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ANNUAL SURVEY OF ANTITRUST DEVELOPMENTS 1977-1978

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The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations and wanton tempers of men.—John Adams[1]

The year 1978[2] produced no real surprises in antitrust, either at the Supreme Court or elsewhere—with the possible exception of publication of the FTC's new premerger notification rules. Producing no *Illinois Brick*[3] or *GTE Sylvania,*[4] the Supreme Court preserved a steady course by building on and extending antitrust case law. In spite of a flurry of legislative activity, at times displaying fluctuating passions and "flights of enthusiasm," only airline deregulation was enacted. Antitrust enforcement was further marked by continued public focus on the Justice Department's Antitrust Division and by meetings of the National Commission for the Review of Antitrust Laws and Procedures.

I. THE SUPREME COURT'S STEADY COURSE

A. *Introduction*

If measured by volume, the Supreme Court had one of its most active years in antitrust. No fewer than seven antitrust cases during the 1977-78 term yielded full opinions, addressing diverse subject matter ranging from chickens to Greyhound buses. Through these cases, the Court evidenced further hostility toward antitrust immunities, underscored its focus on economic impact, treated the interplay between the Sherman Act and the

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[1] THE TRIAL OF THE BRITISH SOLDIERS 117 (1824) (transcript of 1770 trial of soldiers accused of Boston Massacre).

[2] This article reviews United States Supreme Court antitrust decisions during the 1977-78 term and surveys other major federal antitrust developments in 1978, including one case from the Court's current term.

[3] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[4] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

Robinson-Patman Act while examining the ingredients of criminal intent, and clarified antitrust procedure. Two decisions concerning class action procedure will undoubtedly affect antitrust litigation, and various cases outside antitrust had competitive ramifications.

The Court continued its fascination with antitrust immunities by deciding four cases during the 1977-1978 term in which defendants asserted an immunity from the antitrust laws. In each case the Court upheld a court of appeals decision against the asserted immunity. In another case from the current term, however, the Court accepted a claimed immunity. *National Society of Professional Engineers v. United States*[5] delivered a coup de grace to the so-called "learned professions" immunity while illuminating the rule of reason. *City of Lafayette v. Louisiana Power & Light Co.*[6] held that municipalities are not automatically immune from the antitrust laws under the state action doctrine. *National Broiler Marketing Association v. United States*[7] held that a cooperative organization that included chicken processors is not exempt from liability under the Sherman Act by virtue of the Capper-Volstead Act because processors are not "farmers." And *St. Paul Fire & Marine Insurance Co. v. Barry*[8] interpreted the term "boycott," as used in the McCarran-Ferguson Act, as broad enough to encompass a refusal by certain insurers to deal with the policyholders of another, thus subjecting the insurers to the Sherman Act. In the most recent case, *New Motor Vehicle Board v. Orrin W. Fox Co.*,[9] the Court upheld invocation of the state action doctrine to protect implementation of the California Automobile Franchise Act.

With criminal antitrust enforcement intensifying in the wake of increased antitrust penalties,[10] *United States v. United States Gypsum Co.*[11] may be the most significant case of the term. In *Gypsum*, the Court analyzed the elements of criminal antitrust liability, while confirming that verification of prices by communicating with competitors to establish a "meeting competition" defense under the Robinson-Patman Act does not preclude conviction for price fixing under the Sherman Act.

The Court decided several procedural cases affecting antitrust litigation. In *Pfizer, Inc. v. Government of India*,[12] one of three cases in which the Court wrestled with the meaning of a single statutory term,[13] the Court

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[5] 435 U.S. 679 (1978); *see* text accompanying notes 21-52 *infra*.

[6] 435 U.S. 389 (1978); *see* text accompanying notes 57-102 *infra*.

[7] 436 U.S. 816 (1978); *see* text accompanying notes 144-53 *infra*.

[8] 98 S. Ct. 2923 (1978); *see* text accompanying notes 123-43 *infra*.

[9] 99 S. Ct. 403 (1978); *see* text accompanying notes 103-11 *infra*.

[10] The Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974), amended the Sherman Act to provide that violations constitute felonies rather than misdemeanors, the criminal penalty instituted in 1890. 15 U.S.C. §§ 1-3 (1976). Maximum fines were also increased. *Id.*

[11] 98 S. Ct. 2864 (1978); *see* text accompanying notes 170-224 *infra*.

[12] 434 U.S. 308 (1978); *see* text accompanying notes 225-41 *infra*.

[13] The other cases were National Broiler Marketing Ass'n v. United States, 463 U.S. 816 (1978), examining the meaning of "farmers," and St. Paul Fire & Marine Ins. Co. v. Barry, 98 S. Ct. 2923 (1978), considering the scope of "boycott."

held that foreign governments were "persons" under section 4 of the Clayton Act and thus entitled to bring treble damage actions for alleged antitrust violations.[14] *Greyhound Corp. v. Mt. Hood Stages, Inc.*[15] held that government intervention in an interstate commerce proceeding does not toll the statute of limitations for private antitrust actions[16] because such intervention is not institution of antitrust enforcement under section 5(i) of the Clayton Act.[17] Two additional cases focused on class actions. In *Coopers & Lybrand v. Livesay*[18] the Court sounded the death knell for the "death knell doctrine" by ruling that denial of class certification is not an appealable "final decision" under 28 U.S.C. § 1291 even though named plaintiffs might be induced to abandon their claims. In *Oppenheimer Fund, Inc. v. Sanders*[19] the Court narrowed the range of circumstances in which a trial court may order a defendant to cover the cost of class action notice.

Several other decisions are likely to generate significant competitive impact. From an antitrust standpoint, the most important of these cases was *Exxon Corp. v. Governor of Maryland,*[20] in which the Court upheld a Maryland statute prohibiting oil producers from operating gas stations in the state.

B. *Immunities*

1. Engineers: *Immunity in Light of the Rule of Reason*

National Society of Professional Engineers v. United States[21] provides a useful springboard for examining antitrust cases being reviewed, for in *Engineers* the Court expounded on the rule of reason—the fundamental standard underlying application of the Sherman Act. In examining the contours of the rule of reason, the Court evidenced a restrictive attitude

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[14] The term "person" was also examined in an antitrust setting in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), with respect to jurisdiction over a municipality in a treble damage action. *Id.* at 394-97.

[15] 98 S. Ct. 2370 (1978); *see* text accompanying notes 242-52 *infra.*

[16] Section 4(b) of the Clayton Act provides a four-year statute of limitations for private antitrust actions. 15 U.S.C. § 15(b) (1976).

[17] 15 U.S.C. § 16(i) (1976).

[18] 98 S. Ct. 2454 (1978); *see* text accompanying notes 253-58 *infra.*

[19] 98 S. Ct. 2380 (1978); *see* text accompanying notes 259-68 *infra.*

[20] 437 U.S. 117 (1978). Other such cases include FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding an FCC regulation prohibiting future formation of newspaper-broadcasting combinations in the same community) and Zenith Radio Corp. v. United States, 98 S. Ct. 2441 (1978) (holding that Japan's remission of commodity taxes on exports does not give rise to required levies under the Tariff Act of 1930 upon importation of products into the United States). Even cases such as *In re* Primus, 436 U.S. 412 (1978) and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), which considered restrictions against solicitation by lawyers in the face of first amendment challenges, will impact on competition. While in *Primus* the Court rejected application of South Carolina's solicitation rules to a letter advising of legal assistance available from the ACLU, in *Ohralik* the Court upheld application of Ohio's rules against solicitation in circumstances "likely to pose dangers that the State has a right to prevent." 436 U.S. at 449.

[21] 435 U.S. 679 (1978).

toward immunities by confirming the nonexistence of the "learned professions" immunity.

In *Goldfarb v. Virginia State Bar*,[22] the Court had rejected the argument that Congress had intended a "sweeping exclusion" for the learned professions from the phrase "trade or commerce" in section 1 of the Sherman Act.[23] Although holding that minimum fee schedules published by the Fairfax County Bar Association constituted price fixing, the Court recognized that conduct by a profession should not necessarily be scrutinized in the same light as conduct by a conventional business.

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.[24]

The *Goldfarb* Court's special consideration of professional conduct in footnote 17 is not couched in terms of immunity. Although it is arguable that conduct otherwise constituting a per se violation of the antitrust laws may be brought under the rule of reason if carried on by a profession,[25] the holding in *Goldfarb*, coupled with the words of the footnote, most likely means that professional conduct is simply one factor to be taken into account in a rule of reason analysis. One would have expected such an analysis to include this factor even without *Goldfarb*. Nevertheless, prior to *Engineers*, the Justice Department had regarded *Goldfarb* as making "clear that no such exemption now exists, and the 'learned professions' are *fully* subject to the antitrust laws."[26] *Goldfarb* and *Engineers* together confirm that while there has never been a "learned professions" immunity as such, the fact that challenged conduct is the practice of a profession is relevant for the purpose of applying the rule of reason.

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[22] 421 U.S. 773 (1975).

[23] *Id.* at 788. The Association's argument was based on dicta in cases such as FTC v. Raladam Co., 283 U.S. 643, 653 (1931), in which the Court said that "medical practitioners . . . follow a profession and not a trade. . . ." *See* 421 U.S. at 786 n.15.

[24] 421 U.S. at 788-89 n.17.

[25] *See, e.g.*, Miles, *Competition and Professional Codes of Ethics*, *in* IV VA. B.A.J. 15, 19 (Fall, 1978). Of course, it should be borne in mind that the per se doctrine is merely a corollary of the rule of reason.

[26] U.S. Dept. of Justice, *Report of the Task Force on Antitrust Immunities* 42 (1977) (emphasis added). "Learned Professions" warranted a separate section in this report. Consistent with the conclusion quoted in the text above, the Briefing Paper on Antitrust Immunities, prepared by the Antitrust Division staff supporting the National Commission for the Review of Antitrust Laws and Procedures, failed to mention "learned professions."

The National Society of Professional Engineers relied on footnote 17 in defending a canon of its code of ethics which prohibited competitive bidding by members of the Society.[27] The Court's conclusion was foregone because of the sweeping nature of the prohibition imposed by the canon. As Mr. Justice Stevens noted for the majority, the Society's arguments amounted to "nothing less than a frontal assault on the basic policy of the Sherman Act."[28] However, *Engineers* afforded an opportunity for analytical advance through reexamination of the rule of reason.

Section 11 of the Society's Code of Ethics prohibited members from competing "unfairly" by soliciting or submitting "engineering proposals on the basis of competitive bidding."[29] The district court had found that the Society's Board of Ethical Review had "uniformly interpreted the defendant's ethical rules against competitive bidding for engineering services as prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services."[30] Thus, engineers were to be selected solely on the basis of education, reputation, and other such criteria, without regard to price. Even though the client, once having retained an engineer, could withdraw his selection if negotiations for a fee arrangement proved unsuccessful, a forced series of negotiations with different engineers would increase costs and delay progress on projects. Price competition inevitably would be chimerical. Although the practice was "not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[31] In sum, the practice was held to be a per se violation of the Sherman Act.[32] The injunction issued by the district court against the conduct was upheld.[33]

The Society had contended that the practice was "reasonable" since price competition among professional engineers would be contrary to the public interest. It would cause engineers to bid low with a view toward taking economic shortcuts that would adversely affect the quality of their work. The public health, safety, and welfare would therefore be endangered, the Society asserted. Competition, in such circumstances, would itself be unreasonable and thus in opposition to the rule of reason.[34]

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[27] 435 U.S. at 687.

[28] *Id.* at 695.

[29] *Id.* at 683 n.3.

[30] United States v. National Soc'y of Prof. Eng'rs, 389 F. Supp. 1193, 1206 (D.D.C. 1974). The district court enjoined enforcement of the relevant ethical rules. *Id.* at 1216. On direct appeal to the Supreme Court, the injunction was vacated, and the case was remanded for consideration in light of *Goldfarb*. 422 U.S. 1031 (1975). The district court adhered to its initial decision. 404 F. Supp. 461 (D.D.C. 1975). The Court of Appeals affirmed, but with instructions for the district court to modify its decree in parts so as not to require affirmative statements by the Society that competitive bidding is not unethical. 555 F.2d 978 (D.C. Cir. 1977).

[31] 435 U.S. at 692.

[32] *See id.* at 696.

[33] *Id.* at 699.

[34] *Id.* at 684-85.

The Society's position found no support in *Goldfarb's* footnote 17. As the Court explained, the purpose of a rule of reason analysis is:

> to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.[35]

The Court did not assert that noneconomic considerations—such as public health, welfare, and safety—are improper in a rule of reason analysis. But these considerations are not to obscure a focus on competition. As the government explained, the engineering canon amounted to overkill. "The ban applies no matter how simple and repetitive the work, how expert the purchaser, or how thoroughly the engineer has been able to study the project before quoting a price."[36] In spite of Society assertions of "a relationship between inadequate or negligent engineering work and the awarding of such work by bidding or fee cutting,"[37] competition was not to be overthrown as the ruling criterion in applying the rule of reason. The Court recognized that elimination of the canon would not necessarily lead to choice of engineers solely on the basis of price; and that even when it did, it would not inevitably lead to negligent work.[38] The risk to safety was not sufficient to permit the Court to contradict congressional policy in favor of competition.[39]

One could easily conclude that it is not the proper task of a court to determine whether in given circumstances there is another public policy that transcends competition in importance. Dicta in the majority opinion, however, suggest an excessive and unjustifiable emphasis on competition. In briefly describing the history of the rule of reason, Justice Stevens concluded:

> From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in *Continental T.V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that *promotes* competition or one that *suppresses* competition. "The true test of legality is whether the restraint imposed is such as merely regulates and *perhaps thereby promotes* competition or whether it is such as *may suppress or even destroy* competition."[40]

The Court recognized that professional "[e]thical norms may serve to *regulate and promote* this competition, and thus fall within the Rule of

[35] *Id.* at 692.

[36] Brief for United States at 39.

[37] Brief for Petitioner at 28.

[38] 435 U.S. at 694.

[39] *Id.*

[40] 435 U.S. at 691 (emphasis added; quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

Reason,"[41] but the norm of engineering canon 11 was antithetical to competition and fell outside the rule.

The Court's reliance on *Chicago Board of Trade* is unfortunate. Not only is it questionable whether the trade rule in that case actually promoted competition, but the suggestion that promotion of competition traditionally has been the test of the rule of reason is suspect. The Court might well have replaced the statement of Justice Brandeis with Justice Powell's succinct statement of the rule, which was relegated to a footnote: "Under this rule, the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an *unreasonable restraint on competition*."[42]

The difference between the statements of Justices Brandeis and Powell is significant, for a rule of reason analysis is applied only to restraints to determine whether they are unreasonable. The question of reasonableness presupposes a restraint that adversely affects competition, not one that promotes it. As Professor Sullivan has pointed out, traditional enforcement of the Sherman Act "identifies impact on competition as the sole variable to be measured in applying the rule."[43] Consequently, "this tradition reads the rule of reason as condemning every contract, combination or conspiracy which in purpose or likely effect will *significantly* restrict competition."[44] Conduct ultimately promoting competition entails no application of the rule at all.

Justice Blackmun refrained from joining Part II of the Court's opinion because of a fear that the majority decision left no room for ethical rules with "overall anticompetitive effect."[45] By "holding that ethical norms can pass muster under the Rule of Reason only if they *promote competition*, I am not at all certain that the Court leaves enough room for realistic application of the Sherman Act to professional services."[46] Indeed, if promotion of competition is the sole test, the Court has cast aside footnote 17 and the rule of reason altogether and is subjecting professions to a more severe Sherman Act test than ordinary businesses.

The Court surely intended no such consequence. By drawing on *Mitchel v. Reynolds*[47] to support its holding that economic competition is not to be displaced by competing public policies as the measure of conduct under

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[41] 435 U.S. at 696 (emphasis added).

[42] *Id.* at 691 n.17 (emphasis added; quoting Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977)). Justice Powell did footnote the *Chicago Board of Trade* quotation. 433 U.S. at 49 n.15.

