COVERAGE OF APARTMENT BUILDING MAINTENANCE PERSONNEL UNDER THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974

Brennan v. Jaffey, 380 F. Supp. 373 (D. Del. 1974)

Defendant, in the business of leasing apartments, employed maintenance personnel who worked in defendant's buildings.[1] Janitorial supplies, purchased from manufacturers and local wholesalers and retailers, were used by the workers to maintain and repair defendant's property. The Secretary of Labor brought an action[2] to enjoin defendant from violating the Fair Labor Standards Act.[3] Defendant moved for summary judgment, alleging that his employees were not covered by the Act.[4] The United States District Court for the District of Delaware granted the

1. Jobs performed by the maintenance personnel included cleaning apartments at the expiration of tenancies, minor carpentry repairs, minor electrical work, and maintenance of heating and air conditioning units. Brennan v. Jaffey, 380 F. Supp. 373, 375 (D. Del. 1974).

2. The defendant maintained that a prior decision, Brennan v. Apartment Communities, Corp., 360 F. Supp. 1255 (D. Del. 1973) had held the Fair Labor Standards Act, *see* note 3 *infra*, inapplicable to similar activities. In that case, the defendant-corporation successfully argued that it was itself the "ultimate consumer," *see* note 14 *infra*, of the supplies used by the maintenance personnel. 360 F. Supp. at 1259, *citing with approval* Hamlet Ice Co. v. Fleming, 127 F.2d 165 (4th Cir.), *cert. denied*, 317 U.S. 634 (1942); Shultz [*sic*] v. Arnheim & 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 (3d Cir. 1971), *rev'd sub nom.* Brennan v. Arnheim & Neely, Inc., 410 U.S. 512 (1973).

In *Apartment Communities*, Judge Steel distinguished two cases, Goldberg v. Furman Beauty Supply, Inc., 300 F.2d 16 (3d Cir. 1962) (lotions and creams used by beauty shop passed on to patrons), and Hodgson v. David M. Woolin & Son, Inc., 65 CCH Lab. Cas. 44,865 (S.D. Fla. 1971) (household appliances, purchased by building corporation, passed on to tenants), and rejected outright two other cases, Hodgson v. Rivermont Corp., 71 CCH Lab. Cas. 45,962 (M.D. Fla. 1973), and Sharp v. Warning Holding Co., 70 CCH Lab. Cas. 45,710 (D. Minn. 1972). Brennan v. Apartment Communities Corp., *supra* at 1260-61.

3. Act of June 25, 1938, ch. 676, 52 Stat. 1060, *as amended*, Act of August 9, 1939, ch. 605, 53 Stat. 1266, Act of July 20, 1949, ch. 352, 63 Stat. 446, Fair Labor Standards Amendments of 1949, ch. 376, 63 Stat. 910, Fair Labor Standards Amendments of 1955, ch. 867, 69 Stat. 711, Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 88 Stat. 58, codified at 29 U.S.C. §§ 201-19 (1970, Supp. IV, 1974). Derendant allegedly violated provisions of the Fair Labor Standards Act §§ 6, 7, 11, 29 U.S.C. §§ 206, 207, 211 (1970, Supp. IV, 1974), which contain the minimum wage, overtime, and record keeping requirements of the Act.

4. Brennan v. Jaffey, 380 F. Supp. 373 (D. Del. 1974).

motion in part and denied it in part, and *held*: The 1974 amendments to the Fair Labor Standards Act preclude use of the ultimate consumer exclusion to deny coverage of the Act to apartment building maintenance personnel.[5]

The Fair Labor Standards Act[6] was intended to eliminate substandard labor conditions in occupations involved in interstate commerce.[7] As originally enacted, the Act covered only employees "engaged in commerce"[8] or in "the production of goods for commerce."[9] Amendments

5. Brennan v. Jaffey, 380 F. Supp. 373, 378-79 (D. Del. 1974).

6. 29 U.S.C. §§ 201-19 (1970, Supp. IV, 1974).

7. Fair Labor Standards Act § 2, 29 U.S.C. § 202 (1970, Supp. IV, 1974); *see* Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 135 F.2d 320 (5th Cir. 1943), *aff'd*, 321 U.S. 590 (1944). Although Congress invoked something less than its full plenary power under the commerce clause by using the language "in commerce" the Act has been construed to afford broad coverage.

8. Fair Labor Standards Act § 2(a), 29 U.S.C. § 202(a) (1970). "Commerce" is defined in § 3(b) of the Act, 29 U.S.C. § 203(b) (1970), as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." This definition extends to any channel of commerce, but workers are covered only if they are "in commerce." *See* McLeod v. Threlkeld, 319 U.S. 491 (1943); Overstreet v. North Shore Corp., 318 U.S. 125 (1943); Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943) (employees receiving interstate shipments). Determination of whether an employee is "engaged in commerce" may be made by reference to the use of the instrumentalities of commerce, the essentiality of a job to commerce, and the link between the employees and the instrumentalities. Thus, the Act applies to workers in transportation and communications jobs and to those directly connected with the instrumentalities of interstate commerce. *See, e.g.*, J.F. Fitzgerald Constr. Co. v. Pedersen, 324 U.S. 720 (1945) (repair of railroad bridges); Overstreet v. North Shore Corp., *supra* (toll road and drawbridge operators over a navigable waterway); Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942) (watchmen of an oil pipe line); Phillips v. Meeker Co-op. Light & Power Ass'n, 63 F. Supp. 733 (D. Minn. 1945), *aff'd*, 158 F.2d 698 (8th Cir. 1946) (maintenance workers on interstate power lines). The Act may extend to roads and highways, including their maintenance and repair. Walling v. McCrady Constr. Co., 60 F. Supp. 243 (W.D. Pa. 1945), *aff'd*, 156 F.2d 932 (3d Cir.), *cert. denied*, 329 U.S. 785 (1946). The shipment or receipt of goods that have used the instrumentalities of commerce may also invoke coverage. *See* Wirtz v. Wohl Shoe Co., 382 F.2d 848 (5th Cir. 1967) (clerical employees who prepare reports for out of state mailing); Cushway v. Stork Eng'r Co., 51 F. Supp. 568 (E.D. Mich. 1943), *aff'd per curiam*, 142 F.2d 463 (6th Cir. 1944); Walling v. L. Wieman Co., 52 F. Supp. 131 (E.D. Wisc.), *aff'd*, 138 F.2d 602 (7th Cir. 1943). *But see* Walling v. Mutual Wholesale Food & Supply Co., 46 F. Supp. 939, 945 (D. Minn. 1942), *modified*, 141 F.2d 331 (8th Cir. 1944).

