

## DEPUTIZATION AND PARENT-SUBSIDIARY INTERLOCKS UNDER SECTION 8 OF THE CLAYTON ACT

American corporations have used an array of methods to frustrate the restrictions on interlocking directorates contained in section 8 of the Clayton Act.<sup>1</sup> In its simplest form, an interlocking directorate arises when a single individual sits on the boards of directors of competing companies. Concern over increased concentrations of power in financial, industrial, and manufacturing circles,<sup>2</sup> in part the result of

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1. 15 U.S.C. § 19 (1976) provides in pertinent part:

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

2. See, e.g., the dissenting opinion of Justice Douglas in *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953):

More subtle [than asset acquisitions in creating monopolies and restraints of trade] are interlocking arrangements between directorates. This can accomplish disastrous consequences, as Mr. Justice Brandeis pointed out forty years ago. Interlocking directorates between companies which compete stifle the competition. Or to use the words of Mr. Justice Brandeis, the practice substitutes "the pull of privilege for the push of manhood." Moreover, those entwined relations are the stuff out of which concentration of financial power over American industry was built and is maintained.

*Id.* at 636 (footnote omitted).

Shortly before his appointment to the Supreme Court in 1916, Louis Brandeis authored a number of books and articles that were primarily responsible for bringing to light the need for regulation of interlocking directorates. See L. BRANDEIS, *OTHER PEOPLE'S MONEY* (1914); Brandeis, *Breaking the Money Trusts*, *HARPER'S WEEKLY*, Nov. 22, 1913, at 10; *id.*, Nov. 29, 1913, at 9; *id.*, Dec. 6, 1913, at 13; *id.*, Dec. 13, 1913, at 10; *id.*, Dec. 20, 1913, at 10; *id.*, Dec. 27, 1913, at 18; *id.*, Jan. 3, 1914, at 11; *id.*, Jan. 10, 1914, at 18; *id.*, Jan. 17, 1914, at 18. As Brandeis observed:

The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event it tends to inefficiency; for it removes incentive and destroys soundness of judgment. It is undemocratic, for it rejects the platform: "A fair field and no favors,"—substituting the pull of privilege for the push of manhood.

Brandeis, *The Endless Chain: Interlocking Directorates*, *HARPER'S WEEKLY*, Dec. 6, 1914, at 13.

A final persuasive plea for congressional action on interlocking directorates is found in President Woodrow Wilson's January 20, 1914 statement to Congress. In it, he emphasized the need for

laws which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public-service bodies—as in effect result in making those who borrow and those who

such interlocks, prompted enactment of section 8 in 1914 as a component of the Clayton Act.<sup>3</sup> Section 8 is, however, confined to direct interlocks between directly competing corporations.<sup>4</sup> Indirect interlocking relationships, left unregulated, have allowed corporations to develop the power and influence over competition that Congress intended to preclude.<sup>5</sup> The indirect interlock has consequently become a common and invaluable means of achieving anticompetitive intercorporate communication and control.<sup>6</sup>

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lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business. S. REP. No. 698, 63d Cong., 2d Sess. 14 (1914).

3. For a discussion of the historical context within which § 8 was enacted and a brief overview of the legislative history of the statute, see STAFF OF THE ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON INTERLOCKS IN CORPORATE MANAGEMENT 1-5, 15-29 (Comm. Print 1965) [hereinafter cited as STAFF REPORT]; FEDERAL TRADE COMMISSION, REPORT ON INTERLOCKING DIRECTORATES, H.R. DOC. No. 652, 81st Cong., 2d Sess. 1-5 (1951) [hereinafter cited as FTC REPORT]; 16C J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 20.01 (1981); Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, 21 VILL. L. REV. 393, 396-98 (1976); Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?*, 45 ANTITRUST L.J. 341, 344-45 (1976); Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 YALE L.J. 1266 (1950) (includes extensive discussion of early enforcement); Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEX. L. REV. 819, 824-32 (1968); Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 ANTITRUST L.J. 317, 319-20 (1976); Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, 44 ALB. L. REV. 139, 141-43 (1979); Note, *Interlocking Directorates: A Study in Desultory Regulation*, 29 IND. L.J. 429, 430-33 (1954); Comment, *Keys to Unlock the Interlocks: Dealing with Interlocking Directorates*, 11 U. MICH. J.L. REF. 361, 362-63 (1978) [hereinafter cited as *Keys to Unlock the Interlocks*].

4. This is the result of the requirement that the interlocked corporations "are or shall have been . . . competitors." See notes 17-24 *infra* and accompanying text.

5. See note 67 *infra*. See also Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 150-53; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 365-66.

6. See generally STAFF REPORT, *supra* note 3, at 26-27; FTC REPORT, *supra* note 3, at 14-16; 16C J. VON KALINOWSKI, *supra* note 3, § 20.02 [3][a]; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 150-53.

A 1978 Senate study of interlocks among 130 major companies disclosed some rather startling figures. For example, 123 of the 130 corporations surveyed were involved in 530 direct and 12,193 indirect interlocks with the other firms questioned. As a result, each of the companies involved in the study was interlocked with roughly half of the others surveyed. The 13 largest companies polled were each interlocked with approximately 70% of the remaining 117 firms in 240 direct and 5,547 indirect interlocks. But, as the report notes, the figures do not represent any interlocks that might involve the 13 firms' 486 subsidiaries and the other 117 corporations surveyed. The largest interlocker was American Telephone and Telegraph, with 31 direct and 625 indirect interlocking relationships involving 93 of the 130 firms surveyed. The report concludes that the potential anticompetitive effects of these relationships, such as conflicts of interest and antitrust improprieties, could "impact on the shape and direction of the American economy." The study proceeds to warn

A violation of section 8 occurs when (1) one of the interlocked companies has financial assets in excess of \$1,000,000, (2) all of the interlocked companies are "engaged in whole or in part in commerce," and (3) the interlocked companies are competitors (4) "so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."<sup>7</sup> While a simple interlock meets all four provisions of the statute, an indirect interlock exists when otherwise interlocked firms fail to satisfy the competition requirement of the statute.<sup>8</sup>

This Note focuses on indirect interlocks in the context of section 8's objective criteria.<sup>9</sup> More specifically, it examines the present legal status of deputation and parent-subsidary indirect interlocks in light of the sixty-seven year history of the statute. Because these interlocks are often used successfully to sidestep the express restrictions of the statute, their threat to the purpose of section 8 is substantial.

## I. ELEMENTS OF SECTION 8

Section 8, by its terms, applies to director interlocks between banking institutions and between industrial or commercial corporations.<sup>10</sup> Al-

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of particular dangers inherent in indirect institutional interlocks involving financial institutions, see notes 69, 79-83 *infra* and accompanying text, and suggests a per se approach to prohibiting virtually all forms of interlock, direct and indirect. See Miller, *Interlocking Directorates Flourish*, N.Y. Times, Apr. 23, 1978, § 3, at 2, col. 3. For an earlier study of the composition of the boards of "Fortune 500" companies, see Smith, *Interlocking Directorates Among the "Fortune 500,"* 3 ANTITRUST L. & ECON. REV. 47 (Summer 1970).

7. See note 1 *supra* for pertinent text.

8. See FTC REPORT, *supra* note 3, at 14-15; 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a]; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 369-70, 376-77.

9. For a discussion of the fundamental questions involving direct and indirect interlocks under § 8, see the sources cited in note 3 *supra*. See also Jacobs, *Interlocks*, 29 ANTITRUST L.J. 204 (1965); Turner, *Interlocks—A Legislative View*, 45 ANTITRUST L.J. 331 (1976).

10. For the text of the industrial interlock provision of § 8, see note 1 *supra*. The portions of § 8 dealing with interlocks between banks and banking associations are not pertinent to the present discussion and are omitted. Section 10 of the Clayton Act, 15 U.S.C. § 20 (1976), also treats interlocks, but it is narrowly confined to vertical interlocks between Interstate Commerce Commission regulated carriers and service companies or suppliers with which such carriers have contracts meeting a stipulated annual sum. Paragraph one of that section states:

No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any

though interlocks exist in other business contexts, the anticompetitive impact of these relationships is most directly felt in the industrial/commercial sphere.<sup>11</sup> Paradoxically, the proscriptions of the Clayton Act are most skeletal in this area, thus permitting indirect interlocks to endure.<sup>12</sup> The lack of express regulation of these varied forms of indirect association makes enforcement particularly difficult.<sup>13</sup>

The statute, as it pertains to industrial and commercial interlocks, has remained unchanged since its initial enactment in 1914. The first two conditions necessary to bring a successful interlock challenge<sup>14</sup>—minimum financial holdings<sup>15</sup> and engagement “in commerce”<sup>16</sup>—can

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substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission.

15 U.S.C. § 20 (1976). See also 16C J. VON KALINOWSKI, *supra* note 3, § 20.04.

The staff of the Antitrust Subcommittee of the House Committee on the Judiciary defines a vertical interlock as one where a

[c]ommon director or directors link two or more corporations which deal with each other but are at different levels in the same industry, as a manufacturer-supplier or a manufacturer-distributor. Vertical interlocks may also exist between different industries where one corporation provides a service to the other, as in the case of transportation services, and banking and other financial services . . . .

STAFF REPORT, *supra* note 3, at 9-10.

Other statutes prohibit interlocking directorates in a particular field of commerce, giving primary enforcement responsibility to the department or agency whose function it is to regulate that industry. See STAFF REPORT, *supra* note 3, at 10-13, 29-55; FTC REPORT, *supra* note 3, at 8-9; Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 395-96; Jacobs, *supra* note 9, at 214-15; Wilson, *supra* note 3, at 320-21; Note, *supra* note 3, at 435-38. The FTC report is particularly thorough in its discussion of interlocks in specific industries, but notice should be taken of its early (1951) date.

11. The effects of commercial interlocks are especially strong when the relationship approaches “institutional” proportions with one or more financial institutions at the center of a number of deputization interlocks. See notes 69, 79-83 *infra* and accompanying text. See also 16C J. VON KALINOWSKI, *supra* note 3, § 20.01, at 20-9. On the perceived necessity for congressional action in the area of industrial/commercial (and financial) interlocks, see the sources cited in note 3 *supra*. Effective interlocks in industrial/commercial contexts have a greater and more direct impact on the average consumer than strictly financial interlocks because pricing and output policies are most immediately affected.

12. For a general discussion of the forms of interlock, *i.e.*, indirect, vertical, etc., not prohibited by § 8, see STAFF REPORT, *supra* note 3, at 13-16; 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a], at 20-22 to 20-24.1; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 365-67.

13. See notes 39-63 *infra* and accompanying text.

14. See note 7 *supra* for pertinent text.

15. The general consensus is that only one of the interlocked corporations need have “capital, surplus, and undivided profits aggregating more than \$1,000,000.” As one commentator notes, a fair, literal reading of the statute mandates that only one of the interlocked companies meet the minimum size requirement insofar as the objective terms of the prerequisite are amplified by the

be established easily because of their essentially objective nature. Ap-

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phrase "any one of which." Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 143 n.33 and accompanying text (emphasis added). The author notes, however, that to avoid expensive challenges to interlocks whose potential anticompetitive ramifications do not warrant such expenditures the FTC has adopted the informal policy of attacking only those interlocks in which both corporations meet the minimum size requirement. *Id.* at 143, 156. In view of the per se nature of a § 8 violation, the administrative adoption of such a policy is questionable, particularly from a deterrence perspective. The per se character of a § 8 violation is discussed *infra*.

