

application of these exceptions<sup>48</sup> has led a leading expert in the field to say that "[t]he law embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not."<sup>49</sup> Widespread judicial awareness of section 10(c) can simplify and standardize application of the doctrine by limiting its use to situations where a statute expressly demands exhaustion, or alternatively, where an agency both requires exhaustion and makes its action inoperative pending appeal.

## IX. JUDICIAL REVIEW—PRIMARY JURISDICTION

### ANTITRUST VIOLATIONS AND THE COMMODITIES EXCHANGE COMMISSION

In *Silver v. New York Stock Exchange*<sup>1</sup> the Supreme Court held for the first time that the securities industry is not exempt from the federal antitrust laws,<sup>2</sup> and promulgated the "necessary to make the Act work"<sup>3</sup> test to reconcile the Securities Exchange Act with the Clayton and Sherman Acts. The *Silver* opinion, however, left unresolved<sup>4</sup> the important and complex question of primary jurisdiction<sup>5</sup>

---

and *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir.), cert denied sub nom. *Federal Maritime Bd. v. United States*, 347 U.S. 990 (1954) (irreparable injury threatened); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919) (jurisdictional challenge allowed). See also 3 DAVIS § 20.01, at 56.

48. *E.g.*, 3 DAVIS § 20.02, at 60, 66-67.

49. *Id.* § 20.01, at 56.

---

1. 373 U.S. 341 (1963).

2. The Clayton Act, 15 U.S.C. §§ 12-27 (1970), and the Sherman Act, *id.* §§ 1-7.

3. 373 U.S. at 357; see notes 28-30 *infra* and accompanying text.

4. The *Silver* Court stated:

Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today. 373 U.S. at 358 n.12.

Ordinarily the question of primary jurisdiction arises where a claim is brought before a court and it is asserted that the court's jurisdiction to decide a pertinent issue has been superseded by an agency's authority. JAFFE 121-22. Since the Supreme Court in *Silver* concluded that the SEC had no power to consider the plaintiff's complaint, jurisdiction vested only in the court. The

to apply the “necessary to make the Act work” test. The primary jurisdiction issue was confronted directly for the first time in the 1971 decision, *Ricci v. Chicago Mercantile Exchange*,<sup>6</sup> a case involving reconciliation of the Commodities Exchange Act<sup>7</sup> and the antitrust laws.

In *Ricci*, the Court of Appeals for the Seventh Circuit held that a private treble damage action for antitrust violations charging a mercantile exchange, its officers and a member with non-observance of exchange rules and regulations could not be initiated in federal court. The doctrine of primary jurisdiction was held to require that the Commodities Exchange Commission or the Secretary of Agriculture first be allowed an opportunity to enforce compliance with the rules imposed upon exchanges and their members. In his complaint the plaintiff, a former member of the Chicago Mercantile Exchange, alleged that another commodities broker persuaded the Exchange and its officers to divest plaintiff of his membership and transfer it to a third party. Plaintiff brought an action under the Clayton Act,<sup>8</sup> alleging that the transfer was made pursuant to an unlawful conspiracy that prevented him from trading on the Exchange and demanding an injunction and treble damages against the Exchange, its officers and the member broker. The district court granted the defendants’ motion to dismiss for failure to state a claim upon which relief could be granted, on the ground that conduct regulated by the Commodities Exchange Commission is exempt from the antitrust laws. On appeal, the Seventh Circuit reversed and remanded the action to the district court, holding that a cause of action had been stated. In ordering a remand, the appellate court invoked the administrative law doctrine of primary jurisdiction and instructed the district court to stay its

---

Supreme Court’s rationale for deciding that the SEC had no jurisdiction has been severely criticized as “amateurish” and as a means for “slithering past the difficult issue of primary jurisdiction.” Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675, 687 (1970). See also note 29 *infra*.

5. See generally DAVIS §§ 19.01-.09; JAFFE 121-34.

6. 447 F.2d 713 (7th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3415 (U.S. Feb. 28, 1972) (No. 71-858).

7. 7 U.S.C. §§ 1-17b (1970).

8. 15 U.S.C. § 1 (1970).

proceedings pending any action by the Commodities Exchange Commission.<sup>9</sup>

Primary jurisdiction is a doctrine under which a court may defer to an administrative body for the determination of an issue relevant to a particular controversy. Although easily confused with the substantive aspects of a case, the issue of primary jurisdiction must be kept distinct from the resolution of a claim on the merits. With respect to primary jurisdiction, the sole question to be decided is whether the court or the agency is the proper tribunal to make the initial decision of a substantive issue. The foremost justification for the doctrine has been the promotion of "proper relationships between the courts and administrative agencies charged with particular regulatory duties."<sup>10</sup> The earliest case<sup>11</sup> stressed the importance of uniformity that would result if an agency were the sole body to decide administrative questions.<sup>12</sup> This philosophy was later extended in *Great Northern Railway v. Merchants Elevator Company*,<sup>13</sup> where the Court also emphasized the expertise and specialized knowledge possessed by agencies.<sup>14</sup>

A review of the primary jurisdiction cases dealing specifically with the application of the antitrust laws to industries regulated by administrative agencies reveals additional factors considered important by the Court.<sup>15</sup> The issue of primary jurisdiction in an antitrust suit was first considered in *Keogh v. Chicago & Northwestern Ry. Co.*<sup>16</sup> In that case, the Court reasoned that a statute establishing a regulatory process and a reparation mechanism should be read as having superseded the previously enacted antitrust laws. This result, although purporting to resolve a primary jurisdiction question, seems to go even further

---

9. 447 F.2d at 720.