More generally, since "engaged in commerce" covers only employees who are "*in* commerce," the broad test is whether an employee's activities are so closely related to the movement of commerce to be a part of it. Mitchell v. C.W. Vollmer & Co., 349 U.S. 427 (1955); McLeod v. Threlkeld, *supra*; Beneficial Fin. Co. v. Wirtz, 346 F.2d 340 (7th Cir. 1965); Mitchell v. Brown, 224 F.2d 359 (8th Cir.), *cert. denied*, 350 U.S. 875 (1955); Walling v. Consumers Co., 149 F.2d 626 (7th Cir. 1945); Noonon v. Fruco

Constr. Co., 140 F.2d 633 (8th Cir. 1943); Wirtz v. Sherman Enterprises, Inc., 229 F. Supp. 746 (D. Md. 1964). Courts have evaluated whether, without the particular service or occupation, commerce would be impeded or abated. Overstreet v. North Shore Corp., *supra*; Walling v. Jacksonville Paper Co., *supra*; Stewart-Jorden Distrib. Co. v. Tobin, 210 F.2d 427 (5th Cir.), *cert. denied*, 347 U.S. 1013 (1954). It is the activity of the employee, not the employer, that determines coverage. The percentage of time the employee dedicates to commerce in any given workweek is not determinative. *See* Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); United States v. Darby, 312 U.S. 100 (1941); Montalvo v. Tower Life Bldg., 426 F.2d 1135 (5th Cir. 1970); *cf.* Kelly v. Ford, Bacon & Davis, Inc., 162 F.2d 555 (3d Cir. 1947) (insubstantial though regular use of the mails not enough to invoke coverage).

The Act does not, however, reach every occupation "affecting" commerce. Congress invoked something less than its full plenary power under the commerce clause. Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960); Higgins v. Carr Bros. Co., 317 U.S. 572 (1943); A.B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942); United States v. Darby, *supra*; Wirtz v. Wohl Shoe Co., *supra;* Wirtz v. Ferguson, 317 F.2d 343 (5th Cir. 1963); Walling v. Mutual Wholesale Food & Supply Co., *supra*.

If an occupation is related to the continuity of commerce, it may be covered, but goods which have "come to rest" at a specific point, and an occupation at such a point, may not be "in commerce" and therefore not covered by the Act. *See* Davisson, *Coverage of the Fair Labor Standards Act*, 41 MICH. L. REV. 1060, 1067-72 (1943).

In one case, employees in trash collection were not covered even though they carried trash across state lines to dump it. *See* Barnett v. A-1 Scavenger Serv. Co., 65 CCH Lab. Cas. 44,672 (Mo. Ct. App. 1971). *But see* Schultz v. Instant Handling, Inc., 418 F.2d 1019 (5th Cir. 1969), which held that since trash removal was essential to defendant's operations, employees removing trash were covered under the "production of goods for commerce" language, *see* note 9 *infra*. *See also* 29 C.F.R. § 779.103 (1975); Note, *The Supreme Court and Fair Labor Standards, 1941-45*, 59 HARV. L. REV. 321 (1946).

9. Fair Labor Standards Act § 2(a), 29 U.S.C. § 202(a) (1970). Although "production" is not defined in the Act, "produced" is defined in § 3(j) of the Act, 29 U.S.C. § 203(j) (1970) (emphasis added):

> "Produced" means produced, manufactured, mined, handled or in any other manner worked on in any State; and . . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any *closely related* process or occupation *directly essential* to the production thereof, in any State.

The Fair Labor Standards Amendments of 1949, ch. 376, 63 Stat. 910, inserted "closely related," and substituted "directly essential" for the word "necessary" in the original Act. *See* H. WECHT, WAGE-HOUR LAW—COVERAGE 179-264 (1951) (change in language was an attempt to narrow the scope of this section while expanding the scope of employees "engaged in commerce," 29 U.S.C. § 202(a) (1970)).

The "engaged in . . . the production of goods for commerce" language has been held to reach all steps in a production process and all operations incident to the involvement of goods in commerce, even if there is no physical contact with the goods. *See, e.g.*, Mitchell v. C.W. Volmer & Co., 349 U.S. 427 (1955); A.B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942) (maintenance employees of a loft building crucial to lessees' operations by furnishing light, power, and heat); E.C. Schroder Co. v. Clifton, 153 F.2d 385 (10th Cir. 1946); Hertz Drivurself Stations, Inc. v. United States, 150 F.2d 923 (8th Cir. 1945).

Products sold or services rendered to customers who are in commerce can invoke coverage. Mitchell v. Raines, 238 F.2d 186 (5th Cir. 1956) (sale of lumber to state high-

in 1961[10] and 1966[11] expanded coverage of the Act to all employees of an "enterprise[12] engaged in commerce or in the production of goods

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way department for construction of roads used by mail carriers); Lewis v. Florida Power & Light Co., 154 F.2d 751 (5th Cir. 1946) (transmission of electric power interstate); Phillips v. Star Overall Dry Cleaning Laundry Co., 149 F.2d 416 (2d Cir. 1945) (cleaning of garments for another laundry which rented them to interstate customers); Hanson v. Lagerstrom, 133 F.2d 120 (8th Cir. 1943) (serving meals to interstate travelers).