16. Dispute exists over the proper standard to be applied to the "engaged in commerce" requirement. Under § 1 of the Clayton Act "commerce" is defined as "trade or commerce among the several States and with foreign nations." 15 U.S.C. § 12(a) (1976). Generally, this means that the companies ship or sell goods to an out-of-state buyer or buy or receive goods from an out-of-state seller. See 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[1], at 20-13; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 143 n.35. A second theory involves the more liberal "affecting commerce" concept used to establish federal court jurisdiction under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1976). See 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[1], at 20-14 to 20-15; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 144-45. Von Kalinowski suggests a compromise standard in which the "engaged in commerce" requirement is combined with the third element of a § 8 violation, *i.e.*, that the interlocked corporations be competitors. 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[1], at 20-15. Under this test, each of the interlocked firms must carry on at least some of its business in interstate commerce. The competition between the companies need be only intrastate. Such a rule, according to von Kalinowski, "would more closely keep to the long line of Supreme Court decisions holding that federal jurisdiction does exist and an antitrust law can be violated when an interstate competitor acts in the course of his *intrastate* activities." *Id.* (footnote omitted).

Application of the judicially developed "engaged in commerce" requirement of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976), is perhaps most persuasive. See note 21 *infra* for the applicable text of the statute. In *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975), the Supreme Court went to great lengths to establish the distinction between "engaged in commerce" under § 7 and the less restrictive "affecting commerce" standard. *Id.* at 279-81. The Court held that "the jurisdictional requirements of [§ 7] cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce." *Id.* at 276 (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)). See also *FTC v. Bunte Bros.*, 312 U.S. 349 (1941). The Court continued:

In sum, neither the legislative history nor the remedial purpose of § 7 of the Clayton Act . . . supports an expansion of the scope of § 7 beyond that defined by its express language. Accordingly, we hold that the phrase "engaged in commerce" as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power.

*United States v. American Bldg. Maintenance Indus.*, 422 U.S. at 283.

A number of courts have applied this § 7 interpretation to the § 8 commerce requirement. See, *e.g.*, *Borg-Warner Corp.*, No. 9120, slip op. at 53-54 (FTC June 30, 1980) (initial decision) (von Brand, J.), and cases referred to therein. See also Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 144. To the extent necessary for subsequent development of the subject matter, this Note adopts the more flexible "engaged in commerce" standard established under § 7.

In the parent-subsidiary interlock context it is frequently necessary to impute the business activities of the subsidiary to the interlocking parent to establish the latter as "engaged in commerce."

plication of the final two requirements, however, has caused greater difficulty.

The third element requires that the interlocked corporations compete in the relevant product and geographic markets.<sup>17</sup> Disagreement exists over the proper tests to be used in determining whether competition exists for purposes of section 8.<sup>18</sup> Nevertheless, a policy has developed whereby the courts<sup>19</sup> and the Federal Trade Commission<sup>20</sup> (FTC) apply, by analogy, the "line of commerce" and geographic market standards recognized by the Supreme Court in the section 7<sup>21</sup> merger case

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This procedure, however, has not yet gained full acceptance by the courts. See notes 109-16 *infra* and accompanying text.

17. "[I]f such corporations are or shall have been theretofore, *by virtue of their business and location of operation*, competitors." 15 U.S.C. § 19 (1976) (emphasis added). The statute applies only to actual competitors and not potential competitors. See STAFF REPORT, *supra* note 3, at 25; FTC REPORT, *supra* note 3, at 10; Wilson, *supra* note 3, at 326; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 152. Proof of an anticompetitive effect resulting from the interlock is unnecessary, STAFF REPORT, *supra* note 3, at 26; FTC REPORT, *supra* note 3, at 10, because, as the FTC report notes, *id.*, the statute assumes that such an effect exists. *Accord*, STAFF REPORT, *supra* note 3, at 230. One commentator sums up this situation as follows:

Since Section 8 is essentially preventive in nature, the government need not prove any actual restraint of trade, that the two corporations are large enough to form a hypothetical monopoly, or that there is any substantial effect upon commerce. Instead, the common directorship is *per se* illegal if an agreement between the two competing corporations to eliminate competition in some manner could violate any of the antitrust laws.

E. KINTNER, AN ANTITRUST PRIMER 109 (1965). On the "elimination of competition" question referred to in the preceding quote, see notes 25-37 *infra*. On the lack of empirical evidence substantiating the anticompetitive effects of interlocks, see note 153 *infra*.

18. For example, courts take differing views of whether competition must be more than de minimis before the § 8 requirement can be met. *Compare* Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co., [1966] Trade Cas. (CCH) ¶ 71,678 (S.D.N.Y.) (§ 8 requires that competition be more than de minimis), *with* United States v. Crocker Nat'l Corp., 422 F. Supp. 686 (N.D. Cal. 1976) (dicta that § 8 does not contain a de minimis exception to the competition requirement), *rev'd*, 656 F.2d 428 (9th Cir. 1981).

19. See, e.g., United States v. Crocker Nat'l Corp., 422 F. Supp. 686, 703-04 (N.D. Cal. 1976), *rev'd*, 656 F.2d 428 (9th Cir. 1981).

20. See, e.g., Jim Walter Corp., 90 F.T.C. 671, 741-53 (1977) (§ 7 case).

21. Section 7 of the Clayton Act, in pertinent part, provides:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations

of *Brown Shoe Co. v. United States*.<sup>22</sup> In *Brown Shoe* the Court held that the relevant product market is “determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”<sup>23</sup> The geographic market, on the other hand, must “both ‘correspond to the commercial realities’” of the industry and be economically significant.<sup>24</sup> Although applied in a less than mechanical fashion, these standards provide structured criteria by which to test the degree of competition between interlocked entities.

The lack of a definitive interpretation of the “so that” clause,<sup>25</sup> the final element of a section 8 violation, initially posed problems in application of the statute.<sup>26</sup> The 1953 district court ruling in *United States v.*

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engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1976).

22. 370 U.S. 294 (1962).

23. *Id.* at 325 (footnote omitted). The Court further concluded that product submarkets may also exist for purposes of the antitrust laws and presented a list of criteria by which the limits of such submarkets may be fixed. The basic product market formulation quoted in *Brown Shoe* was established earlier in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

24. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (footnote omitted). *See also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355-62 (1963), in which the Court, in delineating the relevant geographic market, held that “[t]he proper question to be asked . . . is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate,” *id.* at 357; *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd*, 385 U.S. 37 (1966) (per curiam).

25. “[I]f such corporations are or shall have been theretofore . . . competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.” 15 U.S.C. § 19 (1976) (emphasis added).

26. A significant number of commentators read the “so that” clause, *see note 25 supra*, as qualifying the competition requirement rather than establishing a separate and distinct § 8 requisite. *See, e.g.*, STAFF REPORT, *supra* note 3, at 25; FTC REPORT, *supra* note 3, at 5-6; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 145-46; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 363. *But see* *Protectoseal Co. v. Barancik*, 484 F.2d 585, 589 (7th Cir. 1973) (lists only three elements of a § 8 violation: the \$1,000,000 financial asset requirement, the competition requisite, and, separately, the “so that” clause condition); 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[1]-[2] (author’s treatment of the clause, although not doing so explicitly, implies that it exists independently of the competition requirement). *See also* Kramer, *supra* note 3, at 1268-69. Mr. Kramer, at one time a high ranking official in the Antitrust Division of the Justice Department, posed the same question: “Was this [‘so that’] clause intended as a limitation on the preceding word ‘competitors’ so as to render unlawful only those interlocking directorships between corporations that compete to a ‘substantial’ degree? Or is any amount of competition, however slight, enough to outlaw an interlocking directorship?” *Id.* at 1268. After reasoning through interpretative problems in light of legislative history, the author concluded that the clause was not added as a modifier:

*Sears, Roebuck & Co.*,<sup>27</sup> cited as authority in all subsequent cases, resolved the issue by providing a substantive construction of the requirement.

In *Sears* the Government alleged that an interlock between Sears and the B.F. Goodrich Company violated section 8.<sup>28</sup> The defendants, Sears, Goodrich, and the common director, admitted violating the first three requirements of section 8<sup>29</sup> but argued that their relationship did not satisfy the "so that" clause.<sup>30</sup> As a result, the Government's motion for summary judgment<sup>31</sup> depended upon the construction of the "so that" clause adopted by the court.

Contending that the clause must be read in conjunction with the section 7 merger test,<sup>32</sup> the defendants alleged that the Government had failed to prove that a hypothetical *merger* between the two companies would violate "any of the provisions of any of the antitrust laws."<sup>33</sup> The court rejected this interpretation of the "so that" clause as underinclusive,<sup>34</sup> holding that Congress intended the clause to encompass all

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Taking the "so that . . ." clause at its face value, a strong argument can be made that if the corporations in which the directorships are held could not lawfully agree upon prices, they may not lawfully have interlocking directors. Such an agreement would eliminate competition between them. Since price-fixing agreements are now unlawful *per se* regardless of the amount of commerce affected, this interpretation renders the "so that . . ." clause practically meaningless as a limitation upon the word "competitors." It seems probable nevertheless that the courts will sustain an interpretation of the Section which gives little or no weight to the amount of competitive commerce involved. This view is influenced by recent Supreme Court opinions emphasizing that it is the character of the restraint, not the amount of commerce affected by it that is the factor determining illegality under the antitrust laws.

*Id.* at 1269 (footnotes omitted). This effect was established judicially in *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953). See notes 27-37 *infra* and accompanying text. The upshot of this result, the *per se* test, is that any interlock meeting the first three requirements of § 8 will constitute a violation of the statute. The *per se* nature of the majority of the "antitrust laws" referred to in the "so that" clause, see note 25 *supra*, mandates as much.

27. 111 F. Supp. 614 (S.D.N.Y. 1953).

28. *Id.* at 615.

29. *Id.* at 615-16.

30. *Id.* at 616.

31. The Government's motion for summary judgment was granted. *Id.* at 621. The action sought dissolution of an interlock allegedly violative of § 8 through resignation of the common director from one or both of the linked boards.

32. *Id.* at 616, 619. For the pertinent text of § 7, see note 21 *supra*.

