Supreme Court reversed.<sup>241</sup> Concentrating on the fact that the firm was an enterprise for the purpose of providing management services to the owners of the buildings, the five-man majority reasoned that the sale of its services was best measured by the amount of commissions collected from the owners, since its compensation was based not so much on the leases themselves but on the totality of services provided to the property owners.

The Secretary had argued both in the court of appeals and before the Supreme Court that this case differed but little from that of a consignment seller. A retail merchant who purchases his goods from a wholesaler and sells them to the public will have his size measured by the gross amount received from the sale of the goods, not by his net profit. Similarly, a commission merchant who merely has possession of the same goods with the power to sell must have his size measured by the gross amount received from the retail sale, not merely the amount of the commission received from the consignor. If this were not true, the regular retail merchant selling 250,000 dollars worth of goods would be a covered enterprise, while the

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239. *Wirtz v. Jernigan*, 405 F.2d 155 (5th Cir. 1968).

240. 439 F.2d 340 (4th Cir. 1971).

241. *Falk v. Brennan*, 414 U.S. 190 (1973).

commission agent selling an identical amount would not. Obviously, the impact of the two merchants on commerce is identical; thus coverage of the Act should reach both.

Appearing to accept this argument, the Supreme Court indicated that like the retail merchant, the commission merchant would find his size measured by the gross amount received at retail, not his commission. The Court, however, distinguished the commission agent from the management agent in that the commission agent sells a commodity and his service is complete with the sale, whereas the rental agent performs a full measure of management services for the owner of the property throughout the term of the lease. The Court indicated that under these circumstances it was a more accurate measurement of the business' size and impact on commerce to look to the amount received as compensation for its primary service. In closing, the Court even distinguished the situation of a typical realty or stock broker and indicated that where the sale of the principal's property was the primary service, the amount received from the purchases, rather than the commissions from the principal, might be the proper dollar-volume test.

Thus, "sales made or business done" was a test devised by Congress to measure the relevant size of the business operation, a concept intended to be keyed not to a business' net profits but to its monetary intake or inflow. In applying this general idea to particular fact situations it was necessary for the Court to determine the exact nature of the business being done. For example, the Court believed that the business of managing commercial buildings was the sale of managerial services to the owners of the buildings. Although a "rental" *can* be a sale if made by the owner,<sup>242</sup> the thrust of managerial activities is not rental. Thus, the relevant point of monetary inflow is not the rents received from the tenants, but the payment for the primary service being performed—the commission from the owners as compensation for the management services performed. On the other hand, a commission agent is engaged in selling chattels. Although this is naturally a service for the owner thereof, nonetheless the thrust of the agent's activity is the sale of the item, and therefore the relevant point of monetary inflow is the gross receipt for the goods sold. In short, the courts must look carefully to the nature of the business or service being performed. Size is most

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242. Cases such as *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857 (5th Cir. 1966) and *Wirtz v. First Nat'l Bank & Trust Co.*, 365 F.2d 641 (10th Cir. 1966), were reversed. In these cases the owner of the building was directly or indirectly the beneficiary of the rents paid, completely unlike the management firm that is a conduit for the delivery of the rents.

accurately measured by the consideration received for the performance of that service or given in return for providing of a good.

Analytically, the majority of the Court in *Falk* is probably correct. The best measure of size, as Congress envisioned it, is the inflow from the primary service being performed. Nevertheless, this is a rule of extremely difficult application. A single rule that all inflow must be counted without regard to the nature of the employer's primary activity for his principal could be used and understood by those affected by the Act. The Court's decision in *Falk*, however, makes prediction of coverage extremely difficult. The affected business must now make a speculative evaluation as to the thrust of the service and what is being received therefor.

2. Employee Contact with Commerce.—In addition to size or industry qualifications every enterprise must have "employees" (plural)<sup>243</sup> who have the necessary contact with commerce. The requisite contact may be established by fitting the workers in question into one of three categories: (1) employees "engaged in commerce;" (2) employees engaged in the "production of goods for commerce," which includes any activity "closely related or directly essential" to that production; or (3) employees "handling or working on goods or materials that have been moved in commerce."