The language "in any . . . manner working on goods" serves to broaden the term "produced," but the limiting language "closely related" and "directly essential" excludes those activities that are purely local in nature. *See* Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960); Mitchell v. Wade Lahar Constr. Co., 179 F. Supp. 551 (W.D. Ark. 1960), *aff'd*, 290 F.2d 408 (8th Cir.), *cert. denied*, 368 U.S. 992 (1961). A temporary delay in the production process or a temporary halt in commerce, however, will not negate coverage when it otherwise is appropriate. McComb v. Wyandotte Furniture Co., 169 F.2d 766 (8th Cir. 1948).

The employer's expectation that goods will move in commerce is a key factor in determining whether goods were produced "for commerce." *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (expectation is enough to invoke coverage whether the goods actually did so move); Bracey v. Luray, 138 F.2d 8 (4th Cir. 1943); Enterprise Box Co. v. Fleming, 125 F.2d 897 (5th Cir. 1942). The activities of the employee, however, are determinative of whether he is "engaged in . . . the production of goods." Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207 (1959); Wilson v. Reconstruction Fin. Corp., 158 F.2d 564 (5th Cir. 1946); Walling v. Mutual Wholesale Food & Supply Co., 141 F.2d 331 (8th Cir. 1944).

See generally George & Lambert, *Wage-Hour Coverage of the Fair Labor Standards Act*, 36 MINN. L. REV. 454 (1952); Leiter, *Coverage Confusion Under the Fair Labor Standards Act*, 13 LAB. L.J. 139 (1962); Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607, 611-25 (1972); 29 C.F.R. §§ 779.104, .105 (1975). Summarizing the difficulties of determining coverage under this portion of the Act, Justice Frankfurter noted that

> [t]o search for a dependable touchstone by which to determine whether employees are "engaged in commerce or in the production of goods for commerce" is as rewarding as an attempt to square the circle.

A.B. Kirschbaum Co. v. Walling, 316 U.S. 517, 520 (1942).

10. Act of May 5, 1961, Pub. L. No. 87-30, § 2, 75 Stat. 65, *as amended* 29 U.S.C. § 203 (1970).

11. Act of Sept. 23, 1966, Pub. L. No. 89-601, §§ 101-03, 80 Stat. 830-32, *as amended*, 29 U.S.C. § 203 (1970).

12. Section 3(r) of the Act, 29 U.S.C. § 203(r) (Supp. IV, 1974), states in relevant part:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements . . . .

Thus, the test of whether business activities constitute an enterprise turns on whether they are a "unified operation" or under "common control," whether the activities are "related," and whether there is a "common business purpose." *See* Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966).

The "enterprise" concept was introduced into the law by the 1961 amendments

for commerce" in which the employees are "handling, selling, or otherwise working" on goods "that have been moved in or produced for commerce."[13] The Act, however, contains an "ultimate consumer"

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as a basis for a general extension of coverage. Prior to the 1961 amendments, the test of coverage was the work performed by the individual employee. To be covered, the employee himself had to be engaged in interstate commerce or the production of goods for interstate commerce. The business of the employer was not controlling. It was possible to have one employee in an establishment covered by the Act, while another employee working next to him would be outside the law's scope.

This was changed by the "enterprise" concept. An employee is within the Act's general coverage if, in any workweek, he is employed in "an enterprise engaged in commerce or in the production of goods for commerce." Under this concept, all the employees of a particular business unit may be covered by the Act, regardless of the relationship of their individual duties to commerce or the production of goods for commerce.

Willis, *supra* note 9, at 625, *quoting* BNA, THE WAGE AND HOUR LAW 1 (rev. ed. 1967). The effect of the amendment was to extend coverage to fellow employees. It was not intended to increase the number of employers subject to the Act. *See* Maryland v. Wirtz, 392 U.S. 183, 188 (1968).

A variety of business organizations have been held to be an enterprise. *See, e.g.*, Hodgson v Eunice Superette, Inc., 368 F. Supp. 639 (W.D. La. 1973) (slaughterhouse and retail grocery); Hodgson v. Leeco Gas Oil Co., 69 CCH Lab. Cas. 45,611 (M.D. Fla. 1972) (construction, management, maintenance, and sale of apartment houses); Hodgson v. Arlington Protective Agency, Inc., 68 CCH Lab. Cas. 45,362 (E.D. Va. 1972) (detective agency and protection agency); Hodgson v. Frisch's Dixie, Inc., 66 CCH Lab. Cas. 44,958 (W.D. Ky. 1971) (three drive-in restaurants); Hodgson v. Schlosberg-Schnider Co., CCH Lab. Cas. 49,704 (E.D. Va. 1971) (real estate firm and apartment complexes); Hodgson v. Greene's Propane Gas Serv., 64 CCH Lab. Cas. 44,630 (M.D. Ga. 1971) (dependent corporations, all family owned); Hodgson v. Harvey Motor Co., 20 BNA WH Cases 493 (W.D. Tex.), *aff'd*, 461 F.2d 847 (5th Cir. 1971) (new car sales and auto insurance); *cf.* Hodgson v. University Club Tower, Inc., 20 BNA WH Cases 563 (N.D. Okla. 1971) (two apartment buildings and a hotel; no "common business purpose").

13. Section 3(s) of the Act, 29 U.S.C. § 203(s) (Supp. IV, 1974) (emphasis added), *amending* 29 U.S.C. § 203(s) (1970), states in relevant part:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has 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 by any person, and which—
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> (1) . . . is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 . . . .

Section 3(s) was amended to read as above by the Act of April 8, 1974, Pub. L. 93-259, § 6(a)(5), 88 Stat. 58, by adding the emphasized words and by deleting "including" before "employees."