33. *United States v. Sears, Roebuck, & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

34. The court stated:

[T]he defendants' construction [of the "so that" clause as relying on a hypothetical § 7 merger] would denude of meaning the phrase "any of the provisions of any of the antitrust laws." . . . This language is broad enough to cover all methods of violating antitrust legislation. At the time of the passage of § 8, price fixing and division of territory agree-

possible violations of the "antitrust laws" and not merely mergers in violation of section 7.<sup>35</sup> In so deciding, the district court established a rule, thereafter the standard in section 8 cases, that a per se violation of the statute occurs whenever the first three elements of the violation are established and any possible agreement between the interlocked parties would contravene "any of the provisions of any of the antitrust laws."<sup>36</sup> Under this per se rule it is manifestly difficult for a defendant to successfully rebut an alleged section 8 violation when the three remaining conditions are proven.<sup>37</sup>

Analysis of the statutory ingredients of an illegal interlock demonstrates that section 8 is not pervasive in its coverage. The statutory requirement that the interlocked companies be direct competitors makes difficult the inclusion of most indirect interlocking relationships. What scant legislative history exists supports the contention that Congress did not intend section 8 to extend to interlocks other than the more blatant, direct forms that come within the literal meaning of the statute.<sup>38</sup> Re-

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ments were in common use to effect such violations. Merger or acquisition was not the sole means used to achieve this result. There is no logical basis upon which to infer that the all-inclusive language was intended to exclude the other known methods from the reach of § 8.

*Id.* at 620.

35. *Id.* at 617-19.

36. *Id.* at 616-17, 620-21. *Accord*, *Protectoseal Co. v. Barancik*, 484 F.2d 585, 588-89 (7th Cir. 1973). In *Protectoseal* the court, in a private enforcement action under § 16 of the Clayton Act, 15 U.S.C. § 26 (1976), held that "[w]e do not believe Congress intended the legality of an interlock to depend on the kind of complex evidence that may be required in a protracted case arising under § 7." *Id.* at 589. The court elaborately dismissed any legislative intention to engraft § 7 merger standards on the § 8 "so that" clause.

37. Courts confronted with the "so that" clause issue after *Sears* have invariably applied the per se rule there announced. *See, e.g.*, *Protectoseal Co. v. Barancik*, 484 F.2d 585 (7th Cir. 1973). *See also* 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[2]; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 145-46.

38. "Unregulated interlocks . . . are not inadvertent loopholes, but the result of a selective and discriminating legislative approach to the general problem of interlocks. If the FTC's plug-the-hole concept is upheld, such discriminating legislative choices could be wholly frustrated." Wilson, *supra* note 3, at 327 (footnote omitted). *See also* 16C J. VON KALINOWSKI, *supra* note 3, § 20.01, at 20-10 n.16 ("it was not mere slipshod draftsmanship which created the loopholes through which . . . indirect interlocks . . . pass"). Most commentators dismiss the cursory nature of § 8 as the product of congressional inexperience in regulating interlocks. In its thorough analysis of interlocking directorates in American industry, the FTC concluded that "[w]hen the Clayton Act was written the Congress had no experience with legislation about interlocking directorates. The provisions of the statute were apparently designed to cope with the problems that had become most conspicuous during the two previous decades." FTC REPORT, *supra* note 3, at 13. The staff of the Antitrust Subcommittee of the House Committee on the Judiciary later came to a similar conclusion when it reasoned that

ardless of the propriety of this construction of legislative purpose, use of section 8 as an enforcement device against indirect interlocks has been ineffective.

## II. ENFORCEMENT

FTC and Justice Department<sup>39</sup> restraint in enforcing section 8 has aggravated the failure of the statute to reach indirect interlocks.<sup>40</sup> Of the small number of section 8 cases filed since enactment of the statute in 1914, only a handful have reached a decision on the merits.<sup>41</sup> As a

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[d]ivergences in coverage and in treatment [of the Clayton Act anti-interlock provisions] manifest the exploratory and experimental nature of the legislation. Congress apparently was reluctant to go beyond the specific management abuses that had been defined at the time and promulgate a consistent policy that would define and deal with the root of the problem.

STAFF REPORT, *supra* note 3, at 28. See also Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 364-65. For a brief, yet detailed, overview of the legislative history of § 8 and the general historical contexts within which the statute was enacted, see STAFF REPORT, *supra* note 3, at 1-29.

39. The FTC and the Justice Department are the agencies given responsibility for enforcing § 8. Jurisdiction is vested in the FTC by § 11(a) of the Clayton Act, 15 U.S.C. § 21(a) (1976), and in the Justice Department by § 15 of the Clayton Act, 15 U.S.C. § 25 (1976).

40. See generally 16C J. VON KALINOWSKI, *supra* note 3, § 20.01, at 20-10 to 20-11; Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 398-400; Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?*, *supra* note 3, at 345; Jacobs, *supra* note 9, at 208-09; Wilson, *supra* note 3, at 317-19 (includes chart of § 8 filings and subsequent dispositions through early 1976); Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 139-40, 146-48; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 361 n.4. See also 54 B.U.L. REV. 659 (1974) (discussion of private enforcement under § 16 of the Clayton Act, 15 U.S.C. § 26 (1976), in view of *Protectoseal Co. v. Barancik*, 484 F.2d 585 (7th Cir. 1973)). For a general discussion of enforcement in the early years of the statute, see Kramer, *supra* note 3. In *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), the defendant-appellees argued that exclusive § 8 jurisdiction was vested in the FTC under § 11 of the Clayton Act, 15 U.S.C. § 21 (1976). In dismissing this argument the Court noted Congress' intent to establish a "dual scheme" of Clayton Act enforcement. *Id.* at 631-32.

41. As of 1965 the Department of Justice had filed but 10 cases alleging violations of § 8, with the first litigated cases filed in 1952. The only suit to reach a decision on the merits was *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953). See notes 28-37 *supra* and accompanying text. See also STAFF REPORT, *supra* note 3, at 57, 227; 16C J. VON KALINOWSKI, *supra* note 3, § 20.01, at 20-10 n.19. The FTC, on the other hand, filed 13 § 8 suits before 1965 with all but one resulting in dismissal upon voluntary dissolution of the interlock. The one exception involved a cease and desist order entered into by consent. STAFF REPORT, *supra* note 3, at 57, 227. Of nine private enforcement actions filed before 1974 two reached a decision on the merits. 54 B.U.L. REV., *supra* note 40, at 660 n.11. For a chart of more recent § 8 filings, see Wilson, *supra* note 3, at 317 n.1. The first § 8 commercial interlock case to reach the Supreme Court was *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). See notes 55-60 *infra* and accompanying text.

result, the statute has failed to become a meaningful force in antitrust law, diluting any deterrent effect the measure might otherwise possess.

Because most interlocks are voluntarily dissolved upon the filing of a formal challenge in a district or administrative court, few cases survive a motion for summary judgment and reach a decision on the merits.<sup>42</sup> Rather than litigate a claim to a final decision, the FTC is inclined to settle the action by entering into a consent order with both the interlocked corporations and the common director.<sup>43</sup> Such agreements include cease and desist orders prohibiting repetition of the alleged illegal conduct.<sup>44</sup> To induce acquiescence in the consent order, the FTC omits from the document any reference to the defendants' guilt or innocence in the immediate proceeding.<sup>45</sup> This concern with prevent-

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42. See note 41 *supra*. See also Jacobs, *supra* note 9, at 209; Travers, *supra* note 3, at 822. Jacobs notes that "it is relatively easy to avoid being sued by merely resigning from one of the boards before the Government files a case. Some people call this 'evasion'. I prefer to call it 'voluntary compliance.'" Jacobs, *supra* note 9, at 209.

43. "There is nothing in the statute [§ 8] which restricts remedy against interlocking directorates to action by the [Federal Trade] Commission. It seems well known that the Commission has found little occasion, and perhaps little incentive, to take action in the premises." Schechtman v. Wolfson, 244 F.2d 537, 539 (2d Cir. 1957). As one commentator has noted:

Looking back over 60 years of enforcement under Section 8, we find the FTC and Justice Department lacking any discernible policy with regard to interlocks as enforcement has seemingly drifted with a few peaks and many valleys. As late as 1960, it appeared to many that Section 8 was simply a relic of a distant past and presented no greater obstacle to an offending director than resigning one of his directorships, if and when challenged by the government, thereby avoiding an enforcement action.

Goldman, Introductory Remarks to *Interlocking Directorates: The On-Again, Off-Again Saga of Section 8 of the Clayton Act*, 45 ANTITRUST L.J. 315, 315-16 (1976). Mr. Goldman states that the 1970s saw a resurgence of FTC and Justice Department activity in challenging alleged illegal interlocks under § 8. See also Wilson, *supra* note 3, at 318-19; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 140, 147-48. As these authorities note, the more rigorous enforcement policy consists of a movement away from dismissing violations upon dissolution of the interlock in favor of consent decrees containing cease and desist orders. See notes 44-45, 52-53 *infra* and accompanying text. Despite the injunctive nature of the remedy, the continued low number of § 8 filings, see note 41 *supra*, would seem to belie this observation.

44. The power of the FTC to issue a cease and desist order is contained in § 11(b) of the Clayton Act, 15 U.S.C. § 21(b) (1976). On the procedural characteristics of consent decrees and the benefits thereof, see Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 147-48.

45. An admission of guilt would be res judicata in subsequent private actions seeking treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). Section 5(a) of the Act provides in pertinent part:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be

ing future infractions, as opposed to censuring current conduct, renders the FTC consent order of minimal deterrent value.

Justice Department enforcement of section 8 has followed a similar course. More often than not, common directors will resign from one or more of the interlocked boards at the slightest hint of a contemplated challenge by the Department.<sup>46</sup> Such coerced resignation, or "jawboning,"<sup>47</sup> saves litigation expenses, potential monetary penalties in private enforcement actions, time, and adverse publicity.<sup>48</sup> This enforcement through intimidation<sup>49</sup> has since given way, however, to a more formal procedure substantially akin to that followed by the FTC.

When the Justice Department's Antitrust Division<sup>50</sup> files an action to enjoin an alleged illegal interlock, the relationship is usually dissolved by means of voluntary director resignation(s) from all but one of the affected boards. The defendants then move for summary judgment on the ground either that the case has become moot or that granting injunctive relief would prove unnecessary or ineffective. The lawsuit is

an estoppel as between the parties thereto: *Provided*, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . .

15 U.S.C. § 16(a) (1976). The propriety of entering into a consent order or consent decree in a Justice Department action, *see* notes 52-53 *infra* and accompanying text, before trial is obvious. Gambling on dismissal after the offering of testimony clearly could have serious financial repercussions for an unsuccessful defendant.

46. The Department of Justice, in October, 1947, announced the results of a survey it had conducted of 1,600 major corporations to determine the number of interlocking directors sitting on their boards. Roughly 15% of the firms' 10,000 directors sat on the boards of more than one company. Almost all of these interlocks were voluntarily dissolved without formal proceedings. Kramer, *supra* note 3, at 1270-71. This episode is generally considered to be the first instance of "jawboning." *See* notes 47-49 *infra* and accompanying text.

47. *See* note 46 *supra*. *See also* note 42 *supra*.

48. *See* notes 40, 45 *supra* concerning private actions under § 8. *See generally* 54 B.U.L. REV. 659 (1974).

Kramer is supportive of enforcement through "jawboning":

The Department of Justice's extra-judicial procedure for wholesale enforcement of Section 8 is a novel antitrust enforcement technique. It has been customary to correct alleged violations by instituting lawsuits. But if enforcement by administrative persuasion accomplishes the objectives of the statute, that method would seem to be not only in the public interest but also in the interests of the persons whose directorships are questioned since it gives them an opportunity to resign without publicity and its attendant unpleasantness. . . . In Section 8 matters, the relief is simple and specific: resignation from all but one of the boards of the competing corporations.