10. *United States v. Western R.R. Co.*, 352 U.S. 59, 63 (1956).

11. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

12. *Id.* at 440-41.

13. 259 U.S. 285 (1922).

14. *Id.* at 291 (dictum).

15. See generally L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 669-93 (1968).

16. 260 U.S. 156 (1922). The case involved a private shipper who brought an antitrust suit claiming a conspiracy to fix rates. The ICC had previously determined that the rates in question were not discriminatory. Because the agency had already acknowledged the legality of the rates, and because the Act to regulate Commerce, Feb. 4, 1887, ch. 104, 24 Stat. 279, created a remedy in damages, the Court held that plaintiff did not have an additional remedy under the antitrust laws. 260 U.S. at 162.

and decide that, due to supersession, the federal district court lacked any jurisdiction.<sup>17</sup> Subsequent antitrust suits were similarly dismissed by the Court on the basis of supersession and agency expertise.<sup>18</sup> In 1957, however, the Court in *Federal Maritime Board v. Isbrandtsen Company*,<sup>19</sup> indicated a reluctance to continue to defer to agencies. Instead, it engaged in a meticulous examination of statutory language to find congressional intent to limit the agency's power to immunize from the antitrust laws certain practices of the regulated industry. *Isbrandtsen* marked the first of a continuing series of cases concentrating on the breadth of a particular regulatory scheme and the

---

17. Professor Jaffe characterizes this result as either reaching beyond primary jurisdiction or illustrating the most extreme extension of the doctrine. JAFFE 143.

18. See, e.g., *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). [The plaintiff sought a court injunction charging that a conference of other shipping companies had joined together in anticompetitive practices against plaintiff. By the Shipping Act of 1916, 39 Stat. 728, the Shipping Board had been granted both the power to immunize industry practices from antitrust consequences and to prohibit anticompetitive practices by using cease and desist orders. Because of the existence of these powers in the agency, and because the alleged antitrust violations contravened the Shipping Act and were remediable under the Act, the Court held that the antitrust laws had been superseded. 284 U.S. at 485]; *Far East Conference v. United States*, 342 U.S. 570 (1952) [*Far East* was factually similar to *Cunard* but concerned an antitrust suit for an injunction brought by the United States government rather than by a private party. The government claimed that the defendant conference was engaging in a practice of discriminatory rates. In delivering the opinion of the Court, Mr. Justice Frankfurter set forth what has been considered to be the classic statement of the policy behind primary jurisdiction:

[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. *Id.* at 574-75].

19. 356 U.S. 481 (1958). Plaintiff, a non-member of the defendant shipping conference, alleged that defendant's rates were discriminatory. The Federal Maritime Board had already given its approval of the conference rate plan in question. However, the Court held that the agency's power to immunize as granted by the Shipping Act of 1916, 46 U.S.C. §§ 801-42 (1970), formerly Act of Sept. 7, 1916, ch. 451, §§ 1-36, 39 Stat. 728, could not insulate conference members from antitrust liability where the agency-approved rate plan discriminated against a non-member of the conference because such a practice was expressly outlawed by the Act. 356 U.S. at 491. It is interesting that the subsequent legislative reaction to the Court's construction of the statutory scheme seems to indicate disapproval of the *Isbrandtsen* result. See L. JAFFE & N. NATHANSON, *supra* note 15, at 687-88. Nevertheless, the case is important because its incorporation of careful statutory construction reflects a change in approach to the question of primary jurisdiction in antitrust cases.

existence of express statutory grants of immunity from the antitrust laws to resolve the primary jurisdiction question.<sup>20</sup> Under this analysis the primary jurisdiction doctrine becomes applicable when an agency has "pervasive" power over the industry regulated.<sup>21</sup> Specifically, this includes situations in which an agency has been granted the power to immunize the same practices that allegedly comprise the antitrust violation or where the administrative body has been entrusted with enforcement of the antitrust laws and may provide a remedy for anticompetitive behavior.<sup>22</sup> The concentration on express statutory

---

20. See, e.g., *California v. FPC*, 369 U.S. 482 (1962). This case involved the acquisition of stock of one gas company by another. The Natural Gas Act § 7, 15 U.S.C. 717f (1970), requires Federal Power Commission approval for any such acquisition. However, the Court decided that primary jurisdiction did not lie in the agency since the Act did not explicitly grant the FPC power to immunize mergers from the antitrust laws. 369 U.S. at 485-86. As additional support for denying primary jurisdiction in the agency, the Court pointed out the absence of a "pervasive regulatory scheme" that otherwise might include or supersede the antitrust laws. *Id.* at 485. See also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), where a bank merger, which had been approved by the Comptroller of Currency, was alleged to be violative of the antitrust laws. The Court noted a lack of pervasiveness with respect to the agency's powers over the industry regulated and concluded that the authority to approve of a merger was not tantamount to a grant of power to immunize. Thus, the agency did not have primary jurisdiction and the antitrust suit was properly brought in federal court. *Id.* at 350-55.