Until 1974 the necessary employee contact was defined as "employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce. . . ."<sup>244</sup> The 1974 amendments made two seemingly unimportant alterations that have substantial potential impact.<sup>245</sup> First, the word "including" was replaced with the word "or." Secondly, the words "or materials" were inserted following the word "goods." The Act now reads, ". . . employees engaged in commerce or in the production of goods for commerce *or* employees handling, selling, or otherwise working on goods *or materials* that have been moved in or produced for commerce. . . ."<sup>246</sup> (emphasis added). The implications of these two apparently insignificant alterations will be discussed fully, but it should first be noted that the necessary employee contact with commerce may be established by having

243. *Robertson v. Dailey Elec. Supply Co.*, 21 Wage & Hour Cas. 734 (N.D. Tex. 1974).

244. 29 U.S.C. § 203(s) (1970).

245. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, (Apr. 8, 1974).

246. The amendment of course has prospective application only. Coverage questions up to the effective date of May 1, 1974 will be governed by the 1966 language. As there is a two year statute of limitation for non-willful violations of the Act (three years for willful violations), Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C. § 255(a) (1970), the unamended language will have importance until April 30, 1977.

employees covered by the two traditional concepts of "engaged in commerce" or "production of goods for commerce." Thus, all of the post-1938 cases interpreting those two phrases still have vitality by determining in large part whether the employee contact necessary for enterprise coverage is present.

a. Handling goods that have been moved in commerce.— "Engaged in commerce" is a species of term unto itself, and "production of goods for commerce" looks to activities preliminarily to goods entering commerce. The newer third basis of contact complements the second by establishing a source of employee contact subsequent to the interstate movement of goods. Thus, "handling goods or materials that have been moved in commerce" is a concept that clearly has an expansive impact upon the class of employers covered by the Act, going well beyond the two traditional coverage concepts. Nevertheless, in the landmark case of *Maryland v. Wirtz*,<sup>247</sup> Mr. Justice Harlan created substantial confusion as to the impact of the new phrase. The issue was the constitutionality of the enterprise concept. Speaking for the Court, Harlan stated: "Thus, the effect of the 1961 change was to extend protection to fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of *employers* subject to the Act."<sup>248</sup> The majority was attempting here to draw an analogy to *United States v. Darby*,<sup>249</sup> which had upheld the constitutionality of traditional coverage, in order to support the constitutionality of the amendments. The Court reasoned simply that since no new employers were covered by the 1961 amendments, the issue of effect on commerce was controlled by *Darby*. Nonetheless, employers seized upon the "semi-dicta" quota above and argued that unless they had two or more employees traditionally covered, theirs was not an "enterprise engaged in commerce."

A few lower courts likewise suggested that the "including handling goods that have been moved in commerce" was merely an "attempt to correct unartful draftsmanship."<sup>250</sup> This interpretation appeared to have some logical support, since the use of the connecting modifier "including" suggested an explanation rather than an expansion of the previous phrases of "engaged in commerce" and "production of goods for commerce."

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247. 392 U.S. 183 (1968).

248. *Id.* at 188.

249. 312 U.S. 100 (1941).

250. *Shultz v. Travis Edwards, Inc.*, 320 F. Supp. 834, 838 (W.D. La. 1970), *rev'd on other grounds, sub nom. Hodgon v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir.), *cert. denied*, 409 U.S. 1076 (1972).

Nevertheless, arguments that Congress had indeed expanded the class of employers subject to the Act were quite persuasive. First, it must be assumed that Congress would not engage in a futile act, and that statutory language should not be construed as mere surplusage.<sup>251</sup> "Engaged in commerce" and "production of goods for commerce" had been in the Act since 1938, and had well established, if not perfectly clear, meanings. When Congress desired to clarify or alter some aspect of traditional coverage, as it did in 1949, it did not hesitate to make its intention quite clear. However, in the 1961 and 1966 amendments there is not a single word from the sponsors, or any one else, that the phrase "handling goods that have been moved in commerce" means other than what it clearly says.

Furthermore, the *Jacksonville Paper*<sup>252</sup> case was well known when the 1961 and 1966 amendments were enacted. For nearly twenty years it had been established that employees who handle goods after they had "come to rest" locally were neither "engaged in commerce" nor in the "production of goods for commerce." Congress was aware of this doctrine,<sup>253</sup> and therefore, when a classification of employees who handle "goods that *have been moved* in commerce" was added, it must have been the deliberate desire of Congress that this "come to rest" limitation upon traditional coverage should not impose a similar limitation on the newly created enterprise concept. This "expanded" coverage was vigorously attacked by the critics of the amendments,<sup>254</sup> and comments of the sponsors indicate that they too realized the import of this language.<sup>255</sup>