[43] L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 186 (1977) (emphasis added) [hereinafter cited as SULLIVAN]. An excellent treatment of the history of the rule of reason is set forth at 165-97. *Id.* *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY 9-53 (1954).

[44] SULLIVAN, *supra* note 43, at 187.

[45] 435 U.S. at 699 (Blackmun, J., concurring). Justice Rehnquist joined the concurring opinion. The Chief Justice dissented in part, challenging under the first amendment a portion of the injunction that prohibited the Society from making any statement that competitive bidding is unethical. *Id.* at 701. Justice Brennan took no part in the consideration of the case.

[46] *Id.* at 701 (emphasis added).

[47] 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

the Sherman Act, the Court implied it was not manufacturing new clothing for the rule of reason. *Mitchel* had upheld a covenant not to compete that was ancillary to the sale of a bakery business. Enhancement of the marketability of the business was reasonable in light of only a "temporary and limited loss of competition."[48] Moreover, as noted above, the Court in *Engineers* quoted Justice Powell's formulation of the rule of reason, and it cited favorably a 1955 government report explaining that the rule of reason examined whether the challenged conduct "constitutes an *undue restraint* of competitive conditions . . . ."[49] These are not sources for a promotion of competition test.

The Court's purpose in *Engineers* was to eliminate the proposition that the rule of reason considers whether competition in given circumstances is itself reasonable. In summarizing the historical course of the rule, the Court borrowed language from *Chicago Board of Trade*, a case outside the mainstream of that course.[50] Nevertheless, even in *Chicago Board of Trade*, the Court's references to "regulation" and to "suppress or destroy competition" may signify only that anticompetitive effects can at times be offset by procompetitive effects and that what is of consequence is whether ultimately there is a significant adverse impact on competition.[51] In light of the precise issue before the Court in *Engineers*, then, the liberties the Court may have taken in describing the rule of reason should not be treated as a reformulation of the rule itself.[52]

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[48] 435 U.S. at 689 (footnote omitted).

[49] Report of Attorney General's National Committee to Study the Antitrust Laws 11 (1955) (emphasis added), *quoted at* 435 U.S. 691 n.16.

[50] *See generally* SULLIVAN, *supra* note 43, at 175-79 (discussing *Chicago Board of Trade*).

[51] The Court in *Engineers* recognized that irrespective of the actual competitive impact of a rule (the "Call Rule") in *Chicago Board of Trade* regulating the price of certain bids after normal operating hours of the Chicago grain exchange, the Court in *Chicago Board of Trade* determined that the Call Rule had positive effects on competition. 435 U.S. at 693 n.19. Thus, the statement there of the rule of reason fits the facts of that case as the Court understood them, and it was unnecessary to determine whether the rule of reason needed to be more expansive.

[52] *See* Smith v. Pro Football, Inc., 1978-2 TRADE CAS. ¶ 62,338, at 67,039 (D.C. Cir. 1978). The issue raised in *Engineers* had been confronted early in the interpretation of the Sherman Act in a case that helped formulate the first generation of the rule of reason. In United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898), the Court rejected the contention that elimination of "ruinous competition" through cartel-imposed railroad freight rates would ultimately promote rather than restrain trade:

> An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker [rail]roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Id. at 577. *Joint Traffic* recognized that a restraint of trade and a restraint of competition are not necessarily the same. For example, unilateral refusal by a seller to deal with a particular buyer restrains trade between the two but does not affect the buyer's ability to compete, assuming alternative sources of supply. On the other hand, competitors forming a joint venture eliminate competition between themselves but may well increase their collective trade with others. The distinction has become blurred through the years, however, because

2. City of Lafayette *and* Orrin Fox: *The Maturing of State Action*

Engineers illustrates the role of federal antitrust laws in prohibiting the displacement of competition by private entities. State economic regulation, however, has inhibited competition in varying circumstances from a time well before passage of the Sherman Act in 1890. The principles of federalism dictate that this regulation be preserved, at least to a substantial degree. The Supreme Court has responded accordingly. Through imposition of the doctrine of "state action," it has recognized permissible restraints placed on competition by states.

The term "state action" is a judicially created child of the 1940's that traces its roots to *Parker v. Brown*[53] and beyond.[54] Only in recent years, however, has the doctrine begun to mature. *City of Lafayette v. Louisiana Power & Light Co.*[55] and *New Motor Vehicle Board v. Orrin W. Fox Co.*[56] were the fourth and fifth Supreme Court cases in the past four years involving circumstances in which "state action" might be said to have been taken. In spite of this recent scrutiny, the Court has failed to place the boundaries of state action in sharp focus. Development of the doctrine has been hindered by unnecessary and misleading attention to whether those seeking immunity are governmental or private in nature.

Lafayette's five opinions initially addressed the narrow question of whether conduct by municipalities is entitled automatically to state action immunity. In responding negatively, a plurality of the Court offered guidelines as to when the immunity would be available to municipalities. Five opinions in one case hardly can be expectd to clarify rules of conduct. Nevertheless, viewed in its historical context, *Lafayette*, coupled with the virtually unanimous decision in *Orrin Fox*, adds meaning to the term "state action" generally—not just in its application to municipalities or other governmental entities.

a. City of Lafayette

This case presented a counterclaim brought by the power company against two Louisiana cities, both of which had alleged various restraints of trade on the part of the company. The counterclaim asserted several forms of anticompetitive behavior by the cities, including an alleged conspiracy to require customers of the company to purchase electricity from the cities as a condition for obtaining continued water and gas service.[57] The district court had granted a motion by the cities to dismiss the counterclaim[58] on the ground that the federal antitrust laws were made in-

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antitrust addresses only restraints adversely affecting competition. *See* Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

[53] 317 U.S. 341 (1943).

[54] Olsen v. Smith, 195 U.S. 332 (1904); Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895).

[55] 435 U.S. 389 (1978).

[56] 99 S. Ct. 403 (1978).

[57] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 392 n.6 (1978).

[58] 1975-1 TRADE CAS. ¶ 60,240 (E.D. La. 1975).

applicable to them by *Parker*, as interpreted in *Saenz v. University Interscholastic League*.[59] The Fifth Circuit reversed on the ground that conduct by cities is not "automatically outside the scope of the federal antitrust laws."[60] In determining when municipal conduct is outside that scope, the court of appeals explained:

> [A] district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent.[61]

The Supreme Court affirmed both the decision and analysis of the court of appeals. After rejecting the cities' arguments that Congress never intended the Sherman Act to apply to municipalities, and other contentions apart from the state actin doctrine that might justify immunity, the plurality[62] turned to the doctrine itself. *Goldbarb* had "made it clear," the plurality said, "that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign."[63] Thus, cities being subordinate to states, are not automatically immune under the state action doctrine. The question remained, however, as to when cities can successfully claim immunity, a question best resolved in its historical setting, beginning with *Parker*.

In *Parker*, suit had been brought against state officials and private parties acting under color of state law to enjoin enforcement of a marketing program contemplated by a California statute. The program restricted competition among grape growers and regulated prices in the distribution of raisins to packers.[64] Both the impetus and the final approval for the program came from the producers who were regulated by the program, and who, through a committee, administered it.[65]

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[59] 487 F.2d 1026 (5th Cir. 1973). The Fifth Circuit held in *Saenz* that a state agency and state official were "outside the ambit of the Sherman Act." *Id.* at 1028.

[60] 532 F.2d 431, 434 (5th Cir. 1976).

[61] *Id.*

[62] Justice Brennan authored the plurality opinion, in which Justices Marshall, Powell, and Stevens joined. Justice Marshall also filed a concurring opinion. The Chief Justice concurred in part and concurred in the judgment. Justice Stewart, joined by Justices White and Rehnquist and in part by Justice Blackmun, dissented. Justice Blackmun filed a separate dissent.

[63] 435 U.S. at 410.

[64] Suit was originally brought on the ground that enforcement of the program interfered with the plaintiff's right to engage in interstate commerce. The Court on its own motion raised the question whether the state statute was rendered invalid by the Sherman Act. The precise issue, then, was whether California law was preempted. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 586-89 (1976); *id.* at 618 (Stewart, J., dissenting).

[65] Under the statute, ten producers of an agricultural commodity could petition an advisory commission, comprised of the Director of Agriculture and other members appointed by the Governor for the establishment of a marketing program. After a public hearing, and an appropriate finding by the commission, the Director was required to select a program committee from nominees chosen by the producers. The committee was to formulate the program

The Supreme Court assumed that the program would have violated the Sherman Act if it had been organized and made effective *solely* by a combination of private persons.[66] However, the California program had derived its authority from the command of the state legislature. The Court explained that while a state cannot provide immunity simply by authorizing violations of the Sherman Act, California had adopted as state policy an anticompetitive program and had prescribed the conditions of its operation, including proposal and approval of this program by producers.[67] The state, "as sovereign, [had] imposed . . . as an act of government" a type of restraint that the Sherman Act was not intended to prohibit.[68] In view of the words and history of that Act, the Court held that the Act must be taken as "a prohibition of individual and not state action."[69] The reason was apparent. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[70]

Eight years after *Parker*, the Court confirmed its admonition that a state may not simply legalize private conduct that is prohibited by the Sherman Act. In *Schwegmann Brothers v. Calvert Distillers Corp.*,[71] the Court invalidated a Louisiana fair trade statute passed in response to the Miller-Tydings amendment to section 1 of the Sherman Act, permitting the fixing of minimum resale prices if authorized by state law. The state statute was held deficient in that it purported to cover retailers who were not signatories to resale price contracts. Once any retailer had signed such a contract, the others were bound. The Court's holding was based on its interpretation of Miller-Tydings, but when read in conjunction with *Parker, Schwegmann* suggests that "state action" at least necessitates comprehensive state regulation—not merely an attempt to legalize conduct illegal under federal law. Nor is it enough for the private conduct simply to arise in a regulatory setting. Thus, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[72] the Court rejected a *Parker* defense to monopolistic and discriminatory conduct, allegedly engaged in through a corporate purchasing agent of the Canadian government, but which was not "approved" or "compelled" by government officials or Canadian law.

Nothing in *Parker, Schwegmann*, or *Continental Ore* suggested that governmental entities automatically are immune from Sherman Act liabil-

for approval, modification, or rejection by the commission after another public hearing. If a given percentage of the producers then approved the program, the Director was to declare it instituted under committee administration. 317 U.S. at 344-47.

[66] *Id.* at 350.

[67] *Id.* at 351-52.

[68] *Id.* at 352.

[69] *Id.*

[70] *Id.* at 351.

[71] 341 U.S. 384 (1951).

[72] 370 U.S. 690, 706-07 (1962).

ity, nor was there any indication that a purely private party[73] automatically is beyond state action protection. Subsequent lower court decisions reenforced the notion that the doctrine rested not on *whose* conduct was under review, but on *what* authority gave rise to it.[74] As the Fourth Circuit concluded in 1959, "When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control, or, in a proper case, to eliminate competition therein."[75] The crucial question is "whether the real decision makers were public officials or private businessmen."[76] Cases concerning the pervasive regulation of natural monopolies, such as public utilities, illustrated circumstances in which such a question could be answered so as to afford immunity.[77]

In 1975, the Supreme Court reexamined the state action doctrine for the first time since *Parker v. Brown*. In *Goldfarb v. Virginia State Bar*,[78] first of the five state action cases of the 1970's to reach the Supreme Court, the facts made extended analysis of the doctrine unnecessary. Nevertheless, a unanimous Court,[79] in applying antitrust laws to the legal profession for the first time, held that state agencies are not necessarily entitled to the state action shelter.

The Court rejected the arguments of the Virginia State Bar that by enforcing a county bar association's minimum fee schedules it was merely implementing ethical rules promulgated by the Virginia Supreme Court and that, as the agency authorized to enforce these rules, it was entitled

[73] The producer defendants in *Parker* were members of the program committee charged by statute with administering the marketing program. 317 U.S. at 344.

[74] For example, in George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), relating to the adoption of defendant's specifications for purposes of competitive bidding on public swimming pool accessory equipment, the court rejected "the facile conclusion that action by any public official automatically confers exemption," and held that "valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation." *Id.* at 30. Similarly, in Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), concerning regulation by a Texas agency of natural gas extraction, the court recognized that action by a state "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter." 438 F.2d at 1294.

[75] Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959). The court continued by explaining that persons subject to state control may participate in the regulation so long as they are "adequately supervised by independent state officials." *Id.* However, protected action "must be state action, not individual action masquerading as state action." *Id.*

[76] Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1295 (5th Cir. 1971) (quoting George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 n.8 (1st Cir. 1970)).

[77] *E.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971).

[78] 421 U.S. 773 (1975).

[79] The decision was unanimous. Justice Powell took no part in the decision. Justice Douglas has since been replaced by Justice Stevens. The other seven Justices, along with Justices Powell and Stevens, produced the opinions in *City of Lafayette* and *Orrin Fox*.

to immunity. The Court also rejected the local association's attempt to ride the coattails of the state bar by arguing that issuance of fee schedules had been "prompted" by the bar. The Court recognized that there was no statute directing members of the bar to establish minimum fee schedules and no indication that the Virginia Supreme Court approved of the state bar's ethical opinions on this subject. The state bar, by enforcing the use of county minimum fee schedules through disciplinary sanctions, had "voluntarily joined in what [was] essentially a private anticompetitive activity."[80] *Parker* provided no defense, for the defendants had failed to meet the "threshold" requirement said to have been established by *Parker.*

> The threshold inquiry in determining if an anticompetitive act is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . It is not enough that . . . anticompetitive conduct is promoted by state action; rather anticompetitive activities must be compelled by direction of the State acting as sovereign."[81]

The words "required" and "compelled" were ill-chosen, for they imply that the conduct in question must itself be required by the state, without any choice on the part of the regulated party. In light of *Parker* and *Continental Ore*, both of which were cited in *Goldbarb* as support for the compulsion standard, these terms should not be read literally. The marketing program in *Parker* could not have come into being without private initiative and approval. *Continental Ore* suggested that governmental "approval" of conduct would be sufficient. The difference between *Parker*, in which conduct was protected, and *Continental Ore*, in which it was not, is that in *Parker* the challenged conduct was contemplated by a regulatory scheme.

Cantor v. Detroit Edison Co.,[82] decided one year after *Goldfarb*, represented a digression in the development of the state action doctrine. For the first time the Court considered a claim to state action immunity by a purely private party—one not participating in the administration of a state program. In *Cantor*, the Court held that an investor-owned utility, which supplied customers with free light bulbs and incorporated within its rate structure the cost of doing so, was not protected by the state action doctrine even though the bulb distribution program had become a mandatory service upon adoption of the utility's tariff by the Michigan Public Service Commission. The confusing and unorthodox plurality opinion presented the novel view that *Parker* applies only to actions against state officials who act pursuant to express legislative command. The Court glossed over the act that the producer members of the agricultural marketing program committee were among the defendants in *Parker.*[83]

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[80] 421 U.S. at 792.

[81] *Id.*

[82] 428 U.S. 579 (1976).

[83] Justice Stevens delivered the Court's opinion, joined in whole by Justices Brennan, White and Marshall and in substantial part by Chief Justice Burger. The Chief Justice

Five Justices joined in suggesting a two-pronged state action test for private defendants: whether the defendant had merely obeyed a state command and whether Congress had intended to have antitrust standards applied in the circumstances of state regulation.[84] In *Cantor* the Court could have found that the threshold standard of *Goldfarb* had been met since the utility was required to continue its bulb distribution program until further modification of its rate schedule. Nevertheless, the Court held that since neither of the two parts of the suggested test had been satisfied there had been no state action.

It is unnecessary for present purposes to explore the murky depths of *Cantor*'s twofold test.[85] As the plurality noted in *City of Lafayette, Cantor*'s analysis is not "necessarily applicable" in examining conduct by state subdivisions.[86] What should be recognized is that a conventional state action analysis (without a new test because of a private defendant) could have produced the same result in *Cantor*. As the Court there pointed out, light bulb distribution was unregulated. Neither theMichigan legislature nor the Public Service Commission had ever specifically investigated the desirability of the distribution program or its possible anticompetitive effect on the relevant market.[87] The underlying justification for state action immunity is state regulation of conduct in furtherance of state policy. The absence of such regulation and policy concerning the distribution of lightbulbs dictated the results in *Cantor*.