21. See *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963). The defendants in *Pan American* had allegedly violated the antitrust laws by conspiring in the allocation of air routes. In an antitrust suit prosecuted by the United States, the Court dismissed the complaint and held that primary jurisdiction was in the Civil Aeronautics Board. The Court viewed the CAB as having expansive regulatory powers over the industry as a result of its power to immunize and its power to issue cease and desist orders to prohibit a wide range of unfair and anticompetitive practices. By virtue of this pervasive scheme, the Court concluded that all the issues raised by the government's complaint had been entrusted to the agency by Congress. The Court, however, limited its holding by noting that, although it was not required to "determine the ultimate scope of the Board's power," *id.* at 312, the CAB had "no power to award damages," and did not "have jurisdiction over every antitrust violation by air carriers," *id.* at 311-12. The 1971 decision, *Breen Air Freight, Ltd. v. Air Cargo, Inc.*, 30 Ad. L.2d 76 (S.D.N.Y. 1971), involved a variation on the holding in *Pan American*. In *Breen*, the CAB had initially granted approval of an agreement, but defendants had engaged in anticompetitive behavior allegedly outside the scope of the CAB approved conduct. Defendant contended that the CAB's action conferred antitrust immunity on the agreement and that the agency had primary jurisdiction over the claim. The federal district court disagreed, asserting that "to permit the new activities to be insulated [from antitrust liability] would achieve indirectly what could not be done directly," *id.* at 77, and refused to invoke primary jurisdiction in the CAB. The court relied on the grounds that the allegedly illegal activities did not appear to be "necessary" to comply with the CAB order and that plaintiff sought only treble damages which the agency had no authority to give. *Id.*

22. The recent case of *United States v. Navajo Freight Lines*, \_\_\_ F. Supp. \_\_\_, CCH TRADE REG. REP. ¶ 73,737, at 91,098 (D. Colo. 1971), an antitrust suit against a motor carrier that involved the Interstate Commerce Act, extensively discusses the evolutionary process which the doctrine of primary jurisdiction has undergone. The court, closely following the *Pan*

powers means that agency expertise, standing alone, is given only limited weight.<sup>23</sup>

The applicability of antitrust laws to commodities exchanges remains an unsettled question. Despite the fact that early antitrust attacks failed,<sup>24</sup> the vitality of these decisions is questionable in light of the more recent legislative and case law developments.<sup>25</sup> To further adumbrate the present impact of federal antitrust laws on commodities exchanges, analogies must be drawn from the field of securities regulation.<sup>26</sup> Until recently, the Securities Exchange Act<sup>27</sup> was

---

*American* approach, emphasized the "pervasiveness" of the statutory scheme. *Id.* at 91,105. The court held that primary jurisdiction was in the ICC, mentioning agency expertise and the avoidance of conflict as further policy justifications for the invocation of primary jurisdiction. *Id.* at 91,108.

23. Expertise is pertinent only to the extent that a statute accords it importance. JAFFE 124.

24. *See, e.g.*, Board of Trade v. United States, 246 U.S. 231 (1918), which upheld the "Call" rule, by which members of the Board of Trade "were prohibited from purchasing or offering to purchase [specified commodities] during the period between the close of the Call [one day] and the opening of the [next] session . . . at a price other than the closing bid at the Call." *Id.* at 237. *See also* Moore v. New York Cotton Exch., 270 U.S. 593 (1926); Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905); Anderson v. United States, 171 U.S. 604 (1898).

25. As presently formulated the Commodities Exchange Act, 7 U.S.C. §§ 1-17b (1970), embodies a policy of deterring "speculation, manipulation or control which are detrimental to the producer or the consumer, [or the trader]." *Id.* § 5. Among the mechanics adopted to effectuate these policies is the requirement that individual exchanges must enforce their own rules relating to trading. The status of a "contract market" must be retained by an exchange in order for it to qualify as an appropriate forum for commodities transfer. *Id.* § 6h. One requirement for maintaining this designation is that the exchange comply with certain enumerated "duties of contract markets." *Id.* § 7a. By the 1968 amendments these duties were expanded to include enforcement of bylaws "relating to trading requirements," *id.* § 7a(8), and bylaws "providing minimum financial standards and related reporting requirements." *Id.* § 7a(9); *see* Vogelson, *Tightened Regulation for Commodity Exchanges*, 55 A.B.A.J. 858 (1969). Upon a showing of any failure to fulfill these obligations, a Commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General can suspend or revoke the contract market designation and thereby render illegal any commodities transfer engaged in at such market. 7 U.S.C. § 8 (1970). The Commission may also institute cease and desist proceedings with possible misdemeanor sanctions against any contract market not enforcing its rules. *Id.* § 13a. Likewise, individuals who violate any rule or regulation promulgated pursuant to the Act may be held accountable for such violations in an administrative proceeding. *Id.* § 13c(a).

26. The legislative controls of the commodities and securities industries are similar, particularly in their emphasis on self-regulation. *See* Wolff, *Comparative Federal Regulation of the Commodities Exchanges and the National Securities Exchanges*, 38 GEO. WASH. L. REV. 223 (1969). *See generally* Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675 (1970); Johnston, *Application of Antitrust Laws to the Securities Industry*, 20 SW. L.J. 536 (1966); Comment, *An Approach for Reconciling Antitrust Law and Securities Law: The Anti-Trust Immunity of the Securities Industry Reconsidered*, 65 NW. U.L. REV. 260 (1970).