From the earliest decisions construing this term until the present time the vast majority of the courts have agreed that Mr. Justice Harlan was wrong. The impact of the phrase is perhaps best stated by the leading Second Circuit case of *Wirtz v. Melos Construction Corp.*<sup>256</sup> There, construction employees handled building supplies that had been purchased locally. In holding this to be sufficient to establish coverage, the court stated:

[T]he 1961 amendments expanded coverage under the Act in two particulars. First, it brought within the Act's coverage all employees of an enterprise if some of its employees 'engaged in commerce or in the production of goods for commerce' . . . Second, the Section defined 'enterprise engaged in commerce

251. *McDonald v. Thompson*, 305 U.S. 263, 266 (1938); *Platt v. Union Pac. R.R.*, 99 U.S. 48, 58-59 (1878); 2 J. SUTHERLAND, *STATUTORY CONSTRUCTION* § 4705 (3d ed. 1943).

252. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943).

253. S. REP. NO. 145, *supra* note 145, at 94-100; 107 CONG. REC. 5840-41 (1961).

254. H.R. REP. NO. 75, 87th Cong., 1st Sess. 63 (1961); S. REP. NO. 145, *supra* note 145, at 94-100; 106 CONG. REC. 5964 (1961); 107 CONG. REC. 4630-31 (1961); 107 CONG. REC. 5964-65 (1961).

255. 107 CONG. REC. 5840-41, 6236 (1961).

256. 408 F.2d 626 (2d Cir. 1969).

. . . ' to include an enterprise having employees engaged in 'handling, selling, or otherwise working on goods that have been moved in or produced for commerce.'

. . . Melos' operation, like many other operations which were formerly not covered by the Act, was brought under it by the extension of coverage. . . .<sup>257</sup>

This rationale has been uniformly followed by the courts of appeals.<sup>258</sup> In recent months the Supreme Court had two opportunities before it to address this unusual situation of uniform lower court disagreement with a statement in a majority opinion of the Court. In each case (*Arnheim & Neely*<sup>259</sup> and *Falk*<sup>260</sup>) the Court expressly avoided overturning what was by 1974, the well established import of the phrase. "Handling goods that have been moved in commerce" expanded employer coverage by adding a new, third basis to traditional employee contact.

Any ambiguity that may have remained was resolved by Congress in the 1974 amendments by deleting the confusing modifier "including" and substituting the disjunctive term "or."<sup>261</sup> Consequently it is now quite clear that "handling goods that have been moved in commerce" does not in some way define the preceding clauses of traditional coverage. Instead, the disjunctive "or" makes "handling goods that have been moved in commerce" a basis for enterprise coverage of independent dignity with "engaged in commerce" and "production of goods for commerce."

b. Goods or Materials.—(1) Consumed consumables.—Having lost the main argument that the enterprise amendments of 1961 and 1966 introduced no new employers to the Act's coverage, many employers, particularly in service industries, retreated behind a second line of defense, one decidedly more complex, but meeting with some degree of initial success in the lower federal courts. The argument was this: In order to establish enter-

257. *Id.* at 627-28.

258. *Brennan v. Iowa*, 494 F.2d 100 (8th Cir. 1974) *petition for cert. filed*, 42 U.S.L.W. 3611 (U.S. Apr. 19, 1974) (No. 73-1565); *Brennan v. Greene's Propane Gas Serv., Inc.*, 479 F.2d 1027 (5th Cir. 1973); *Brennan v. Dillion*, 483 F.2d 1334 (10th Cir. 1973); *Shultz v. Falk*, 439 F.2d 340 (4th Cir. 1971), *vacated on other grounds sub nom. Falk v. Brennan*, 414 U.S. 190 (1973); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971); *Shultz v. Kip's Big Boy, Inc.*, 431 F.2d 530 (5th Cir. 1970); *Shultz v. Union Trust Bank*, 297 F. Supp. 1274 (M.D. Fla. 1969); *Childress v. Earl Whitley, Enterprises, Inc.*, 388 F.2d 742 (4th Cir. 1968); *Shultz v. Deane-Hill Country Club, Inc.*, 310 F. Supp. 272 (E.D. Tenn. 1969), *aff'd*, 433 F.2d 1311 (6th Cir. 1970); *Wirtz v. Mayer Constr. Co.*, 291 F. Supp. 514 (D.N.J. 1968).

259. *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973).

260. *Falk v. Brennan*, 414 U.S. 190 (1973).