In *Bates v. State Bar of Arizona*,[88] the Court returned to unanimity. In *Bates*, the Court rejected an antitrust challenge to Arizona's ban on lawyer advertising, finding that the state bar was immune from liability.[89] The Court observed that the challenged restraint was the affirmative command of the Arizona Supreme Court, which was the real party in interest since the role of the state bar was completely defined by that court. Consequently, the restraint in *Bates* was "compelled by direction of the State

preferred to base the decision on the absence of a state policy governing the distribution of light bulbs. Justice Blackmun concurred in the result on the ground that the anticompetitive harms outweighed its benefits. Justice Stewart dissented, joined by Justices Powell and Rehnquist.

[84] Assuming an antitrust violation if state action provided no shield, a majority of the Court recognized there "might" be instances when "private conduct required by state law is exempted from the Sherman Act." 428 U.S. at 592.

> First, if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law. Second, if the State is already regulating an area of the economy, it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism.

Id.

[85] *See generally* Shenefield & Hartwell, *Annual Survey of Antitrust Developments 1975-1976*, 34 WASH. & LEE L. REV. 7, 34-59 (1977).

[86] 435 U.S. at 410-11 n.40.

[87] Cantor v. Detroit Edison Co., 428 U.S. 579, 585 (1976).

[88] 433 U.S. 350 (1977).

[89] The Court, however, did sustain the challenge on first amendment grounds. *Id.* at 363-84.

acting as a sovereign."[90] Through prohibition, there has been compulsion in a literal sense. The Court in *Bates* made no mention, however, of a "threshold inquiry" in applying the *Goldfarb* compulsion standard to the state bar's rules. The compulsion standard having been met, there was nothing further to decide on antitrust grounds. Moreover, the challenged "disciplinary rules reflect[ed] a clear articulation of the State's policy with regard to professional behavior."[91] Application of the antitrust laws were therefore inappropriate in *Bates* where state policy was "so clearly and affirmatively expressed and . . . the State's supervision . . . so active" in regulating the activities of the bar.[92]

In light of *Parker, Goldfarb*, and *Bates*, it is not surprising that in *City of Lafayette* the Court rejected the claim to automatic immunity for action taken by municipalities. Prior case law had not even supported the proposition of automatic immunity for actions by state agencies or officials. However, the Court recognized that actions by municipalities "may reflect state policy."[93] Actions by municipalities are to be protected as state action if undertaken pursuant to state policy. Therefore, the Court held:

> [T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state poicy to displace competition with regulation or monopoly public service . . . .
>
> . . . This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate government units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."[94]

Again, no mention was made of a threshold standard. Moreover, the Court demonstrated that it was not limiting the applicability of the state action doctrine to instances of compulsion of the kind evident in *Bates*. With respect to government conduct, then, the plurality followed *Parker*, thereby preserving "to the States their freedom under our dual system of federalism to use their municipalities to administer state reguatory policies free of the inhibitions of the federal antitrust laws without at the same time

[90] *Id.* at 360 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)).

[91] 433 U.S. at 362.

[92] *Id.*

[93] 435 U.S. at 413, 424.

[94] *Id.* at 413, 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).

permitting purely parochial interests to disrupt the Nation's free-market goals."[95]

The operation of federalism is apt to be frustrated, however, when as in *Cantor*, the state action defense is denied to private parties acting under state supervision within a regulatory scheme that restrains competition. Just as a claim to protection by a municipality is not "as readily established" as the "claim by a state government sued as such," private parties might be subjected to an even more stringent application of the very same standard applied to governmental entities. The *Cantor* standard for private defendants serves only to confuse an already complicated doctrine.

The threshold standard appears to be left with the Chief Justice, who coined the term in *Goldfarb*. After a determination that state policy *compels* the type of conduct under review, he would then ask whether the conduct was part of a governmental scheme to displace competition and whether immunity is essential to make the scheme work. In his concurring opinion in *Cantor*, the Chief Justice contended that it was unnecessary for the plurality to have set forth its two-pronged test because there was no state policy to displace competition.[96] Only when such a policy exists is it necessary to apply what amounts to the *Cantor* test, according to the Chief Justice. He would have applied the *Cantor* test in *City of Lafayette* because the conduct in question was "proprietary" in nature and thus like the conduct of private parties.[97] Although he had rejected the view of the plurality in *Cantor* that *Parker* applies only to governmental defendants, he too appears to adhere to two tests of state action—one for governmental defendants acting in their governmental capacities, and one for private parties and governmental entities engaged in "proprietary" conduct. Nevertheless, the Chief Justice joined in the *City of Lafayette* result because he believed that at a minimum the cities should be required to demonstrate that their activities were "contemplated" by the state regulatory scheme.[98]

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[95] 435 U.S. at 415-16.

[96] 428 U.S. at 604-05.

[97] 435 U.S. at 422. With respect to any conduct, it appears that the Chief Justice would require, as a threshold, that the conduct be compelled within a regulatory scheme in order to be protected under the state action doctrine. For private conduct and proprietary governmental conduct, he would further require that state action immunity be "*essential* to the State's plan." *Id.* at 425 n.6. The first part of the plurality's two-pronged test in *Cantor* may be no more than a rearticulation of the Chief Justice's threshold standard. Both emphasize conduct compelled by the state. The second part of the test, concerning congressional intent, rests on the proposition that in considering whether state regulation gives rise to immunity, the standard should be as strict as that applied to federal regulation arguably in conflict with federal antitrust. Then the immunity must be necessary to make the regulatory scheme work "and even then only to the minimum extent necessary." Cantor v. Detroit Edison Co., 428 U.S. 579, 597 (1976) (quoting Silver v. New York Stock Exch. 373 U.S. 341, 357 (1963)). This part coincides with the Chief Justice's requirement that immunity be essential to making the regulatory scheme work. In *City of Lafayette*, the Chief Justice based his requirement on the *Cantor/Silver* standard. 435 U.S. at 426 (Burger, C.J., concurring).

[98] *Id.* at 426 n.6. Justice Marshall in a separate concurrence agreed with the Chief Justice that anticompetitive conduct unnecessary to effect a government purpose to displace competition was not to be allowed.

Justice Stewart, as he did in *Cantor,* filed a lengthy dissent,[99] this time emphasizing the distinction between governmental and private action and declaring that the former was immune under *Parker* while the latter was governed by the compulsion standard of *Goldfarb.* He expressed concern over the vagueness he perceived in the plurality's test, the adverse impact he foresaw on the operation of federalism, and the potentially extreme economic impact on municipalities faced with antitrust litigation.[100] He correctly perceived what might be the practical consequence of *City of Lafayette:* that cities will be looking (with no guarantee of success) toward state legislatures for more specific and comprehensive enabling legislation to justify their myriad activities. It remains to be seen whether the decision's impact will be as severe as Justice Stewart predicted. Although cities can expect an increasing number of antitrust challenges,[101] flexible application of the plurality's "contemplation" standard probably would do much to alleviate his concern.[102]

b. Orrin Fox

The decision in *New Motor Vehicle Board v. Orrin W. Fox Co.*[103] centered on a procedural due process challenge to implementation of the California Automobile Franchise Act. This statute requires an automobile manufacturer to give notice to and obtain approval of the state's New Motor Vehicle Board before opening an additional dealership in a market of an existing dealer, if the existing dealer protests to the Board[104] the proposed establishment of the other dealership. The filing of a protest suspends, without a prior hearing, the right of the manufacturer to open the additional dealership.

Although the three-judge court that originally heard the case refused to consider a possible conflict between the Franchise Act and the federal antitrust laws, the antitrust issue was again argued on appeal from the lower court's injunction.[105] The argument was that the Act gave rise to

[99] Justice Stewart's dissent is analyzed in a student note, *infra* at 129.

[100] The power company's counterclaim was for $180 million in damages before trebling. Brief for Petitioners at 21.

[101] To paraphrase former Deputy Assistant Attorney General for antitrust, Joe Sims, antitrust has arrived at Main Street. *See* "Antitrust Comes to Main Street," Remarks by Joe Sims, Conference of the Municipal Finance Officers Association (May 15, 1978). Mr. Sims points to licensing; utility and transportation services; operation of sports and convention centers, airports, and parking lots; public health services; procurement practices; and zoning as examples of municipal activities that may come under antitrust scrutiny.

[102] One decision preceding *City of Lafayette* holds that state intent to restrain competition "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." Duke & Co., Inc. v. Foerster, 521 F.2d 1277, 1280 (3d Cir. 1975); *accord,* Kurek v. Pleasure Driveway and Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated* 98 S. Ct. 1123, *judgment reinstated* 1978-2 TRADE CAS. ¶ 62,219 (7th Cir. 1978). These guides and others can be used to determine whether conduct has been contemplated by a statute, an inquiry that is no more difficult or obscure than most that pervade antitrust.

[103] 99 S. Ct. 403 (1978).

[104] *Id.* at 408-09.

[105] An action for declaratory and injunction relief was brought under 28 U.S.C. § 2281

privately initiated restraints of trade through the filing of protests which delay the opening of dealerships and sometimes lead to outright prohibitions against openings.[106] Thus, the state had granted private parties the right to enjoin competition temporarily. It was asserted that such a right was prohibited by *Schwegmann v. Calvert Distillers Corp.*[107]

The conduct challenged in *Schwegmann*, however, was clearly violative of the Sherman Act but for the possible protection of the Miller-Tydings Act.[108] In contrast, the mere unilateral filing of a protest in good faith suggests no antitrust violation. Moreover, the Supreme Court recognized that such protests are protected by the *Noerr-Pennington* doctrine, which permits the concerted efforts of private parties to solicit government action favorable to them.[109] Consequently, the Court could have decided the case on grounds other than the state action doctrine. Nevertheless, the Court held that enforcement of the California Automobile Franchise Act was exempt from the antitrust laws in that:

> [T]he Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption.[110]

The immunity was not sacrificed by permitting private parties, existing dealers, to trigger action by the Board through the filing of protests. While the Board determined whether there was good cause to prohibit opening a dealership, the interim restraint against establishment or relocation of franchisees was subject to ongoing state supervision.

With its emphasis on state supervision within a clearly prescribed system of regulation designed to encroach upon normal competitive conditions, the Court echoed part of its holding in *Bates* in circumstances that resembled those in *Parker*. Further, as in *Bates*, there was no mention of a threshold standard. Unlike *Bates*, however, there was no mention of "compulsion," for the dealers were not compelled to protest. Nor was there concern whether the defendants were governmental or private. The operation of the regulatory scheme rested on the activities of both state officials

(1970) before its repeal by the Act of Aug. 12, 1976, Public Law 94-381, § 1. Thus, the matter was heard by a three-judge court pursuant to 28 U.S.C. § 2284 (1976) and was appealed directly to the Supreme Court by virtue of 28 U.S.C. § 1253 (1976). The lower court's decision is reported as Orrin W. Fox Co. v. New Motor Veh. Bd., 440 F. Supp. 436 (C.D. Cal. 1977).

[106] 99 S. Ct. at 412.

[107] *See* Brief for Appellants at 41-47; text accompanying note 71 *supra*.

[108] 15 U.S.C. § 1 (1970) (proviso repealed by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975)).

[109] *See* Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961) and UMW v. Pennington, 381 U.S. 657, 669-72 (1965).

[110] 99 S. Ct. at 412. The Court in *Orrin Fox* cited *Parker, Bates,* and *City of Lafayette* as authority for its explanation of the state action doctrine. *Id.* There were no dissents to the antitrust section of the Court's opinion, which was written by Justice Brennan.

and private parties, and it was the role of the latter, the dealers, that arguably made the scheme subject to antitrust challenge.[111] Had an antitrust action been brought against a protesting dealer, undoubtedly the result would have been the same.

c. *State Action in Context*

In reexamining the state action doctrine from the vantage point of the late 1970's, it should be recognized that the state action shelter arose from application of the principles of federal preemption.[112] Preemption involves the displacement of state law under the supremacy clause—Article VI of the Constitution[113]—through federal legislation. In considering federal-state relationships, the Court has applied an array of tests, but normally it has focused on whether state and federal law conflict or interfere with each other, and if so, whether such a conflict is irreconcilable.[114]

Although conventional preemption theory opposes giving true state regulation carte blanche, this is precisely what is accorded the states in their regulation of competition. Since *Parker*, the preemption framework for antitrust has been that states may directly contradict the aims and functions of federal antitrust laws, so long as the states themselves, rather than other entities acting in their guise, actually regulate. Cases examining state action, then, are cases in which federal preemption is necessarily absent. These cases merely represent an examination whether the challenged conduct ultimately is rooted in the state and carried out under its supervision. While guidelines for this examination vary from those applicable to preemption analysis, in each instance the Court must examine the sensitive relations between the two levels of government that characterize our federal system.

In spite of the Court's sometimes confusing rhetoric, it is reasonably clear that the Court has not lost sight of what is at stake in applying the state action doctrine. Although the Court has disserved clarity by saluting principles concerning the relationship between federal antitrust and federal regulation,[115] *City of Lafayette* indicates that the Court will not focus

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[111] The dealers in *Orrin Fox* were like the producers in *Parker* who petitioned for the agricultural marketing program. Both groups were composed of private persons who did not wear the mantle of the state. However, the dealers were purely private, unlike the producers in *Parker* who were members of the program committee, and those acting on behalf of the state bars in *Goldfarb* and *Bates*.

[112] *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 427 n.1 (Stewart, J., dissenting); FTC, *Report of the State Regulation Task Force* 1-10 (March 14, 1978); Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

[113] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl.2.

[114] *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[115] For example, in *Cantor:* "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary

more on principles of federalism. The plurality limited the notion of "repeal [of antitrust laws] by implication" to the clash of federal regulation with federal antitrust and pointed to state action, not as an exemption, but as one of the "implied *exclusions* from coverage of the antitrust laws."[116] The plurality emphasized that "a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred."[117]

Certain conclusions become apparent in light of the five Supreme Court state action cases of the 1970's in their historical context. In setting the standard for conduct by municipalities and other subordinate government entities, the plurality in *City of Lafayette* required state policy displacing competition and contemplation by the legislature of the type of conduct under review. The Court suggested that a less stringent application of this same standard would be applied to state agencies. *Orrin Fox* suggests a more stringent application to private parties of what basically is the same standard. The type of conduct under review would have to be more clearly expressed by the governing statute, and the conduct itself would have to be subject to meaningful state supervision. *Orrin Fox* did not consider application of the state action doctrine to a private party whose conduct invoked state regulation of business practices and who remained subject to that regulation. Surely, however, there is no significant difference for purposes of the state action doctrine between triggering regulation and remaining subject to it.[118]

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in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" Cantor v. Detroit Edison Co., 428 U.S. 579, 597 (1976) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); *see* note 97 *supra*.

[116] 435 U.S. at 398 (emphasis added). Justice Stewart was quite right in pointing out in *Cantor* that implied repeal of the federal antitrust laws through state regulation is impossible. 428 U.S. at 629 (Stewart, J., dissenting).

[117] 435 U.S. at 412.

[118] At least three recent lower court cases support this analysis. In United States v. Texas State Board of Public Accountancy, 1978-1 TRADE CAS. ¶ 62,039 (W.D. Tex. 1978), the court considered restrictions in price-related competitive bidding similar to those examined in *Engineers*. The Board was essentially a quasi public entity, composed of licensed practicing accountants appointed by the Governor. The Board had issued the restrictive regulation pursuant to general statutory authority to "establish and maintain a high standard of integrity in the profession of public accountancy . . . ." *Id.* at 74,475. In rejecting the Board's assertion of state action, the court held that the enabling legislation did not mandate anticompetitive conduct, nor could it be said that it "in anyway concerns or contemplates 'the kind of action complained of' here." *Id.* at 74,477 (quoting *City of Lafayette*, 435 U.S. at 415).

