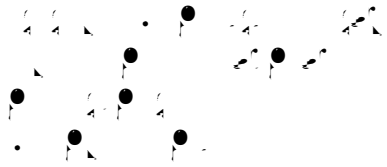

_____

)
)
)
)
)
)
)
)
)
_____)

Commission challenged industry-wide base point pricing in the cement industry. *Id.* at 688. Prior to issuing the complaint, the Commission, in reports and testimony to Congress, had stated that "the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act." *Id.* at 701.[1] Forming such opinions did not prevent the Commission from deciding the adjudicatory matter:

> "[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

Id. at 702-03.

The analysis would be different if a Commissioner made statements unrelated to the Commission's official duties. Disqualification is appropriate if a Commissioner gives a speech discussing the merits of a pending case. *See Cinderella Career and Finishing School v. Federal Trade Commission*, 425 F.2d 583 (D.C. Cir. 1970). In contrast, the statements Whole Foods relies on were made as part of the Commission's attempts to invoke relief under Section 13(b).

Third, the logic of Whole Foods' argument would destroy the utility of Section 13(b), which allows the Commission to pursue preliminary relief as plaintiff while it adjudicates the ultimate merits in administrative litigation. If Whole Foods' argument were accepted, the Commission would risk disqualification from pursuing administrative litigation – the administrative hearing as well as an appeal of an Initial Decision – each time the Commission decided to pursue preliminary relief under section 13(b) of the FTC Act in federal district court. Under Whole Foods' view, the Commission could not, or should not, participate in administrative proceedings at all if, on appeal from a denial of preliminary injunction under 13(b), it declared that the evidence before the federal district court was sufficient to satisfy the applicable standard. Such a result would nullify Section 13(b). If Whole Foods were correct, every time the Commission sought a preliminary injunction, it could not pursue administrative litigation, so there would be no need for a preliminary injunction pending the outcome of the adjudicative trial.

---

[1] In its reports, the Commission also said it "regarded the cement industry in the same category, as far as price fixing was concerned, as steel and other industries." *Marquette Cement Mfg. Co. v. Fed. Trade Comm'n*, 147 F.2d 589, 591 (7th Cir. 1945) *aff'd sub nom. Fed. Trade Comm'n v. Cement Institute*, 334 U.S. 683 (1948).

[2] Whole Foods did not follow the proper procedure for seeking disqualification of the presiding officer. The movant must file "a timely and sufficient affidavit" that shows "personal

acts as the presiding official or not, it will decide this matter, like all matters, based on the evidence in the case and the law, in an impartial and fair manner. Accordingly,

Respondent Whole Foods' Motion to Disqualify the Commission is and

Respondent Whole Foods' Motion for Oral Argument on its Motion to Disqualify the Commission is .

By the Commission.

Donald S. Clark
Secretary

ISSUED: September 5, 2008