261. Pub. L. No. 93-259, § 6(a)(5)(A) (Apr. 8, 1974); S. REP. No. 690, 93rd Cong., 2d Sess. 17 (1974). Note also that until April 30, 1974, when the statute of limitations will toll all actions arising prior to the amendment, the 1966 language will still have applications. See *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857 (5th Cir. 1966).



prise coverage prior to 1974, the employees must have handled "goods" that had been moved in commerce. The section 3(i) definition of "goods," however, "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."<sup>262</sup> Thus, argued the employer, if the employees are handling only such items as soaps, toilet paper, waxes, light bulbs, and similar custodial and maintenance supplies that are utilized on the premises of the employer himself, these objects are in the hands of the "ultimate consumer thereof," and "goods" in the hands of the "ultimate consumer" are not "goods" within the definition of the Act.

It is to this argument that the second apparently insignificant 1974 amendment was addressed. The term "goods" is no longer the sole frame of reference to employee handling. The word "materials" was added and this term is not burdened with an "ultimate consumer" restriction. Some background will clarify the importance of this single new word.

The ultimate consumer argument had no application to merchandise situations in which goods were sold directly to third persons, because such persons were clearly consumers beyond the employer. Likewise, the argument had little application to the construction industry, since, although the building materials were consumed in the construction of the building, the building itself was passed on to others.<sup>263</sup> Even if the builder did not immediately plan to resell the completed structure, working with the building materials, changing their form and value, made the builder himself a "producer," and the "ultimate consumer" proviso does not apply to producers.<sup>264</sup> Consequently, the "ultimate consumer" argument was primarily applicable to hospitals, schools, real estate management firms, laundries, and similar concerns—those areas where a service was being supplied on particular premises and the employees worked with consumable supplies consumed in providing the service.

Three basic answers existed to the employer's argument that "goods" are no longer "goods" when they are consumed in the hands of these service employees. The first one, historical in origin, derives from the fact that the section 3(i) definition of "good" was inserted

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262. 29 U.S.C. § 203(i) (1970).

263. See *Wirtz v. Melos Constr. Corp.*, 408 F.2d 626 (2d Cir. 1969); *Wirtz v. Mayer Constr. Co.*, 291 F. Supp. 514 (D.N.J. 1968).

264. See *Wirtz v. Allen Green & Associates*, 379 F.2d 198 (6th Cir. 1967).

265. 29 U.S.C. § 215(a) (1970).

in the original Act in 1938, long before the enterprise concept was conceived. The limitation as to "ultimate consumers" was a protection for ordinary consumers who might otherwise run afoul of the "hot goods"<sup>265</sup> provisions of the Act.<sup>266</sup> It was unlikely that Congress intended this "hot goods" protection for consumers to restrict the scope of this newly conceived and expanded basis for coverage of the Act. In fact the necessary contact with commerce for the industries singled out by Congress for special coverage (hospitals, schools, laundries, renting and leasing property<sup>267</sup>) will in fact be their employees who handle maintenance supplies. Surely Congress would not have intended to expand coverage to these industries while denying it to many employers within these industries because of an obscure restriction in another section of the previous Act. Furthermore, the definition of "goods" need not apply literally if the result would have been to frustrate the manifest intent of Congress and the purposes of the statute. A single term may have one definition in one section of a statute, and be given an entirely different meaning in another section.<sup>268</sup>

The second major argument against the position that these consumable articles are not "goods" is that the employer is not the "ultimate consumer" of these items. It is the customer, not the employer, that directly benefits from and utilizes the soaps, toilet paper, waxes, and light bulbs. In each case the cost of these consumable items will be paid for by the customer through payment for the total service rendered. A substantial portion of a tenant's rent goes to pay for maintenance staff and the products they consume in performing the service. The laundry fee relates directly to the cost of soaps, bleach, and starch utilized in performing the service. Therefore, it is difficult to argue that the business as an institution consumes the items. The employer uses the goods to perform the service, but the true enjoyment and consumption is with the beneficiary of the service—the customer. The counter-argument states that because the employer is not in fact the "ultimate consumer" of these miscellaneous consumable items, they continue to be "goods" when handled by the employees. If they have been "moved

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266. 29 C.F.R. § 776.20(d) (1974); see *Powell v. United States Cartridge Co.*, 339 U.S. 497, 512-15 (1950).

267. See S. REP. NO. 1487, *supra* note 165, at 7-8.

268. See *International Ass'n of Machinists v. King*, 335 F.2d 340 (9th Cir. 1964). In this case the court was required to interpret the term "discipline" appearing in two different sections of the Landrum-Griffin Act [29 U.S.C. § 401 (1970)]. The court indicated that removal of a union official from union office was not "discipline" when used in the context of whether a due process hearing was required before removal. Removal from office, however, was "discipline" when used in the context of the official's protection of free speech within the union. See also 2 J. SUTHERLAND, *STATUTORY CONSTRUCTION* §§ 4704, 4814 (3d ed. 1943).

in commerce" the necessary employee nexus with commerce will be established.