The Third Circuit in Mobilfone v. Commonwealth Telephone Co., 571 F.2d 141 (3d Cir. 1978), upheld reliance on state action by a radio-telephone paging common carrier. Mobilfone, which served the area of Wilkes-Barre, Pennsylvania, had sought an injunction against competing service to be established by Commonwealth. Both had been certified by the state's Public Utilities Commission. Accepting Commonwealth's defense, the court rejected the distinction between private and governmental defendants and interpreted *Goldfarb, Cantor,* and *Bates* as requiring "that the state has an independent regulatory interest in the subject matter of the antitrust controversy; that there exists a clear and affirmative articulation of the state's policy with regard to that interest; and that the state supervision is active." *Id.* at 144.

3. Barry *and* National Broiler: *Two Word Games*

The other two immunity cases, *St. Paul Fire & Marine Insurance Co. v. Barry*[119] and *National Broiler Marketing Association v. United States,*[120] will have less impact than the three already discussed. In these two cases, the Court construed specific statutory exemptions, without then creating far-reaching judicial doctrine. Indeed, one may wonder why the Court accepted these cases only to affirm decisions that had already rejected the asserted exemptions. In *Barry*, the Court did resolve a split of opinion among several circuits as to the scope of the term "boycott" under the McCarran-Ferguson Act.[121] The granting of certiorari in *National Broiler* is less understandable.[122] Whatever the reasons, the Court's affirmations strengthen the view that few corners of commerce should completely escape antitrust scrutiny. The Court's decisions in the five immunity cases discussed in this survey are of particular significance in light of the current movement toward deregulation. The immunity quintet may be characterized as judicial deregulation.

These views were reinforced by the Third Circuit in Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir.), *cert. denied,* 98 S. Ct. 424 (1978), in which the court rejected a Sherman Act challenge to a prohibition against the purchase by attorneys of space in the classified section of a community phone book. (A first amendment challenge, however, was upheld. The court stated further that:

> The weaker the relationship between the state and the defendant, the more clearly the state must command the precise action taken by the defendant to enjoy the state action exemption. Conversely, the closer the relationship between the state and the defendant, the less clearly the state need command the precise action for the defendant to enjoy the exemption. As noted above, in the latter situation, the state need only authorize action in a particular area.

582 F.2d at 719 (citing *City of Lafayette,* 435 U.S. at 416; Duke & Co. v. Foerster, 521 F.2d 1277, 1280 (3d Cir. 1975)). In *Bate,* the prohibition was instituted by a committee of practicing lawyers, the Advisory Committee on Professional Ethics, appointed by the New Jersey Supreme Court. The committee's posture, then, was similar to that of the Texas State Board of Public Accountancy. In *Bate,* the court found that the state as sovereign "did command the *kind* of action the defendants took." 582 F.2d at 719 (emphasis added). Although the court used the word "command," it is clear from the context of the opinion that there had been no command to the committee to take the position that had been challenged. The phrase "kind of action" is straight from *City of Lafayette,* which was discussed by the court and undoubtedly influenced its decision. Arguably, the Texas district court would have reached a different conclusion. Each court, however, appeared to have applied essentially the same standard for determining state action. *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 207-220 (1978).

[119] 98 S. Ct. 2923 (1978).

[120] 436 U.S. 816 (1978).

[121] *See* St. Paul Fire & Marine Ins. Co. v. Barry, 98 S. Ct. 2923, 2927 n.5 (1978).

[122] The Court granted certiorari because of "the importance of the issue for the agricultural community and for the administration of the antitrust laws." 436 U.S. at 820. The case was dignified by the appearances of University of Chicago Professor Richard A. Posner, who argued for the Association, and John H. Shenefield, Assistant Attorney General in charge of the Antitrust Division, who argued for the government. Nevertheless, the Court had explained earlier that the issue before it was only "apparently" of importance to the broiler industry and antitrust administration. 436 U.S. at 818.

a. Barry

Barry was one offspring of the crisis over rapid escalation of medical malpractice insurance rates in the early 1970's.[123] Following a change in policy by St. Paul Fire & Marine Insurance Co., which placed strict limitations on medical malpractice coverage through new policies and policy renewals, the other three malpractice insurers in Rhode Island allegedly agreed with St. Paul to refuse to sell insurance to St. Paul's policyholders. Practicing physicians and their patients brought a class action alleging, in part, a conspiracy in violation of section 1 of the Sherman Act. Defendants successfully moved to dismiss the case on the ground of immunity under section 2 of the McCarran-Ferguson Act.[124] The Supreme Court upheld the First Circuit's reversal[125] of the dismissal.

The McCarran-Ferguson Act[126] was passed in 1945 in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Association*[127] (*SEUA*), which had been decided the year before. In *SEUA* the Court held that the sale of insurance was within interstate commerce and, therefore, subject to the provisions of the Sherman Act. Prior to that decision, the sale of insurance had been considered outside interstate commerce and thus exclusively under state control.[128] The McCarran-Ferguson Act represented an attempt to restore that control by conferring upon persons "engaged" in the "business of insurance" an exemption from the federal antitrust laws to the extent such business is regulated by state law.[129] However, section 3(b) of the Act states that nothing contained in

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[123] Brief *Amici Curiae* of the American Insurance Association, the Alliance of America Insurers, and the National Association of Independent Insurers at 6-10.

[124] 15 U.S.C. § 1012 (1976).

[125] Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3 (1st Cir. 1977). The district court opinion was not reported.

[126] 15 U.S.C. §§ 1011-1015 (1976).

[127] 322 U.S. 533 (1944).

[128] *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).

[129] Sections 2 and 3 of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012, 1013 (1976), provide in relevant part:

> Sec. 2(a). The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> . . . .
>
> Sec. 3(b). Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

the Act "shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[130] Some courts narrowly construed this exception to apply only to conduct of insurance companies against other participants within the insurance industry.[131]

In *Barry*, the Supreme Court held "that the term 'boycott' is not limited to concerted activity against insurance companies or agents, or more generally, against competitors of members of the boycotting group."[132] Finding that the "conduct in question accords with the common understanding of a boycott," the Court concluded that the exception to the exemption was applicable.[133] The alleged concerted refusal by other insurance companies to sell insurance to St. Paul's policyholders was subject to federal antitrust scrutiny.

Arguably, *Barry* has provided the plaintiffs' antitrust bar with an important new weapon. Justice Stewart, who has become the Court's foremost dissenter in immunity cases, contended that the majority's expansive reading of "boycott" compels a similar reading of "coercion". and "intimidation," which would "plainly devour the broad antitrust immunity bestowed by § 2(b)."[134] Justice Stewart read the legislative history of the Act as limiting application of the section 3(b) exception to members of the insurance industry.

The potential new weapon, however, may lack ammunition. Writing for the seven-man majority,[135] Justice Powell alluded to the narrow scope of the decision. Case law, he contended, failed to support any suggestion by the dissent that the terms of section 3(b), "are coextensive with the prohibitions of the Sherman Act."[136] The precise issue before the Court in *Barry* was whether the challenged conduct was a boycott for the purpose of McCarran-Ferguson immunity—not whether the conduct was per se unreasonable,[137] as it normally would be characterized if deemed a group boycott under the Sherman Act. Characterization of the conduct as a boycott depended on conventional Sherman Act analysis of concerted refusals to deal.

Moreover, the Court explained that the conduct in question occurred outside any regulatory arrangement instituted by the state.[138] The Court

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[130] 15 U.S.C. § 1013(b) (1976); *see* note 129 *supra*.

[131] *See, e.g.*, Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732 (5th Cir. 1975); Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1975); Transnational Ins. Co. v. Rosenlund, 261 F. Supp. 12 (D. Or. 1966). *But see* Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977); Ballard v. Blue Shield, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977) (cases construing § 3(b) more broadly).

[132] 98 S. Ct. at 2935.

[133] *Id.*

[134] *Id.* at 2939 (Stewart, J., dissenting). The Court refrained from considering the meaning of "coercion" and "intimidation." *Id.* at 2929 n.10.

[135] Justice Rehnquist joined the dissent of Justice Stewart.

[136] 98 S. Ct. at 2932 n.18.

[137] *Id.* at 2930.

[138] *Id.* at 2936.

refused to decide whether "state regulatory direction or authorization" would have been considered under section 3(b) or "whether it comes into play as part of a possible defense under the 'state action' doctrine as elaborated in *Parker v. Brown* . . . and its progeny."[139] The answer would depend on the extent of regulation and the nature of the conduct. In *Barry*, there had been no dispute over the application of section 2(b).[140] Yet it is less than clear that section 2(b) in fact would have afforded protection but for section 3(b). The test of the 2(b) exemption is "whether the state has 'generally authorized or permitted certain standards of conduct,'"[141] a more liberal test than that of state action. Nonetheless, it is difficult to characterize the conduct challenged in *Barry* as having been even "generally authorized" by the state. Had the Court not found a boycott, it is still possible the exemption would not have been available.

If section 3(b) turns out to be construed as broadly as Justice Stewart fears, and the breadth of section 2(b) is eroded, insurance defendants may still seek the more confined shelter of the state action doctrine. Since the McCarran-Ferguson Act has been described as "an enunciation of the *Parker v. Brown* decision,"[142] the narrowing scope of state action may have influenced the Court's decision in *Barry*. Replacing the broad section 2(b) exemption with immunity under the state action doctrine would have the effect of narrowing the section, not "devouring" it. Perhaps it is time for the insurance industry to be placed on the same footing as other forms of state-regulated conduct.[143]

b. National Broiler

Little need be said about *National Broiler*. After examining a variety of mechanistic definitions of the term "farmers,"[144] Justice Blackmun, speaking for a seven-man majority, did little more than reveal one example of what a farmer is not.

The exemption at issue was section 1 of the Capper-Volstead Act,[145] which provides that "persons engaged in the production of agricultural

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[139] *Id.* at 2937 n.27. For a discussion of the state action doctrine, see text accompanying notes 53-102 *supra*.

[140] *See* Brief for Petitioners at 7.

[141] Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178, 1182 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972) (quoting California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959)).

[142] Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 87 (E.D.N.C. 1965), *aff'd*, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966).

[143] See the discussion *infra* at 308-22, regarding recommendations of the National Commission for the Review of Antitrust Laws and Procedures, which include recommended repeal of the McCarran-Ferguson Act.

[144] *E.g.*, "[A] person or other entity cannot generically be a farmer without owning or operating a farm on which an agricultural commodity is produced." Brief for American Farm Bureau as Amicus Curiae at 5. The term "farmers" was meant by Congress "to mean holders of land, owners of farms, occupiers of farms, persons cultivating their own land, tillers of the soil, and so on." Brief for the United States at 13.

[145] 7 U.S.C. § 291 (1976).

products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations . . . in collectively processing, preparing for marketing, handling, and marketing in interstate and foreign commerce, such products of persons so engaged." *Case-Swayne Co. v. Sunkist Growers, Inc.*[146] held that *all* members of such an association must be within one of the categories enumerated by the statute; otherwise the association is not entitled to protection under the Act.[147] In *National Broiler*, each member of the marketing Association was "integrated," in that each participated in more than one of the several stages of production of broiler chickens.[148] Although the members generally contracted with independent growers for the raising or "grow-out" of at least part of their breeding flocks, six members neither owned nor controlled any flock or hatchery, and three of these maintained no grow-out facility. Thus, these members, who bought chicks after they had hatched and placed them with growers, were, in the Court's view, more like processors than farmers and therefore placed the Association beyond protection of the Capper-Volstead Act.[149]

The Court carefully avoided the question whether the remaining association members would have been entitled to protection despite integration by most of the members. Justice Brennan, concurring, emphatically concluded they would not be protected.[150] Justice White, joined by Justice Stewart in dissent, correctly noted the failure of the majority to provide a "functional definition"[151] was a disappointing result in light of the Court's recognition that the Act was "to aid only those whose economic position rendered them comparatively helpless."[152] Why the chicken breeders, hatchers and growers were helpless compared to those who bought chickens after they were already hatched was left to surmise. The Court simply assumed that the three members played an economic role "indistinguishable" from that of the processor or packer.[153] This conclusion, and the decision generally, offers no aid to counsel seeking to advise clients on the scope of the Capper-Volstead exemption.

C. Exxon: *A Postscript on State Regulation*

In another case in which state legislation was challenged as contrary to federal antitrust law, the Supreme Court again expressed an attitude of restraint toward interfering with the power of states to regulate competi-

[146] 389 U.S. 384 (1967).
[147] *Id.* at 395-96.
[148] Stages include the raising and breeding of flocks to produce eggs, hatching of the eggs and placement of the chicks, production of feed for them, raising of the chicks, removing them to processing facilities, and operation of those facilities to prepare them for market. National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 820-21 (1978).
[149] 389 U.S. at 393-96.
[150] 436 U.S. at 829 (Brennan, J., concurring).
[151] *Id.* at 840 (White, J., dissenting).
[152] *Id.* at 826.
[153] *Id.* at 827-28.

tion within their borders. The Court illustrated its concern for the dynamics of federalism by refusing to invoke the doctrine of federal preemption in *Exxon Corp. v. Governor of Maryland*[154] and by reaffirming the state action doctrine in *Orrin Fox.*[155] In each case, the Court upheld state legislation which may have had anticompetitive effects.

Since the suit in *Exxon* was for a declaratory judgment and no antitrust violation was alleged, the state action doctrine had no application as it did in *Orrin Fox* where implementation of a state statute was challenged as a restraint of trade. In *Exxon,* several major oil companies challenged the validity of a Maryland requirement that a producer of petroleum products must extend its "voluntary allowances"[156] to all service stations the producer supplied in the state.[157] The companies argued that the requirement conflicted with the proviso of section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act which allows a localized price reduction by a supplier in good faith to meet competition.[158] They further argued that the requirement of uniform allowances conflicted with the nation's antitrust policy favoring vigorous price competition.[159]

The Supreme Court rejected these arguments. Contrary to the producer's assertions, the Maryland requirement would not frustrate "the Congressional accommodation between the overall Sherman Act policy of promoting and indeed requiring competitive pricing practices and the Robinson-Patman Act policy of eliminating anti-competitive price discriminations."[160]

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[154] 437 U.S. 117 (1978).

[155] 98 S. Ct. 403 (1978); *see* text accompanying notes 103-11 *supra.*

[156] 437 U.S. at 119-20, 129-34. Although the state statute is silent on the meaning of "voluntary allowances," the Maryland Court of Appeals defined the term as temporary price reductions granted to retail dealers to enable the retailers to meet lower prices of their competitors. Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102, 1122 (1977). Based on this definition, the court of appeals found no conflict with the meeting competition defense of the Robinson-Patman Act. *Id.* at 1122-24. The court held that the meeting competition defense would not cover a price reduction given by an oil company to its own dealer to meet the lower price of a competing dealer. *Id.* at 1124-25.

[157] 437 U.S. at 119-20, 129-34.

[158] 15 U.S.C. § 13(b) (1976). Section 2(a) of the Robinson-Patman Act prohibits anticompetitive price discrimination. *Id.* § 13(a). However, § 2(b) provides that price discrimination is justified if "made in good faith to meet an equally low price of a competitor. . . ." *Id.* § 13(b).

[159] 437 U.S. at 131.

[160] Brief of Appellants, Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978), at 56. The basic provisions of the Maryland statute, MD. CODE ANN. art. 56, § 157E (Supp. 1978), prohibit the operation of retail service stations after a specified date by producers or refiners of petroleum products. These provisions were challenged unsuccessfully on substantive due process and commerce clause grounds. 437 U.S. at 124-29.

The statute was an outgrowth of the 1973 oil shortage, during which producers supposedly had discriminated in supply and price against independent dealers in favor of company owned stations. *Id.* at 121. Prior to the efective date of the statute, certain producers filed a declaratory judgment action in a Maryland circuit court challenging the statute on several constitutional and federal statutory grounds, some of which were not asserted before the Supreme Court. *Id.* at 122 n.5.

