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Hailed as a "charter of freedom" conceived with a "generality and adaptability comparable to that found to be desirable in constitutional provisions,"[1] the Sherman Act[2] has justifiably been treated by the federal courts as a mandate to develop an "antitrust law" in the manner of the common-law courts.[3] In following this mandate, however, courts have at times been inclined to forget that the antitrust statutes are, after all, only statutes and that Congress remains free to decide the extent to which competition is truly in the public interest[4] and to enact limitations on, and exemptions from, the antitrust laws it has created.[5]

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1. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

2. 15 U.S.C. §§ 1-7 (1982).

3. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 106 (1978).

4. *See id.* ¶ 202b.

5. *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *See generally* 16F J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 44.01 (1983) (discussing statutory exemptions in the antitrust laws).

Exemptions may be either express or implied. In finding an implied exemption, the courts are fairly rigorous in requiring proof that Congress intended to exempt an industry from the antitrust laws, and the courts construe such implied exemptions quite narrowly. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [relevant act] work, and even then

One such congressionally created exemption is the Newspaper Preservation Act (NPA).[6] The NPA was enacted in 1970 with the express purpose of preserving editorial and reportorial diversity within the newspaper industry.[7] The NPA was passed in direct response to the Supreme Court's decision in *Citizen Publishing Co. v. United States*,[8] which had declared that a joint operating arrangement (JOA)[9] between two Tucson daily newspapers violated the Sherman Act. The NPA overruled *Citizen Publishing* by providing a limited exemption from antitrust liability to participants in existing JOAs (pre-Act JOAs) and by establishing standards and a procedure for proposed JOAs (post-Act JOAs) to qualify for antitrust exemption.[10] Thus, Congress tacitly blessed the twenty-two JOAs already in existence and cleared the path for future combinations, which would otherwise have been vulnerable to antitrust attack.

During the early and mid 1970s, the NPA succeeded in stabilizing the industry. Attacks on existing joint operating arrangements were rare and were settled without judicial interpretation of the standards set forth in the Act.[11] During this period the formation of three new JOAs was proposed, and two of the JOAs were approved without challenge. The third was contested at the administrative level, but the Attorney General's approval of that application was not tested in the courts.

In the late 1970s, however, the stability produced by the NPA was threatened. In 1979, the case of *Pacific Sun Publish-*

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only to the minimum extent necessary.").

6. Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804 (1982)).

7. 15 U.S.C. § 1801 states that the Act's purpose is "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." *See also* S. REP. No. 535, 91st Cong., 1st Sess. 3 (1969), *reprinted in* S. OPPENHEIM & C. SHIELDS, NEWSPAPERS AND THE ANTITRUST LAWS § 58, at 215 (1981) (incorrectly cited as S. REP. No. 585) ("The committee believes that this bill is necessary to prevent communities with newspapers having editorial voices under separate corporate control from losing one of the established editorial voices.").

8. 394 U.S. 131 (1969).

9. A joint operating arrangement is a merger of the noneditorial and nonreportorial functions of the newspapers. "Typically, the two newspapers [are] published in the same plant, [use] the same distribution facilities, set advertising and circulation rates jointly, and [share] in the profits." S. OPPENHEIM & C. SHIELDS, *supra* note 7, at 187. For a description of one JOA, see findings 17-20 in United States v. Citizen Publishing Co., 280 F. Supp. 978, 980-81 (D. Ariz. 1968).

10. *See* 15 U.S.C. § 1803(a), (b) (1982); S. REP. No. 535, 91st Cong., 1st Sess. 3 (1969), *reprinted in* S. OPPENHEIM & C. SHIELDS, *supra* note 7, at 215.

11. The most notable of these was Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972).

ing Co. v. Chronicle Publishing Co.[12] required a San Francisco jury to decide the fate of a preexisting joint operating arrangement. After protracted litigation, the trial ended with a hung jury. In 1981, an extended retrial with a wholly different set of jury instructions produced a verdict in favor of the defendant newspapers.

In 1982, the case of *City of Honolulu v. Hawaii Newspaper Agency*[13] went to trial in the United States District Court for the District of Hawaii. The *Honolulu* court applied yet a different interpretation of the NPA standards, in its instructions to the jury, than had either of the *Pacific Sun* courts. The *Honolulu* litigation also resulted in a hung jury. In February 1983, the court granted the *Honolulu* defendants' motion for a judgment notwithstanding the verdict.[14] These two cases have been the only challenges to preexisting JOAs to reach the trial courts.

Two applications for approval of prospective JOAs under section 1803(b)[15] of the Act have been contested. In 1977, an administrative law judge considered the application of two Cincinnati newspapers. After a hearing in which the Antitrust Division opposed the JOA, the judge recommended approval,[16] and his recommendation was accepted by the Attorney General. More recently in *Committee for an Independent P-I v. Hearst Corp.*,[17] the Court of Appeals for the Ninth Circuit analyzed the NPA's test for future applications. In the course of affirming the Attorney General's approval of a joint operating arrangement between two Seattle newspapers, the Ninth Circuit became the first reviewing court to articulate standards to be applied in resolving challenges to proposed JOAs.

As this handful of cases began reaching the courts and administrative proceedings, observers hoped that the NPA's vague generalities would be clarified and that specific tests and consistent standards would evolve. All that the recent decisions make clear, however, is that barring congressional reconsideration, the NPA is here to stay.

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12. Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

13. 559 F. Supp. 1021 (D. Hawaii 1983).

14. Intervenors have been permitted to appeal the district court's decision. Their appeal will probably be reviewed by the Ninth Circuit.

15. 15 U.S.C. § 1803(b) (1982).

16. Application by The Cincinnati Enquirer, Inc., Dep't of Justice Docket No. 44-03-24-4, slip op. at 143 (May 1, 1979) (recommended decision of Donald R. Moore, A.L.J.).

17. 704 F.2d 467 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983).

Although challenges to its constitutionality have been rejected by two different courts,[18] the Act's standards for qualification and its effect on the future of the industry seem even more uncertain now than they did in 1970. Each attempt to construe the Act has resulted in conflict with preceding constructions. The recent Ninth Circuit decision—which could have resolved these conflicts—has instead perpetuated uncertainty and undermined the NPA's stated objective.

This article argues that the Ninth Circuit missed a golden opportunity to provide stable guidelines to future JOA applicants, examines the NPA in the context of the conflicting judicial interpretations, and seeks to determine what those judicial interpretations might mean to future challenges to both existing and prospective JOAs.