The third and final argument made by the Secretary is that the employer who handles these consumable items in order to perform his service technically is also a "producer" of these goods. These items are "handled" and "worked on" by the employees, their form being changed for the benefit of the customer, who pays for the item in its modified form. The Secretary argues that this falls within the Act's definition of "produced,"<sup>269</sup> and thus the "ultimate consumer" exclusion is inapplicable.

Initially, the courts were divided with a number accepting the argument that it was the employer who was the "ultimate consumer" of these items.<sup>270</sup> On the other hand, the Fourth Circuit<sup>271</sup> and the District of Columbia Court of Appeals<sup>272</sup> strongly intimated that the Secretary's position was correct and that the service employer was not protected by the "ultimate consumer" proviso. On at least two occasions, the Fifth Circuit avoided the issue by disposing of lower court holdings on alternative grounds.<sup>273</sup> The only court of appeals to resolve the issue unambiguously was the Tenth Circuit in *Brennan v. Dillion*.<sup>274</sup> In *Dillion* a real estate management firm had maintenance employees handling soaps, waxes, toilet paper, and similar consumables. The tenant of the institution, rather than the employer, was held to be the ultimate consumer of the items even though they were consumed during the course of the employees' work.

A similar analysis was followed, although as an alternative ground, by the Eighth Circuit in *Brennan v. Iowa*.<sup>275</sup> There, hospital employees who handled maintenance supplies were considered to

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269. 29 U.S.C. § 203(j) (1970).

270. See, e.g., *Brennan v. Jaffey*, 21 Wage & Hour Cas. 971 (D. Del. 1974); *Brennan v. Apartment Communities Corp.*, 21 Wage & Hour Cas. 225 (D. Del. 1973); *Shultz v. Travis Edwards, Inc.*, 320 F. Supp. 834 (W.D. La. 1970), *rev'd on other grounds sub nom. Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir.) *cert. denied*, 409 U.S. 1076 (1972); *Shultz v. Wilson Bldg., Inc.*, 320 F. Supp. 664 (S.D. Tex. 1970), *aff'd on other grounds sub nom. Brennan v. Wilson Bldg., Inc.*, 478 F.2d 1090 (5th Cir.) *cert. denied*, 414 U.S. 855 (1973); *Shultz v. Arnheim & Neely, Inc.*, 324 & Neely, INC., 324 F. Supp. 987 (W.D. Pa. 1969), *rev'd on other grounds sub nom. Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609 (3rd Cir. 1971), *rev'd on other grounds sub nom. Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973).

271. See *Shultz v. Falk*, 439 F.2d 340 (4th Cir. 1971), *vacated on other grounds sub nom. Falk v. Brennan*, 414 U.S. 190 (1973).

272. See *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971).

273. See *Brennan v. Wilson Bldg., Inc.*, 478 F.2d 1090 (5th Cir. 1973); *Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir. 1972).

274. 483 F.2d 1334 (10th Cir. 1973).

275. 494 F.2d 100 (8th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3611 (U.S. Apr. 19, 1974) (No. 73-1565).

have sufficient contact with commerce to establish coverage, since the hospital was not deemed to be the ultimate consumer of these supplies. Thus the emerging majority of the district courts appears to be in accord with a clear holding in the Tenth and dicta in the Fourth, Eighth and the District of Columbia circuits.<sup>276</sup>

Thus, on the eve of the passage of the 1974 Amendments it was relatively well established that the phrase "*including* goods that have been moved in commerce" expanded coverage by establishing a new class of employee contact with commerce. Secondly, the term "goods" was not being unduly restricted by the "ultimate consumer" proviso. Consumable items utilized in the performance of services were not deemed by most courts to be within the meaning of the proviso. Nevertheless, the 1974 amendments removed all doubt as to both issues. Replacing "*including*" with "*or*" clearly indicated the expansive intent of the phrase "have been moved in commerce."<sup>277</sup> Secondly, the addition of the word "materials" clearly indicated that coverage was not to be restricted by the "ultimate consumer" restriction on the definition of "goods." "Materials" is not defined in the Act and thus its literal meaning is not restricted. Consequently, the employee who handles soaps, light bulbs, toilet paper, and other maintenance and custodial supplies is clearly handling unadorned and unmodified "*materials* that have been moved in commerce."<sup>278</sup>