The Court found that there was no specific conflict between the Maryland statute and the "meeting competition" defense of section 2(b). There was no preemption even assuming the defense would be available to a producer that offered a price reduction to its retailer to meet a competing retailer's price which was subsidized by its own supplier.[161] That the Maryland statute required statewide uniformity where federal law would *permit* local discrimination was a "hypothetical conflict . . . not sufficient to warrant preemption."[162] Section 2(b) affords no right to localized discrimination but is merely a narrow exception to the Robinson-Patman Act's broad prohibition against price discrimination.[163] Moreover, compliance with the statute would not expose the producers to Robinson-Patman liability, for uniform price reduction is not discrimination, and potential discrimination affecting areas immediately outside state boundaries could be avoided by extending a price reduction to those areas as well.[164]

Finally, the Court rejected the argument that the statute would disturb the "delicate balance struck by Congress between the purposes of the Robinson-Patman Act and the Sherman Act."[165] The Court interpreted this argument as "merely another way of stating that the Maryland statute will have an anticompetitive effect."[166] Although such an effect does conflict with the policy of the Sherman Act, "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed."[167] This same conclusion was expressed in support of the Court's decision in *Orrin Fox.*[168] Both *Orrin Fox* and *Exxon* point to a minimum of judicial interference with increasing state regulation aimed at requiring new business practices or protecting existing ones.[169]

In rejecting the argument that the statute discriminated against and unduly burdened interstate commerce, the Court explained that a burden placed on interstate companies by the statute did not in itself establish discrimination. Nor would interstate commerce be burdened because some business could be expected to shift from some interstate suppliers to others. *Id.* at 127. Thus, the Court underscored the view that the antitrust laws are to protect competition, not competitors. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). Similarly, the Court's decision lends support to certain defenses in Sherman Act cases on the ground that any restraint of trade has not substantially and adversely affected interstate commerce. *E.g.*, Dominion Parking Corp. v. Baltimore & O.R.R., 450 F. Supp. 441 (E.D. Va. 1978) (substitution of one parking lot operator for another as result of alleged conspiracy, while affecting former operator, did not substantially affect interstate commerce).

[161] 437 U.S. at 129-30.

[162] *Id.* at 131.

[163] *Id.* at 131-32.

[164] *Id.* at 130 n.21, 131 n.22.

[165] Brief of Appellants at 80.

[166] 437 U.S. at 133.

[167] *Id.*

[168] 99 S. Ct. 403, 411 (1978).

[169] State regulation of competition is not necessarily anticompetitive. In *Exxon*, for example, the state of Maryland argued that the statute reflected a concern for an overly broad interpretation of the meeting competition defense by federal antitrust enforcement authorities. Brief of Appellees at 42-52. Section 2(b) of the Robinson-Patman Act is discretionary. If a seller chooses, he may selectively rely on § 2(b):

D. *Gypsum* and Price Fixing: Rejection of One Defense and Creation of Another

1. *Accommodating the Robinson-Patman Act with the Sherman Act*

In *United States v. United States Gypsum Co.*,[170] the Court again confronted the "delicate balance" between the Sherman Act and the Robinson-Patman Act, this time in a criminal prosecution of a conspiracy to fix prices in violation of section 1 of the Sherman Act.[171] The Court rejected the Third Circuit's holding that direct verification of a competitor's price pursuant to a Robinson-Patman meeting competition defense, cannot be the basis of Sherman Act liability. Nevertheless, the Court affirmed the circuit court's reversal[172] of criminal convictions in the lower court. In doing so, the Court fashioned a new test for determining intent in a criminal antitrust case.

The case began in 1971 with a 28-month grand jury investigation of the gypsum board industry, a highly concentrated industry producing the type of wall board that forms the main component of interior walls and ceilings in residential and commercial structures. Gypsum board is a fungible produce, and competition in this industry revolves primarily around price, credit terms and delivery services.[173] In December 1973, an indictment was filed against six major manufacturers and several of their corporate executives.[174] At the core of the charges was the allegation that the defendants "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom."[175] Although the defendants disputed the alleged scope and duration of these price verification activities, they rested their case primarily on the contention that a lawful purpose justifies exchange of information among competitors even when the exchange results in increased price stability.[176]

> "Selective price discounts allow sellers to suppress competition, especially from independent, non-branded dealers, in a relatively small area without offering lower prices on a new generalized basis. . . . [T]o expand the § 2(b) defense to permit petroleum suppliers to extend localized, discriminatory price cuts to a retail dealer to enable that dealer to meet the lower price of a competing retail dealer, which is subsidized by a price cut by the supplier's competitor, would be inconsistent with the purpose and legislative history of the Robinson-Patman Act."

Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102, 1124 (1977). The Maryland statute prohibited selective price discounts.

[170] 98 S. Ct. 2864 (1978).

[171] *Id.* at 2868; *see* 15 U.S.C. § 1 (1976).

[172] United States v. United States Gypsum Co., 550 F.2d 115 (3d Cir. 1977).

[173] 98 S. Ct. at 2868.

[174] The trial court denied a motion to dismiss the indictments. United States v. United States Gypsum Co., 383 F. Supp. 462 (W.D. Pa. 1974).

[175] 98 S. Ct. at 2869 (quoting from specification (h) of the indictment).

[176] *Id.* at 2869; *see* Respondents' Joint Brief at 21-43. Other defenses asserted by the defendants included allegedly unreasonable preindictment delay, unsuccessfully argued before both the district court and the court of appeals; erroneous jury instructions on participation in the conspiracy, which the Supreme Court found sufficient; erroneous instructions on

The defendants argued that their lawful purpose was twofold. First, verification of prices through direct communications with competitors was necessary to confirm a customer's claim of a more favorable offer from a competitor, thereby enabling the seller to meet competition in "good faith" pursuant to section 2(b) of the Robinson-Patman Act.[177] Second, verification was necessary to protect the seller from fraud or misrepresentation on the part of its customer.[178] Thus, the defendants argued that verification was within the so-called "controlling circumstance" exception to Sherman Act liability.[179]

The controlling circumstance language stems from a passage in *United States v. Container Corp.*,[180] a civil action in which the government charged that exchange of price information as to specific customers amounted to price fixing in violation of section 1 of the Sherman Act. The defendants in *Container* argued that their conduct was not illegal on the basis of *Cement Manufacturers Protective Association v. United States.*[181] Justice Douglas distinguished *Cement Manufacturers:*

> While there was present here, as in [*Cement Manufacturers*], an exchange of prices to specific customers, there was absent the *controlling circumstance,* viz., that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job.[182]

Since *Container,* several courts have seized on Justice Douglas' controlling circumstance language to create an "exception" to Sherman Act liability for exchanges of price information made for the purpose of establishing a meeting competition defense under section 2(b) of the Robinson-Patman Act.[183] The Supreme Court in *Gypsum,* however, did not directly

withdrawal from the conspiracy, which the Court decided constituted reversible error; and the impropriety of *ex parte* communications between the trial judge and the jury foreman, which the Supreme Court also held was a sufficient basis for reversal. 98 S. Ct. at 2867-69.

Justices Brennan, Marshall, and White joined the Chief Justice's opinion for the Court; Justices Stewart and Powell joined except as to Part IV of the opinion concerning communications between court and jury foreman; Justice Powell further took issue with a portion of Part III concerning the asserted defense under the Robinson-Patman Act; Justice Stevens joined except as to Part II, concerning the test for intent, as to which he dissented; Justice Rehnquist dissented except as to the introduction to the opinion and the portion concerning the instruction on participation in the conspiracy; Justice Blackmun took no part in consideration of the case.

[177] 15 U.S.C. § 13(b) (1976). This section permits a discriminatory price to be "made in good faith to meet an equally low price of a competitor."

[178] 98 S. Ct. at 2879 n.24.

[179] *Id.* at 2879.

[180] 393 U.S. 333 (1969).

[181] 268 U.S. 588 (1925).

[182] 393 U.S. at 335 (emphasis added).

[183] *See, e.g.,* United States v. United States Gypsum Co., 550 F.2d 115, 123-27 (3d Cir. 1977); Belliston v. Texaco, Inc., 455 F.2d 175, 181-82 (10th Cir. 1972); Wall Prods. Co. v.

address the existence and scope of the so-called controlling circumstance exception because the Court found no conflict between the Sherman Act and the Robinson-Patman Act that would require modification of conventional Sherman Act enforcement.[184] Thus, the Court ruled that "meeting competition" was not a controlling circumstance and reserved for another day the question whether the "exception" may exist.

The absence of a conflict between the two antitrust acts should have been apparent more than 30 years ago when the Court in *FTC v. A.E. Staley Manufacturing Co.*[185] held that the good faith standard of meeting competition "does not require the seller[s] to justify price discrimination by showing that *in fact* they met a competitor's price."[186] Nevertheless, the Court in *Staley Manufacturing* had rejected the meeting competition defense, in part because of the failure "to investigate or verify" oral informational reports.[187] In *Corn Products Refining Co. v. FTC,*[188] decided the same day as *Staley Manufacturing,* the Court rejected the defense because of the lack of "personal knowledge of the transactions" on the part of witnesses who assumed competitive justifications for price discrimination.[189] The *Gypsum* Court recognized that the language in *Staley Manufacturing* and *Corn Products* "suggested" that direct verification of discounts was necessary to make out a section 2(b) defense.[190] However, none of the courts permitting interseller verification as a defense to Sherman Act liability had held that such verification was *required* by the Robinson-Patman Act.

National Gypsum Co., 326 F. Supp. 295, 312-15 (N.D. Cal. 1971).

The "controlling circumstance" exception advanced by the defendants in *Gypsum* was the result of an excessive reading of the language in *Container Corp.* In *Cement Manufacturers,* the Court did not create an "exception" to Sherman Act liability, but found that the information exchange was designed to prevent purchasers of cement from taking unfair advantage of the sellers. Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 595 (1925). The need to protect against buyers' fraud was a distinguishing feature that was prominent in the Court's application of the rule of reason to the information exchange. *Id.* at 606.

In *Container,* there was an anticompetitive effect, according to the Court. Occasional direct and reciprocal communications between competitors concerning prices in the oligopolistic corrugated container industry was sufficient to create "irrestible" inferences that "the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition." 393 U.S. at 337. The Court's finding of increased potential for interdependent pricing in *Container* contrasts clearly with the finding in *Cement Manufacturers* that the exchange of price information was neutral with respect to the firms' interdependence. *See* 268 U.S. 588, 606 (1925). *See generally* Note, *Antitrust Liability for Exchange of Price Information—What Happened To* Container Corporation?, 63 VA. L. REV. 639 (1977).

[184] 98 S. Ct. at 2880. The Court stated that a defendant's purpose would not "insulate him from liability unless it is deemed of sufficient merit to justify a general exception to the Sherman Act's proscriptions." *Id.* at 2879 n.23 (citing Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925)).

[185] 324 U.S. 746 (1945).

[186] *Id.* at 758.

[187] *Id.*

[188] 324 U.S. 726 (1945).

[189] *Id.* at 741.

[190] 98 S. Ct. at 2881; *see* note 183 *supra.*

The Third Circuit in *Gypsum* followed these cases but prescribed its own set of circumstances in which interseller verification would be permitted.[191]

The Supreme Court in *Gypsum* summarized the meeting competition defense as requiring a "good faith belief, rather than an absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor. . . ."[192] Acquiring such a belief does not compel a seller to discuss prices with competitors. Besides, the Court observed, there is as much incentive among competitors to misrepresent price as there is among customers.[193] Direct communications, to the extent they are reciprocal, tend to defeat their own purpose. If price concessions cannot be kept from competitors, there is little incentive to offer them.[194] The Court also recognized that direct communications necessarily afford opportunities "for the growth of prohibited anticompetitive activity."[195]

Having concluded that interseller verification is not required to establish good faith, it was unnecessary for the Court to chart a path toward satisfaction of the good faith standard. The Court did provide some direction, however, for determining how to employ the section 2(b) shelter. By saying that "*casual reliance* on uncorroborated reports of buyers or sales representatives without further investigation may not . . . be sufficient to make the requisite showing of good faith,"[196] the Court implied that thoughtful reliance may be proper. The seller may be able to show there was no reason to doubt the veracity of a prospective buyer. And when the seller has "vague, generalized doubts,"[197] he is entitled to make the sale if "after making reasonable, lawful, inquiries [he] cannot ascertain that the buyer is lying . . . ."[198] Threatened refusals to buy, consistent reports from several customers, and corroborating documents or market data would tend to support an assertion that a lower price is available from a competing seller.[199]

More specific doubts might not be disspelled in spite of all reasonable efforts to do so, and the Court suggested that at times the meeting competition defense may not be available. Justice Powell was concerned over the possible effect of withholding the defense in the face of every reasonable effort to verify information.[200] This might lead a prudent seller to forego a price reduction, he said. Nevertheless, under *Staley's* test of establishing "facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a

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[191] 550 F.2d at 126.
[192] 98 S. Ct. at 2881.
[193] *Id.* at 2883.
[194] *Id.* at 2883-4.
[195] *Id.* at 2884.
[196] *Id.* at 2881 (emphasis added).
[197] *Id.* at 2882.
[198] *Id.* at 2882 n.29 (quoting Brief for United States at 86, United States v. United States Gypsum Co., 98 S. Ct. 2864 (1978)).
[199] *Id.* at 2882.
[200] *Id.* at 2890.

competitor,"[201] the meeting competition defense occasionally will be unattainable. As the Court concluded in *Exxon,* there is no "right" to meet competition through price discrimination.[202]

2. *Criminal Antitrust: Purpose, Intent, and Knowledge*

a. *Intent as an Element of the Violation*

Although the *Gypsum* Court rejected the defense argument that a lawful purpose will shelter price exchanges from Sherman Act liability, the Court refused to accept the government's position that purpose is irrelevant if anticompetitive effect is shown. Relying primarily on *Container,* the government insisted that "this Court's long-standing rule [is] that an agreement among sellers to exchange information on current offering prices violates section 1 of the Sherman Act if it has either the purpose or the effect of stabilizing prices."[203] The Court held, however, that an effect on prices, without more, was insufficient to support a criminal conviction under the Sherman Act.[204]

The trial court in *Gypsum* had instructed the jury as follows:

> [T]he law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the *effect* of the exchanges of pricing information was to raise, fix, maintain and stabilize prices, then the parties to them are *presumed,* as a matter of law, to have intended that result.[205]

Although this instruction would not have been improper in a civil antitrust enforcement action, it was reversible error in a criminal proceeding because it minimized the element of intent. On this point the *Gypsum* Court held:

> [A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices . . . . We are unwilling to construe the Sherman Act as mandating a regime of strict liability criminal offenses.[206]

This holding extended previous case law. Since *United States v. Patten*[207] in 1913, conventional antitrust wisdom had held:

> [C]onspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the

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[201] 324 U.S. at 759-60.
[202] *See* text accompanying notes 154-69 *supra.*
[203] 98 S. Ct. at 2872 (quoting Reply Brief for United States at 1).
[204] 98 S. Ct. at 2872.
[205] *Id.* at 2869 (emphasis added).
[206] *Id.* at 2872-73.
[207] 226 U.S. 525 (1913).

> contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.[208]

This policy was not challenged directly by the defendants in *Gypsum* since their controlling circumstance defense did not necessitate an attack of such scope. Moreover, as Justice Rehnquist pointed out in his dissent, the deficient instruction concerning presumption of intent was just one instruction among many, covering some 40 pages of record, and did not constitute reversible error in view of several other instructions that purpose be taken into account.[209] Nevertheless, the Supreme Court reached out to affirm the Third Circuit's reversal. The reason for doing so likely arose from changes in criminal antitrust law enforcement.