I. The Background and Enactment of the NPA

Enforcement of the antitrust laws is premised on the assumption that promoting economic competition serves the public interest.[19] Thus, an exception to the antitrust laws may be justified when (1) economic competition is secondary to another even more important goal; or (2) competition is not in the public interest.[20] The NPA embodies a congressional determination that both bases for creating an exception exist in the newspaper industry.

Newspapers operate in two arenas: the commercial marketplace and the marketplace of ideas.[21] In the marketplace of ideas, a newspaper provides to society numerous benefits that do not always translate directly into profits. In the commercial marketplace, economic pressures unique to the newspaper industry create a market structure in which competition is not necessarily a healthy condition. In fact, competition between two or more newspapers in metropolitan areas has usually resulted in driving financially weaker papers out of business,[22] leaving the public

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18. *See Indep. P-I*, 704 F.2d at 467; Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972); *accord* Hebeman v. Bell, 1978-1 Trade Cases ¶ 61,975 (S.D. Ohio 1978).

19. *See* P. Areeda & D. Turner, *supra* note 3, ¶ 103.

20. Comment, *The Newspaper Preservation Act*, 32 U. Pitt. L. Rev. 347, 349 (1971).

21. *See, e.g.*, S. Oppenheim & C. Shields, *supra* note 7, at iii, 1; Note, *Monopoly Newspapers: Troubles in Paradise*, 7 San Diego L. Rev. 268, 278 (1970).

22. Morton, *St. Louis Newspaper Blues*, Wash. Journalism Rev., Jan.-Feb. 1984, at 16 [hereinafter cited as Morton, *St. Louis*]; Morton, *Failures in the Fourth Estate*,

less well served, rather than providing incentives for the production of better goods.

Thus, in the newspaper industry, antitrust legislation designed to enhance competition in the commercial marketplace has threatened to stifle competition in the marketplace of ideas.[23] In enacting the NPA, Congress chose to preserve competition in the marketplace of ideas by allowing cooperation in commercial operations.[24]

Newspapers occupy a unique position in American society. As Justice Stewart has observed, the guarantee of a free press is the only provision in the Bill of Rights that protects an institution rather than a type of individual liberty.[25] This institutional protection reflects a view of the free press as a quasi-governmental branch existing to scrutinize, to criticize, and thereby to check the three official branches.[26] Although Justice Stewart's remarks are applicable to the media in general,[27] the newspaper industry is a unique component of the media in several respects: (1) the daily newspaper provides a cluster of services in one twenty-five cent package,[28] (2) the newspaper reflects the local

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WASH. JOURNALISM REV., Dec. 1981, at 14.

23. Note, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L.J. 948, 1007 (1952) [hereinafter cited as Note, *Local Monopoly*]; *accord* KNOX, *Antitrust Exemptions for Newspapers: An Economic Analysis*, 1971 LAW & SOC. ORD. 3, 17-18. A number of commentators have questioned the reality of this dilemma. *See* Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media*, 32 VAND. L. REV. 1249, 1340-41 (1979); Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 322-24 (1968); Note, *Newspoper Preservation Act: A Critique*, 46 IND. L.J. 392, 411-12 (1971) [hereinafter cited as Note, *Critique*]; Note, *The Newspaper Preservation Act: The Seattle Application*, 1982 U. ILL. L. REV. 669, 670 [hereinafter cited as Note, *Seattle Application*].

24. S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 50; *see* KNOX, *supra* note 23, at 17-18; Note, *supra* note 21, at 282-83. Enactment of the NPA has generated a storm of controversy over whether the Act is an effective means of achieving its goal of preserving editorial diversity. *See* KNOX, *supra* note 23, at 20-21; Lee, *supra* note 23, at 1275; Note, *Critique*, *supra* note 23, at 399, 410; Comment, *Antitrust Malaise in the Newspaper Industry: The Chains Continue to Grow*, 8 ST. MARY'S L.J. 160, 167 n.57 (1976); Comment, *supra* note 20, at 358; Note, *supra* note 21, at 282-83; Note, *Failing Newspaper or Failing Journalism: The Public Versus the Publishers*, 4 U.S.F.L. REV. 465 (1970) [hereinafter cited as Note, *Failing Newspaper*].

25. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633 (1975).

26. *Id.* at 634.

27. *See* Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 651 (1975) (pointing out similarities between media types).

28. One court has described this package as follows:

> [A daily newspaper] provides readers with a daily written record of current events and reference information including vital statistics, public announce-

community's needs and identity in more detail than other media,[29] and (3) the newspaper plays a dominant role in informing consumers and providing market information.[30] Furthermore, newspapers typically provide more editorial content than do the other media. Because of newspapers' vital role in a democratic society,[31] newspapers representing a diversity of viewpoints must be preserved.[32] Therefore, while the reallocation of resources caused by the business failure of an inefficient manufacturer is usually in the public interest,[33] allowing newspapers to fail may result in a net loss to society.[34]

A. The Demise of an Industry

Unfortunately, the metropolitan newspaper industry in America is in serious trouble. Its economic health has been deteriorating for half a century,[35] and its decline has been hastened in recent years by the advent of television and other changes in life-style inimical to this once dominant medium. In 1909, 609 American cities had competing daily newspapers. By 1968, that number had been reduced to forty-five. At present, only twenty-three cities in the entire United States have two or more com-

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> ments, legal notices, box scores, stock market reports, weather reports, theater listings and radio and television logs. They provide more, wider and deeper coverage of all news—international, national and local—than any other medium of daily news dissemination. They offer a combination of syndicated features, such as comics, columnists and cartoons, not carried by any other medium.

United States v. Times Mirror Co., 274 F. Supp. 606, 617 (C.D. Cal. 1967), *aff'd per curiam*, 390 U.S. 712 (1968).

29. *Id.*; S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 3, at 3.

30. S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 4, at 11 ("Advertising designed to appeal primarily to the consumer's desire to compare the prices, or specifications of a range of products, is better served by printed than by audible media.").

31. Comment, *supra* note 20, at 355; *see also* Note, *Local Monopoly*, *supra* note 23, at 951-52.

32. Celler, *The Concentration of Ownership and the Decline of Competition in News Media*, 8 ANTITRUST BULL. 175, 178-79 (1963); *see also* Note, *Local Monopoly*, *supra* note 23, at 955-57.

33. *See* Knox, *supra* note 23, at 18. In opposing enactment of the NPA, the Department of Justice argued that "a special antitrust exemption for newspapers would undermine the basic premise of our economic system; that is, the success of an enterprise should depend on the ability of its management to produce an acceptable product for its customers." S. REP. No. 535, 91at Cong., 1st Sess. 6 (1969), *reprinted in* S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 58, at 217.