2. Capital items—Are they goods or materials?—A question now presented is whether the counter-arguments discussed above concerning the applicability of the "ultimate consumer" exception

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276. See *United States v. Doochin*, 21 Wage & Hour Cas. 743 (M.D. Tenn. 1974); *Hodgson v. Rivermont Corp.*, 21 Wage & Hour Cas. 171 (M.D. Fla. 1973); *Hodgson v. Keller*, 20 Wage & Hour Cas. 1093 (N.D. Ohio 1973); *Sharp v. Warner Holding Co.*, 21 Wage & Hour Cas. 206 (D. Minn. 1972); *Mansdorf v. Ernest Tew & Associates*, 20 Wage & Hour Cas. 956 (M.D. Fla. 1972); *Shultz v. Union Trust Bank*, 297 F. Supp. 1274 (M.D. Fla. 1969); *Wirtz v. Washeterias*, 304 F. Supp. 624 (D.C.Z. 1968).

277. See *Hodgson v. Keller*, 20 Wage & Hour Cas. 1093 (N.D. Ohio 1973); S. REP. No. 690, *supra* note 248, at 17.

278. Recently the District Court in Delaware refused to retreat from its earlier position that soaps, bulbs, toilet paper and other consumables used by maintenance employees were in the hands of the "ultimate consumer" and thus not "goods" within the meaning of the Act. In so doing the court recognized that Congress added the word "materials" in 1974 specifically to insure coverage to employees like the ones before the court. It also acknowledged that Congress had stated in the history of the 1974 amendments that it had intended in 1961 and 1966 to reach these same employees, and that the cases to the contrary had wrongly interpreted the will of Congress. It was to correct any lingering misimpressions that the additions were made. Nonetheless, this court refused to retreat, insisting that these items were not "goods" under the 1961 and 1966 provisions, and Congress' retroactive interpretation of its intent was not binding. Only upon the effective date of the 1974 amendments would "handling" of these "materials" establish coverage. *Brennan v. Jaffey*, 21 Wage & Hour Cas. 971 (D. Del. 1974).

to consumable supplies dictate an interpretation of the term that includes capital goods. For example, one can imagine a businessman employing a secretary and a delivery boy—a situation so purely “local” that Congress had indicated no desire to regulate his wage-hour practices.<sup>279</sup> Although he receives no consumables that have ever been in commerce (or if he does, he handles them himself exclusively), and performs no services or ships no goods across state lines, his secretary utilizes a ten year old typewriter sitting on a twenty year old desk, both of which were manufactured out of state. Furthermore, his delivery boy rides a three year old Sears-Roebuck bicycle. If these capital items are considered “goods or materials,” this would seem to be sufficient employee contact with commerce to establish that element of coverage.

In defining “goods,” the Act itself speaks in terms of “articles of commerce,” neither excluding nor including capital non-consumables that an employer purchases for long term use in his business. On its face, however, the definition is certainly broad enough to include capital goods. The new term “materials” is not defined in the Act. In common usage, however, it has a more limited definition than the term “goods.”<sup>280</sup>

Until 1970 the Secretary of Labor’s interpretive bulletin excluded tools, capital equipment and similar non-consumables not for shipment or resale from the definition of “goods.”<sup>281</sup> In April 1970, the Secretary deleted this restriction<sup>282</sup> but did not state positively that capital equipment was now considered to be “goods.” Since that time, however, he has argued in court that employees who handle such non-consumable items are handling “goods” within the meaning of the Act.<sup>283</sup>

In most cases the problem of whether an employer’s capital items are “goods” presents little problem. Most businesses of the size necessary for coverage will have employees with a more direct connection with commerce than merely handling equipment or similar non-consumable items that are not for resale and are not themselves shipped by the employer. Nevertheless, there is the possibility of unique enterprises of 250,000 dollars operating “locally,” and of small schools or laundries (whose minimum dollar volume is not

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279. See *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310 (1960); *10 E. 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578 (1945); S. REP. NO. 1487, *supra* note 165; S. REP. NO. 145, *supra* note 145.

280. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1392 (unabridged 1961) defines “material” as “the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical as a machine, tool, building, fabric is made. . . .”

281. 29 C.F.R. § 779.240(a)(1969).

282. 35 Fed. Reg. 5872 (1970).

283. See *Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir. 1972).

material) that have supplies manufactured locally, and whose only contact with commerce is through employees working with the employer's capital goods.