Kramer, *supra* note 3, at 1271.

49. Jacobs refers to "jawboning" as "voluntary compliance." Jacobs, *supra* note 9, at 209.

50. The Antitrust Division is the enforcement arm of the Justice Department in antitrust matters.

thus converted into a hearing on the summary judgment motion.<sup>51</sup> Should the court deny this motion, the parties can enter into a consent decree<sup>52</sup> that contains an injunctive order similar to an FTC cease and desist order.<sup>53</sup> If, on the other hand, the motion for summary judgment is granted, the defendant corporations lose nothing more than the direct channel of communication existent before the voluntary resignations. The decision against issuance of an injunctive remedy is not equivalent to a condonation of the defendants' action; it merely indicates the court's satisfaction that such anticompetitive behavior—if that it was—is not likely to recur.<sup>54</sup>

*United States v. W.T. Grant Co.*,<sup>55</sup> the first case presenting the Supreme Court with the need to construe the terms of section 8, involved such a procedural background. The Justice Department filed complaints alleging three violations of section 8 and seeking an injunctive remedy against future violations of the statute.<sup>56</sup> Shortly thereafter the individual defendant resigned from the board of one company in each of the three separate two-party interlocks.<sup>57</sup> The Court reasoned that resignation of a common director from all but one of the interlocked boards does not necessarily render the litigation moot.<sup>58</sup> It held, rather, that an injunction can still lie, but only in the event the court is persuaded that "there exists some cognizable danger of recurrent violation . . . ."<sup>59</sup> In *W.T. Grant* the Government failed to sustain this

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51. See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *United States v. Newmont Mining Corp.*, 34 F.R.D. 504 (S.D.N.Y. 1964). *W.T. Grant* is discussed at notes 55-60 *infra* and accompanying text.

52. See generally Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 147-48.

53. See Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 361 n.4.

54. See note 59 *infra* and accompanying text.

55. 345 U.S. 629 (1953).

56. *Id.* at 630.

57. *Id.*

58. *Id.* at 632-33.

59. *Id.* at 633. See also *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). In *W.T. Grant* the Court determined that a finding of mootness was not warranted, but it nevertheless affirmed the district court's dismissal of the suits on the defendants' motions for summary judgment. (The defendants originally sought dismissal on the basis of mootness but the trial court converted their motions into ones for summary judgment. 345 U.S. at 630.) See note 60 *infra* and accompanying text. See also *United States v. Newmont Mining Corp.*, 34 F.R.D. 504 (S.D.N.Y. 1964), in which the defendants' motions, based on *W.T. Grant* and treated by the court as motions for summary judgment, were denied under the rule of that case: "They [the defendants] have not shown sufficient on this motion to establish that there is no genuine issue of material fact as to whether 'there is no reasonable expectation that the wrong will be repeated.'" *Id.* at

heavy burden, and hence the Court affirmed summary judgment in favor of the defendants.<sup>60</sup>

Despite the efficiency of these summary enforcement techniques, their use detracts from the deterrence value of the statute.<sup>61</sup> The paucity of reasoned decisions on the merits in section 8 cases<sup>62</sup> gives the statute less coherence and predictability of interpretation than a sixty-seven year old law would normally warrant. The present method of enforcement will no doubt persist, thereby hindering the development of section 8 jurisprudence.<sup>63</sup>

### III. DEPUTIZATION AND PARENT-SUBSIDIARY INDIRECT INTERLOCKS

Two common means of circumventing the competition requirement of section 8<sup>64</sup> are the "deputization"<sup>65</sup> and parent-subsidiary<sup>66</sup> forms of

507. In 1966 Newmont Mining entered into a consent judgment with the Department of Justice prohibiting future interlocks with Phelps Dodge, the other interlocked firm. [1966] Trade Cas. (CCH) ¶ 71,709 (S.D.N.Y.). See also *SCM Corp. v. FTC*, 565 F.2d 807, 812 (2d Cir. 1977) (voluntary dissolution of illegal interlock does not render case moot) (*W.T. Grant* examined); *United States v. Cleveland Trust Co.*, 392 F. Supp. 699, 706-07 (N.D. Ohio 1974) (thorough discussion of mootness question), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975); *In re Penn Cent. Sec. Lit.*, 367 F. Supp. 1158, 1168 (E.D. Pa. 1973) (alleged § 8 violation held moot); *Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co.*, [1966] Trade Cas. (CCH) ¶ 71,678, at 82,065-66 (S.D.N.Y.) (mootness question discussed in context of inability of alleged violators to resume competition). *But cf. Jacobs*, *supra* note 9, at 210 (questioning Supreme Court's conclusions in *W.T. Grant* in view of facts of case).

60. 345 U.S. 629, 633-36.

61. Halverson notes the logical result that "jawboning," see notes 46-49 *supra* and accompanying text, "lacked the accompanying deterrent impact that formal prosecution possessed." Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 399 (footnote omitted).

62. See notes 40-41 *supra*.

63. *But see* Goldman, *supra* note 43; Wilson, *supra* note 3, at 318-19; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 140. These commentators note a resurgence in formal governmental opposition to alleged illegal interlocks. Such formal challenges usually result in injunctive consent orders and decrees that survive mootness claims on dissolution of the interlock. See note 43 *supra*.

64. See notes 17-24 *supra* and accompanying text.

65. See notes 79-103 *infra* and accompanying text.

66. See notes 104-51 *infra* and accompanying text.

The term "parent-subsidiary" is decidedly inaccurate in that the interlock is between separate and distinct parents or between a parent and a corporation without a subsidiary. See text accompanying notes 73-74 *infra*. Whether a director is shared by a parent and its own subsidiary is not important to this discussion except to the extent that such an interlock evidences parental dominance over the subsidiary, an issue that is dealt with below. See note 109 *infra*. The term "direct interlocks between indirectly competing corporations," see Comment, *Keys to Unlock the Inter-*

indirect interlock. Neither of these relationships comes within the literal provisions of the statute,<sup>67</sup> yet both, under proper conditions, create an interlock as effective in terms of intercorporate communication and control as a direct horizontal interlock between directly competing corporations.<sup>68</sup> A deputization interlock exists when an outside corporation, often a banking or other financial institution,<sup>69</sup> "sits" on the boards of competing firms through its placement of different individual

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*locks, supra* note 3, at 365, is more exact, albeit more burdensome. For that reason, it is discarded in favor of the more convenient "parent-subsidary" in this article.

67. See note 1 *supra* for pertinent language. Legislators and commentators concede that § 8 literally applies only to direct interlocks between directly competing corporations—*i.e.*, it does not encompass indirect interlocks. See, *e.g.*, STAFF REPORT, *supra* note 3, at 26-27; FTC REPORT, *supra* note 3, at 13-16; Jacobs, *supra* note 9, at 204, 208. As noted by the late Congressman Emanuel Celler, Chairman of the House Judiciary Committee and the advocate of legislation to tighten the grip on corporate interlocks, "Section 8 . . . is as full of holes as swiss cheese." 110 CONG. REC. 5767 (1964).

68. "Indirect interlocks . . . are not covered [by § 8], notwithstanding the fact that such relationships may dilute competition as much as the direct interlock that is prohibited." FTC REPORT, *supra* note 3, at 26. For a deputization interlock to be effective the deputized director must "stand in the shoes" of and effectively represent the deputizing corporation. See *Cleveland Trust Co. v. United States*, 392 F. Supp. 699, 711 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975). See notes 78-102 *infra* and accompanying text. In order for a parent-subsidary interlock to take on the characteristics of a direct interlock, the parent must dictate, *i.e.*, closely control, the policies and actions of its subsidiary. See, *e.g.*, Comment, *Keys to Unlock the Interlocks, supra* note 3, at 370. The control and deputization questions are considered more fully below.

69. See, *e.g.*, *Cleveland Trust Co. v. United States*, 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975). At this point, the issue of the financial-industrial "institutional" interlock arises. See note 11 *supra*. See also Comment, *Keys to Unlock the Interlocks, supra* note 3, at 366-67, 371-72. Such relationships assume many of the qualities of both indirect and vertical (*i.e.*, supplier-purchaser or creditor-debtor, see note 10 *supra*) interlocks:

The institutional interlock can be viewed as the third tier of interlocking relationships between commercial corporations and financial institutions (notably commercial banks). In a sense it is the combination of the vertical and indirect interlocks. The first tier is a single bank interlocked with a single corporation, which can be analyzed as a vertical interlock. The second tier exists when the directors of several competing firms all sit on a single bank's board. At this stage, not only are there vertical interlocks but there is also an indirect interlock among the competing corporations. The final tier (institutional interlock) exists when the leading competitors in an industry are interlocked with several of the major commercial banks.

*Id.* at 366 n.37. On the widespread existence of interlocks involving banking institutions and their propensity to result in severe anticompetitive practices, see *Hearings on Corporate Disclosure Before the Subcomm. on Budgeting, Management, and Expenditures and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess., pt. 2, 897-912 (1974) (statement of FTC Chairman Lewis A. Engman); FTC REPORT, *supra* note 3, at 15, 25, 27; Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective, supra* note 3, at 402, 406-08; Kramer, *supra* note 3, at 1274. On institutional interlocks in general, see notes 80-83 *infra* and accompanying text.

representatives on each board.<sup>70</sup> In effect, these “deputies” of the outside company function on each board as the common outside corporate director. This linkage of competing businesses through a third party constitutes a violation, in principle, of section 8.<sup>71</sup>

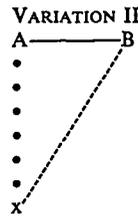
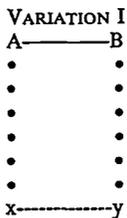
There are two basic parent-subsidary interlock models. In variation I below,<sup>72</sup> an interlock is established between noncompeting parent corporations while direct competition exists between their noninterlocked subsidiaries.<sup>73</sup> In variation II, a director interlock exists between noncompeting parent *A* and corporation *B*; there is, however, direct competition between *B* and corporation *x*, *A*’s subsidiary.<sup>74</sup>

The controlling question in the parent-subsidary context is the extent to which the parent dictates the policies and operations of its sub-

70. *E.g.*, United States v. Cleveland Trust Co., 392 F. Supp. 699 (N.D. Ohio 1974), *aff’d mem.*, 513 F.2d 633 (6th Cir. 1975). See Kramer, *supra* note 3, at 1272-74; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 366, 371, 373-75. See also STAFF REPORT, *supra* note 3, at 10. The deputized directors must be different individuals. If they were the same person, a direct violation of § 8 would ensue because two competing corporations would then be sharing a common director. The controlling question in any presumed deputization situation is whether the director is actually a deputy so that he sits *for* and *as* the common interlocking corporation itself. See note 88 *infra*.

71. The question is one of proof whether the directors are in fact mere puppets, or “deputies,” of the outside, noncompeting corporation. See note 70 *supra*. Once an actual deputization is established, attention must then be focused on the propriety of naming the third party corporate director as a defendant—*i.e.*, can the deputizing entity *itself* be found guilty of violating § 8? The courts have yet to decide this issue definitively. See notes 92-101 *infra* and accompanying text. A persuasive argument in favor of corporate liability under the statute is drawn through analogy to cases arising under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1976), the short-swing profits provision. See notes 97-101 *infra* and accompanying text.