27. 15 U.S.C. §§ 78a-78hh (1970).

thought to have exempted activities controlled by the New York Stock Exchange from the antitrust laws. However, *Silver v. New York Stock Exchange*<sup>28</sup> reversed this thinking by holding:

The Securities Exchange Act contains no express exemption from the antitrust laws . . . [and] [r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work.<sup>29</sup>

The *Silver* court resolved the "necessary to make the Act work" test in favor of the plaintiff, on the ground that the Securities Exchange Act "afford[ed] no justification for [the defendant's] anticompetitive collective action."<sup>30</sup> Since the New York Stock Exchange practice in issue was not deemed necessary to effectuate the purposes of the regulatory act, a violation of the federal antitrust laws was present.

The scope of *Silver* was placed in doubt by the much criticized<sup>31</sup> decision in *Kaplan v. Lehman Brothers*<sup>32</sup> where it was alleged that the minimum commission rates established by the New York Stock Exchange constituted a *per se* antitrust violation.<sup>33</sup> The district court

28. 373 U.S. 341 (1963).

29. *Id.* at 357. In *Silver* the New York Stock Exchange had deprived plaintiff, a non-member securities broker, of his telephone connections to member firms without affording hearing or notice to the plaintiff. The Court held that practices regulated by the New York Stock Exchange were subject to the antitrust laws unless such practices were an integral part of the regulatory scheme. In essence, the rule of the case is that a plaintiff will prevail on the merits in an antitrust action against an exchange upon a showing that the exchange practice under attack has an anticompetitive impact and its continued existence is not necessary to make the act work. However, because of a technicality, the *Silver* Court did not confront the equally important problem of determining which tribunal—a federal court or an agency—has primary jurisdiction to hear the substantive antitrust claim. The Court reasoned that the antitrust violation pertained to the enforcement of a rule and not to a rule itself. Finding that the SEC could review only rules and not "particular instances of enforcement," *id.*, see note 4 *supra*, the Court held that in this instance, federal courts had exclusive jurisdiction to hear the merits of the antitrust case.

30. 373 U.S. at 364.

31. See note 34 *infra*.

32. 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

33. The term "*per se* violation" developed from the judicial gloss placed upon the first two sections of the Sherman Act, 15 U.S.C. §§ 1-2 (1970). *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), enunciated the "rule of reason" standard which read the Sherman Act as applying only to *unreasonable* restraints of trade. Consequently, any reasonable restraint of trade is not punishable under the Act. Certain practices, however, such as group boycotts or price fixing, are viewed as being intrinsically unreasonable or without redeeming virtues and thus constitute "*per se* violations." See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (group boycotts); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (price fixing). See generally Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965); 75 YALE L.J. 373 (1966).

concluded that the Securities Exchange Act granted the Exchange power to fix commissions and issued an order in favor of the defendants. The Court of Appeals for the Seventh Circuit affirmed and the Supreme Court denied certiorari. In a caustic dissent, however, Chief Justice Warren denounced the analysis used by the lower courts as a “blunderbuss approach [that fell] far short of the close analysis and delicate weighing process mandated by . . . *Silver*.”<sup>34</sup> According to the Chief Justice, after finding that the agency was competent to consider the antitrust question, the district court should have continued its study in an effort to reconcile the antitrust and regulatory statutes. If this approach had been followed, the court would first have had to resolve the question of primary jurisdiction, and thereby determine whether a court or agency should initially decide if minimum fixed commission rates were “necessary to make the Act work.”

A recent case which discusses primary jurisdiction in the context of a securities exchange is *Thill Securities Corp. v. New York Stock Exchange*.<sup>35</sup> In *Thill* the plaintiff was a non-member broker who alleged that the Exchange’s anti-rebate rule<sup>36</sup> violated the federal antitrust laws. The lower court, using the same analysis as that in *Kaplan*, granted summary judgment for the defendant and held that the commission rates were reviewable by the SEC and hence not subject to

---

34. 389 U.S. at 957. Several commentators have also criticized the *Kaplan* result. See, e.g., Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675, 691 (1970); Comment, *An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered*, 65 NW. U.L. REV. 260, 308-09 (1970). The *Kaplan* court apparently read the “different case” alluded to in footnote twelve of the *Silver* opinion, see note 4 *supra*, as implying that antitrust immunity would obtain where the conduct complained of was within the scope of SEC review.

35. 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971). Although the *Thill* decision was not concerned directly with primary jurisdiction, the issue was raised in a concurring opinion. See notes 38, 39 *infra* and accompanying text.

36. The “anti-rebate rule,” embodied in the Constitution of the New York Stock Exchange, art. XV, § 1 (1970), provides as follows:

Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed; and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect . . . . No member, member firm or member corporation shall, in consideration of the receipt of listed business and at the direct or indirect request of a non-member or by direct or indirect arrangement with a non-member, make any payment or give up any work or give up all or any part of any commission or other property to which such member, member firm or member corporation is or will be entitled.

antitrust attack. In rejecting this approach and reinstating plaintiff's claim, the Court of Appeals for the Seventh Circuit concluded that a harmonization of the Securities Exchange Act and the antitrust laws is not precluded merely because a certain challenged practice might also be subject to SEC review. Instead, "it is at this point that the analysis of reconciliation really begins,"<sup>37</sup> by an application of the "necessary to make the Act work" test. The majority opinion in *Thill* did not directly treat the issue of primary jurisdiction or apply the *Silver* test. However, in a concurring opinion Chief Judge Swygert noted that the problem of primary jurisdiction was "lurking in the background" and was essential for the "proper resolution of conflicting antitrust and securities law."<sup>38</sup> While pointing out that the question was not before the court at this stage in the litigation, Swygert posited four criteria which the district court might employ to settle the issue on remand. These included:

- (1) whether and to what extent the SEC is empowered to consider antitrust laws and policy in fulfilling its duty of review of exchange self-regulation;
- (2) whether an aggrieved party may initiate SEC review of exchange rules under the provisions of the Securities Exchange Act or the Administrative Procedure Act;
- (3) whether and to what extent SEC expertise would be useful in resolving, in the first instance, the question of whether a given rule is necessary to make the Securities Act work; and
- (4) whether the anticompetitive aims of the Sherman Act can be achieved without subjecting the exchanges to treble damage suits which necessarily result if the doctrine of primary jurisdiction is unavailable to the defendant in this case.<sup>39</sup>

The majority opinion endorsed a proposal by plaintiff's counsel that the SEC and Justice Department, both directly interested in the issues at bar, be invited to participate by way of expert testimony and legal argument.<sup>40</sup> Although the statement was set forth in a context other than that of primary jurisdiction, it imports a suggestion for the resolution of that issue as well. To the extent that a court's procedure permits the utilization of administrative expertise in an antitrust action, deference to an agency proceeding can no longer be looked to as the sole technique for utilizing the agency as a repository of exper-

---

37. 433 F.2d at 269.

38. *Id.* at 276.

39. *Id.* at 277.

40. *Id.* at 273.

tise. The court's procedural freedom will partially neutralize any advantage that an agency's expertise might initially create, and in resolving the question of primary jurisdiction the court will thus look to factors other than expertise.<sup>41</sup>

In *Ricci v. Chicago Mercantile Exchange*<sup>42</sup> the court initially asked whether the case was a proper one for invoking the doctrine of primary jurisdiction—an issue which the earlier decisions in *Silver*, *Kaplan*, and *Thill* had not confronted. The court recognized that the plaintiff had claimed, among other theories of recovery, the existence of a group boycott—a *per se* antitrust violation—for which the defendants would have to find “justification” in the Commodities Exchange Act. Although not explicitly mentioned, it seems clear that the court considered an application of the “necessary to make the Act work” test to be in order. Unlike *Kaplan*, the *Ricci* court refused to dismiss the action solely because it was brought on a *per se* theory against conduct arguably within the scope of agency regulation. Instead, *Ricci* followed *Thill* and Chief Justice Warren's dissent in *Kaplan* by recognizing that such an allegation requires a reconciliation of the regulatory act and the antitrust laws.

The court refuted plaintiff's next argument purportedly based on *Silver*. Plaintiff maintained that no “justification” could be inferred from the Commodities Exchange Act that would condone the defendants' actions, and that this conclusion was reinforced by the fact that he had been excluded from the Exchange without being afforded notice or hearing. Thus, the Exchange did not even reach the “threshold of justification”<sup>43</sup> alluded to in *Silver*. On these grounds plaintiff asserted that *Silver* directly controlled, and thus his antitrust claim should proceed to trial in federal court. The court of appeals conceded *arguendo* that there might be a *per se* violation of the antitrust laws without “justification” in this instance, but determined that this factor did not dispose of the primary jurisdiction issue. Apparently the plaintiff had confused the primary jurisdiction question with the mer-

---

41. At least one other case, *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), has cited with approval the *Thill* suggestion of appropriating agency expertise by utilizing expert testimony. *Id.* at 272. Although this decision is not directly concerned with the issue of primary jurisdiction, it does involve a class action against odd-lot dealers on the New York Stock Exchange for violations of the federal antitrust laws.

42. 447 F.2d 713 (7th Cir. 1971).

43. See text accompanying note 30 *supra*.

its of the antitrust claim, and the court of appeals correctly made the distinction. The court then noted that the Exchange had a duty to enforce its own rules and regulations as they pertained to "trading requirements."<sup>44</sup> This obligation arose by virtue of the Exchange's designation as a "contract market" under the Commodities Exchange Act.<sup>45</sup> According to the court plaintiff's antitrust allegations encompassed violations of exchange rules relating to trading requirements, and as such "they could have been examined by the Commodities Exchange Commission or the Secretary of Agriculture."<sup>46</sup> *Silver* was distinguished from the instant case on the grounds that the *Silver* opinion did not have to reconcile any conflict or "co-extensiveness of coverage" between a private antitrust suit and an agency remedy. Evidently, the court felt that since there was potential agency jurisdiction over the practices that allegedly violated the antitrust laws, *Ricci* was the "different case" referred to in the *Silver* opinion.<sup>47</sup> As a result, the *Ricci* court, unlike that in *Silver*, was required to resolve a question of primary jurisdiction.

After determining the appropriateness of deciding the primary jurisdiction issue, the court then looked to *Thill Securities Corp. v. New York Stock Exchange*<sup>48</sup> and the four guidelines that Chief Judge Swygert suggested in his concurring opinion to resolve that point.<sup>49</sup> The majority in *Ricci* answered all four of the *Thill* questions in the affirmative, concluding that primary jurisdiction was in the agency.

---

44. 447 F.2d at 717.

45. See note 25 *supra* and accompanying text.

46. 447 F.2d at 718.