From 1938 until 1961, by virtue of the Act's definition of "goods," an employee was covered by his contact with "goods" only if they were destined to enter the stream of commerce. Only with the expansion of coverage to reach employers on the other end of the flow of commerce, who have employees working with "goods that have been moved in commerce," does a refined definition of the term "goods" become necessary. Unfortunately, Congress has not attempted any revision or redefinition of the 1938 definition of "goods" since 1961, and thus there is no relevant legislative history to provide insight into congressional thinking.

Because Congress in 1938 was clearly addressing itself to "goods" that were to be shipped by the employer, that interpretation of the term should continue to be applied unless to do so would frustrate the purposes of subsequent amendments. The concept of shipping goods to others necessarily excludes the concept of non-consumable capital items that are *received* for use in one's own business with no intent to transfer these items to others.

This limited view of "goods" does not frustrate the purpose of the 1961 and 1966 amendments. On the contrary, an interpretation of "goods" that excludes capital non-consumables appears to be consistent with the thrust of these amendments. If the contact with capital goods is sufficient to establish coverage, employee contact as a factor is rendered virtually meaningless. The nature of the business (schools, hospitals, construction, laundries) or the requisite dollar volume of sales would be the sole basis for determining coverage. While few employers may lack employees traditionally covered or who handle consumables that "have been moved in commerce," clearly no employer lacks employees who walk on floors, work at desks, operate machinery, or handle tools, many of which will have been produced out of state. By necessity all employees either will be themselves engaged in commerce, handle products for sale, utilize consumable items, or work with capital goods. Furthermore, it would be difficult, if not impossible, to distinguish between types of capital goods so that some limiting factor could be devised. There is probably no legal difference between a delivery boy's bicycle and an operating engineer's bulldozer, among a hammer, a desk, and a doorknob.

In making employee contact with commerce a factor for coverage, Congress could not have been engaging in a futile act by including an all inclusive factor applying to every living person in society

today. When Congress desired to cover a whole class of employees without regard to contact with commerce it specifically did so, as in its passage of the 1974 amendments extending coverage to domestic employees on the basis of "affecting commerce."<sup>284</sup> Furthermore, the courts have all assumed that employee contact with commerce in some way limited the usual coverage of the Act. Assuming, then, that Congress did not engage in a futile act, and did not desire to utilize the nature or size of the business as the sole criterion for establishing coverage, the definition of "goods" must be limited to exclude capital non-consumables.

Secondly, in the example above of a "local" businessman with a secretary working at a typewriter, and a delivery boy riding a bicycle, one might argue that such business activity does not even rise to the level of "affecting commerce" and thus Congress could not *constitutionally* have legislated to regulate this conduct.<sup>285</sup> More importantly, because Congress avowedly did not exercise all of its constitutional power to regulate all that affected commerce, we must assume that even if this small local employer "affected commerce," Congress stopped short of regulating his wage-hour policies. The Supreme Court has indicated more than once that Congress desired to reserve an area of local concern for local regulation.<sup>286</sup>

Even if all observers agree that "goods" cannot be interpreted to include capital goods, the question remains as to how this can be done consistently with the broad definition of "goods" in the Act. First, upon looking to the historical context and intent of the Act, it is clear that Congress in 1938 had no idea of "goods" including capital items that were not being shipped by the employer. Nothing in the 1961, 1966 or 1974 amendments requires an alteration of that view. In fact, as pointed out, to alter and expand the idea of "goods" to cover capital items renders meaningless the supposed limiting factor of employee contact.

Secondly, the "ultimate consumer" proviso can be dusted off and applied to capital items. The courts' conclusion that this proviso is inapplicable to consumable items utilized by the employer in providing services to customers does not preclude a distinction be-

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284. Pub. L. No. 93-259, § 7(a) (Apr. 8, 1974).

285. Congress obviously believes it has the power to regulate such purely "local" conduct if it desires. This is evidenced by the 1974 amendments in which Congress found that domestic service affects commerce, and proceeded to apply the minimum wage protection to domestic service and baby sitters. Pub. L. No. 93-259, § 7(a) (Apr. 8, 1974). See *Daniel v. Paul*, 395 U.S. 298 (1969); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942), in which extremely tenuous contact with commerce was held to support the congressional regulation.