34. Note, *Seattle Application*, *supra* note 23, at 671 n.15.

35. *See* S. OPPENHEIM & C. SHIELDS, *supra* note 7, at 187.

peting newspapers.[36] Most recent victims include such large circulation dailies as the *Cleveland Press,* the *Philadelphia Bulletin,*[37] the *New York Daily News Tonight,*[38] the *Washington Star,*[39] and the *Buffalo Courier Express.*[40]

In the thirty largest markets, only four cities are supporting more than one profitable newspaper. Three of these cities are in Texas, and the newspapers in those cities may owe their success more to circumstances unique to the prosperity of Texas than to unusually efficient management policies.[41] In the fourth city, Chicago, two papers are still feeding on the failure of three other major newspapers in the past twelve years. A leading analyst has described the current situation in these terms: "In a town where there are two commercially separate newspapers, the second one is usually losing money."[42] As early as 1953, the Supreme Court described this phenomenon, stating in *Times-Picayune Co. v.*

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36. Telephone interview with John Morton, Washington, D.C. security analyst specializing in newspaper properties with the securities firm of Lynch, Jones, and Ryan (Nov. 5, 1984). The list of the remaining cities is interesting: Anchorage; Baltimore; Boston; Chicago; Colorado Springs; Dallas; Denver; Detroit; Green Bay; Hooksville, Tennessee; Houston; Kingsport, Tennessee; Laredo; Las Vegas; Little Rock; Los Angeles; New York; Sacramento; San Antonio; Scranton; Trenton; and York, Pennsylvania.

37. The *Philadelphia Bulletin* held on for a while by requesting and receiving an eleventh hour capitulation from eight unions that agreed to a package reduction amounting to $4.9 million per year. Even so, experts had forecast, and the *Philadelphia Bulletin* acknowledged, losses of $10.3 million in the first six months of 1981.

38. The *New York Daily News Tonight*'s actual performance fell dismally short of ambitious plans for achieving a circulation of 300,000 subscribers in head-to-head competition with the *New York Post.* The newspaper conceded defeat, having realized a circulation of only approximately 60,000 subscribers after expending the $20 million appropriated for the purpose by the Tribune Company, owner of the *Chicago Tribune* and other newspapers. Cuts involving scaling down of news and feature contents still left the well-managed and well-financed *Daily News* with losses in the neighborhood of $10 to $15 million in 1982. Various unions agreed to concessions and buyouts, which cost the Tribune Company $75 million and left the *Daily News* with a much reduced labor force. By the start of 1983 the newspaper was beginning to show a modest profit.

39. After total losses of $85 million (ranging between $16 and $20 million during the last two years of operation), Time, Inc. conceded defeat to the powerful *Washington Post* and suspended operations. Although rumors were rampant, no one stepped forward to take over the *Star*'s circulation and its equipment was purchased by the competing *Washington Post,* effectively eliminating any possibility of major competition in the future.

40. The *Buffalo Courier Express* closed September 19, 1982. The owner stated that the paper had lost an average of $8.6 million per year since he acquired it in 1979.

41. The three cities are Houston, Dallas, and San Antonio. The economy of Texas was seemingly immune from the recession that plagued most of the nation during the late 1970s and early 1980s, arguably accounting for the performance of the newspaper industry in these cities.

42. Gordon, *Ad Starvation Sinks 'Star,'* ADVERTISING AGE, July 27, 1981, at 1, 66 (quoting John Morton).

United States,[43] "[D]aily newspaper competition within individual cities has grown nearly extinct."[44]

This discouraging situation is, in large part, a product of the unique market position of the daily metropolitan newspaper. During the past three decades, newspapers have been the target of an intensely competitive attack by television and by a resurgent radio industry.[45] The dwindling ranks of blue-collar workers, once the bulwark of the afternoon newspaper market, have abandoned the ritual afternoon paper in favor of the more easily digested television or radio news report. In addition, the flight to the suburbs has contributed to the problem by providing the catalyst for the creation of new, highly competitive suburban papers. Rapidly expanding "bedroom communities" have produced new schools, police departments, and local political personalities and issues—all the ingredients necessary to create a news matrix justifying a suburban newspaper. These outlying papers have cut away at the edges of the metropolitan daily's circulation and advertising.[46]

The essence of the problem, however, lies in the "downward spiral," an economic phenomenon with a negative impact on both the cost side and the revenue side of the newspaper business. On the one hand, the newspaper industry is troubled by a cost side that is both labor and capital intensive. For this reason, expanding circulation is the only means for a locally independent daily to improve its efficiency.[47] On the revenue side, newspapers differ from industrial enterprises because a daily newspaper must depend on advertising revenues (rather than subscriptions) to cover total costs and to ensure a profit.[48] Advertisers naturally favor the newspaper with the greatest circulation. Thus, if a newspaper's circulation drops, advertising revenues will suffer. A reduction in revenues causes a decline in the quality of the newspaper, which in turn causes circulation to drop further.[49] Once this spiral begins, it is rarely reversed.[50]

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43. 345 U.S. 594 (1953).

44. *Id.* at 603.

45. *See* Reed, *Hard times force papers to merge—or purge*, ADVERTISING AGE, July 19, 1982, § 2, at M-32; *see also* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT 48-52 (1975).

46. *See* Note, *supra* note 21, at 271.

47. *See* Note, *Local Monopoly*, *supra* note 23, at 976-77.

48. S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 3, at 4.

49. *See, e.g.*, United States v. Citizen Publishing Co., 280 F. Supp. 978, 985 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969); Note, *supra* note 21, at 272-73; Note, *Seattle Applica-*

B. The Industry's Response

With its survival at stake, the newspaper industry responded in several ways. Some of the responses were of questionable legality, including (1) volume discounts, a tactic that did not always meet the vaguely stated criteria of the Robinson-Patman Act[51] and that was often alleged to constitute price discrimination;[52] (2) advertising price wars, in which sales below cost were attacked as predatory pricing;[53] (3) combination rates,[54] which have been held to constitute an illegal tying arrangement in violation of the Sherman Act;[55] and (4) cancella-

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tion, supra note 23, at 671-72; Note, *Failing Newspaper, supra* note 24, at 472-73.

50. Note, *supra* note 21, at 272-73; Note, *Failing Newspaper, supra* note 24, at 472-73; *see also* B. OWEN, *supra* note 45, at 50-52, *reviewed by* Posner, Book Review, 86 YALE L.J. 567 (1977) ("cost and demand conditions severely limit the possibilities of competition within local newspaper markets").