47. *Silver v. New York Stock Exch.*, 373 U.S. 341, 358 n.12 (1963); see note 4 *supra* and accompanying text.

48. 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

49. See note 39 *supra* and accompanying text. Resort to this four-fold test was necessary because the court found no express exemption from the antitrust laws in the Commodities Exchange Act. A possible criticism of *Ricci* arises from the court's use on the appellate level of the four criteria set forth in *Thill*. The *Ricci* court engaged in the same determination that *Thill* suggested the district court might subsequently undertake on remand. For this reason, a remand in *Ricci* to the district court for the purpose of gathering evidence and then making the four-fold *Thill* evaluation might have been more correct. Significantly, Judge Kerner, in his dissenting opinion in *Ricci*, see notes 67-72 *infra* and accompanying text, pointed out that the issue of primary jurisdiction had not been briefed or argued, 447 F.2d at 722 n.10, and asserted that for this reason the *Ricci* court should remand the case to the district court for consideration of the primary jurisdiction problem. It is also noteworthy that Chief Judge Swygert's approach to primary jurisdiction in *Thill* was deliberate, and he intended that the district court consider all four of the proposed criteria only after the taking of additional evidence. Consequently, the *Ricci* holding on primary jurisdiction, even if correct, may reasonably be labelled premature.

In regard to the first two questions they reasoned that the Commodities Exchange Commission was not expressly or implicitly barred from weighing antitrust policy, and that the direct institution of proceedings was possible.<sup>50</sup> These two parts of the *Thill* test, as applied in *Ricci*, are most nearly analogous to the Supreme Court's inquiry in *United States v. Philadelphia National Bank*<sup>51</sup> of whether the agency could "enforce the competitive standard clearly delineated" by statute.<sup>52</sup> A positive response to these questions presents a strong basis for invoking primary jurisdiction because arguably such powers in the agency show a congressional intent to entrust the agency with enforcement of the antitrust laws. However, because the court of appeals relied on the fact that there was no express bar to agency consideration of antitrust principles, the correctness of the *Ricci* court's approach to these two points is drawn into question as it entails an inverted approach to deciding the issue of agency power to remedy anticompetitive behavior.<sup>53</sup> In *Pan American World Airways, Inc. v. United States*,<sup>54</sup> the Supreme Court had previously resorted to primary jurisdiction only after finding an affirmative grant of "broad powers" in the agency to prohibit a wide range of anticompetitive practices. Finding such powers by negative implication is therefore

---

<sup>50</sup> The court said: "There exists no express or implied exemption in the Commodities Exchange Act that would prevent the [agency] from taking into account antitrust principles in their deliberations pursuant to the Act . . . . If indeed the allegedly anticompetitive transfer of membership were in violation of Exchange rules, the Commission could have prevented it." 447 F.2d at 718-19.

<sup>51</sup> 374 U.S. 321 (1963); see note 20 *supra* and accompanying text.

<sup>52</sup> 374 U.S. at 351; see text accompanying notes 20-22 *supra*.

<sup>53</sup> The majority opinion is also troublesome because the regulations cited by the court do not explicitly provide for an antitrust remedy in the agency. 447 F.2d at 719 nn.13-14, *citing* 17 C.F.R. §§ 0.3, 0.8, 0.53, 0.58 (1971). By *id.* §§ 0.3, 0.53, a complainant may file for the institution of proceedings before the Commission, and subsequently by *id.* §§ 0.8, 0.58, petition to intervene in such proceedings. Although the proceedings which can be initiated by a petitioner pertain to "any violation of the act," *id.* § 0.3, they are merely called "Disciplinary Proceedings" and could conceivably be deemed an improper forum for remedying antitrust grievances. Moreover, the individual who files an application to institute proceedings has "no legal status in the proceedings . . . except [as an intervenor or witness]," *id.* §§ 0.3(b), 0.53(b). In order to intervene, a party must petition for permission from the Commodities Exchange Commission or the Secretary of Agriculture who "may" allow intervention where the petitioner shows, among other factors, a "relationship to the matters involved in the proceeding." *Id.* §§ 0.8, 0.58. Because of the discretion in the Commission and Secretary of Agriculture on the question of intervention, these regulations could be applied against a petitioner in a manner that would deny him standing before any agency. In such a situation a petitioner would clearly have no antitrust remedy in an agency for a breach of exchange rules.

<sup>54</sup> 371 U.S. 296 (1963); see note 21 *supra* and accompanying text.

clearly at odds with the *Pan American* rationale. Further, the traditional canon of statutory construction that "[i]mmunity from the antitrust laws is not lightly implied,"<sup>55</sup> argues against the *Ricci* rationale. Despite these infirmities in its approach, the court of appeals may have redeemed itself by its footnote discussion of *Pan American* and the pervasiveness of the regulatory scheme.<sup>56</sup> The footnote indicates that the court found an affirmative statutory conferral of power to hear charges of anticompetitive behavior at least when such behavior concerns the enforcement of exchange rules. This construction of the Commodities Exchange Act as granting the Commission "broad powers" over exchange rules and their enforcement draws support from the strong statutory policy of exchange enforcement of rules and the Commission's numerous powers to remedy any failure to enforce these rules.<sup>57</sup> However, because the regulations equivocate on the question of whether the Commission has power to remedy an antitrust violation, the court's conclusion is still questionable.<sup>58</sup>