72.



———— interlock; ••••• parent-subsidary; ----- competition

73. See 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a], at 20-23 to 20-24.2; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 365.

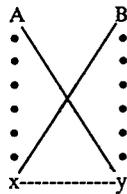
74. 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a], at 20-23 to 20-24.2. The author suggests a third form of parent-subsidary interlock in which the tie is not between the parents. Rather, two interlocks are created between competing subsidiaries and the competitors’ non-competing parents:

sidiary:<sup>75</sup> the more intimate the control, the more justified the imputation of the subsidiary's business to the parent for purposes of establishing the section 8 commerce and competition requirements.<sup>76</sup>

Section 8's literal confinement in the industrial/commercial context to direct interlocks between directly competing corporations leaves a substantial void in which the deputization and parent-subsidiary interlocks, as well as other hybrid forms,<sup>77</sup> are allowed to persist. Notwithstanding the mootness doctrine affirmed in *W.T. Grant*,<sup>78</sup> the summary enforcement policies of the FTC and the Justice Department combine with the narrow scope of the statute to make these two models of interlocking relationship particularly appealing methods of establishing anticompetitive intercorporate communication without risking section 8 liability.

### A. Deputization Interlocks

Deputization interlocks are especially suitable as a means for large financial corporations to influence or control the policies and operations of businesses competing in a particular industry or a particular



*Id.* at 20-23.

75. See notes 107-51 *infra* and accompanying text.

76. *Id.* The importance of the control issue was recognized three decades ago by Victor H. Kramer, a former high ranking official in the Justice Department's Antitrust Division:

[D]oes the Section [§ 8] apply to directorships in two parent companies each of which has a wholly-owned subsidiary where the subsidiaries are in competition but not the parents? Where the major policies of the subsidiaries are dictated by the parents, it would seem that there is a strong case for holding the directorships unlawful.

Kramer, *supra* note 3, at 1268 n.11.

77. For a discussion of the forms of industrial/commercial interlock not within the authority of § 8 as the statute has been interpreted to date, see STAFF REPORT, *supra* note 3, at 26-27; FTC REPORT, *supra* note 3, at 13-16; 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a], at 20-22 to 20-24.1; Kramer, *supra* note 3, at 1271-75; Wilson, *supra* note 3, at 326-29; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 150-53; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 365-72.

78. See notes 55-60 *supra* and accompanying text.

product or geographic market.<sup>79</sup> As the pervasiveness of the relationship approaches what is known as an "institutional" interlock,<sup>80</sup> the anticompetitive effects become particularly acute.<sup>81</sup> In an institutional interlock, the dominant businesses in a single industry are linked with a number of powerful financial institutions through deputization interlocks.<sup>82</sup> As participation in the interlock extends to other members of the industry, it becomes increasingly reasonable to assume that anticompetitive practices are being conducted.<sup>83</sup> A deputization interlock need not reach institutional proportions to violate the principle of section 8. Because of the literal limits to the statute's scope, however, enforcement efforts have proven weak in the face of even the most blatant

79. See generally Smith, *supra* note 6, at 52; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 371 and sources cited therein.

80. See notes 11, 69 *supra*.

81. This omission [from § 8 of vertical interlock regulation] is of peculiar importance with reference to interlocking relationships between industrial and commercial corporations and concerns such as banks, that supply them with indispensable services. An interlocking directorate between an industrial corporation and a bank may establish preferential access to credit for the industrial corporation. *Where several industrial and commercial corporations are interlocked with the same bank, a community of interest may be established that is strong enough to be a substantial handicap to other concerns dependent upon that bank for service.*

FTC REPORT, *supra* note 3, at 15 (emphasis added). The report continues: "Interlocking relations between manufacturing corporations and financial institutions, notably the commercial banks, constituted the most important series of interlocking relations found [by the Commission's study] and also gave rise to the most extensive and apparently significant of the networks of indirect interlocking relations." *Id.* at 27. See also Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 402, 406-07; Turner, *supra* note 9, at 337-38; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 371-72.

82. See notes 11, 69 *supra*. A deputization interlock requires representation of the outside common director on the boards of at least two competing firms. An institutional interlock mandates such interlocks among all, or at least a large majority, of the leading businesses in a particular industry. A director shared between a bank or other noncompeting business and another company, without more, would constitute at most a vertical interlock. See note 10 *supra*. See also Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 402 n.47. Absent a vertical supplier-customer, creditor-debtor, etc. relationship or the existence of competing subsidiaries, the interlock probably would not arouse suspicion. At present, even vertical interlocks are not within the reach of § 8. See STAFF REPORT, *supra* note 3, at 26-27; 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][b]; Comment, *Interlocking Directorates and Section of the Clayton Act*, *supra* note 3, at 151-52; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 365-66. Creditor-debtor interlocks may result from contractual provisions or other agreements for the extension of credit and are perhaps distinguishable. Possibly the largest number of interlocks flowing from a single financial corporation involved J.P. Morgan & Co. Governmental pressures forced the company's withdrawal from many of these interlocks shortly before the Clayton Act became law, although a substantial number continued. See 16C J. VON KALINOWSKI, *supra* note 3, § 20.01, at 20-4 to 20-6; Kramer, *supra* note 3, at 1266.

83. See note 81 *supra*; note 153 *infra*.

deputization interlocks.<sup>84</sup>

*United States v. Cleveland Trust Co.*<sup>85</sup> provided a significant opportunity for a federal court to define the permissible limits of a deputization interlock. The interlock between the financial corporation, Cleveland Trust, and two industrial firms was typical of deputization interlocks.<sup>86</sup> To avoid an obvious section 8 violation, the defendant bank placed different individual agents, the bank's chairman of the board and its executive vice president, on the boards of competing machine tool manufacturers.<sup>87</sup>

As a prerequisite to testing the legality of the interlock, the district court had to address two basic issues. Of primary importance was whether the implicated directors were acting principally as agents of the bank so that their presence on the boards of the competing companies was in a representative, rather than individual, capacity.<sup>88</sup> If so, and conceding that these "deputies" were proper parties-defendant to the Government's suit, the next question was whether Cleveland Trust, as the alleged indirect interlocking director, could also be found guilty of violating section 8.<sup>89</sup> Determination of the latter issue was crucial from an enforcement point of view insofar as the noncompeting outside

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84. See notes 85-103 *infra* and accompanying text.

85. 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975). *Cleveland Trust* also presented parent-subsidiary interlock issues. See notes 124-28 *infra* and accompanying text. The Government's § 7 cause of action was dismissed as moot. 392 F. Supp. at 708.

86. See Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 366, in which the fact pattern used to define a deputization interlock is taken from *Cleveland Trust*.

87. *United States v. Cleveland Trust Co.*, 392 F. Supp. 699, 702-03 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975). See also note 70 *supra*. The conclusions reached in *Cleveland Trust* take on added significance because one of the interlocking individuals was not a director of the deputizing corporation but, rather, a high ranking officer.

88. "Such informal links . . . are clearly not sufficient to demonstrate a continuing principal-agent relationship. The Government's theory of 'deputization' under section 8 is largely predicated on Shaw (and Karch) [the alleged deputized directors] being important officers of defendant, subject to its control and direction." *United States v. Cleveland Trust Co.*, 392 F. Supp. 699, 710 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975). The "informal links" refer to any personal ties remaining between Shaw, one of the interlocked personnel, and defendant Cleveland Trust after Shaw's retirement as the defendant's executive vice president shortly before filing of the suit. It was held, nevertheless, that injunctive relief could be necessary insofar as the defendant was completely "free to return to his old ways." *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). See note 59 *supra* and accompanying text. The case was resolved by consent decree filed in 1975. See note 103 *infra* and accompanying text.

89. See notes 92-101 *infra* and accompanying text. This question was explicitly left unanswered in *United States v. W.T. Grant Co.*, 345 U.S. 629, 634 n.9 (1953).

interlocking corporation, sitting as a director through its deputies, would be the actual violator of the statute.

Because it was merely ruling on the Government's motion for summary judgment, the court found it unnecessary to answer either of these crucial questions.<sup>90</sup> In passing, however, the court refused to hold that an agent of an interlocking firm could not be deputized for purposes of section 8 or that a corporation could not be a director within the restrictive language of the statute.<sup>91</sup> Considering both of these questions together—insofar as a finding of actual deputization is prerequisite to a determination that the corporation itself is sitting on the interlocked boards—logic and the internal integration of the Clayton Act compel the conclusion that a corporation is a proper party-defendant in a deputization interlock suit.<sup>92</sup>

Under section 8 “[n]o *person* at the same time shall be a director in any two or more corporations . . . .”<sup>93</sup> The definitional section of the Clayton Act includes corporations in its description of juristic “persons.”<sup>94</sup> Hence, the internal structure of the Act dictates that a corporation can be a director and, along with the individual deputized directors, a defendant for purposes of the statute in a government enforcement or private<sup>95</sup> proceeding.<sup>96</sup>

90. *United States v. Cleveland Trust Co.*, 392 F. Supp. 699, 710-12 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975).

91. “[T]here is no doubt that the issue of ‘deputization’ in this case . . . is entirely unsettled and unquestionably is in genuine controversy.” *Id.* at 712 (footnote omitted).

92. *See* notes 93-102 *infra* and accompanying text.

93. 15 U.S.C. § 19 (1976) (emphasis added). *See* note 1 *supra* for pertinent text.

94. “The word ‘person’ or ‘persons’ wherever used in this Act shall be deemed to include corporations . . . .” Clayton Act, § 1, 15 U.S.C. § 12(a) (1976). The court in *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975), while explicitly recognizing the Clayton Act definition of “person,” nevertheless held resolution of the ‘corporation as director’ issue unnecessary to consideration of the Government’s motion for summary judgment. *Id.* at 711. Despite the propriety of the court’s conclusion, the internal consistency of its treatment of the issue leaves much to be desired.

95. *See* notes 40-41, 45 *supra*. The basis of the private injunctive action is § 16 of the Clayton Act, 15 U.S.C. § 26 (1976), while treble damages may be sought under § 15 of the Act, 15 U.S.C. § 15 (1976).

96. *See* note 94 *supra*. *See also* Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 374-75, where the author, relying in part on the Clayton Act definition of “person,” concludes that the only valid prerequisite to holding a corporation in violation of § 8 is the factual determination of whether a “deputization” actually occurred.

One court has held, in a nondeputization context, that policy considerations mandate holding a corporation in violation of § 8. In *SCM Corp. v. FTC*, 565 F.2d 807 (2d Cir. 1977), the Commission alleged that a direct interlock in violation of § 8 existed between SCM and Kraftco. In refusing to enter into a consent order, SCM claimed that a corporation is not a proper defendant to a

A less straightforward but equally persuasive argument in favor of the deputization theory is predicated upon a similar concept that has developed under section 16(b), the short-swing profits provision, of the Securities Exchange Act of 1934.<sup>97</sup> A line of section 16(b) cases holds that a corporation is accountable for the short-swing profits it realizes through trading in the stock of another corporation on whose board its deputized director sits.<sup>98</sup> In so deciding, the courts inferentially affirm the validity of the deputization concept.