Under the enterprise concept, the "stream of commerce" test of coverage was rejected. Courts look to whether the "employer's activities . . . are such as to exert a substantial impact upon commerce . . . ." Wirtz v. Mayer Constr. Co., 291 F. Supp. 514, 517 (D.N.J. 1968). In this regard,

> [C]ongress' overall view was that the local activities of employers subse-

quent to interstate movement of goods are equally vital to such general welfare (of workers) and hence entitled to the same legislative consideration and regulation as that originally extended to the handling of goods by employees engaged in commerce, or in the production of goods for such commerce, before the goods came to rest.

Id. at 518 (footnote omitted). *See also* H.R. 75, 87th Cong., 1st Sess. (1961); S. 145, 87th Cong., 1st Sess. (1961).

By bringing under the Act all employees of an enterprise if any of its workers qualified, Congress intended to expand greatly the coverage of the Act. *See* Wirtz v. Melos Constr. Corp., 408 F.2d 626 (2d Cir. 1969). *See also* Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974) (state institutions can be enterprises; no ultimate consumer exclusion since goods passed on to inmates); Brennan v. Hattan, 474 F.2d 9 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1974) (installation and repair of air conditioning units); Brennan v. Parnham, 366 F. Supp. 1014 (W.D. Pa. 1973) (towing vehicles interstate brought enterprise into commerce); Brennan v. S & M Enterprises, 362 F. Supp. 595 (D.D.C. 1973) (public parking garage); Brennan v. Ventimiglia, 356 F. Supp. 281 (N.D. Ohio 1973) (servicing cars and selling products that originated out of state).

In Brennan v. Arnheim & Neely, Inc., 410 U.S. 512 (1973), a real estate management company that managed eight commercial office buildings under contract with the owners was held to be an enterprise, since the company employed all the maintenance employees in the various buildings. A fully integrated management corporation directed operations, and as such it was irrelevant that the owners of the individual buildings were agents of defendants.

Since "goods" as used in § 3(s) is defined only in § 3(i), 29 U.S.C. § 203(i) (1970), the ultimate consumer exclusion has been considered applicable to the determination whether an enterprise is "engaged in the production of goods for commerce," or has employees "handling goods." *See, e.g.*, Brennan v. Industrial America Corp., 371 F. Supp. 1164 (M.D. Fla. 1974). The difference, however, between the statutory language of § 3(s), *quoted in* note 13 *supra*, and 3(j), *quoted in* note 9 *supra*, has been held to render the "come to rest" doctrine, *see* note 8 *supra*, inapplicable to enterprise coverage. Since under § 3(s) it is only necessary that employees have worked on goods that "have been moved in" commerce by any person, the position of goods in the stream of commerce is irrelevant to determining enterprise coverage. Schultz v. Kip's Big Boy, Inc., 431 F.2d 530, 531 (5th Cir. 1970); Schultz v. Deane-Hill Country Club, Inc., 310 F. Supp. 272 (E.D. Tenn. 1969), *aff'd per curiam*, 433 F.2d 1311 (6th Cir. 1970); Hodgson v. Rivermont Corp., 71 CCH Lab. Cas. 45,962 (M.D. Fla. 1973).

> It is immaterial . . . that the goods may have "come to rest" within the meaning of the term "in commerce" as interpreted in other respects, before they are handled, sold, or otherwise worked on by the employees of an enterprise. . . . Thus, employees will be considered to be "handling, selling, or otherwise working on goods that have been moved in . . . commerce" where they are engaged in the described activities on "goods" that have moved across State lines at any time in the course of business, such as from manufacturer to the distributor . . . .

29 C.F.R. § 779.242 (1975).

The "purely local" doctrine has survived, however. *See, e.g.*, Robertson v. Dailey Elec. Supply Co., 369 F. Supp. 1069 (N.D. Tex. 1974). But where

> [d]efendant's employees also use regularly goods which although purchased locally have previously moved in interstate commerce . . . this is sufficient to satisfy the test used to determine whether employees are engaged in interstate commerce. § 203(s) extends coverage to enterprises which may not purchase goods directly from out-of-state but which do have employees who handle

exclusion, which creates an exemption from the definition of "goods."[14]

"goods that have been moved in . . . commerce" and which have come to rest within the state.

Schultz v. Dean-Hill Country Club, *supra* at 277. *See* Montalvo v. Tower Life Bldg., 426 F.2d 1135 (5th Cir. 1970) (small amount of time engaged in interstate activity irrelevant); Wirtz v. Mayer Constr. Co., *supra*; Wirtz v. Melos Constr. Co., *supra*; Schultz v. Union Trust Bank, 297 F. Supp. 1274 (M.D. Fla. 1969); Hodgson v. Howard, 69 CCH Lab. Cas. 45,602 (N.D. Ala. 1972) (laundry supplies); Wirtz v. Washeterias, 59 CCH Lab. Cas. 43,641 (D.C.Z. 1968) (laundry supplies). *See generally* Donahue, *Wage and Hour Developments—The Fair Labor Standards Act*, 15 NYU CONF. LAB. 137 (1962); Nystrom, *Current Problems In the Administration of Wage-Hour Laws*, 3 GA. L. REV. 362, 368-71 (1969); Willis, *supra* note 9, at 628-32.

There is also a volume of business requirement. The dollar volume of business done by a firm managing rental property is measured by the gross rental receipts received, rather than from the management's commission fees. Petrlik v. Community Realty Co., 347 F. Supp. 638, 640 (D. Md. 1972). The gross receipts of all parts of an enterprise must be accumulated to determine the volume of business. Wirtz v. Jernigan, 405 F.2d 155, 159 (5th Cir. 1968); Schultz v. Dean-Hill Country Club, Inc., *supra; accord*, Wirtz v. Columbian Mut. Life Ins. Co., 246 F. Supp. 198 (W.D. Tenn. 1965), *aff'd*, 380 F.2d 903 (6th Cir. 1967). Only those parts of a business organization that are part of the "enterprise" may be included in determining the volume of business. Schultz v. Mack Farland & Sons Roofing Co., 413 F.2d 1296 (5th Cir. 1969).

14. "Goods" is defined in 29 U.S.C. § 203(i) (1970):

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof but 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.