The complaint in *Gypsum* was filed prior to the enactment of legislation in 1974[210] raising criminal violation of the Sherman Act from a misdemeanor to a felony and increasing the maximum fines substantially.[211] The changing nature of criminal enforcement of the Sherman Act[212] undoubtedly influenced the Supreme Court's decision to analyze carefully the intent element of the offense. Also, the Court was influenced by the general nature of the Sherman Act, which, "unlike most traditional criminal stat-

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[208] *Id.* at 543; *accord,* United States v. Griffith, 334 U.S. 100, 105 (1948). *See also* Nash v. United States, 229 U.S. 373, 376-77 (1913). In *Nash* the Court rejected the contention that the Sherman Act is too vague to justify criminal enforcement. The intent addressed in *Gypsum, Patton* and *Griffith* concerns the intent to implement the conspiracy. A threshold question of intent concerns the formation of the conspiracy. *See* 98 S. Ct. at 2876 n.20.

[209] 98 S. Ct. at 2891 (Rhenquist J., concurring and dissenting).

[210] Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1706 (amending 15 U.S.C. §§ 1-3 (1976)).

[211] In addition to raising a Sherman Act criminal violation to a felony, the Antitrust Procedures and Penalties Act, *see* note 210 *supra,* increased the penalty for individual violators to a maximum of three years imprisonment and a fine of $100,000. Also, corporate violators face a 1 million dollar fine for violation of the Sherman Act. *See* 15 U.S.C. §§ 1-3 (1976).

[212] The increased penalties for violations of the Sherman Act, *see* note 211 *supra,* have injected the Antitrust Division of the Justice Department with new vitality. During the four years immediately preceding the 1974 amendment to the Sherman Act, *see* note 210 *supra,* the Division initiated 64 merger cases and 52 criminal cases. Criminal indictments were issued against 114 individuals. During the four years following the amendment, the Division brought 128 criminal cases while reducing the number of merger cases to 29. During this period indictments were issued against 359 individuals. *See Antitrust Report* (June 1978) at 21, 16 BUSINESS ORGANIZATIONS, ANTITRUST LAW & TRADE REGULATION (von Kalinowski, ed. June, 1978) [hereinafter cited as *Antitrust Report*].

The severity of sentences against antitrust violators has increased. The Antitrust Division reports an increase in individual fines from $755,200 in fiscal 1977 to $1,093,750 in fiscal 1978. Corporate fines increased from $2.6 million to almost $11 million. In fiscal 1977, 24 individuals received a total of 1,561 days in jail. In fiscal 1978 jail sentences for 29 individuals totaled 2,921 days. *See* Address by John H. Shenefield, Assistant Attorney General, Antitrust Division, presented to Corporate Counsel Institute, Chicago, Illinois, at 8 (Oct. 4, 1978) [hereinafter cited as Shenefield address]. These figures are striking when one considers that from 1890-1970, only 19 individuals were sentenced to jail for Sherman Act violations. *See Antitrust Report, supra* at 23.

utes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes."[213] Consequently, Sherman Act liability without regard to intent can lead to "overdeterrence"—too much caution by businessmen, with a dampening effect on competition.[214]

b. *The Element of Knowledge and Its Impact*

The Supreme Court in *Gypsum* avoided the extreme of requiring specific intent to violate the law or purpose to achieve anticompetitive effects.[215] Instead, the Court opted for a standard of knowledge, drawing direction from the ALI Model Penal Code.[216] The Court concluded that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws."[217] Conduct accompanied by anticompetitive purpose also would support liability, even absent anticompetitive effects if a conspiracy could be proven.[218]

Theoretically the question of specific intent remains open because *Gypsum* did not concern a felony prosecution. However, post-*Gypsum* arguments that the 1974 amendment to the Sherman Act implicitly imposed a requirement of specific intent have been rejected.[219] Although the

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[213] 98 S. Ct. at 2876 n.18.

[214] *Id.* at 2875-76. Also, the Court was doubtlessly influenced by the fact that the interseller price verification in *Gypsum* had been undertaken on advice of counsel who may have been genuinely concerned with the burden of establishing a meeting competition defense. *See* Respondents' Joint Brief, *supra* note 176, at 11-13.

[215] The Court did not cite any antitrust cases addressing the question of criminal intent, although the Court cited United States v. Griffith, 334 U.S. 100, 105 (1948), as indirect authority for the proposition that unfulfilled anticompetitive purpose would support liability. *See* 98 S. Ct. at 2877 n.21.

In the first criminal antitrust case brought under the 1974 amendment, *see* note 210 *supra*, a federal district court suggested that the conventional standard of proof of criminal conspiracy may apply in antitrust prosecutions. *See* United States v. Nu-Phonics, Inc., 433 F. Supp. 1006 (E.D. Mich. 1977) (proof of a purpose was essential to the prosecution of an indirect price-fixing conspiracy). *Cf.* United States v. Noll Mfg. Co., 1977-2 TRADE CAS. ¶ 61,712 at 72,906-07 (N.D. Cal. 1977) (court noted that *Nu-Phonics* did not require proof of specific intent; Congress left traditional elements of Sherman Act offense undisturbed).

[216] 98 S. Ct. at 2878; *see* MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955).

[217] 98 S. Ct. at 2877.

[218] *Id.* at n.21.

[219] *E.g.*, United States v. Continental Group, Inc., 456 F. Supp. 704 (E.D. Pa. 1978). In *Continental Group,* the court, in denying post-conviction motions, cited *Gypsum* as supporting the long-established rule that proof of specific intent is not required in an antitrust misdemeanor case. The court also cited legislative history to support its view that Congress did not intend in 1974 to change the substantive elements of a Sherman Act offense. Although the court quoted the knowledge standard of *Gypsum,* it did so only in the context of considering knowing participation in the conspiracy, after which it relied on the *Patten* principle that conspirators must be held to intend the "necessary and direct consequences of their acts." *Id.* at 716-18. Thus, the court treated *Gypsum* as having made no changes at all in criminal antitrust enforcement. *Id. Cf.* United States v. United States Gypsum Co., 1978-2 TRADE CAS. ¶62,359 at 76,156 (motion for acquittal denied on ground that there was sufficient evidence of criminal intent to permit a new trial).

Gypsum Court addressed conduct occurring prior to 1974, the Court clearly was concerned with the implications of felonious conduct occurring under the Sherman Act.

By no means, however, will *Gypsum* be the final word on criminal intent in antitrust proceedings. Nor is the decision likely to have the limited impact predicted by the government. In arriving at its decision to make knowledge the standard of criminal intent in antitrust enforcement, the Supreme Court cited the Antitrust Division's 1967 guidelines that criminal prosecutions should be undertaken only against willful violations.[220] The Head of the Antitrust Division, Assistant Attorney General Shenefield, has repeated this theme, declaring recently that *Gypsum* does not represent a significant change, at least insofar as per se offenses are concerned: "Per se offenses are those for which no justification or defense can be offered."[221] Conduct that "clearly constitutes a per se offense carries with it its own intent."[222] According to Shenefield this is the type of conduct that is prosecuted criminally.

The Antitrust Division's attempt to minimize the impact of *Gypsum* may be unjustified. Yet if *Gypsum*'s knowledge standard is interpreted as requiring only general knowledge that some unidentified anticompetitive effects will follow, then the impact of *Gypsum* will be slight. However, such an interpretation would conflict with the concern in *Gypsum* over the distinction between unlawful anticompetitive conduct and "the gray zone of socially acceptable and economically justifiable business conduct."[223] *Gypsum* implies that more than mere general knowledge—perhaps knowledge of substantial anticompetitive impact, if not of specific anticompetitive effects—may be required to satisfy the intent element.

Thus, in so-called indirect price-fixing cases, such as *Gypsum*, defense counsel can be expected to marshal voluminous evidence to demonstrate purity of purpose and inadequate knowledge of anticompetitive consequences. Purpose is relevant to determining what a defendant foresaw the consequences of his conduct to be, and evidence on both purpose and knowledge will enhance the confusion that inevitably arises in trying to implicate numerous defendants in a conspiracy, the precise effects of which may be unclear. If economists must be called to testify as to actual effects, can businessmen be held to have knowledge that such effects were "probable," especially if there is significant disagreement over what the effects actually are? Although the Supreme Court recognized that an effect on prices "may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference."[224]

A per se violation is merely an extension of the rule of reason. When

[220] 98 S. Ct. at 2875 n.15.

[221] Shenefield Address, *supra* note 212, at 11.

[222] *Id.*

[223] 98 S. Ct. at 2875.

[224] *Id.* at 2878.

conduct is deemed unreasonable, it is unnecessary to engage in elaborate proof of effect. Yet the government in a criminal antitrust action must prove an agreement and show what the agreement was designed to accomplish. Even assuming concerted action, the less clear the purpose of the conduct, the more important it will be for the government to demonstrate effect and some degree of foreknowledge about this effect. In either case, both purpose and knowledge can be expected to attract much evidentiary attention in future criminal antitrust actions. The lower federal courts now have the task of clarifying the degree of knowledge necessary to impose liability.

E. *Four Points of Procedure*

Each of the remaining cases to be reviewed involved a specific question of procedure. Two dealt with antitrust procedure and are characterized by literalism—literal interpretation by the Court of the applicable legal standards. The other two dealt with class action procedure, which is quite important in treble damage litigation. Both decisions tend to restrict the use of the class action device by plaintiffs.

1. Pfizer: *A Person is a Person*

In *Pfizer, Inc. v. Government of India,*[225] the Court split 5-3 over the meaning of "person" in section 4 of the Clayton Act, which authorizes treble damage suits by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."[226] The question before the Court was whether a foreign government is embraced by the word "person."[227] The majority and minority of the Court recognized that Congress did not directly address the question in enacting the predecessor to section 4 in 1890.[228] However, each side drew a different conclusion as to the significance of the lack of congressional direction on the issue. The majority reasoned that an exception to the general rule permitting foreign governments to sue in American courts could not be justified without clear legislative intent.[229] The minority opined that the scope of standing to sue under the antitrust laws should not be expanded "without express congressional intent to do so."[230]

Permitting antitrust standing in a case of first impression, however, does not necessarily expand the scope of standing. Such a case may simply

[225] 434 U.S. 308 (1978).

[226] 15 U.S.C. § 15 (1976).

[227] Several actions were brought against six manufacturers of pharmaceuticals for price fixing and other alleged violations of §§ 1 and 2 of the Sherman Act. 434 U.S. at 309-10 & nn. 1, 2 & 3.

[228] *Id.* at 312. The original treble damage provision was § 7 of the Sherman Act, which was re-enacted as § 4 of the Clayton Act. 15 U.S.C. § 15 (1976).

[229] 434 U.S. at 319. Justice Stewart wrote for the five-man majority.

[230] *Id.* at 329. The Chief Justice wrote the dissenting opinion, joined by Justices Powell and Rehnquist. Justice Powell filed a separate dissent. Justice Blackmun took no part in consideration of the case.

delineate the scope predefined by statute. As the majority pointed out, nothing in the legislative history of the Sherman Act demonstrated an intention to narrow the "naturally broad and inclusive meaning" of the phrase "any person."[231]

The Court analyzed two characteristics of the governments seeking standing that arguably could exclude them from the reach of section 4. First, the respondents were foreign, not American consumers. The Court noted, however, that foreign corporations are entitled to sue as "persons" under certain sections of the Sherman and Clayton Acts.[232] The Court also recognized that permitting foreign parties to sue for treble damages may contribute to the protection of American businesses and consumers by deterring anticompetitive conduct having both international and domestic impact.[233] Thus, the status of the respondents as foreigners was insufficient to deny standing to sue. The second possible argument was that respondents were sovereign governments. The Court observed, however, that in its decision in *Georgia v. Evans*[234] a state government was included within the scope of "any person."[235] Since a foreign government may suffer to the same extent as a state government victimized by antitrust violations, the majority in *Pfizer* reasoned that a foreign government should be entitled to the same remedy as the states.[236] Therefore, the Court expressed concern over the impact of standing on two antitrust goals: deterrence and compensation.[237] In light of the broad scope of antitrust remedies generally, the Court was reluctant to allow a Sherman Act violator to escape liability because of the fortuity that the victims were foreign customers.[238]

In view of the Court's previous denial of standing of the United States to sue for treble damages,[239] affording standing to foreign countries seems anomalous. Although section 4(a) of the Clayton Act[240] was added to modify the exclusion of the United States, that section specifically limits recovery by the federal government to actual damages, plus costs. As

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[231] *Id.* at 312.

[232] *See* § 8 of the Sherman Act, 15 U.S.C. § 7 (1976); § 1 of the Clayton Act, 15 U.S.C. § 12 (1976).

[233] 434 U.S. at 314-15.

[234] 316 U.S. at 159 (1942).

[235] *Id.* at 162-63.

[236] 434 U.S. at 318.

[237] It should be noted that the Supreme Court has specifically excluded the United States government from seeking treble damages as a "person" under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). United States v. Cooper Corp., 312 U.S. 600 (1941). The Court's holding in *Cooper* was based on legislative history and the recognition that the federal government, unlike the states, can seek antitrust remedies such as injunctions, seizure of property, and criminal prosecutions. *Id.* at 606-07; *see* 434 U.S. at 316-17.

[238] The Court rejected the argument that it was interfering with foreign policy. 434 U.S. at 319. The Department of State foresaw "no foreign policy problems" with permitting foreign governments to sue under § 4. Memorandum for United States, as amicus curiae, Appendix A.

[239] *See* note 237 *supra.*

[240] 15 U.S.C. § 15(a) (1976).

Judge Ross noted in his concurrence in the Eighth Circuit's decision in *Pfizer*, the time had come for Congress to address this matter directly.[241]

2. Greyhound: *Literalism v. Equity*

What is now section 5(i) of the Clayton Act[242] "was enacted to ensure that private litigants would have the benefit of prior Government antitrust enforcement efforts."[243] The section tolls the running of the statute of limitations for private and state actions under the antitrust laws from the date when "any civil or criminal [antitrust] proceeding is *instituted* by the United States . . ." until one year after the conclusion of such a proceeding.[244] In *Greyhound Corp. v. Mt. Hood Stages, Inc.*,[245] the Court considered whether the statute of limitations was tolled by the filing of a petition by the United States in an Interstate Commerce Commission proceeding.

The Ninth Circuit held that the literal wording of section 5(i) was not controlling. Rather, the ICC intervention was treated as "the functional equivalent" of direct action by the United States.[246] The Supreme Court reversed. Emphasizing the need for "certainty and predictability"[247] in applying section 5(i), the Court adhered to the plain meaning of the statute.[248] However, Mt. Hood argued that if statutory tolling was not available, then equitable tolling should have been.[249] The Court refrained from examining this alternative theory,[250] but the Chief Justice, concerned over Greyhound's "egregious conduct,"[251] invited the court of appeals on re-

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[241] 550 F.2d 396, 399-400 (8th Cir. 1976) (en banc) (Ross, J., concurring); *see* text accompanying notes 294-304 *infra*.

[242] 15 U.S.C. § 16(i) (1976). This is a modification of what originally was § 5 of the Clayton Act.

[243] Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 334 (1978).

[244] 15 U.S.C. § 16(i) (1976) (emphasis added).

[245] 437 U.S. 322 (1978).

[246] 555 F.2d 687, 700 (9th Cir. 1977) (quoting from the opinion of the trial court).

[247] 437 U.S. at 335.

[248] *Id.* at 329 n.11. Mt. Hood had challenged certain Greyhound acquisitions in the 1940's and 1950's which nevertheless were approved by the ICC. As the result of Greyhound's alleged breach of representations before the ICC, Mt. Hood sought in 1964 to reopen the acquisition proceedings. *Id.* at 326. After Mt. Hood filed its petition in October of that year, the government filed a petition on December 14, asserting that it had "no way of knowing whether those of Mt. Hood's allegations which Greyhound denies are true or false . . . ." *Id.* at 327. On July 5, 1968, in the midst of settlement negotiations following an ICC evidentiary hearing, Mt. Hood filed a federal antitrust action. *Id.* at 328. The jury found, in 1973, that Greyhound had fraudulently concealed its antitrust violations from 1953 until July 4, 1964, but that Mt. Hood knew or should have known of the violations by December 14, 1960. Thus, tolling by virtue of the government's December, 1964, petition would have served to link the four-year limitations period preceding July 5, 1968, with the prior period to December 14, 1960, which in turn would have been linked by fraudulent concealment to a period beginning on January 1, 1953. *Id.* at 329. As a result of the Supreme Court's decision, damages could not relate to the time prior to July 5, 1964.