In *Cleveland Trust* the Government argued for application of this reasoning in the corporate interlock context.<sup>99</sup> The court, in responding to the Government's motion for summary judgment, recognized the 16(b) argument but did not pass on the applicability of the 16(b) decisions to section 8 of the Clayton Act.<sup>100</sup> "Meaningful analysis" was deferred until development of a full record.<sup>101</sup> This abstention allows for application of the 16(b) analogy to a section 8 interlock under proper circumstances.<sup>102</sup>

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§ 8 suit. The court held otherwise, reasoning that Congress intended the statute's prohibitions to extend to corporations. *Id.* at 811. The court reinforced its conclusion by reference to § 11(b) of the Clayton Act, 15 U.S.C. § 21(b) (1976), which authorizes the FTC to issue an "order requiring such person [violating § 8] to . . . rid itself of the directors chosen contrary to the provisions of [§ 8]." (Emphasis added.) The court concurred in the Commission's argument that only a corporation could rid itself of a director, 565 F.2d at 810-11, thereby strengthening its decision. *See also* *Protectoseal Co. v. Barancik*, 484 F.2d 585, 588 (7th Cir. 1973) (corporate plaintiff has standing under § 8 to request judicial removal of a director whose position on its board violated the statute insofar as "[t]he corporation itself is a potential defendant in litigation which the government may initiate to enforce § 8"); *United States v. Sears, Roebuck & Co.*, [1952-53] Trade Cas. (CCH) ¶ 67,561 (S.D.N.Y. 1953) (interlocked companies violated § 8 by acquiescing in the dual directorship of the implicated individual). For reasoned analyses concluding that an interlocked corporation is a proper party-defendant to a § 8 suit, see Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 148-50 (adopting conclusion of *SCM*); Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 374 (corporation is a "person" and thus falls within § 8 language). *But see* *Wilson*, *supra* note 3, at 322-23, where the author concludes that "the Section 8 status of interlocked corporations remains an open question."

97. 15 U.S.C. § 78p(b) (1976).

98. *Feder v. Martin Marietta Corp.*, 406 F.2d 260 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036 (1970); *Marquette Cement Mfg. Co. v. Andreas*, 239 F. Supp. 962 (S.D.N.Y. 1965). *See also* *Blau v. Lehman*, 368 U.S. 403 (1962).

99. *United States v. Cleveland Trust Co.*, 392 F. Supp. 699, 711-12 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975).

100. *Id.* The court concluded that the "language, purpose, and history" of § 16(b) rendered the statute of questionable significance in the corporate interlock context.

101. *Id.* at 712.

102. Application of section 16(b) reasoning in the corporate interlock context has received commentator support. *See, e.g.*, Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 403-04 n.55; Comment, *Inter-*

*Cleveland Trust* was settled one year later by the filing of a consent decree which impliedly adopted the Government's arguments.<sup>103</sup> This lack of a decision on the merits resulted in the forfeiture of an opportunity to place significant restrictions on the legality of deputization interlocks. Until deputization issues as pronounced as those in *Cleveland Trust* are decided on the merits, the legal boundaries of this form of indirect interlock will remain nebulous.

### B. *Parent-Subsidiary Interlocks*

Despite the conceptual simplicity of the parent-subsidiary interlock, interpretive difficulties analogous to those encountered in the deputization context hinder the proscriptive force of section 8.<sup>104</sup> Like other indirect interlocking schemes, the purpose of the parent-subsidiary interlock is to establish intercorporate communication without satisfying the competition requirement.<sup>105</sup> Distinguishing the parent-subsidiary interlock from the deputization relationship, however, is the desire to establish direct intercourse between the parent corporations of competing subsidiaries rather than deferring to the influence of a third party corporate director.

Determination of the legality of a parent-subsidiary interlock is particularly complicated because the competition is between the subsidiaries rather than their interlocked parents.<sup>106</sup> The paramount question in

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*locking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 149 n.80; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 374 n.103.

103. *United States v. Cleveland Trust Co.*, [1975-2] Trade Cas. (CCH) ¶ 60,611 (N.D. Ohio). The decree prohibited Cleveland Trust from hiring or retaining as an officer or employee any individual who was a director of one of the interlocked industrial corporations or a subsidiary thereof when a director of the second interlocked company or a subsidiary thereof was also employed by the defendant bank for so long as the interlocked manufacturing companies were in competition with one another. See Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 404; Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?*, *supra* note 3, at 342 n.4; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 149 n.80; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 374 n.99.

104. One commentator notes, for example, that "[t]here is nothing in the legislative history to indicate that Congress even considered the situation where the same person is the director of one company and the director of a parent of a competing company." 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a], at 20-24 n.40. See also FTC REPORT, *supra* note 3, at 18; Kramer, *supra* note 3, at 1268 n.11 and accompanying text, *quoted at* note 76 *supra*.

105. See notes 17-24 *supra* and accompanying text. See also Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 376.

106. The competition may either be between the subsidiaries or between the subsidiary and the entity interlocked with the parent. See notes 73-74 *supra* and accompanying text.

a section 8 challenge to a parent-subsidiary interlock, therefore, is whether the interlocked parent dictates the policies and operations of its competing subsidiary and, if so, to what extent.<sup>107</sup>

Assuming the exercise of close control by a parent over its subsidiary, logic compels the imputation of the subsidiary's business to the parent for purposes of the antitrust laws.<sup>108</sup> A finding of strong parental influence is crucial under section 8 for two reasons. First, it may be necessary to attribute the business of the subsidiary to the dominating parent so that the "engaged in commerce" requirement is satisfied.<sup>109</sup>

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107. See notes 108-51 *infra* and accompanying text.

108. The most limited purpose that can be attributed to section 8 is prevention of the anticompetitive effects caused by interlocks among competitors. If a parent exercises sufficient control over its subsidiary's policies and operations, then an interlock between the parent and the subsidiary's competitor presents the same problem as if the parent itself directly competed with its interlocked partner. Use of section 8 against such interlocks merely fulfills that section's purpose.

Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 377.

109. See note 16 *supra*.

The question whether the business of a subsidiary should be imputed to its parent for purposes of the "engaged in commerce" requirement of an antitrust or other regulatory statute has generally arisen in non-§ 8 contexts. See, e.g., *North American Co. v. SEC*, 327 U.S. 686 (1946), in which the Supreme Court announced the basic rule controlling application of the "engaged in commerce" requirement in situations involving parent-subsidiary relationships. In *North American* the Court said:

Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control [e.g., director interlocks between a parent and its own subsidiary]. . . . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. . . . To conclude otherwise is to ignore the realities of intercorporate relationships.

. . . . In view of North American's very substantial stock interest and its domination as to the affairs of its subsidiaries, as well as its latent power to exercise even more affirmative influence, it cannot hide behind the façade of a mere investor. *Their acts are its acts in the sense that what is interstate as to them is interstate as to North American.* . . . They make even more inescapable the conclusion that North American bears not only a "highly important relation to interstate commerce and the national economy," . . . but is actually engaged in interstate commerce.

*Id.* at 693, 695-96 (citations omitted) (emphasis added) (case arising under § 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k (1976)). As to the issue of interlocks between a parent and its own subsidiary, see *In re Penn Cent. Sec. Lit.*, 367 F. Supp. 1158, 1168 (E.D. Pa. 1973); *Jim Walter Corp.*, 90 F.T.C. 671, 740 (1977); *Borg-Warner Corp.*, No. 9120, slip op. at 54-56 (FTC June 30, 1980) (initial decision) (von Brand, J.). Such interlocks are relevant to this Note to the extent they evidence parental control over a subsidiary.

The FTC has held, consistent with the Supreme Court's language in *North American*, that the control-imputation standard is applicable in appropriate antitrust cases. In the context of a § 7 merger case, *Jim Walter Corp.*, 90 F.T.C. 671 (1977), the Commission said:

Respondent's rather crabbed interpretation of the Court's language in *American Building* [*United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 283 (1975)], that "a corporation must itself be directly engaged . . . in interstate commerce," finds no sup-

When the plaintiff is unable to establish that the parent is itself engaged in commerce, it becomes necessary to look to the business of the closely controlled subsidiary in an effort to meet this requirement.<sup>110</sup> Courts are, however, hesitant to use this approach.<sup>111</sup>

In *Borg-Warner Corporation*,<sup>112</sup> a 1980 section 8 case involving manufacturers of automotive replacement parts, an administrative law judge did apply this reasoning to the facts presented. Pursuant to an acquisition of Borg-Warner stock by Bosch GmbH, a German corporation, two directors sitting simultaneously on the boards of Bosch GmbH and Bosch U.S., the German company's wholly-owned American subsidiary, assumed positions on Borg-Warner's board.<sup>113</sup> The FTC issued a complaint alleging that the arrangement constituted an illegal interlock insofar as Bosch U.S. competed directly with Borg-Warner.<sup>114</sup> The Commission argued that Bosch GmbH's close control and supervision over Bosch U.S. compelled the imputation of the sub-

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port in that decision. Nowhere in that case is there the slightest hint that a corporation operating through its subsidiaries, which in turn are admittedly involved in interstate commerce, falls outside the reach of Section 7 because it is not deemed to be "engaged in commerce."

*Id.* at 740. *See also* *Borg-Warner Corp.*, No. 9120, slip op. at 53-56 (FTC June 30, 1980) (initial decision), in which Judge von Brand highlights the history of the control test as applied to the "engaged in commerce" requirement of §§ 7 and 8 of the Clayton Act citing, *inter alia*, the above quoted cases. The judge based application of the control concept to the competition requirement upon a reasoned analysis consisting first of the use of the concept to establish the parent's engagement in commerce. Although inherent in a finding that the parent is a competitor by virtue of its subsidiary's business is a determination that it is also "engaged in commerce," *see* text accompanying note 122 *infra*, courts have chosen to take the easier route and sidestep the logical step-by-step reasoning of *Borg-Warner*. Avoidance of this fundamental reasoning by other courts has perhaps led to the failure of the control concept to gain a foothold in § 8 litigation. In any event, use of the test in the interlock context seems entirely justified.

110. *See* notes 112-16 *infra* and accompanying text.

111. *See, e.g.*, *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978); *Schechtman v. Wolfson*, 141 F. Supp. 453 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 537 (2d Cir. 1957); *Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co.*, [1966] Trade Cas. (CCH) ¶ 71,678 (S.D.N.Y.). *But cf.* *United States v. Crocker Nat'l Corp.*, 656 F.2d 428, 450 (9th Cir. 1981) (control standard applicable in determining parent's status as competitor), *rev'g*, 422 F. Supp. 686 (N.D. Cal. 1976) (bank or bank holding company status of parents and subsidiaries on one side of bank-insurance company director interlocks an impediment to § 8 violation under industrial/commercial interlock provision of statute). These decisions are limited to consideration of the competition requirement, but to the extent they involve a determination of engagement in commerce they are pertinent to this reasoning. *See also* note 125 *infra*.

112. No. 9120 (FTC June 30, 1980) (initial decision) (von Brand, J.).

113. *Id.* at 6.