51. 15 U.S.C. § 13 (1936). This section substantially rewrote and amended section 2 of the Clayton Act, 15 U.S.C. §§ 12-27 (1914).

52. Because media advertising has been classified as an intangible good not fitting within the "commodity" language of § 2(a) of the Robinson-Patman Act, that Act has traditionally been held not to apply to the sale of media advertising. *See, e.g.*, ALW, Inc. v. United Air Lines, 510 F.2d 52, 57 (9th Cir. 1974); Columbia Broadcasting Sys. v. Amana Refrigeration, Inc., 295 F.2d 375, 378 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962). The FTC attempted to revive an argument in favor of extending application of the Robinson-Patman Act in that manner. Times-Mirror Co., 92 F.T.C. 230 (1978). However, the Commission ultimately rejected the argument. Times-Mirror Co., 100 F.T.C. 252 (1982).

53. The California Unfair Practices Act, CAL. BUS. & PROF. CODE § 17043 (West 1964), prohibits the sale of a product for a price below cost for the purpose of injuring a competitor or destroying competition. A newspaper owner's assertion that circulation and advertising revenues are not sufficient to meet expenses can easily be turned around by an adversary into an alleged admission that the sales price was below the cost of production. If prices were deliberately kept low because of competitive pressures, the adversary will undoubtedly attribute to the newspaper's management the objective of "injuring competition" and argue that the Unfair Practices Act has been violated. The difficulty of defending against this charge can, ironically, be turned on its attackers. Advertising and newspaper sales must be considered separate products because they are sold separately. Yet because of the unique interrelationship of advertising and circulation—all production expenses are properly chargeable to either or both—there is no rational basis upon which to allocate expenses between the two "products." (Is a costly delivery truck used for advertising or circulation?) The cost of each separate article or product is therefore beyond calculation, which makes the Act impossible to apply.

54. Combination rates are established by a newspaper with a morning and afternoon edition. They compel the advertiser to duplicate his advertisement in the weaker edition because of the small additional cost involved.

55. In Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), the Supreme Court considered a Sherman Act § 1 claim alleging that the exclusively joint sale of advertising in commonly owned morning and afternoon newspapers constitutes an illegal tying arrangement. The Court held that, because the relative market share of a competing afternoon paper prevented a finding of market dominance in either the morn-

tion of independent distributorships, sometimes alleged to be an attempt to maintain resale prices.[56]

Some of the responses were clearly legitimate. Intensive promotions were, and still are, the most common of such responses. These typically have taken the form of two-for-one offers, giveaways, and other devices that bolster circulation reports but undercut the "true" circulation base.[57] A second response was reformation of the product, which is a form of de facto market segmentation. Product reformation succeeded in San Francisco in the mid-1950s when the *San Francisco Chronicle* redirected its focus to the hip, college-educated, suburban audience and displaced the *San Francisco Examiner* as the number one newspaper in town.[58] A third response was to change to a tabloid format. Newspaper owner Rupert Murdoch favors this approach, which is characterized by a shift to a simplified story approach with emphasis on the upbeat and the bizarre. In some instances such changes of format have been more a signal of impending demise than a panacea for economic recovery, but even when the tabloid format has produced financial success, this success has come at the cost of product quality. The fourth response was the acquisition of smaller papers. For example, the Hearst Corporation acquired twenty-eight shoppers and two small dailies in the Los Angeles area in an effort to bolster circulation of the ailing *Los Angeles Herald-Examiner* in its losing battle against the *Los Angeles Times*. However, this form of survival is expensive,

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ing or afternoon field, the arrangement was not an unreasonable restraint of competition. This case has been soundly criticized for its classification of morning and afternoon advertising as a single product and for the resultant conclusion that the sole morning paper did not exercise market dominance. *See, e.g.*, S. OPPENHEIM & C. SHIELDS, *supra* note 7, §§ 82, 85, 87; Lee, *supra* note 23, at 1257-62. The Court's ruling was substantially revised in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), which substituted the concept of sufficient economic power to produce "an appreciable restraint" on the market for the requirement of market dominance.

56. In Albrecht v. Herald Co., 390 U.S. 145 (1968), the Supreme Court held that, absent an express antitrust exemption, any agreement between a seller and distributor fixing the price at which the distributor may resell the product is a per se violation of Sherman Act § 1.

57. Knowing that such promotional offers were always available, subscribers frequently cancelled after two months in order to resubscribe at cut rates. The loss of subscription revenue was compounded by the added bookkeeping costs in keeping track of starts and stops.

58. Predictably, the second-place *Examiner* tried harder and put even more pressure on the revenue side of both newspapers. The two began a series of promotions that continued until both papers were losing money. The result of this struggle was the institution of a joint operating arrangement. *See infra* notes 80-84 and accompanying text; *see also* Note, *Failing Newspaper*, *supra* note 24, at 470.

and its use only underscores the suicidal intensity of intracity competition.

Far and away the most dramatic and successful response to the threat to survival of competing newspapers in metropolitan areas has been the joint operating arrangement. A joint operating arrangement is a merger of the noneditorial and nonreportorial functions of two or more newspapers. The most frequently combined functions are production facilities, circulation departments, and advertising departments. First developed in 1933 by two newspapers in Albuquerque, New Mexico, the JOA was adopted over the next three decades by newspapers in twenty-one other cities. Although critics claim that these arrangements are indistinguishable on a commercial level from a full merger,[59] defenders argue that they are less anticompetitive than mergers since the newspapers involved generally continue to engage in some degree of commercial competition.[60] At least one commentator has observed that the reduction or elimination of commercial competition leads to heightened competition in other areas and thus increases the quality of reportorial and editorial services.[61] In any event, there is no doubt that JOAs have preserved several newspapers that otherwise would have failed.[62]

Conflict with the antitrust laws was inevitable, however, since price fixing, profit pooling, and market allocation were often the very objectives of the JOA.[63] Until 1968, the frail authority for such combinations was generally found in a liberal interpretation of the "failing company" doctrine of *Interna-*

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59. Note, *Critique*, *supra* note 23, at 393.

60. Roberts, *supra* note 23, at 351-52.

61. Judge Posner suggests that oligopolistic industries are likely to compete more vigorously in nonprice areas of service than unconcentrated industries, effectively substituting noneconomic competition. *See* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 11-12 (1976).