Assuming the correctness of the *Ricci* finding of remedial antitrust powers in the Commission, *Pan American* poses problems in one other regard. In *Pan American* the "broad jurisdiction" of the agency encompassed most facets of the regulated industry,<sup>59</sup> while in *Ricci* the court found such pervasive powers only with respect to a single dimension of the commodities industry. Thus, the question presented is whether an affirmative grant of broad agency jurisdiction over essentially all of the regulated industry is required by *Pan American* before the doctrine of primary jurisdiction is to be considered, or whether a pervasive delegation of authority over only that type of conduct which is the subject matter of the antitrust attack will suffice. The *Ricci* court adopted the latter position, reasoning that the Commodities Exchange Commission's power over the enforcement of rules was

---

55. *California v. FPC*, 369 U.S. 482, 485 (1962); see note 20 *supra* and accompanying text.

56. The court stated:

Although the overall regulatory scheme in the instant case is less pervasive than the scheme in *Pan American*, the specific allegations relate directly to the [agency's] power to designate contract markets and allow the trading in futures by individuals. Such power is no less basic to the regulatory scheme than it was [in *Pan American*]. 447 F.2d at 719 n.15.

57. See note 25 *supra* and accompanying text.

58. See note 53 *supra* and accompanying text.

59. 371 U.S. at 304. See note 21 *supra*.

“basic to the regulatory scheme.”<sup>60</sup> Hence the agency had been charged with the duty of remedying anticompetitive conduct that violated exchange rules. This conclusion appears to be the better reasoned of the two alternatives, especially upon consideration of the policy behind the “pervasiveness” test. In general, broad agency jurisdiction over anticompetitive actions illustrates a legislative intent to confer the power of antitrust enforcement upon an administrative body. Such intent logically applies to a limited range of practices as well as to the industry at large. Depending upon the nature of the industry and the type of regulatory system thought to be most beneficial for that industry, a combination of federal court and agency jurisdiction over anticompetitive practices may be desirable. In the commodities industry, agency inability to diligently enforce exchange rules has had disastrous consequences,<sup>61</sup> and led Congress to specifically enhance agency powers over this area. Federal court antitrust jurisdiction over the enforcement of commodities exchange rules would, therefore, contravene the apparent congressional plan to have an agency initially consider a matter so acutely important to the commodities industry. Consequently, *Ricci* might be read as a case attempting to achieve harmonization of the antitrust laws and a regulatory act by employing primary jurisdiction in a situation where all the issues raised by the antitrust complaint pertained to matters over which agency jurisdiction was extensive.

In response to the third *Thill* criterion, agency expertise, the *Ricci* court pointed out that the plaintiff’s complaint had raised questions that were particularly within the agency’s “watchdog function.”<sup>62</sup> Evidently the court thought that the Commission’s role as a “watchdog” would result in thorough knowledge of the intricacies of the commodities industry. While the question of expertise has not controlled the issue of primary jurisdiction since the Supreme Court decision in *Federal Maritime Board v. Isbrandtsen Co.*<sup>63</sup> the Commodities Exchange Commission’s expertise in this area should not be ignored.

---

60. 447 F.2d at 719 n.15; see note 56 *supra*.

61. See Vogelson, *supra* note 25, at 858, *citing*, *United States v. De Angelis*, No. 452-63 (D.N.J., Dec. 23, 1963), a salad oil scandal case, as the major impetus for the 1968 Commodities Exchange Act amendments that included a provision requiring exchanges to enforce their own rules relating to trading.

62. 447 F.2d at 719.

63. 356 U.S. 481 (1958). See notes 19-23 *supra* and accompanying text.

Finally, in answer to the fourth part of the *Thill* test,<sup>64</sup> the *Ricci* court asserted that the Commodities Exchange Commission would be hindered in its self-regulatory duties if treble damage suits were permitted against an exchange. Although this contention may be true, it is irrelevant to the allocation of primary jurisdiction. It must be recognized that the Commission's self-regulatory duties are the product of the powers conferred upon it by statute and are restricted by the limits of those powers. Therefore, federal antitrust jurisdiction should not be interpreted as inhibiting the agency's performance of its self-regulatory policy, but simply as a necessary result of Congress's limited grant of power to that agency. It must be assumed that Congress intended the federal antitrust laws to remain in force where the agency's powers are less than pervasive, and consequently the aims of those laws will be achieved only by permitting antitrust suits.

The most important aspect of the application of the *Thill* criteria by the majority in *Ricci* was to find agency power to hear complaints of anticompetitive behavior pertaining to the enforcement of rules. The existence of this power strongly supports a finding of primary jurisdiction in the agency. However, the lack of any inquiry concerning the agency's power to immunize industry practices from the antitrust laws is immediately obvious. The Supreme Court has seemingly accorded both the power to immunize and the power to provide a remedy for anticompetitive behavior equal importance in deciding the issue of primary jurisdiction.<sup>65</sup> The *Ricci* court briefly alluded to the power to immunize in a footnote, but refused to consider it because neither party had raised or briefed the issue.<sup>66</sup> This shortcoming in the majority's analysis might be viewed as reversible error. An inquiry concerning agency power to immunize a violation of exchange rules from antitrust consequences is essential in resolving the question of primary jurisdiction, for unless the agency's "broad powers" include the power to immunize, resort to primary jurisdiction in the agency is improper. Consequently, the *Ricci* court should have remanded to

---

64. See note 39 *supra* and accompanying text.

65. See notes 20-22 *supra* and accompanying text.

66. The court said:

We express no opinion on any antitrust immunity that might result from action or inaction taken by the [agency] in this case. The complicated issues of reconciliation of the Commodities Exchange Act and the Sherman Act that would be presented will require the benefit of brief and argument before any determination could be attempted. 447 F.2d at 720 n.18.

the district court for a determination of at least this issue before finding primary jurisdiction in the agency.