114. *Id.* at 2-3. The FTC also alleged that the interlock violated § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976 & Supp. III 1979). *See* note 159 *infra* for pertinent language.

subsidiary's business and competition with Borg-Warner to the parent for purposes of the section 8 "engaged in commerce" and competition requirements.<sup>115</sup>

For purposes of imputing the business of the subsidiary, Bosch U.S., to the parent, Bosch GmbH, the administrative law judge drew exclusively on an identical concept adopted in section 7 merger cases.<sup>116</sup> This analogy gives content to the control concept, thereby expanding the prohibitory effect of section 8 to include the parent-subsidiary interlock within the statute's authority. The reasoning in *Borg-Warner* evidences a practical approach to modern corporate realities, giving a common sense meaning to the statute that elevates substance over form. Such a practical approach has been employed to fortify other antitrust laws but has been slow to gain a foothold in the context of director interlocks.

The second important function of the control concept involves imputing the competition of the subsidiary to the parent to satisfy the competition requirement.<sup>117</sup> For example, in a variation II parent-subsidiary interlock,<sup>118</sup> attributing subsidiary *x*'s commerce to parent *A* would elevate *A* into direct competition with *B*.<sup>119</sup> Likewise, assigning the competition of both competing subsidiaries to their interlocked parents in a variation I interlock<sup>120</sup> would elevate the latter into direct competition with one another.<sup>121</sup> This imputation of the subsidiary's competition to the parent for purposes of the competition requirement would satisfy the "engaged in commerce" provision as well.<sup>122</sup> Again,

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115. *Borg-Warner Corp.*, No. 9120, slip op. at 2-3 (FTC June 30, 1980) (initial decision) (von Brand, J.). The § 5 claim was upheld by the judge. *Id.* at 56-58.

116. *Id.* at 53-54, 56. See note 16 *supra* for judicial interpretation of the § 7 "engaged in commerce" requirement. See also note 109 *supra*. The judge also held § 7 standards applicable to the competition requirement. *Borg-Warner Corp.*, No. 9120, slip op. at 46.

117. See notes 17-24 *supra* and accompanying text.

118. See text accompanying note 74 *supra*.

119. See, e.g., *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686 (N.D. Cal. 1976), *rev'd*, 656 F.2d 428 (9th Cir. 1981); *Schechtman v. Wolfson*, 141 F. Supp. 453 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 537 (2d Cir. 1957).

120. See text accompanying note 73 *supra*.

121. See, e.g., *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part and rev'd and remanded in part*, 584 F.2d 1195 (2d Cir. 1978); *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975); *Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co.*, [1966] Trade Cas. (CCH) ¶ 71,678 (S.D.N.Y.).

122. See, e.g., *Borg-Warner Corp.*, No. 9120, slip op. at 53, 56 (FTC June 30, 1980) (initial decision) (von Brand, J.).

however, courts have not accepted this reasoning.<sup>123</sup>

*Cleveland Trust*<sup>124</sup> is one of the few cases dealing with the issue of parental control over a subsidiary that did not result in an immediate dismissal of the argument.<sup>125</sup> In ruling against the Government's mo-

123. See note 111 *supra*.

124. 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975).

125. See cases cited in note 111 *supra*. In *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686 (N.D. Cal. 1976), *rev'd*, 656 F.2d 428 (9th Cir. 1981) the district court acknowledged the concept underlying the control theory but nevertheless held it inapplicable to the facts of the case:

Even assuming that the control which the bank holding companies exercised over their subsidiary banks was sufficient to attribute the subsidiary banks' activities to their parents, it seems that the subsidiaries' status as banks, and hence their exemption from the fourth paragraph of section 8, should similarly be attributed to those parents.

*Id.* at 704. See note 1 *supra* for the text of the fourth paragraph of § 8. The district court in *Crocker* thus adopted the control-attribution doctrine to the extent it immunized the interlocked parents from a § 8 violation via the exemption afforded the bank subsidiaries under the same statutory provision.

On appeal the Ninth Circuit expressly held the control concept applicable in determining whether a parent competes for purposes of the § 8 industrial/commercial interlock provision. 656 F.2d at 450. The court stated:

A parent corporation is not a competitor of another corporation merely because its subsidiary is [citing *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978). See note 144 *infra*.] On the other hand, to interpret Section 8 as meaning that the business activity of the subsidiary can never be considered in determining whether the parent is a "competitor" within the meaning of Section 8 would assume that Congress intended to permit such a simple and obvious means of avoidance as to render the statute meaningless . . . .

Whether for the purposes of Section 8 the business of a subsidiary is to be attributed to a parent in determining if the parent competes with another corporation with which it is interlocked, turns upon the extent of the control exercised by the parent over the subsidiary's business.

If the parent substantially controls the policies of its subsidiary, it may fairly be said, in the language of the competing corporations provisions of Section 8, that the "business and location" of the parent include the business and location of the subsidiary.

*Id.* The circuit court reversed the district court and held that interlocks violated § 8. For parallel reasoning in the "engaged in commerce" context, see note 109 *supra*.

The district court in *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part and rev'd and remanded in part*, 584 F.2d 1195 (2d Cir. 1978), used the control-attribution doctrine to find a contemplated interlock in violation of § 8. *Id.* at 965-66. The court of appeals, however, held this reasoning incorrect and reversed the lower court's decision on the § 8 claim. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978). For a more detailed discussion of the case, see notes 132-45 *infra* and accompanying text.

In *Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co.*, [1966] Trade Cas. (CCH) ¶ 71,678 (S.D.N.Y.), the court held that:

Subsidiary or parent corporations of those corporations in which there is an alleged infringing interlocking directorate are not to be considered in determining whether competition exists between the directed corporations. . . . The issue was not expressly adjudicated in the District Court in *Schechtman v. Wolfson* [citation omitted]. To the extent that that decision can be understood to imply the contrary, it is not followed here.

tion for summary judgment, the district court concluded that a more thorough development of the facts concerning the degree of parental influence exerted on the competing subsidiaries was necessary for an informed consideration of the interlock issue.<sup>126</sup> The subsequent filing of a consent decree,<sup>127</sup> however, precluded the anticipated decision on the merits and thereby eliminated an opportunity for the federal courts to impose substantive limits on the legality of the parent-subsidiary form of indirect interlock. Although the consent decree tacitly adopted the Government's contentions,<sup>128</sup> its superficial nature significantly diminishes any value it might have in a future parent-subsidiary case reaching a decision on the merits.

*Cleveland Trust* suggests that the introduction of ample evidence of subsidiary domination could result in a ruling against the legality of the interlock.<sup>129</sup> Should substantial control<sup>130</sup> over a subsidiary competing with an interlocked corporation (or with the interlocked corporation's controlled subsidiary) be established, the domineering interlocked parent should be held per se in competition with the interlocked competitor.<sup>131</sup> By satisfying the direct competition requirement of section 8 that the indirect interlock was constructed to avoid, this per se rule would effectively buttress the enforceability and deterrence value of the statute.

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*Id.* at 82,065. The divestiture by one of the interlocked parents of its competing subsidiary and a finding that any competition among the interlocked parents and their subsidiaries was de minimis were further bases for dismissal of the § 8 claim. *Id.* at 82,065-66. The *Paramount* court's conclusion that *Schechtman v. Wolfson*, 141 F. Supp. 453 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 537 (2d Cir. 1957), only inferentially recognized the existence of a parent-subsidiary form of interlock is accurate.

126. *United States v. Cleveland Trust Co.*, 392 F. Supp. 669, 712 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975).

127. *United States v. Cleveland Trust Co.*, [1975-2] Trade Cas. (CCH) ¶ 60,611 (N.D. Ohio).

128. *See* note 103 *supra*.

129. *See* notes 126, 128 *supra* and accompanying text.

130. *See, e.g.*, *Borg-Warner Corp.*, No. 9120, slip op. at 54 (FTC June 30, 1980) (initial decision), in which Judge von Brand discusses the degree of control necessary to impute the business of a subsidiary to the parent. Application of that standard to an elaborate factual determination in *Borg-Warner* resulted in a holding that the interlock violated § 8. *Id.* at 54-56. *See* notes 112-16 *supra* and accompanying text; notes 146-51 *infra* and accompanying text.

131. For a discussion of the possible creation of a per se rule extending to interlocks otherwise outside the authority of § 8, *see* Turner, *supra* note 9, at 338-40; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 153-57; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 384-85.

In a 1978 case, *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,<sup>132</sup> the District Court for the Southern District of New York held that the prohibitory policy of section 8 requires consideration of a subsidiary's competition in passing on the validity of a parental interlock.<sup>133</sup> The litigation centered on Curtiss-Wright's attempt to acquire control of Kennecott through stock purchases and the election of representatives to Kennecott's board.<sup>134</sup> Alleging antitrust and securities law violations,<sup>135</sup> Kennecott sought a permanent injunction to prohibit Curtiss-Wright from further solicitation of proxies, to foreclose voting of the Kennecott shares and proxies already held, and to order divestiture of the acquired stock.<sup>136</sup> Kennecott claimed, in particular, that the placement of a Curtiss-Wright director on its board would constitute a violation of section 8.<sup>137</sup> Although the parties did not compete directly, Curtiss-Wright's second-tier subsidiary, National Filter Media, did compete with the Filter Media Division of the Carborundum Company, itself a wholly-owned subsidiary of Kennecott.<sup>138</sup>

Reasoning that modern corporate business practices dictate treatment of a parent and its subsidiaries as a single entity for purposes of the statute,<sup>139</sup> the court found that the parent corporations were in com-

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132. 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part and rev'd and remanded in part*, 584 F.2d 1195 (2d Cir. 1978).

133. There is authority that, for the purposes of this section [§ 8], the business of subsidiary corporations is not to be considered in determining whether competition exists between the two parent corporations. *Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co.*, 1966 Trade Cases ¶ 71,678 (S.D.N.Y. 1966). That authority, however, ignores the reality of intercorporate relationships and the goal of Section 8 in preventing "a potential conflict of interest or a potential frustration of competition." *Protectoseal Co. v. Barancik*, 484 F.2d 585, 589 (7th Cir. 1973). Accord, *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953). We, therefore, read Section 8 as prohibiting interlocking directorships between parent companies whose subsidiaries are competitors. *In re Penn Central Securities Litigation*, 367 F. Supp. 1158 (E.D. Pa. 1973).

*Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 449 F. Supp. 951, 965-66 (S.D.N.Y.), *aff'd in part and rev'd and remanded in part*, 584 F.2d 1195 (2d Cir. 1978). The § 8 issue arose as a result of Curtiss-Wright's attempt to elect one of its directors to Kennecott's board. Therefore, the case involved only a potential parent-subsidiary interlock.

134. *Id.* at 955.

135. *Id.*

136. *Id.*

137. *Id.* at 962.

138. *Id.* Curtiss-Wright held an interest in National Filter Media by virtue of its majority ownership of Dorr-Oliver, Inc., which owned virtually all of the outstanding shares in National Filter Media. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1202-03 (2d Cir. 1978).