62. Parks, *Fold or combine: It's a matter of dollars*, ADVERTISING AGE, July 19, 1982, § 2, at M-31, M-33; *cf.* Note, *Seattle Application*, *supra* note 23, at 672 ("Joint operating newspapers can survive in areas that would not support commercially competing newspapers.").

Only one of 24 JOAs has been unable to rescue a newspaper caught in the downward spiral. In St. Louis, where the *Globe-Democrat* and the *Post-Dispatch* have operated under a JOA since 1979, the market was undercut by two free distribution papers. Even with the JOA, the *Globe-Democrat* continued to lose more money than the *Post-Dispatch* was making. In November 1983, the owner of the *Globe-Democrat* announced that it was closing the newspaper at the end of the year. Its intention to retain its interest in the joint agency, which would continue to publish the profitable *Post-Dispatch*, caught the attention of the Antitrust Division. *See infra* note 116.

63. *See* Knox, *supra* note 23, at 6.

tional Shoe Co. v. FTC.[64] In 1968, however, the viability of the JOA was jeopardized, as was the continued existence of the newspapers that were parties to the twenty-two JOAs then in existence. In that year a federal district court held, in *United States v. Citizen Publishing Co.*,[65] that the 1940 JOA between the *Arizona Daily Star* and the *Tucson Daily Citizen* was a per se violation of section 1 of the Sherman Act. The newspapers argued for a rule of reason analysis and asserted the failing company doctrine as a defense, but the court chose to interpret narrowly the test established in *International Shoe.*[66] The potentially devastating consequences of this decision sent a wave of anxiety through the newspaper business. As the *Citizen* case proceeded toward the Supreme Court, a threatened industry turned to Congress.

C. The Congressional Response: The Newspaper Preservation Act of 1970

In 1969, the Supreme Court handed down its decision in *Citizen Publishing Co. v. United States.*[67] The Court affirmed the district court's decision, dissolved the Tucson JOA, and articulated a standard for the failing company defense that effectively put an end to JOAs. Simply stated, the requirements for invoking the failing company defense were (1) the weaker newspaper must be facing the substantial probability of financial failure; (2) the failing paper must have no alternative to shutting down the presses other than the JOA; and (3) the failing paper must have attempted, unsuccessfully, to find a purchaser other than the stronger paper. In a Catch-22 pronouncement, Justice Douglas said in effect that the willingness of a stronger paper to enter into the JOA was presumptive evidence that the weaker paper was not failing, since if the weaker paper were in fact failing and had exhausted all alternatives, the stronger paper would simply let it fail and thereby fall heir to the entire market at no

64. 280 U.S. 291 (1930). In this case the Supreme Court refused to enforce an FTC order requiring the nation's largest shoe manufacturer to divest itself of its stock in another shoe manufacturing company. The Court held that a defense to § 7 of the Clayton Act existed when, at the time of the acquisition, the acquired company's assets were "so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated." *Id.* at 302.

65. 280 F. Supp. 978 (D. Ariz. 1968).

66. *See id.* at 992-94.

67. 394 U.S. 131 (1969).

cost.[68] It became clear that if any of the twenty-two JOAs across the nation were to survive, protection would have to come from Congress.

In July 1967, responding to the district court's ruling and anticipating an adverse decision by the Supreme Court, Congress commenced hearings on Senate Bill 1312.[69] Known at that time as The Failing Newspaper Act, the bill was sponsored by Senator Carl Hayden of Arizona. During the three years preceding the enactment of the Newspaper Preservation Act, Congress heard testimony from 168 witnesses and produced a record of 5201 pages. In addition, 150 pages of the *Congressional Record* were devoted to floor debate on the bill during the same period. In those hearings and debates, frequent reference was made to the progress of the *Citizen Publishing* litigation through the appellate courts, and within two months of the Supreme Court's decision, Congress was ready to override it. On July 24, 1970, President Richard Nixon signed the Act into law.[70]

The language Congress employed in the NPA to achieve its purpose is simply stated and easily summarized. First, Congress declared that pursuant to its purpose[71] of "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States," newspaper publications could merge everything but editorial functions through JOAs formed in accordance with the provisions of the Act.[72] The Act thus provides a limited exemption from the antitrust laws to qualified JOAs.[73] A preexisting JOA qualifies if no more than

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68. *Id.* at 137-38. This concept has not died easily. *See* discussion of the Seattle JOA, *infra* notes 120-36 and accompanying text.

69. S. 1312, 90th Cong., 1st Sess., 113 CONG. REC. 7067 (1967). For a discussion of the bill as originally introduced, see Flynn, *Antitrust and the Newspapers: A Comment on S. 1312*, 22 VAND. L. REV. 103 (1968).

70. Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804 (1982)).

71. For an interesting discussion of the use of statements of purpose in federal legislation, see Hammond, *Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence*, 5 HASTINGS INT'L & COMP. L. REV. 323 (1982).

72. 15 U.S.C. § 1801 (1982).

73. The general scope and operation of the Act has been summarized as follows:

> The antitrust exemption of the Newspaper Preservation Act does not provide antitrust immunity for newspapers. The exemption extends only to those aspects of a joint operating agreement listed in the definition of such agreements or arrangements. The exemption is available only when one of the participating newspapers is in a failing condition. The exemption does not change antitrust enforcement, under the Sherman, Clayton, or Federal Trade Commis-

one of the publications involved was, at the time of the arrangement's inception, likely to become or remain a "financially sound publication," regardless of ownership or affiliation.[74] A JOA established after July 24, 1970, can qualify by obtaining the written consent of the United States Attorney General after he or she determines that no more than one of the newspapers involved is a publication other than a "failing newspaper," and that approval would "effectuate the policy and purpose" of the Act.[75] The Act defines a failing newspaper as a publication that is in "probable danger of financial failure."[76] The NPA's final section effectively reversed *Citizen Publishing* by allowing reinstatement of the qualifying pre-Act JOA previously held to be in violation of the antitrust laws.[77]

II. The Courts' Attempts to Interpret the NPA

Despite the apparent simplicity of the NPA's language, the task of deciding what it means and of applying the Act's criteria to specific situations has not been easily accomplished. Because of the absence of previous judicial construction of the Act, the courts in *Pacific Sun Publishing Co. v. Chronicle Publishing Co.*[78] and *City of Honolulu v. Hawaii Newspaper Agency*[79] were ruling on legal issues of first impression with regard to preexisting JOAs. Similarly, the Ninth Circuit was writing on a blank judicial slate when it articulated standards and principles applicable to approval of future JOAs in *Committee for an Independent P-I v. Hearst Corp.*[80]

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sion Acts, against the merger of two or more financially healthy newspapers. S. Oppenheim & C. Shields, *supra* note 7, § 51, at 191.