[249] Respondent's Brief at 22-32.

[250] 437 U.S. at 337 n.21.

[251] *Id.* at 337-38 (Burger, C.J., concurring).

mand to examine the equitable tolling doctrine under "traditional equitable principles."[252]

3. Livesay *and* Sanders: *Confronting the Realities of Class Actions*

Class actions typically are expensive, protracted litigation, the outcome of which is often dictated by the resolution of issues unrelated to the merit of the plaintiffs' underlying claims. Decisions such as those pertaining to class certification and allocation of expenses, if resolved in favor of defendants, can bring possibly meritorious claims to an early demise. On the other hand, if such decisions favor plaintiffs, groundless claims can impose staggering burdens on defendants. Class actions that assert in conclusory fashion claims of antitrust conspiracy founded on parallel business behavior can be particularly onerous from a defendant's standpoint. Complaints barely sufficient to survive motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure can lead to disruptive discovery that forces businesses (especially small firms) to settle simply because they cannot afford the expense of litigation—no matter how strong their defenses. Such suits, although brought under antitrust laws, in fact distort the operations of antitrust, which encourages competition and frequently affords special solicitude to the small entrepreneur. As a leading antitrust commentator has observed, "[m]assive class actions constitute a net liability for antitrust, for federal courts, and for society generally."[253]

Two 1978 Supreme Court class action decisions, although not involving the antitrust laws, should be welcomed by antitrust defendants. In *Coopers & Lybrand v. Livesay,*[254] the Court resolved a conflict among the circuits[255] by holding that a denial of class certification under Rule 23 is not a "final decision" within the meaning of 28 U.S.C. § 1291[256] and, therefore, not independently appealable as a matter of right.[257] Although several circuits had held such denials appealable if likely to sound the "death knell" of the action—the end of the litigation because it would be economically unfeasible to proceed without certification—Justice Stevens, for a unanimous Court, sounded a death knell for the "death knell" doctrine itself.

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[252] *Id.* at 339. The district court has since held that equitable tolling applies. Mt. Hood Stages, Inc. v. Greyhound Corp., 1979-1 TRADE CAS. ¶62,446 (D. Ore. 1979).

[253] Handler, *The Shift from Substantive to Procedural Innovation in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 10 (1971). The need for reform is widely recognized, and a reform bill (S. 3475) introduced in 1978 is expected to undergo revisions and receive serious attention from the 96th Congress. A succinct discussion of the bill was provided by Assistant Attorney General Meador, in charge of the Justice Department's Office for Improvements in the Administration of Justice, in 65 A.B.A.J. 48 (Jan. 1978). Mr. Meador asserts that the measure "is not a plaintiffs', defendants', or judges' bill." *Id.* at 55.

[254] 437 U.S. 463 (1978).

[255] *See id.* at 465 n.2.

[256] 28 U.S.C. § 1291 (1976) provides circuit courts with jurisdiction over appeals "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court."

[257] 437 U.S. at 467.

The Court stated that a decision to deny or grant a motion for class certification is "inherently tentative."[258] Courts applying the death knell doctrine looked not to the finality of an order but to the prospective impact the order would have on an individual plaintiff.

In the other decision, *Oppenheimer Fund, Inc. v. Sanders*,[259] the Court examined the question of allocation of the cost of preparing a list of class members and their addresses to be used in distributing the requisite notice of the action. Again the Court was unanimous. The Court held that Rule 23(d), while authorizing district courts to direct defendants to help compile such a list, permits allocating the cost of doing so to defendants only if the expense of the task performed by them is "insubstantial."[260] In *Sanders*, preparing an accurate list would have required the defendant's stock transfer agent to sort papers manually, keypunch from 150,000 to 300,000 computer cards, and create new computer programs.[261] The estimated cost of completing the list was $16,000.[262]

The Court first resolved a split of authority on whether Rule 23(d) or the discovery rules empower district courts to enlist the aid of defendants in identifying class members. The Court held that if the information was sought only for the purpose of compiling the class member list, the aid may be ordered only under Rule 23(d). The Court explained that a district court in its discretion may order a defendant to perform a task necessary to the notice procedure if the defendant can perform the task "with less difficulty or expense than could the representative plaintiff."[263] Although the district court may allocate the cost of performing the task, the Supreme Court cautioned "that courts must not stray too far from the principle underlying *Eisen IV*[264] that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action."[265] Thus, the burden should be shifted only if "insubstantial," such as in cases when the cost is insubstantial or the task would have been performed in any event by the defendant in the ordinary course of business.[266] In *Sanders*, the district court had abused its discretion in requiring defendants to pay the "relatively modest" sum of $16,000.[267] Although recognizing that the assets of the Fund exceeded $500 million, the Supreme Court explained, "In the context of a lawsuit in which the defendants deny all liability, the imposition on them of a thresh-

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[258] *Id.* at 469 n.11.

[259] 437 U.S. 340 (1978).

[260] *Id.* at 359.

[261] *Id.* at 345.

[262] *Id.*

[263] *Id.* at 356.

[264] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In *Sanders*, the Court confined its holding in *Eisen IV* to a requirement that plaintiffs must pay the cost of class action notice when they prepare and mail notice themselves. 437 U.S. at 350.

[265] 437 U.S. at 359.

[266] *Id.*

[267] *Id.* at 361.

old expense of $16,000 to enable the plaintiffs to identify their own class hardly can be viewed as an insubstantial burden."[268]

II. ANTITRUST ENFORCEMENT: AT THE AGENCIES AND ON THE HILL

A. *Premerger Notification: Regulatory Antitrust*

The most significant event in antitrust enforcement in 1978 was the issuance of the long-awaited premerger notification rules of the Federal Trade Commission,[269] implementing Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[270] Some two years in the making,[271] the rules were finally published in the Federal Register on July 31, 1978.[272] Perhaps it was to be expected, in light of their lengthy period of gestation, that publication of the rules would contain numerous typographical errors and omission. The appended notification and report form was republished on August 4,[273] and the rules finally took effect on September 5, 1978.[274]

Congress passed Title II to provide statutory clout for the FTC's program of premerger notification, which had been in existence since 1969.[275] Title II, which is codified as new section 7A to the Clayton Act,[276] has furnished the government's antitrust agencies with an important new means of enforcing section 7, which was designed to prevent restraints of trade in their incipiency.[277] The new requirements signify the beginning of

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[268] *Id.* at 362.

[269] 43 Fed. Reg. 33,357 (1978) (to be codified in 16 C.F.R. §§ 801.1-803.90).

[270] Pub. L. No. 94-435, 90 Stat. 1390 (codified at 15 U.S.C. § 18a (1976)).

[271] The Antitrust Improvements Act was signed into law on September 30, 1976. The premerger notification provisions (Title II) were to take effect on February 27, 1977. On December 20, 1976, proposed rules were published in the Federal Register. 41 Fed. Reg. 55,488 (1976). On January 27, 1977, the FTC issued a transitional rule suspending operation of Title II until final rules were promulgated. 42 Fed. Reg. 6,365-66 (1977). The transitional rule was corrected, 42 Fed. Reg. 63,883 (1977), and later amended, 43 Fed. Reg. 27,516 (1978). Revised proposed rules were published for comment on August 1, 1977. 42 Fed. Reg. 39,040 (1977). Comments each time were extensive. One hundred thirty-three were received initially, and 116 were received in response to the revised proposal.

[272] 43 Fed. Reg. 33,537 (1978).

[273] 43 Fed. Reg. 34,443 (1978).

[274] Most, but not all, of the typographical errors were corrected on August 15, 1978. 43 Fed. Reg. 36,053 (1978).

[275] Fed. Reg. Doc. 69-5617, May 9, 1969, *superseded by* 39 Fed. Reg. 7,951 (1972), *supplemented by* 38 Fed. Reg. 5,513 (1973), *superseded by* 39 Fed. Reg. 35,717 (1974). The old rules were of limited scope, nearly impossible to enforce, and lacked effective sanctions for persons failing to comply. Nevertheless, the old rules, as further amended, remain in effect for those who fail to file under the new rules in spite of a requirement to do so unless exempt. 43 Fed. Reg. 57,656-57 (1978). Presumably, the old rules will provide the FTC some leverage in the event of legal challenge to any of the new rules.

[276] 15 U.S.C. § 18a (1976).

[277] 16A VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 15.02 [1] at 15-8 (1978). Section 7 generally prohibits the acquisition by one corporation of another's stock or assets "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." 15 U.S.C. § 18 (1976).

a new era of section 7 enforcement, one with "bite" as well as "bark,"[278] and thus one resembling the new era of Sherman Act enforcement brought about by the Antitrust Procedures and Penalties Act of 1974.[279]

Ostensibly, the new requirements make no substantive changes in the antitrust laws. Their official appellation sounds innocuous: "Reporting and Waiting Period Requirements."[280] The statute, as implemented by the rules, requires companies of a certain minimal size, in terms of assets or sales,[281] to report to the FTC and to the Department of Justice prior to consummating acquisitions that exceed specified dimensions.[282] The requirements are intended to provide for preclosing review of mergers by federal agencies. Thirty days after agency notification, or 15 days in the case of cash tender offers, the companies may close the transaction without affirmative agency approval.[283]

The new rules are both broad and complex, in contrast to the deceptively simple contents of the statute. The rules span some fifteen pages of the Federal Register, and are accompanied by the appended reporting form and an 86-page commentary. Not only do the rules cover conventional purchases of stock or assets, but they also encompass mergers,[284] consolida-

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[278] Section 7A(g)(1) creates up to a $10,000 civil penalty for each day any person, including any officer, director, or partner, fails to comply with the requirements. 15 U.S.C. § 18a(g)(1) (1976).

[279] Pub. L. No. 93-528, 88 Stat. 1706 (codified at scattered statutes in U.S.C. titles 15, 47, and 49 (1976)).

[280] 43 Fed. Reg. 33,450 (1978).

[281] Firms must report if one party to an acquisition of voting securities or assets has net sales or total assets of at least $100 million and the other has net sales or total assets of at least $10 million, regardless of which company is acquiring the other, unless the company to be acquired is not engaged in manufacturing and the $100 million size threshold is not met by it, in which case the acquired company must have *assets* of at least $10 million. *See* 15 U.S.C. § 18a(a)(2) (1976).

[282] The size-of-transaction thresholds, established by Section 7A(a)(3) 15 U.S.C. § 18a(a)(3) (1976), coupled with the minimum dollar value rule, 43 Fed. Reg. 33,544-45 (1978) (to be codified in 16 C.F.R. § 802.20) produce the following test: An acquisition of stock is reportable if as a result of the acquisition the "acquiring person" would hold at least 50% of the outstanding voting securities of an issuer which, together with all entities it controls, has annual net sales or total assets of $10 million or more, *or* would hold more than $15 million worth of the voting securities of the "acquired person." An acquisition of assets is reportable if as a result of the acquisition the "acquiring person" would hold at least 15% *and* more than $10 million worth of the assets of the "acquired person" *or* would hold more than $15 million worth of assets, regardless of the percentage. If both stock and assets are to be acquired, the transaction is reportable if as a result of the acquisition the "acquiring person" would hold "an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000." 15 U.S.C. § 18a(a)(3) (1976). The term "person," is critical, having been used 36 times in the statute. 43 Fed. Reg. 33,455 (1978). The term is defined by Rule 801.1(a)(1) to include the "ultimate parent entity" and "all entities" controlled directly or indirectly by the parent. *Id.* at 33,538. The terms "entity" and "ultimate parent entity" are defined by Rule 801(a)(2) and (3). *Id.* The terms "acquiring person" and "acquired person" are defined in Rule 801.2. *Id.* at 539.

[283] *See* § 7A(a), (b); 43 Fed. Reg. 33,549-50 (1978) (to be codified in 16 C.F.R. § 803.10).

[284] In spite of the nomenclature "premerger notification," statutory mergers as a form of acquisition are inadequately treated in the rules. Depending on their structure, they could be deemed acquisitions of either assets or securities. The FTC, in keeping with the purposes

tions, tender offers,[285] exchange offers, open market purchases, and the formation of corporate joint ventures. The rules even reach secondary acquisitions[286] and natural persons.[287] In short, the rules affect any form of significant acquisition of stock or assets.[288] The complexity of the rules stems from the multiplicity of forms that such acquisitions may take and from the difficulties inherent in premerger analysis, which by necessity is speculative.

The rules also require that premerger notification be accompanied by relevant documents, including copies of SEC filings and studies "prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets [and] potential for sales growth or expansion . . . ."[289] The statute provides for confidential treatment of such studies and other information submitted, but it remains to be seen how much comfort the assurance of confidentiality affords in light of the vague statutory exception for material deemed "relevant to any administrative or judicial action or proceeding."[290]

Although procedural in nature, the new requirements may in certain circumstances have substantive impact on proposed acquisitions. The government, by requesting additional information, can extend the waiting period an additional 20 days (10 days for cash tender offers) beyond the time of *receipt* of the additional information, and further extensions may be granted by a court.[291] Moreover, premerger filings may trigger the use

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of the rules, is considering all mergers, no matter how they are structured, to be acquisitions of securities. *Cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 334-49 (1963) (Supreme Court takes similar view).

[285] Tender offers are specifically addressed by the statute, 15 U.S.C. § 18a(b) (1976), as well as by the rules. 43 Fed. Reg. 33,549 (1978) (to be codified in 16 C.F.R. § 803.10). The main impact of the new requirements on tender offers is when they are hostile, for the "white knight" must report and wait just as the "raider" does. But the "raider" normally has a head start.

[286] 43 Fed. Reg. 33,539-40 (1978) (to be codified in 16 C.F.R. § 801.4). Secondary acquisitions are indirect acquisitions of voting securities held by an acquired person that does not control the issuer of the securities (that is, hold 50% or more of the outstanding voting securities). The notification requirements are applicable to secondary acquisitions in the same manner as they are applicable to primary acquisitions.

[287] 43 Fed. Reg. 33,537 (1978) (to be codified in 16 C.F.R. § 801.1(a)(2)). A natural person is an "entity" that can "control" another corporation by holding 50% or more of its outstanding voting securities. Thus, the natural person can be part of the same "person" as the corporation. Since the natural person cannot be "controlled" under the rules, such a person can only be a stockholder who is an "ultimate parent entity." *See id.* at 33,537-38 (to be codified in 16 C.F.R. § 801.1(a), (b)).

[288] There are exemptions, including, for example, goods or realty transferred in the ordinary course of business and acquisitions of voting securities solely for the purpose of investment if as a result of the acquisition the acquiring person would not hold more than 10% of the issuer's outstanding voting securities. Section 7A(c)(1), (9), 15 U.S.C. § 18a(c)(1), (9), (1976); *see* Fed. Reg. 33,544, 33,548 (1978) (to be codified in 16 C.F.R. § 802.1, 802.71).

[289] 43 Fed. Reg. 33,555 (1978) (Item 4(c) of the Notification and Report Form).

[290] Section 7A(h), 15 U.S.C. § 18a(h) (1976).