Judge Kerner, concurring in part and dissenting in part, agreed with the majority in reversing the district court's dismissal of the plaintiff's suit, but opposed their disposition of the primary jurisdiction issue. Kerner argued that resort to the agency should be discretionary rather than mandatory. He noted that the case involved no unconventional facts, and read part of the Commodities Exchange Act<sup>67</sup> as obviating administrative discretion by commanding the agency to enforce exchange rules. On this basis, Kerner contended that the plaintiff's claim should have been remanded to the district court for a decision on the merits. This line of his argument is weakened, however, by its reliance on the lack of need for agency expertise, now a criterion of secondary importance. It is further weakened by its reliance on the fact that the Commission has a mandatory duty to enforce exchange rules. A mandatory duty supports rather than rebuts the need for primary jurisdiction. To allow federal courts to enforce exchange rules via the mechanisms of the antitrust law would in many instances preclude the agency from initially performing its mandatory function. In order to prevent plaintiffs from circumventing the administrative system, primary jurisdiction in the Commodities Exchange Commission should be utilized.

Kerner further asserted that a proper application of the *Thill* criteria<sup>68</sup> would indicate that a remand to the district court should have been ordered in *Ricci*. He set forth *inter alia* that a resort to primary jurisdiction "needlessly [multiplied] the number of tribunals involved in these proceedings"<sup>69</sup> and violated the notion that courts

---

67. *Id.* at 721, citing 7 U.S.C. § 7a(9) (1970).

68. Kerner contested the majority's reliance on *Thill* to support primary jurisdiction in the Commission or the Secretary of Agriculture. He pointed out that a majority of the *Thill* panel concurred in a remand to the district court rather than to the agency. Therefore, reasoned Kerner, both judges must have concluded that primary jurisdiction in the agency was not proper, and hence the majority view in *Ricci* was inconsistent with *Thill*. This conclusion is doubtful, because in *Thill* Chief Judge Swygert specifically stated that the issue of primary jurisdiction was not before the court. 433 F.2d 264, 276-77 (7th Cir. 1970). More importantly, the *Thill* case was appealed only on the issue of summary judgment, and the district court proceedings had not yet developed to a point where the issue of primary jurisdiction could be raised. The majority in *Ricci*, however, did not contend that *Thill* was a controlling precedent on primary jurisdiction. Instead, they merely adopted a list of criteria set forth as a possible means of resolving that issue.

69. 447 F.2d at 722.

are the traditional "repositories of antitrust expertise."<sup>70</sup> As to the first reason cited, Kerner was concerned with the possibility that the majority might have erred in concluding that the Commodities Exchange Commission could hear plaintiff's antitrust claim. He thus felt that a determination of the agency's antitrust jurisdiction should initially be made by the district court. Because the statutory powers are broad but unclear in scope, Kerner's doubts on this point are not entirely unfounded. Indeed, they lend added support to the contention that the entire *Thill* test and any other primary jurisdiction questions should have been remanded to the district court.<sup>71</sup> However, his statements extolling the federal courts as "repositories of antitrust expertise" are misdirected. The federal courts' traditional antitrust expertise is not a relevant factor because the involvement of a regulatory act alters the antitrust test. Where the plaintiff has alleged a *per se* violation by an Exchange, the real controversy on the merits of the antitrust claim will center on whether the challenged practice is justified by the Commodities Exchange Act and not whether the facts adduced in evidence prove the *per se* allegation. The presence or absence of a statutory grant of agency powers to remedy anticompetitive behavior and to immunize industry practices from antitrust consequences should thus control the issue of allocating primary jurisdiction.<sup>72</sup>

The result in *Ricci* illustrates the uncertainty that presently pervades any resolution of primary jurisdiction under antitrust claims. At one extreme the doctrines of uniformity, supersession, and expertise<sup>73</sup> favor an administrative disposition of antitrust claims, while at the other extreme, the theories requiring a statutory grant of power to immunize and power to enforce antitrust laws<sup>74</sup> incline toward an expansion of federal court jurisdiction.<sup>75</sup>

---

70. *Id.* at 723, citing, 433 F.2d at 273.

71. See note 49 *supra*.

72. The recent case of *Seligson v. New York Produce Exch.*, 29 AD. L. 2D 1069 (S.D.N.Y. 1971), cited Kerner's resolution of the primary jurisdiction question in *Ricci* with approval. *Seligson* involved another antitrust suit against a commodities exchange. The district court refused to invoke primary jurisdiction, ostensibly for reasons of judicial economy since the parties had already undergone five years of discovery and pre-trial motions.

73. See notes 11-18 *supra* and accompanying text.

74. See notes 19-23 *supra* and accompanying text.

75. Professor Jaffe has criticized this "assumption of exclusive alternatives," especially where the antitrust and regulatory laws are both designed to safeguard the public's economic interest. JAFFE 148.