74. 15 U.S.C. § 1803(a) (1982).

75. *Id.* § 1803(b). The qualifying section, § 1803, concludes by providing that there is no exemption for predatory pricing, other predatory practices, or "any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity." *Id.* § 1803(c).

76. *Id.* § 1802(5).

77. *Id.* § 1804(a). The House Judiciary Committee Report was more specific in mentioning the *Citizen Publishing* case by name: "H.R. 279 as amended by the Committee is designed to accomplish the following objectives: . . . 4. To permit the joint newspaper operating arrangement in Tucson, Arizona, to be reinstituted notwithstanding the opinion of the Supreme Court in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969)." H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3547.

78. Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

79. 559 F. Supp. 1021 (D. Hawaii 1983).

80. 704 F.2d 467 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983).

In order to determine the state of the NPA with respect to JOAs that antedated the NPA, this article will first review the recent decisions in *Pacific Sun* and *Honolulu*. After analyzing the widely differing standards used in each case, the authors will discuss the major areas of conflict and propose a standard consistent with the intent of the Act. Decisions dealing with applications for approval of prospective JOAs will then be considered, beginning with the opinion of Administrative Law Judge Moore in *Application by The Cincinnati Enquirer, Inc.*[81] and concluding with an analysis of the Ninth Circuit's decision in *Independent P-I*. Finally, the authors will analyze problems created by the Ninth Circuit's opinion and suggest standards for deciding future cases.

A. Preexisting JOAs

1. The Pacific Sun *case*

Pacific Sun Publishing Co. v. Chronicle Publishing Co.[82] involved the first preexisting JOA to be tested under the Act. For the first time, a court was called upon to make evidentiary rulings and to articulate jury instructions construing the Act. *Pacific Sun* is of particular interest because two courts were required to prepare jury instructions and interpret the Act. The first trial (*Pacific Sun I*) resulted in a hung jury in 1979. After being reassigned to a different judge for retrial in 1981 (*Pacific Sun II*), the case ended with a verdict in favor of the defendant newspapers.

Both *Pacific Sun* trials were bifurcated by stipulation of the parties to enable the NPA defense to be tried first. Therefore, the question presented to each jury was whether, at the time the JOA was first entered into, more than one of the defendant San Francisco newspapers, regardless of ownership or affiliation, was likely to remain or become financially sound.[83] A comparison of the two *Pacific Sun* courts' interpretations of the crucial phrases emphasized above and a comparison of those instructions with the charge given in *Honolulu* demonstrate the incredible range of confusion the NPA has produced.

a. Factual background. For decades, the "newspaper of rec-

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81. Dep't of Justice Docket No. 44-03-24-4 (May 1, 1979) (recommended decision) [hereinafter cited as *Cincinnati*].

82. Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

83. *See* 15 U.S.C. § 1803(a) (1982).

ord" in San Francisco was the *San Francisco Examiner*. Its dominance was threatened in the early 1960s, however, as the *San Francisco Chronicle*, inspired by an imaginative and iconoclastic editor, revamped its product and began making substantial gains in circulation relative to the *Examiner*.[84] Despite the *Examiner*'s heavy and expensive promotional efforts, the *Examiner* continued to lose readership to the *Chronicle*. In 1961, the *Chronicle* became the daily circulation leader, and by 1965 its daily circulation exceeded the *Examiner*'s by more than 60,000. The *Examiner* had slipped into the downward spiral.[85]

Even though it appeared to have the advantage of momentum, the *Chronicle* still had not arrived at the point of profitable operation.[86] In fact, the *Examiner*'s retaliatory promotional efforts required a response by the *Chronicle* that caused both newspapers to suffer huge losses. Moreover, despite its apparent success, the *Chronicle* could not be certain that the Hearst Corporation would not invest a substantial amount of its national resources in an attempt to resuscitate the fortunes of its San Francisco "flagship" publication. It soon became clear to the managements of both the *Chronicle* and the *Examiner* that unless the intense competition between them was alleviated in some lawful manner, San Francisco would be left with only a single daily newspaper and that the remaining newspaper would be severely crippled by the battle. Faced with these circumstances, Randolph Hearst proposed to the *Chronicle*'s publisher the formation of a joint operating arrangement. After protracted negotiations, a JOA was executed in 1964.[87]

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84. These gains may possibly be explained by a number of changes in the style and format of the *Chronicle*, coupled with an aggressive promotional campaign.

85. *See supra* notes 47-50 and accompanying text. This phenomenon was also claimed by Pacific Sun in its complaint:

> The unavailability of additional advertising revenues also deprived Pacific Sun of revenues which would be used to promote and increase the circulation of *The San Francisco Pacific Sun*; the resulting gain in circulation would have led to a further increase in advertising revenues, which would have provided the funds for additional circulation gains, and so forth, in a cumulative effect well-known in the newspaper industry.

Complaint at 12, Pacific Sun Publishing Co. v. Chronicle Publishing Co., Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

86. The *Chronicle* incurred losses in all years from at least 1954 through 1964, with the sole exception of 1956.

87. A condition precedent to the implementation of the JOA was the fullest possible assurance from the Department of Justice that the operations contemplated were in compliance with the law. Accordingly, the parties submitted financial data that established, among other things, that over the five-year period from 1960 through 1964 the

In order to achieve the desired integrative efficiencies available under a JOA, three daily newspapers[88] were reduced to a morning daily-except-Sunday newspaper, the *Chronicle*, and an afternoon daily-except-Sunday newspaper, the *Examiner*. The two Sunday newspapers were similarly reduced to a single Sunday publication. Recognizing that the morning newspaper that took the afternoon slot would certainly decline in circulation and advertising, the two publications agreed to divide combined profits or losses equally. Finally, the San Francisco Newspaper Printing Company ("Printco") was formed to perform circulation, advertising production, and other noneditorial functions, using selected equipment and personnel from both papers. Each newspaper maintained its separate and independent editorial staff as required by the NPA.

Following several skirmishes,[89] the most serious attack on this arrangement came on Septemher 3, 1975, from the Pacific Sun Publishing Company (Pacific Sun), which had published a weekly newspaper in Marin County, California, since 1963. On that day, Pacific Sun filed suit alleging violations of sections 1 and 2 of the Sherman Act. Pacific Sun claimed to have been seriously disadvantaged by combination rates and other features of the joint operating arrangement. In 1979 the case came to trial. Thus, fifteen years after the *Chronicle* and the *Examiner* had formed their JOA and nine years after passage of the News-

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combined losses of the *Examiner* and the *News Call-Bulletin* exceeded $15 million, $9 million of which was attributable to the *Examiner*.