139. *See* note 133 *supra*.

petition with one another,<sup>140</sup> thereby establishing both the third and fourth elements of a section 8 violation.<sup>141</sup> Despite its failure to address the control issue as such, the court implied approval of the doctrine in its discussion of the realities of contemporary corporate conduct.<sup>142</sup>

On appeal, the Second Circuit reversed,<sup>143</sup> concluding that section 8 does not establish a general rule prohibiting director interlocks between parent corporations whose subsidiaries compete.<sup>144</sup> In its carefully worded opinion, the circuit court conceded that the existence of "close" parental control over the competing subsidiary could mandate a contrary result.<sup>145</sup> This conclusion leaves open the possibility that parent-subsidiary interlocks eventually will be brought within the enforcement perimeter of section 8.

In *Borg-Warner*,<sup>146</sup> the administrative law judge relied upon this loophole in the Second Circuit's *Kennecott Copper* opinion as support for the control test.<sup>147</sup> The judge cited *Cleveland Trust*<sup>148</sup> in concluding that the control issue must be considered for purposes of establishing both the "engaged in commerce" and competition requirements in a section 8 action against a parent-subsidiary interlock.<sup>149</sup> As a result,

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140. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 449 F. Supp. 951, 966 (S.D.N.Y.), *aff'd in part and rev'd and remanded in part*, 584 F.2d 1195 (2d Cir. 1978).

141. *Id.*

142. *Id.* See note 133 *supra*.

143. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978).

144. This general rule [announced by the district court] is not supported by the language of the statute, its legislative history, or the few pertinent cases. See *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975); *Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co.*, 1966 Trade Cas. ¶ 71,678 (S.D.N.Y. 1966). We decline to adopt it. We need not conjecture about the possible application of the statute to a parent corporation that closely controls and dictates the policies of its subsidiary. See *United States v. Cleveland Trust Co.*, *supra*, 392 F. Supp. at 712.

*Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978) (footnote omitted).

145. See note 144 *supra*.

146. No. 9120 (FTC June 30, 1980) (initial decision) (von Brand, J.).

147. *Id.*, slip op. at 52.

148. See notes 124-28 *supra* and accompanying text. The Second Circuit cited *Cleveland Trust* for the contrary position in *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978). See note 144 *supra*.

149. *Borg-Warner Corp.*, No. 9120, slip op. at 53-56 (FTC June 30, 1980) (initial decision) (von Brand, J.). The judge presented an exhaustive list of factual data substantiating the high degree of control exercised by the parent, Bosch GmbH, over its wholly owned subsidiary, Bosch U.S. *Id.* at 54-56. Ascription of the subsidiary's business to the parent for purposes of the § 8

the judge held the statute applicable to the interlock between Bosch GmbH/Bosch U.S. and Borg-Warner,<sup>150</sup> a significant decision in view of prior judicial treatment of the control issue. The extent to which the holdings of this initial administrative decision will survive anticipated review remains an open question.<sup>151</sup>

#### IV. CONCLUSION

Despite detailed analyses confirming the widespread existence of direct and indirect interlocks,<sup>152</sup> there is a lack of empirical evidence corroborating the anticompetitive effects of such relationships.<sup>153</sup> Nevertheless, the congressional intent in enacting section 8<sup>154</sup> and the power to influence the functioning of markets inherent in an effective

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competition requirement automatically establishes the "engaged in commerce" element of the statutory violation. *See* note 122 *supra* and accompanying text.

150. The record demonstrates the requisite degree of control by Bosch GmbH [the parent interlocked with Borg-Warner] over the subsidiary [competing with Borg-Warner] so as to bring it within the purview of Section 8 of the Clayton Act. Bosch GmbH had the power, whether or not exercised, to influence or control those decisions which might involve violations of the antitrust laws.

Borg Warner Corp., No. 9120, slip op. at 56 (FTC June 30, 1980) (initial decision) (von Brand, J.). The case involved a classic variation II parent-subsidiary interlock. *See* text accompanying note 74 *supra*.

151. The case is presently pending on appeal before the full FTC.

152. *See* note 6 *supra*.

153. *See, e.g.*, Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 394-95; Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?*, *supra* note 3, at 348-49; Wilson, *supra* note 3, at 329-30; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 154-57. *See generally* Travers, *supra* note 3 (extensive analysis of interlocks in terms of corporate management considerations, concluding that indirect interlocks should not be attacked under a per se rule, favoring instead a case by case approach to determine whether competition is in fact affected). Some authorities conclude, however, that a common sense approach should be taken to interlock enforcement regardless of the existence or nonexistence of analyses substantiating the anticompetitive effects of such relationships. *See, e.g.*, STAFF REPORT, *supra* note 3, at 230 ("[d]espite the lack of evidence demonstrating specific abuses that have resulted from management interlocks, commonsense, practical observation, and abstract reasoning, all support the conclusion that such effects should follow. It would be naive to think that the ability of two corporations to compete is not impaired by common management members"); FTC REPORT, *supra* note 3, at 36 "[The industrial/commercial interlock provision of § 8], based on the practical certainty that an interlocking directorate between competitors had an adverse effect upon competition, does not require for its enforcement any proof that in the particular instance the expected effect actually exists."); Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 367-72 ("[w]hile no empirical studies have been undertaken to analyze the economic consequences of these interlocks [not within § 8's express prohibitions], logic and common sense lead to the presumption that they are anticompetitive," *id.* at 386).

154. *See* note 38 *supra*.

interlock<sup>155</sup> are sufficient justification for more energetic use of the statute. Formal enforcement procedures, however, often give way to more summary compliance techniques.<sup>156</sup>

Once the control test gains judicial acceptance, there is little question that section 8 can reach parent-subsidiary interlocks.<sup>157</sup> But such interlocking relationships are generally established between only a limited number of corporations. The potential impact of a parent-subsidiary interlock on competition is therefore minimal compared to that possible under a strong deputization interlock, particularly one approaching institutional proportions.<sup>158</sup> Ironically, the deputization interlock is by comparison more difficult to reach under the statute. This results because both identification of the interlock and competition relationships among the immediate participants and determination of whether a deputization has actually occurred are often tenuous. If section 8 proves inadequate in challenging indirect interlocks, alternate or supplemental attacks can be mounted under either section 5 of the Federal Trade Commission Act<sup>159</sup> or section 1 of the Sherman Act.<sup>160</sup>

155. See note 11 *supra*.

156. See notes 39-63 *supra* and accompanying text.

157. See Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 364-65, 373-77 (“[a] narrow interpretation of section 8 . . . is both contrary to congressional intent and unwarranted in light of the dangers of unregulated interlocks that have become apparent over time”).

158. See notes 11, 69, 79-83 *supra* and accompanying text.

159. 15 U.S.C. § 45 (1976 & Supp. III 1979) provides in pertinent part:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Subsection (a)(2) can be used to overcome the “corporation as defendant” problem, see notes 92-101 *supra* and accompanying text, as the statute expressly includes corporations in its list of potential violators. For detailed consideration of § 5 of the FTC Act and its applicability to interlocking directorates, see 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a], at 20-24.2 to 20-25; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 157-60; Comment, *Keys to Unlock the Interlocks*, *supra* note 3, at 377-84. See also Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 404-05; Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?*, *supra* note 3, at 343, 349; Jacobs, *supra* note 9, at 208; Travers, *supra* note 3, at 821, 833, and cases cited therein; Wilson, *supra* note 3, at 327, 329; Note, *supra* note 3, at 439-40.

160. 15 U.S.C. § 1 (1976). Section 1 of the Sherman Act provides in pertinent part that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.” On application of § 1 of the Sherman Act to interlocking directorates, see 16C J. VON KALINOWSKI, *supra* note 3, § 20.02[3][a], at 20-24.2; Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If*

The unwillingness of courts to adopt the control-imputation standard for determining whether a parent is engaged in an illegal interlock is unfortunate. Consent decrees, cease and desist orders, and Justice Department "jawboning" are effective to the extent that they dissolve illegal interlocks, but they fail to provide adequate deterrent force. Unless the agencies empowered to enforce the law do so with greater vigor, bold corporations will continue to establish direct interlocks, secure in the knowledge that at worst they will be required to disintegrate the relationship. At the same time, those less resolute will make use of more subtle relationships, such as the parent-subsidiary interlock.

A broader construction of section 8 could remedy this situation without doing harm to the statute. The strategies proffered by the Department of Justice in *Cleveland Trust* are indicative of the flexibility inherent in the statute, a flexibility heretofore unrecognized as a result of the courts' literal, and hence underinclusive, approach to the law. A conscious retreat from dismissal of complaints upon the voluntary resignation of an interlocked director,<sup>161</sup> combined with a more elastic reading of the statute, will discourage the parent-subsidiary and deputization forms of indirect interlock as practicable methods of achieving anticompetitive intercorporate communication. This can be accomplished only by an interpretation which gives greater emphasis to the spirit of the law than to its letter.

The most effective means for challenging indirect interlocks would be adoption of a per se rule analogous to the one enunciated in *Sears* pertaining to direct interlocks<sup>162</sup> or the one suggested above in the con-

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*So, What Kind?*, *supra* note 3, at 343; Travers, *supra* note 3, at 821, 833; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 159-60.

161. See discussion of *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), at notes 55-60 *supra* and accompanying text.

162. See notes 27-37 *supra* and accompanying text. *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953), arose in the context of a direct interlock between directly competing corporations. Establishing a per se rule applicable to indirect interlocks is necessarily more difficult due, in part, to the absence of clear cut competition and interlock relationships. Commentators, however, appear averse to adoption of an indirect interlock per se rule of illegality. For example, Halverson argues that "from an antitrust viewpoint, several factors lead the author to believe that, in the absence of a showing of actual anticompetitive effects, a legislated per se restriction of all vertical and indirect interlocks is unwarranted." Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, *supra* note 3, at 403. See *id.* at 402-06, 409; Travers, *supra* note 3, at 851, 863-64; Wilson, *supra* note 3, at 329; Comment, *Interlocking Directorates and Section 8 of the Clayton Act*, *supra* note 3, at 153-57. See also note 131 *supra*. For suggestions relating to per se legislation aimed at indirect, as well as direct, interlocks, see STAFF REPORT, *supra* note 3, at 231-32; Note, *supra* note 3, at 444-45; Com-

text of the parent-subsiary control issue.<sup>163</sup> For example, any non-competing corporation having different agents on the boards of competing businesses should be held per se in violation of section 8, even with insufficient proof of actual deputization. Any harsh or overly restrictive effects are offset by the understanding that this standard would strengthen deterrence and facilitate enforcement. Judicial recognition could come as a result of FTC or Justice Department prodding, but congressional initiative would clearly accelerate application of the rule.

*Borg-Warner* should prove valuable in resolving a number of important parent-subsiary interlock questions. Evasion of the pertinent issues as in *Cleveland Trust* and, to a lesser extent, *Kennecott Copper* will only exacerbate and prolong the impotence of section 8 in controlling indirect interlocks. Financial considerations and the presence of complicated ancillary issues could prompt the parties to negotiate a pre-judgment settlement. This possibility does not, however, detract from the need for a final, reasoned decision on the merits. Such a judicial rendering would serve to reduce confusion surrounding the application of section 8 and give meaning to an important statute.

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ment, *Keys to Unlock the Interlocks*, *supra* note 3, at 384-86. On congressional consideration of a new anti-interlock bill and for a general discussion of legislative attitudes to new legislation, see Turner, *supra* note 9.

163. See text accompanying note 131 *supra*.