Generally, the definition includes articles or subjects of commerce of any type, tangible or intangible. *See, e.g.*, Bozant v. Bank of N.Y., 156 F.2d 787 (2d Cir. 1946); Darr v. Mutual Life Ins. Co., 74 F. Supp. 80 (S.D.N.Y. 1947); Lenroot v. Western Union Tel. Co., 52 F. Supp. 142 (S.D.N.Y. 1943), *aff'd*, 141 F.2d 400 (2d Cir.), *rev'd on other grounds*, 323 U.S. 490 (1945) (telegraph messages); Thomas v. Associated Cleaning Contractors, Inc., 35 CCH Lab. Cas. 71,724 (N.D. Ga. 1958). If any ingredient of an item is a good that has moved interstate, it is possible that the entire item is within the statutory framework. *See* Mitchell v. Hooper Equip., 279 F.2d 893 (5th Cir. 1960); McComb v. Super-A Fertilizer Works, 165 F.2d 824 (1st Cir. 1948); Bracey v. Luray, 138 F.2d 8 (4th Cir. 1943).

"Goods" includes documents that are essential to a business. Willmark Serv. System, Inc. v. Wirtz, 317 F.2d 486 (8th Cir.), *cert. denied*, 375 U.S. 897 (1963); Mitchell v. Welcome Wagon, Inc., 139 F. Supp. 674 (W.D. Tenn. 1954), *aff'd*, 232 F.2d 892 (6th Cir. 1956); Darr v. Mutual Life Ins. Co., *supra* (insurance policies). *But see* Stevens v. Welcome Wagon Int'l, Inc., 390 F.2d 75 (3d Cir. 1968) (sending reports to home divisional offices only incidental to operations); Billeaudeau v. Temple Associates, 213 F.2d 707 (5th Cir. 1954) (mailing reports to home office not covered since commerce does not include commerce with oneself). Building and construction materials can be "goods," Wirtz v. Mayer Constr. Co., 291 F. Supp. 514 (D.N.J. 1968); Donahue v. George A. Fuller Co., 104 F. Supp. 145 (D.R.I. 1952), but such materials do not trigger coverage of the Act if they are in the hands of an ultimate consumer. *See* Cooper v. Rust Eng'r Co., 84 F. Supp. 149 (W.D. Ky. 1949), *aff'd*, 181 F.2d 107 (6th Cir.), *cert. denied*, 340 U.S. 879 (1950). *See* note 15 *infra.*

The receipt of goods by an employer who withdraws them from commerce with no intention of further passing them through commerce does not invoke coverage of the Act.[15]

Before the 1961 and 1966 amendments, coverage of the Act and its applicability to maintenance personnel depended upon the work performed by individual employees.[16] Since the addition of "enterprise"

See generally George & Lambert, *supra* note 9, at 481-85; WECHT, *supra* note 9, at 148-68.

15. The availability of the exclusion hinges, to some extent, on the particular fact pattern presented. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968); Powell v. United States Cartridge Co., 339 U.S. 497 (1950); Hamlet Ice Co. v. Fleming, 127 F.2d 165 (4th Cir.), *cert. denied*, 317 U.S. 634 (1942); Irby v. Davis, 311 F. Supp. 577 (E.D. Ark. 1974) (materials in concrete slabs used in homes are useless in themselves and thus the home-owner, not the builder, was the ultimate consumer); Brennan v. Patio Cleaners, Inc., 73 CCH Lab. Cas. 46,427 (S.D. Ohio 1974) (dry cleaning supplies; customers were the ultimate consumers); Brennan v. Industrial America Corp., 73 CCH Lab. Cas. 46,417 (M.D. Fla. 1974) (gasoline used by trash collection company; company was the ultimate consumer); Hodgson v. Unified School Dist. No. 490, 73 CCH Lab. Cas. 46,317 (D. Kan. 1973) (school supplies moved in commerce; students were ultimate consumers); Futrell v. Columbia Club, Inc., 66 Lab. Cas. 44,944 (S.D. Ind. 1971) (private club not the ultimate consumer since food and other items resold); Glick v. Montana, 65 CCH Lab. Cas. 44,734 (D. Mont. 1971) (books for school children are not in the hands of the ultimate consumer even though state retains possession).

16. Before enterprise coverage was introduced in 1961, the Act covered only "employees engaged in commerce or the production of goods for commerce." *See, e.g.*, Fair Labor Standards Act §§ 6, 7, 29 U.S.C. §§ 206, 207 (1970).

Some cases have found maintenance personnel to be "engaged in commerce." Brennan v. Wilson Bldg., Inc., 478 F.2d 1090 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310 (8th Cir. 1946) (retail oil stations); Walling v. Atlantic Greyhound Corp., 61 F. Supp. 992 (E.D.S.C. 1945) (bus terminal); Fleming v. American Stores Co., 42 F. Supp. 511 (E.D. Pa. 1941), *modified*, 133 F.2d 840 (3d Cir. 1942) (warehouse).

Other cases have found it necessary to rely upon the "production of goods for commerce" language to extend coverage to maintenance personnel. Borden Co. v. Bordella, 325 U.S. 679 (1945); Nunn's Battery & Elec. Co. v. Wirtz, 335 F.2d 599 (5th Cir. 1964); *cf.* Thomason v. Alester G. Furman Co., 222 F.2d 421 (4th Cir.), *cert. denied*, 350 U.S. 865 (1955).