286. See cases and materials cited note 279 *supra*.

tween consumable and non-consumable items. The fruits and benefits of the consumable items are more or less directly passed on to the consumer who pays the employer directly for these goods.<sup>287</sup> With respect to capital items, however, the employer is more truly the consumer. Although the furnishing of goods and services ultimately depends upon capital, and payment to the employer is in part allocated to the amortization of capital expenditures, the connection between the good or service provided and capital is more attenuated than it is between a service and a consumable item directly necessary for its performance. Furthermore, if the "ultimate consumer" proviso is to have any current coverage meaning, such meaning must derive from its application to the employer's capital goods. Therefore, when the employer purchases capital items handled by his employees, the capital item is now in the hands of the "ultimate consumer" thereof, and thus can no longer be considered "goods" within the meaning of the Act.

This analysis, however, does not dispose of the new term "materials," which is not graced by an "ultimate consumer" proviso. Regardless of the limitation that can be placed on the term "goods," unless capital goods are not "materials" then coverage still will be established by the existence of employees handling tools, equipment and similar items. As previously mentioned, the term "materials" has a relatively limited definition,<sup>288</sup> relating more to components or ingredients of a product or service and suggesting a unit of a larger element. The dictionary definition expressly distinguishes "material" from capital items. In short, it is hard to think of a desk, a bicycle, or a bulldozer being a "material." Furthermore, there is no indication that the 1974 Congress intended to give it a more expanded meaning,<sup>289</sup> since the word was added to remove any ambiguity surrounding the term "goods" and its application to consumable items utilized in the performance of a service. That limited intent should be honored.

To summarize briefly, by 1974 the term "goods," after some contrary authority, was being applied to consumable supplies utilized by service employers, and "ultimate consumer" proviso was not being utilized to exclude these supply items. The courts viewed the customer rather than the employer as the ultimate consumer of these supplies. Ultimately, any lingering confusion concerning the

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287. See *Goldberg v. Furman Beauty Supply, Inc.*, 300 F.2d 16 (3rd Cir. 1962), where, interpreting the retail exemption of § 13(a)(2) of the Act (29 U.S.C. § 213(a)(2) (1970)), the court believed that lotions and shampoos placed on the hair of customers were being "resold" to the patron of the beauty parlor.

288. See material cited note 280 *supra*.

289. See S. REP. No. 690, *supra* note 261.



application of "goods" to these items was rendered moot by the addition of the term "materials," a term that was not encumbered by any ultimate consumer caveat. Although there is no direct authority on point, it would appear, however, that the "ultimate consumer" proviso would be applicable to capital items utilized by the employer in the production of goods or services. Unlike consumables, capital items at rest and at use on the premises of the employer are in the hands of the "ultimate consumer" and consequently are not "goods." The 1974 term "materials" is so limited in its scope and purpose that it likewise would not appear applicable to capital items. This amendment appears not to have expanded "goods" beyond making it clear that consumable items utilized by service employees would serve as a basis for coverage.

#### IV. CONCLUSION

Unlike sister statutes of special reform, where litigation over coverage has been rare, the history of the FLSA has been a battle over the fundamental question of coverage. The term "affecting commerce" has determined the application of most statutes, and has long since been resolved on constitutional grounds. Congress, however, did not use those magic words when it first passed and then amended the FLSA. As it existed from 1938 through 1961, the Act looked solely to employee contact with commerce through their "engaging in commerce" or "production of goods for commerce"—two complicated terms of art. In 1961 Congress added, for the first time, the extremely complicated concept of "enterprise coverage." With subsequent amendments in 1966 the concept was refined and the required dollar volume of "sales made or business done" was reduced to 250,000 dollars. Furthermore, the 1974 amendments gave coverage to domestic servants, public employees, and removed any lingering ambiguity as to necessary employee contact with materials that had "come to rest."

The result has been that because of the expansive interpretations of traditional phrases "engaged in commerce" or "production of goods for commerce" many employees of some small or "local" businessmen are covered by the Act. Because of the lower dollar volume, already depreciated by inflation, and the minimal employee contact with commerce, all but a few small pockets of enterprises are covered. Yet, the complicated, esoteric coverage provisions remain. Congress should recognize this reality. As it exists now coverage generally meets, seldom falls below, and perhaps is asserted occasionally beyond the congressional power to regulate that which "affects commerce." The Act should be amended to wipe

away this confusion by covering all employers "affecting commerce." Should Congress desire to exempt certain employers because of their businesses or even their size, this can be accomplished more easily through exceptions than by the complicated concepts of "engaged in commerce," "production of goods for commerce," and "enterprise engaged in commerce." These archaic problems of interpretation provide little substance, many traps to understanding, and much litigation. They should be removed.