On the basis of this consistent pattern of losses, for which no financially practical solution existed, and after extensive consideration and examination of the matter, the Department of Justice sanctioned the JOA. The Attorney General of the United States wrote to Hearst on August 30, 1965, and to the *Chronicle* on September 7, 1965, stating:

> On the basis of your submissions and our further review of the heavy losses being suffered by the Hearst newspapers in San Francisco, I wish to advise you that it is not the present intention of the Department of Justice to initiate antitrust action against the implementation of the proposed production plan.
>
> As you know, we are presently reviewing a number of other newspaper transactions which could conceivably raise related problems. Accordingly, the Department must, of course, be free to take any future action which may be required to insurs equality of treatmant should the question arise.

Letter from Nicholas de B. Katzenbach, Attorney General of the United States, to William J. Manning (Aug. 30, 1965).

88. The *Examiner* also publisbed an afternoon paper, the *Call-Bulletin*.

89. *See, e.g.*, Bay Guardian Co. v. Chronicle Publishing Co., 318 F. Supp. 227 (N.D. Cal. 1970) (order denying motion to convene three-judge court); 340 F. Supp. 76 (N.D. Cal. 1972) (action for declaratory judgment); 344 F. Supp. 1155 (N.D. Cal. 1972) (order denying motion to strike answer).

paper Preservation Act, the question of whether a preexisting JOA was entitled to significant antitrust immunity was ready for its first court test. The battle lines were drawn.

b. Pacific Sun I. The trial strategies of the parties dictated the conflicting interpretations of the Act's key phrases that were urged on the *Pacific Sun I* court. In particular, Pacific Sun desired to take advantage of the difference in size between its tiny publication and the giant defendants. Pacific Sun logically wanted to impress the jury with evidence that the *Examiner*'s huge historical earnings had been drained off by the Hearst Corporation and to argue that the availability of this capital was proof of the *Examiner*'s financial soundness. In addition, Pacific Sun wanted to argue that the Hearst Corporation had not exhausted all alternatives to a JOA when it entered into one in 1964 and that the papers were merely exploiting the NPA's easy road to massive profits.

With no pre-Act JOA decisions to guide it, the court looked to the 1977 opinion of Administrative Law Judge Donald Moore in *Cincinnati*, which presented an analysis of a post-Act application. Although the statutory standards for pre-Act and post-Act applications are different, the *Pacific Sun I* judge substantially adopted Judge Moore's analysis and applied it to the pre-Act case before him. Confusion was inevitable, and a hung jury resulted, with a majority voting for the plaintiffs. The court's treatment of the NPA's key standards for qualification warrants discussion:

(1) "Regardless of ownership or affiliations." The defendants argued that the phrase "regardless of ownership or affiliations" in the NPA reflected the congressional intent that qualification for the Act's protection be determined solely by reference to the profit-and-loss statement of the publication in question, excluding reference to its owner's ability to infuse capital to keep it afloat. Pacific Sun argued that the jury should consider the millions in profits "drained" by the Hearst Corporation from the *Examiner* in earlier successful years in order to determine whether capital was in fact available to make the *Examiner* profitable. The court essentially resolved this conflict in the plaintiff's favor.[90]

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90. At various points, the court instructed the jury in language similar to the following:

> [Y]ou may consider the profits received by Hearst Publishing Company, Inc., Hearst Consolidated Publications, Inc., or the Hearst Corporation from the op-

(2) "Likely to become a financially sound publication." The other major area of conflict centered on the key phrase "likely to become a financially sound publication." Pacific Sun argued that the phrase implied that the jury should hear testimony critical of the *Examiner*'s management and should be permitted to conclude that different or better management decisions would "likely" have made the *Examiner* financially sound without recourse to the JOA. In essence, the plaintiff urged that the statutory test be read "could have become financially sound if the publication had been managed differently"—in effect a "reasonable manager" standard.

The defense argued that because Congress's concern focused on preserving competing editorial voices, the sole relevant consideration was the newspaper's condition at a specific point in time, not the process by which the paper got that way. Further, since, by definition, poorly managed newspapers would be those most likely to be threatened with extinction, they would be those most in need of preservation. Moreover, the defendants argued that if Congress had intended "likely to become" to mean "could have become," it would have said so. Its refusal to impose such a standard, despite constant importuning by NPA critics, reflected Congress's clear intention to reject the interpretation urged by the plaintiff.

The plaintiff also won this battle. The court overruled the defendants' objections and permitted evidence critical of the *Examiner*'s management to come in. Nevertheless, the judge seemed troubled by the points raised by the defendants, and his instructions reflected his ambivalence. For example, the judge instructed the jury, consistent with the defendants' position, that the "[d]efendants need not have undertaken or attempted to implement all possible or available alternatives before entering into the joint operating agreement,"[91] yet he also instructed as follows:

> eration of the Examiner in evaluating the extent of capital available for its operations or business needs. . . . In determining whether a newspaper publication is likely to remain or become financially sound you may consider . . . availability of capital from shareholders . . . .

Court's Jury Instructions at 3818:25 to 3819:4, 3820:25 to 3821:7, *Pacific Sun I*. Such an instruction seems clearly contrary to the congressional intent. *See* S. REP. No. 535, 91st Cong., 1st Sess. 5 (1967) *reprinted in* S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 58, at 216.

91. Court's Jury Instructions at 3822:2 to :4, *Pacific Sun I*.

> Now in determining whether these newspapers were likely to remain or become financially sound you may consider each of the following: Possible available alternatives to a joint operating agreement, . . . whether defendants had considered 'all means reasonably available' to them to make their publications profitable newspapers, whether there was any reasonable likelihood that the infusion of new ownership or management would have improved defendants' operating results sufficiently to preserve defendants as separate commercial entities in the absence of a joint operating agreement, the feasibility of curative measures short of entering into a joint operating agreement, all measures which persons with reasonable skill and judgment in the newspaper business could have used in operating these newspapers . . . .[92]

In permitting the jury to consider available alternatives to a JOA and whether new management could have done a better job, without providing any guidelines on how these factors should influence the ultimate determination, the court set the jury adrift. The instructions on these issues undoubtedly contributed to the jury's confusion and its inability to reach a verdict. Thus, despite the plaintiff's success in persuading the trial judge to give instructions that substantially reflected its version of the Act, the plaintiff was forced ultimately to proceed with a second trial before a new jury.

c. Pacific Sun II. The second *Pacific Sun* case was assigned to a new judge for trial. After initially expressing his intention to retry the case under the same instructions used in *Pacific Sun I*, the judge reconsidered his decision and developed his own instructions.