The Supreme Court established the limits of coverage under the "production of goods for commerce" language in three cases. In A.B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942), space in a loft building was rented to persons producing goods for interstate commerce. The work of the maintenance personnel was found to be "necessary to the production" as the Act then defined coverage, and the workers were covered. On the other hand, in 10 East 40th St. Bldg., Inc. v. Callus, 325 U.S. 578, 583 (1945), the Court found that "[r]unning an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods." In Borden Co. v. Bordella, *supra*, the Court reasoned that the interstate nature of the tenant's business did not invoke coverage of the maintenance workers unless the employees met the tests of relatedness and essentiality to the production process, but

coverage, application of the Act to maintenance personnel has, in many cases, turned on the availability of the ultimate consumer exclusion and its conflict with the intended broad coverage of the Act.[17] In *Brennan v. Apartment Communities Corp.*,[18] the building owner was held to be an ultimate consumer since the supplies handled by its maintenance personnel were neither resold nor passed on to tenants.[19] In *Brennan v.*

found that when the building was owned by an interstate producer who occupied most of the building, the maintenance personnel were covered. *See* Johnson v. Dallas Downtown Dev. Co., 132 F.2d 287 (5th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943).

In response to the local test of *10 East 40th St. Bldg., Inc.*, and to determine the relatedness and essentiality of maintenance workers to commerce, the courts established a 20 percent rule: If 20 percent of the tenants of a building or 20 percent of the floor space is engaged in commerce or the production of goods for commerce, the employees are held to have a sufficient nexus to commerce or production for commerce that they are covered. *See, e.g.*, Russell Co. v. McComb, 187 F.2d 524 (5th Cir. 1951) (85 percent); Ullo v. Smith, 177 F.2d 101 (2d Cir. 1949); Roberg v. Phipp's Estate, 156 F.2d 958 (2d Cir. 1946); Schultz v. Isaac T. Cook Co., 314 F. Supp. 461 (E.D. Mo. 1970) (5 out of 125 tenants insufficient); *cf.*, Borden v. Bordella, *supra*; Schultz v. Blaustein Indus., Inc., 321 F. Supp. 998 (D. Md. 1971) (85 percent).

An insufficient nexus between maintenance employees and the production process was found in Hunter v. Madison Ave. Corp., 174 F.2d 164, 166 (6th Cir.), *cert. denied*, 338 U.S. 836 (1949), *citing with approval* 10 E. 40th St. Bldg. v. Callus, 325 U.S. 578 (1945). *See also* Rucker v. First Nat'l Bank, 138 F.2d 699 (10th Cir.), *cert. denied*, 312 U.S. 769 (1943); Ware v. Guilford Bldg., Inc., 313 F. Supp. 1061 (M.D.N.C. 1969), *aff'd per curiam*, 427 F.2d 1368 (5th Cir. 1970).

See generally Willis, *supra* note 9, at 622-24.

17. Note that, while traditional coverage is still applied, *see, e.g.*, Schultz v. Blaustein Indus., Inc., 321 F. Supp. 998 (D. Md. 1971), the broader concepts of enterprise coverage often obviate the question of traditional coverage, *see, e.g.*, Schultz v. Falk, 439 F.2d 340, 345 n.11 (4th Cir.), *cert. denied*, 404 U.S. 827 (1971).

Under the enterprise concept, workers are covered if they engaged in "handling, selling or otherwise working on *goods* that *have been moved* in or *produced* for commerce . . . ." Fair Labor Standards Act § 3(s), 29 U.S.C. § 203(s) (1970) (emphasis added). A conflict arises when a worker is engaged in handling supplies that "have been moved" in commerce or were "produced" for commerce, and thus apparently capable of bringing the worker within coverage, but the supplies are such that the employer will consume them, making the employer an ultimate consumer and thus taking the supplies out of the definition of "goods," *see* note 14 *supra*. The use of the terms "have been moved" and "produced" implies a congressional intent to cover goods after they have left interstate commerce, while the ultimate consumer exclusion explicitly exempts such supplies in many cases. *See generally* Note, *Fair Labor Standards Act—Expanded Coverage For Building Employees Under the Enterprise Doctrine*, 20 WAYNE L. REV. 903 (1974).

18. 360 F. Supp. 1255 (D. Del. 1973).

19. *Accord*, Schultz 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); Schultz v. Wilson Building, 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). In these cases, supplies handled by maintenance workers of an office building were not "goods" because the

Dillion,[20] the Court of Appeals for the Tenth Circuit held that, since the cost of supplies used by maintenance personnel was passed on to tenants in the form of rent, the tenants rather than the owner were the ultimate consumers and the maintenance personnel were covered.[21]

Coverage of the Act was extended by amendment in 1974[22] to reach the handling of "goods *or materials*" that moved in commerce. Congress sought to expand and clarify coverage, and specifically criticized several cases that had narrowly construed the statute's coverage language.[23]

Against this background, the court in *Brennan v. Jaffey*[24] held that, prior to the 1974 amendments, the employees were not within the Act's coverage.[25] The court refused to accept the *Dillion* reasoning that the building tenants, not the owner, were ultimate consumers, labeling it a "tortured interpretation."[26] Reaffirming *Apartment Communities*, the

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building owners were held to be ultimate consumers. *See* note 14 *supra*. This interpretation by the district courts was criticized in S. REP. No. 93-690, 93d Cong., 2d Sess. 17 (1974). *See* note 23 *infra* and accompanying text. In Sharp v. Warner Holding Co., 70 CCH Lab. Cas. 45,710 (D. Minn. 1972), the use of cleaning supplies by apartment house maintenance employees on a regular and recurring basis to satisfy tenants' needs established coverage. The employer constituted an enterprise, and the ultimate consumer exclusion was seen as contemplating only the use of items for an organic part of a business on a nonrecurring basis.

The effect of the exclusion is to exclude employees "whose enterprise would be within the coverage of the Act on disparate occasions only because of extraordinary and non-recurring purchases." *Id.* at 45,714.

20. 483 F.2d 1334 (10th Cir. 1973).

21. *Accord*, Hodgson v. Rivermont Corp., 71 CCH Lab. Cas. 45,962 (M.D. Fla. 1973); Mansdorf v. Ernest Tew & Associates, 69 CCH Lab. Cas. 45,595 (M.D. Fla. 1973).

22. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(5), 88 Stat. 58, *amending* 29 U.S.C. § 203(s) (1970) (codified at 29 U.S.C. § 203(a) (Supp. IV, 1974)).