[291] Section 7A(e)(5); 43 Fed. Reg. 33,551 (1978) (to be codified in 16 C.F.R. § 802.20(c)).

of other governmental investigatory tools, such as civil investigative demands. By compelling the government to examine all major acquisitions in advance, Title II of the Antitrust Improvements Act has created a type of regulatory antitrust, necessitating tacit governmental approval before companies may proceed with a major acquisition. The government, as a result of its power to delay an acquisition, in effect, becomes a party to the acquisition. Further, by merely expressing concern over the antitrust consequences of an acquisition through a request for additional information, the government's interference with the delicate timing of the acquisition negotiations can affect their outcome. At times, the authority to delay a transaction is tantamount to the power of halting the acquisition altogether.[292]

The new requirements should make section 7 a more effective means of insuring competition since now section 7 is more likely to be used prospectively against potentially anticompetitive acquisitions, rather than merely as a club to be wielded after the fact. Courts naturally have been reluctant to unscramble consummated business combinations; however, the government has had no effective means for assuring timely intervention. The new requirements are designed to provide those means. If the government fails to take advantage of the new requirements, it should expect increasing hostility from courts asked to dissolve combinations that might have been prevented in the first place.[293]

B. *Developments in the Congress and the Justice Department*

1. *Deregulation and Attempted Reversals*

Congressional enactment of the Airline Deregulation Act of 1978[294] was consistent with the narrowing of antitrust immunities by the Supreme Court. This landmark measure includes "sunset" amendments to the Federal Aviation Act of 1958[295] that will remove authority of the Civil Aeronau-

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[292] The government clearly recognizes the potential impact. For example, last fall at a seminar on the new requirements, Roger Dennis, Special Assistant to the Assistant Attorney General, Antitrust Division, indicated that the Division would "make the most serious efforts to ensure that premerger notification remains only a notification program. We realize that acquisition transactions are often fragile. Initial requests which are impossible to complete and requests for additional information which cause undue delay can stop a merger just as effectively as an injunction." Remarks by Roger Dennis, New York Law Journal seminar, in New York City, at 3 (October 16, 1978). As of December 21, 1978, reports had been filed for 292 transactions; 26 transactions had prompted 46 requests for additional information. The Antitrust Division had filed two motions for preliminary injunctions as a result of information received pursuant to premerger notification. FTC, *Second Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rudino Antitrust Improvement Act of 1976.* (July 26, 1978).

[293] In spite of the statute's admonition that governmental action or inaction in response to premerger notification shall not bar a later challenge of an acquisition, it seems inevitable that the government's initial response will, as a practical matter, impact upon later proceedings begun by the government.

[294] Pub. L. No. 95-504, 92 Stat. 1705 (to be codified at 49 U.S.C. §§ 1301 *et seq.*).

[295] Pub. L. No. 85-726, 72 Stat. 731 (codified at 49 U.S.C. §§ 1301-1542 (1976)).

tics Board over airline routes by the end of 1981 and over fares as of the end of 1982. Deregulation of the airline industry was prompted by concern over the dramatic cost of regulation by the CAB[296] and the realization that regulation was antithetical to the antitrust principle of free and unfettered competition. Because the inefficiencies of regulation are not peculiar to the airlines industry, the current administration also has set its sights on discarding regulation of the trucking and rail industries.

Before Congress voted to restore competition in the airlines industry, it had started down a collision course with the Court in connection with antitrust enforcement. The majority opinion in *Illinois Brick*[297] had hardly been released before bills were introduced to overturn the Court's holding that only direct purchasers of price-fixed products can suffer antitrust "injury" within the meaning of section 4 of the Clayton Act.[298] Hearings held in 1977 and again in 1978 illustrated the complexities of issues that are now before the 96th Congress.[299]

Whether indirect purchasers should be afforded an opportunity to prove the "pass-on" of illegal overcharges paid by direct purchasers is open to question. The question is complicated by the inevitable consideration by Congress of whether *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[300] should also be reversed to permit defendants to use the "pass-on" theory by arguing that plaintiffs had passed on any overcharges to their customers and thus had not suffered antitrust injury. Congress also was inclined to challenge *Pfizer*,[301] another section 4 decision, but one which raised different issues. Congressional deliberation, however, proved fruitless.[302]

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[296] The cost of regulation of the airlines industry by the CAB has been estimated at $1.8 billion annually. Statement of Joe Sims, Deputy Assistant Attorney General, Antitrust Division at 45, 56, before the National Commission for Review of Antitrust Laws (July 26, 1978).

[297] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[298] *See* text accompanying notes 225-41 *supra*. The Court in *Illinois Brick*, however, did list several exceptions to its holding. *See* 431 U.S. at 732 n.12, 736 n.16.

[299] *See, e.g., Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

[300] 392 U.S. 481 (1968).

[301] *See* text accompanying notes 225-41 *supra*. A fourth decision which was related to the debate, United States v. Cooper Corp., 312 U.S. 600 (1941), was later reversed by Congress to allow single damage actions by the United States under section 4. *See* text accompanying notes 240-41 *supra*.

[302] *Pfizer* was decided in January, 1978, in the midst of the debate over *Illinois Brick*. Provisions to reverse *Pfizer* were added without hearings to pending *Illinois Brick* measures. H.R. 11942 was reported by the Committee on the Judiciary in July and would have reversed *Illinois Brick, Hanover Shoe, and Pfizer*. H.R. Rep. No. 95-1397, pt. I, 95th Cong. 2d Sess. (1978). The bill was then referred to the Committee on International Relations for consideration of section 3, which would have excluded foreign governments from the scope of the term "person" as used in section 4 of the Clayton Act. This committee reported the bill but expressed its "deep concern" over the "serious foreign policy implications" of section 3 and recommended that it be stricken. *Id.* pt. II at 1. The bill never reached the floor for a vote. S. 1874, reported by the Senate Committee on the Judiciary, S. Rep. 95-934, would also have modified all three decisions. The threat of filibuster through hundreds of contemplated amendments prevented the measure from reaching the Senate floor.

Although there is an amalgam of difficult policy issues that deserve congressional scrutiny,[303] the emotional overtones of debate and the misleading tenor of arguments made by proponents of legislation are troublesome. Concern over proposed legislation has been expressed by both sides of the antitrust bar. Yet certain politicians, influenced by federal and state antitrust law enforcement officials and their staffs, seek legislation purportedly in the interest of "fairness" to the "consumer" without giving sufficient regard to the array of criticism of the proposed legislation and to the realities of antitrust litigation.[304]

2. *Justice's Shared Monopoly Theory*

Since the appointment of John H. Shenefield as Assistant Attorney General of the Justice Department's Antitrust Division, businessmen have become increasingly concerned over possible antitrust enforcement efforts, particularly those aimed at concentrated industries. The news media has contributed to the concern of business, for in the past few years antitrust

[303] The basic issues are whether any or all of the three Supreme Court decisions should be overturned, whether proposals to overturn more than one of the decisions should be introduced separately or as one bill, and the precise manner in which the decisions would be overturned. Other matters for consideration are: whether indirect purchasers (and foreign governments) should be limited to actual instead of treble damages; whether there should be "fluid recovery" of aggregate damages without individual proof of the fact or amount of injury, as provided by H.R. 11942; how to deal with the possibility of inconsistent or duplicative judgments; and what impact the *Illinois Brick* legislation would have on the judicial system. Also important is whether legislation should be retroactive until June 9, 1977, the date of the *Illinois Brick* decision and whether relief for indirect purchasers should be limited to amounts recoverable through parens patriae suits by state attorneys general and through suits by state and local governments suing in their commercial capacities.

[304] The Report of the Senate Committee on the Judiciary provides several instances in which the committee members failed to focus on the proper antitrust issues. Consider the discussion of the legislative history of the Sherman Act, which receives emphasis in the report. The Report addresses only the Sherman Act as originally drafted and not the form in which it was passed. The Senate Report contains passages of the debate in 1890 concerning the original draft of the Sherman Act, which, taken out of context, make it appear that those who passed the Act clearly favored standing for all consumers, whether or not they are direct purchasers. However, these passages concern statutory proposals that would have afforded standing to any person "injured or damnified" as a result of violations that included arrangements that "tend to advance the cost to the *consumer* of any such articles [of commerce]." (emphasis added). The quoted language failed to survive when the bill was reported from the Senate Committee on the Judiciary.

Although Congress in 1890 appears to have intended, among other purposes, to benefit consumers through passage of the Sherman Act, the question at hand is how best to enforce the Act and thereby serve the purposes intended. It does not necessarily follow that any consumer of a price-fixed product, regardless of where he stands in the chain of distribution, should be permitted to launch a treble damage action. Any damages suffered by an indirect purchaser from the pass-on of overcharges is likely to be so small that it can only be recouped through a class action. Given the difficulties with class actions, which often reward only counsel for plaintiffs, it is questionable whether expensive, protracted litigation should be permitted over the extent, if any, to which pass-on has taken place if there are other, effective means of deterring price-fixing.

has gained a higher media profile than has been customary.[305] One theory on which attention has been focused is that of "shared monopoly," a term that has aroused great concern, but which is subject to considerable misunderstanding. A confidential Justice Department memorandum prepared last summer, which was leaked to the public,[306] shed some light on the theory. The first of two planned memoranda, this memorandum focused on governmental challenges to "shared monopoly" under section 1 of the Sherman Act. The forthcoming memorandum will examine challenges under section 2.

Although "shared monopoly" is a novel term, the term serves only to confuse an inherently complex inquiry. Shared monopoly relates to circumstances in concentrated industries in which firms, through joint behavior, act as a monopolist by increasing prices and reducing output. Thus, the firms "share" a monopoly only through concerted action. In effect, within the context of the section 1 approach set forth in the memorandum, shared monopoly is nothing more than a conventional Sherman Act indirect price-fixing conspiracy, the existence of which is inferred from interdependent parallel conduct. Such conduct consists of "concerted adoption by firms in a concentrated industry of mechanisms that facilitate the achievement of an industry pricing or output consensus and police deviations from it."[307] Thus, information exchanges, product standardization, price books, and the like may serve as vehicles for illegal price fixing. This activity, however, is actionable without formulation of any new antitrust lexicon. Although numerous Justice Department investigations are underway regarding shared monopoly, no action has been taken against any particular industry. Some action is expected in 1979.

C. *NCRALP*

The National Commission for the Review of Antitrust Laws and Procedures (NCRALP) was established by Executive Order[308] and served throughout the latter half of 1978. NCRALP held its final meeting on January 16, 1979, and issued its report on January 22.[309] In its report NCRALP made recommendations for congressional action to expidite decisions in complex antitrust litigation, provide for more effective remedies, and eliminate various antitrust immunities.

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[305] For predictions of more forceful enforcement of the antitrust laws by the Justice Department after Shenefield's appointment, see BUS. WEEK, Sept. 19, 1977, at 43; FORBES, Aug. 15, 1977, at 25; NEWSWEEK, Sept. 26, 1977, at 66.

[306] This memorandum was released by Mark J. Green, Director of Congress Watch, a public interest lobbying group. ANTITRUST & TRADE REG. REP. (BNA) No. 874, at A-7, F-1 to -6 (July 27, 1978).

[307] *Id.* at F-1.

[308] Exec. Order No. 12,022, 3 C.F.R. 155 (1978), *as amended by* Exec. Order No. 12,052, 43 Fed. Reg. 15,133 (1978). The amendment expanded the size of the Commission from 15 to 22 members. The additional seven members were not appointed until June 21, 1978, the date of the Commission's first meeting.

[309] REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NAT'L COMM. FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (Jan. 22, 1979) [hereinafter cited as REPORT].

Cynics will contend that dust already coats this report. Although nothing startling was revealed by the Commission, the report may at least serve as an additional impetus toward better management of "big" cases and toward fewer immunities, and thus toward less regulation and more competition. Although a detailed analysis of NCRALP's work must await another article, a few words are in order in light of previous discussion in this survey.

Not surprisingly, in light of the Supreme Court's gradual tightening of the state action immunity, the National Commission declined to interfere with the case-by-case shaping of "state action." Certain statutory exemptions, however, should be targets of legislation, according to the Commission, and all immunities should be reexamined by Congress. Quoting Commissioner Kahn, the report succinctly characterized economic regulation (price and entry controls) as consisting largely of "saying 'no.'"[310] NCRALP recognized that immunities and regulation are concomitants in conflict with competition. Immunities and regulation often result in inceased cost and decreased efficiency. Thus, the Commission called for repeal of the Reed-Bulwinkle Act,[311] rapid deregulation of the trucking industry, and substantial deregulation of the rail industry. In addition, the Commission advised that the McCarran-Ferguson Act[312] be replaced by "narrowly drawn legislation" that authorizes "essential collective activities."[313] The report also included recommendations concerning exemptions in agriculture, ocean shipping, and export associations.[314]

The Commission directed its attention to the novel substantive theory of "no-conduct monopolization,"[315] also referred to as "no fault" monopoly,[316] and called for congressional hearings on the subject. Chief apostles of the theory before the Commission were Professor Flynn of the University of Utah, Professors Areeda and Turner of Harvard, and Alfred Dougherty, Director of the FTC's Bureau of Competition. Although the three views differed in some respects,[317] each would permit equity actions to be brought by the government against defendants solely on the basis of monopoly power, without regard to conduct. The no fault monopoly theory advocates overturning the familiar *Grinnell* standard of unlawful monopolization

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[310] *Id.* at 178 (quoting testimony of Alfred K. Kahn, then Chairman, Civil Aeronautics Board).

[311] The Reed-Bulwinkle Act exempts collective ratemaking in the trucking and rail industries. Pub. L. No. 80-662, 62 Stat. 472 (codified at 49 U.S.C. § 5b (1976)); *see* REPORT, *supra* note 309, at 197-223.

[312] 15 U.S.C. §§ 1011-1015 (1976).

[313] *See* REPORT, *supra* note 309, at 225.

[314] *Id.* at 253-306.

[315] *Id.* at 151.

[316] *See FTC: WATCH,* Dec. 1, 1978, at 33.

[317] Dougherty, for example, would permit action only against monopoly power persisiting for at least 5 years in a relevant market where total sales exceeded $500 million; structural relief would be permitted only if there were no "substantial loss of efficiencies of scale." Statement of Alfred F. Dougherty, Jr. before the Nat'l Comm. for the Review of Antitrust Laws and Procedures, Appendix A (Oct. 17, 1978) [hereinafter cited as Dougherty Statement]. *See generally* REPORT, *supra* note 309, at 151-63.

which requires monopoly power coupled with the "willful acquisition or maintenance of that power as distinquished from growth or development as a consequence of a superior product, business acumen, or historic accident."[318] Assuming such a change in the law would expedite litigation under section 2 of the Sherman Act,[319] to amend section 2 for that reason alone would promote form over substance. In establishing antitrust policy, Congress should not *assume* that "bigness" is bad,[320] but instead should demand proof. Moreover, Congress should be reluctant to interfere with an industry solely because of the industry's structure. Fragmentation of large corporations without regard to their conduct would constitute interference with market operations and thus contradict the theme of the Commission's report, which advocates more competition and less regulation.

III. CONCLUSION

In the past year, antitrust developments consisted generally of steady acceleration toward increased competition, fueled by decisions reached by all three branches of the federal government. The Supreme Court narrowed immunities, rejected an asserted defense to government enforcement, and broadened standing for private enforcement. Congress deregulated the airline industry, and an executive commission recommended deregulation of other transportation industries, and further narrowing of immunities. Premerger notification was reenforced through administrative rulemaking, the purpose of which was to foster more effective means for assuring that acquisitions are not anticompetitive.

There is no reason to doubt that efforts to increase competition will continue. Competition is now recognized as an important weapon in the fight against inflation, a leading domestic problem.[321] As the President has predicted, "We will redouble our efforts to put competition back into the American free enterprise system."[322]

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[318] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). Monopoly power is "the power to control market prices or exclude competition." *Id.* at 571 (quoting United States v. du Pont & Co., 351 U.S. 377, 391 (1956).

[319] 15 U.S.C. § 2 (1976). Section 2 makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce . . . ." *See* REPORT, *supra* note 309, at 358-62 (separate views of Commissioner Hatch, questioning whether change in section 2 would expedite litigation).

[320] Dougherty insists there is no controversy over "the undesirability of substantial, persistent monopoly powers." Yet he would permit a defense based on prospective "substantial loss of efficiencies of scale." Dougherty Statement, *supra* note 317, at 4, 11-13.

[321] *See* Address by President Carter on October 24, 1978, 14 WEEKLY COMP. OF PRES. DOC. 1839, 1842 (Oct. 30, 1978).

[322] *Id.*