23. *See* S. REP. No. 93-690, 93d Cong., 2d Sess. 17 (1974). The Senate Report reasoned that

> a few district courts have erroneously construed the "handling" clause as being inapplicable to employees who handle goods used in their employer's own commercial operations . . . .

Id., citing Schultz v. Wilson Bldg., Inc., 320 F. Supp. 664 (S.D. Tex.), *aff'd on other grounds*, 478 F.2d 1090 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); Schultz v. Travis-Edwards, Inc., 320 F. Supp. 348 (W.D. La. 1970), *rev'd on other grounds*, 465 F.2d 1050 (5th Cir. 1970), *cert. denied*, 409 U.S. 1076 (1972). The report, however, did not cite *Apartment Communities, see* notes 18 & 19 *supra* and accompanying text.

24. 380 F. Supp. 373 (D. Del. 1974).

25. *Id.* at 377. That defendant constituted an enterprise within the meaning of § 3(r) of the Act, 29 U.S.C. § 203(r) (1970), was conceded for the purpose of the motion. *Id.* at 375.

26. This reasoning [of *Dillion*], it seems to this Court, is unrealistic and re-

court found that the building owner was the ultimate consumer. Since the employees did not handle "goods"[27] as defined in the Act, the employees were not covered, and dismissal of the claim was affirmed.

As to the postamendment allegations, however, the court refused to grant summary judgment. Although the court reasoned that the added term "materials" was synonymous with "goods," it noted that the legislative history of the 1974 amendment clearly indicated a congressional intent to "clarify" the terms of enterprise coverage[28] and endorse the *Dillion* construction of the coverage language. The similarity of *Apartment Communities* to cases criticized in the Senate Report on the 1974 amendments placed *Apartment Communities* "at variance with the view which Congress expressed in 1974."[29] Consequently, the court refused to dismiss the postamendment allegations.[30] The court reasoned, however, that the intent of the 1974 Congress could not be imputed to an earlier Congress and refused to apply this result to the pre-1974 allegations.[31]

Although the legislative history of the 1974 amendments did not expressly disapprove *Apartment Communities*, independent grounds existed for reconsidering the decision. Generally, the Act is held to be remedial in nature[32] and thus given a liberal construction.[33] Although

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flects a tortured interpretation of the meaning normally attributed to the "ultimate consumer" concept.

Id. at 377. The court rejected plaintiff's argument that the payment of rent constituted a purchase of the supplies by simply noting that the tenant acquired no title to the light bulbs or plumbing components handled by the maintenance personnel. *Id.* at 377, n.3.

27. *Id.* at 378; *see* note 14 *supra.*

28. *Id.* at 378-79. However, the legislative history "meant only to clarify the meaning which it (Congress) believed § 203(s) had theretofore rather than to expand its pre-existing coverage." *Id.*

29. 380 F. Supp. at 379. The court noted that although *Apartment Communities* was not cited in the Senate Report, "its holding was essentially the same as those portions of *Travis-Edwards* and *Wilson Building* disapproved of by the Report." *Id.*

30. *Id.* at 379.

31. "The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* at 379, *citing* United States v. Price, 361 U.S. 304, 313 (1960). Further, alluding to interpretations of the antitrust statutes, the court stated, "'How members of the 1914 Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act.'" *Id., quoting* United States v. Wise, 370 U.S. 405 (1962).

32. *See* A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945); Wirtz v. Ti Ti Peat Humus Co., 373 F.2d 209 (4th Cir.), *cert. denied*, 389 U.S. 834 (1967); Mitchell v. Ballenger Paving Co., 299 F.2d 297 (5th Cir.), *cert. denied*, 370 U.S. 922 (1962); McComb v. Farmers Reservoir & Irrigation Co., 167 F.2d 911 (10th Cir. 1948); Fleming v. Warshawski & Co., 123 F.2d 622 (7th Cir. 1941).

33. *See, e.g.*, Mitchell v. C.W. Vollmer & Co., 349 U.S. 427 (1955); Schultz v.

"goods" was broad enough to include the supplies involved in *Apartment Communities* and the pre-amendment allegations in *Jaffey*, the ultimate consumer exclusion prevented coverage. Yet an arguable purpose of the exclusion is to ignore innocent violations of the "hot goods" provision of the Act,[34] which prohibits the transportation or sale of goods produced under substandard labor conditions. The rental of property can be said to be such a sale, and the exclusion was intended to protect innocent consumers[35] such as tenants, but not landlords.

The maintenance supplies involved in the pre-amendment allegations in *Jaffey* fell within the continuity of commerce doctrine,[36] which suggests that goods moving in commerce are not exempt simply because they have come to a temporary standstill in their passage through commerce. The delay between the defendant's purchase and the tenants' receipt of benefit would therefore be irrelevant.[37] The "come to rest" doctrine would not be applicable in retort, since it need not be considered under enterprise coverage.[38] It is also possible that reliance on the ultimate consumer exclusion under enterprise coverage is misplaced, since Congress intended the "volume of business" prerequisite to be the primary limiting factor.[39]

Mack Farland & Sons Roofing Co., 413 F.2d 1296 (5th Cir. 1969); Lofther v. First Nat'l Bank, 138 F.2d 299 (7th Cir. 1943); Ralph Knight, Inc. v. Mantel, 135 F.2d 514 (8th Cir. 1943); Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 135 F.2d 320 (5th Cir. 1943), *aff'd*, 321 U.S. 590 (1944); Consolidated Timber Co. v. Womack, 132 F.2d 101 (9th Cir. 1942).

Exemptions are usually construed narrowly. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960); Mitchell v. Kentucky Fin. Co., 359 U.S. 290 (1958); Wirtz v. Jernigan, 405 F.2d 155 (5th Cir. 1968).

34. Fair Labor Standards Act § 15, 29 U.S.C. § 215 (1970). As to the notion that the purpose of the ultimate consumer exclusion was to protect against these provisions, see Powell v. United States Cartridge Co., 339 U.S. 497, 514 n.16 (1950); Brennan v. Dillion, 483 F.2d 1334 (10th Cir. 1973); Hodgson v. David M. Woolin & Son, Inc., 65 CCH Lab. Cas. 44,865 (S.D. Fla. 1971); Gorden v. Paducah Ice Mfg. Co., 41 F. Supp. 980 (W.D. Ky. 1941).

35. *See* Sharp v. Warner Holding Co., 70 CCH Lab. Cas. 45,710 (D. Minn. 1972); S. REP. No. 1487, 89th Cong., 2d Sess. (1966).

36. *See* notes 9 & 13 *supra.*

37. *Id.*

38. *See* note 13 *supra.*

39. *See* Sharp v. Warner Holding Co., 70 CCH Lab. Cas. 45,710 (D. Minn. 1972).

> Finally the [dollar volume test] in the committee bill is not the constitutional standard for coverage. The constitutional standard for coverage is contained in these requirements which have just been discussed [enterprises in commerce or the production of goods for commerce].
>
> The [dollar volume test] is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by

Many of the cases relied on by the court have been reversed.[40] The 1974 amendments show the intent of Congress to clarify the meaning of enterprise coverage. This clarification dealt specifically with a confusing body of case law. By adding "materials" to "goods" with a disjunctive "or," Congress intended that "working on . . . materials . . . that have been moved in . . . commerce" would remove the need to consider the ultimate consumer exclusion for materials, since reference to the definition of "goods" is unnecessary.[41] While this construction and the accompanying legislative history comprise a clear legislative mandate, the *Jaffey* court chose not to apply it to the preamendment allegations.

As to the postamendment allegations, the court, having noted the congressional intent to clarify coverage, had little choice but to deny defendant's motion for summary judgment. The court's treatment of the addition of "materials,"[42] however, read the new word very narrowly. While the court correctly concluded that Congress had meant to clarify the Act's pre-existing meaning, it refused to fully effectuate this clarification by applying it to the pre-1974 allegations.[43]

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a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law.

S. REP. No. 145, 87th Cong., 1st Sess. (1961). *See* Brief for Plaintiff opposing summary judgment at 18, 19, Brennan v. Jaffey, 380 F. Supp. 373 (D. Del. 1974); Defendant's Reply Brief at 12, 13, Brennan v. Jaffey, 380 F. Supp. 373 (D. Del. 1974).

40. *See* notes 2 & 23 *supra.* Hamlet Ice Co. v. Fleming, 127 F.2d 165 (4th Cir.), *cert. denied,* 317 U.S. 634 (1942), relied on in *Apartment Communities,* has not been overruled. *Hamlet Ice* involved, however, only traditional coverage, and its weight as precedent should be reconsidered in light of congressional efforts to expand coverage.

41. *See* notes 13 and 14 *supra.*

42. 380 F. Supp. at 378.

43. The principle of United States v. Price, 361 U.S. 304, 313 (1960), *see* note 31 *supra,* has been reiterated many times, but most often in construing the Internal Revenue Code of 1954. *E.g.* Walt Disney Productions v. United States, 480 F.2d 66, 68 (9th Cir. 1973); Brown v. United States, 426 F.2d 355, 357 (Ct. Cl. 1970); Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 32 (9th Cir. 1970). However, in Haynes v. United States, 390 U.S. 85, 87 (1968), the Court cited *Price,* but went on to look at the committee reports on amendments to determine the purpose of the National Firearms Act, 26 U.S.C. 5851 (1970). Further, Bobsee Corp. v. United States, 411 F.2d 231 (5th Cir. 1969), cited *Price,* but stated that "the corollary of this proposition is not that such statements should be disregarded altogether. . . . [They are] entitled to some consideration as a secondarily authoritative expression of expert opinion." *Id.* at 237 n.18.

In Banco Nacional de Cuba v. Fain, 383 F.2d 166, 175 (2d Cir. 1967), it was noted that the views of a later Congress can be useful in determining the intent of an earlier one. The Court in Federal Housing Admin. v. Darlington, Inc., 358 U.S. 84 (1958), in looking at the National Housing Act, 12 U.S.C. § 1743 (1970), cited *Price,* but then stated that "the later law is entitled to weight when it comes to the problem of construc-

Because of the recent amendments, the court's refusal to include the earlier allegations will be of little importance. As to future violations, the 1974 amendments are controlling. There is now little doubt that apartment house maintenance employees are covered by the Act when some connection with commerce is found. The court's failure, however, to find specific meaning in the term "materials" arguably demonstrates an unwillingness to extend coverage to activities other than those in the cases[44] cited in the legislative history, as well as an intent to recognize the ultimate consumer exclusion when it may not be warranted. Given the previously expansive interpretations of "goods" and "engaged in commerce," however, the court's analysis is not likely to slow the growing reach of the Act or have substantial precedential significance.

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tion." *Id.* at 90. *See* Sioux Tribe v. United States, 316 U.S. 317, 329-30 (1941). When later views confirm a prior interpretation, they may be considered. *See* Jacques Isler Corp. v. United States, 306 F. Supp. 452, 460 (Cust. Ct. 1969).

United States v. Wise, 370 U.S. 405 (1962), dealt with the penal provisions of the Clayton Act § 14, 15 U.S.C. § 24 (1914). The *Jaffey* court was dealing with a remedial statute that specified evils to be corrected and advanced the appropriate remedies. The considerations are far different from those involved in penal statutes or the Internal Revenue Code. In light of the congressional criticism of cases similar to *Apartment Communities* and the clear support given to those holding the opposite, as well as the broad humanitarian purposes of the statute, an overruling of *Apartment Communities* would have been eminently reasonable.

44. *See* 380 F. Supp. at 378-79, *quoting* S. REP. No. 93-690, 93d *Cong.*, 2d Sess. 17 (1974).