(1) "Regardless of ownership or affiliations." With respect to the phrase "regardless of ownership or affiliations," the court instructed the jury to look at each defendant newspaper "as if it were an independent entity, not owned or controlled by or affiliated with any other corporation."[93] The judge further advised the jury not to consider whether additional funds or resources

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92. *Id.* at 3819:20 to 3820:12. The court's ambivalent instructions on this issue appear to have been the result of reference to *Cincinnati*, discussed *infra* notes 111-19 and accompanying text. Indeed, in settling the proposed jury instructions, that opinion was quoted and argued extensively by the plaintiff. The use of that opinion in *Pacific Sun* is criticized below. *See infra* notes 95-97 and accompanying text.

93. *See* Defendant's Proposed Supplemental Instruction No. 23:6-8, *Pacific Sun II* (no transcript was made of the *Pacific Sun II* trial, and hence all jury instructions from that trial are cited to typed copies of proposed instructions actually given by the court).

from the owners might have enabled the *Chronicle* or the *Examiner* to stay afloat.

(2) "Likely to become a financially sound publication." With respect to whether the *Examiner* was "likely to become a financially sound publication," the judge modified his predecessor's instructions but revealed himself to be still somewhat under the influence of the *Cincinnati* opinion. Like his predecessor, he continued to treat the exhaustion of all alternatives to the JOA as a prerequisite to the defendants' qualification for protection under the NPA. The ghost of *Citizen Publishing* once again stalked the courtroom.

Although the jury was advised that "[b]ad or negligent management does not disqualify the defendants from the protection of the Newspaper Preservation Act," they were also instructed basically as follows:

> The evidence proffered by plaintiffs shows that defendants themselves considered various alternatives to the joint operating agreement. If you find that defendants in fact considered these alternatives but rejected them, you may consider such evidence with respect to whether the defendants chose the most profitable alternative, rather than the only alternative for the financial success of the papers.
>
> In determining whether defendants' newspapers were likely to remain or become financially sound publications, you may consider whether the defendants have exhausted all means reasonably available to them to make their publications profitable newspapers.
>
> In determining whether defendants' newspapers were likely to remain or become financially sound publications, you may consider whether there was any likelihood that the infusion of new management would have improved the defendants' operating results sufficiently to preserve the defendants as separate commercial entities in the absence of a joint operating agreement.
>
> In determining whether defendants' newspapers were likely to remain or become financially sound publications, you may consider the feasibility of curative measures short of entering into a joint operating agreement.[94]

Despite their continuing preoccupation with the exhaustion of alternatives, the instructions presented a more balanced inter-

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94. Plaintiff's Proposed Instruction Nos. 81:4-10; 46:3-7; 49:3-9; 50:3-6, *Pacific Sun II*.

pretation of congressional intent, and the jury returned a unanimous verdict for the defendants.

d. Analysis of Pacific Sun. Although the *Cincinnati* opinion was useful with reference to some of the questions before the two *Pacific Sun* courts, it could only have misled the courts on the most critical issues. The differences between pre-Act JOAs and post-Act JOAs were debated at length in Congress, and Congress clearly intended that different standards be applied in each situation.

With respect to JOAs that antedated the Act, the House of Representatives' report reads as follows:

> H.R. 279 as amended by the Committee is designed to accomplish the following objectives:
>
> . . . .
>
> 2. To grant a limited exemption from the antitrust laws for joint newspaper operating arrangements that have been entered into prior to the effective date of this Act in twenty-two cities, communities, or metropolitan areas of the United States.[95]

With respect to prospective joint operating arrangements, however, the test was more stringent. The differing standard to be applied to proposed JOAs was articulated by Senator Hruska, a supporter of the Act:

> Before any new joint operating arrangements could come into being, the papers involved would be required to come before the Attorney General for his approval. . . .
>
> . . . [This] will act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition.[96]

The critical differences between the standards applicable to JOAs already in effect when the Act was passed and those applicable to prospective JOAs had also been noted by Judge Moore:

> On the one hand, the test applicable to prospective arrangements, as here, is more stringent than that applied to arrangements already in effect when the Act was passed. For existing arrangements, it was necessary that, at the time the arrangement was entered into, not more than one of the news-

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95. H.R. REP. No. 1193, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3547.

96. 116 CONG. REC. 2006 (1970).

> papers "was likely to remain or become a financially sound publication." As Congressman Railsback stated in floor debate on the bill, the test applied to prospective arrangements was "substantially changed" to provide a "tougher" and "much more stringent" definition than the "financially sound" test that had been applied both to existing and to prospective arrangements in an earlier version of the bill.[97]

Although the legislative history does not demonstrate a clear congressional intent that the duty to explore or exhaust alternatives should apply only to post-Act JOAs, the history does show that (1) the duty to explore alternatives would apply to prospective JOAs; and (2) pre-Act and post-Act arrangements were to be tested under different standards, with those for pre-Act JOAs being more lenient.

Section 1803(a) requires an assessment of the ability of a newspaper, failing at the time it entered into a JOA, to have become financially sound without the JOA. Although the availability of alternatives is logically relevant to this assessment, imposing such a requirement on pre-Act JOAs makes little practical sense. For example, a retrospective finding by either of the *Pacific Sun* juries that the *San Francisco Examiner* had not exhausted all of its alternatives to a JOA, or that different management could have made a difference, would have (1) disqualified the newspaper from the Act's protection; (2) required the dismantling of the joint operating arrangement; and (3) imposed huge antitrust damages. By contrast, a finding that applicants for a prospective JOA have not exhausted reasonable alternatives would simply send the allegedly failing newspaper back to the drawing board for another try, without prejudice to reapplication after the alternatives fail. Amid this confusion over standards, the stage was set for another district court to give the section 1803(a) standard yet another interpretation.

2. *The* Honolulu *case*

A few months after the *Pacific Sun II* jury returned its verdict for the defendants, the case of *City of Honolulu v. Hawaii Newspaper Agency*[98] went to the jury, thus providing a third district court judge the opportunity to construe the NPA.

a. Factual background. Honolulu has two major newspa-

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97. *Cincinnati, supra* note 81, at 119 (citations omitted).
98. 559 F. Supp. 1021 (D. Hawaii 1983).

pers, the morning *Honolulu Advertiser* and the afternoon *Honolulu Star-Bulletin*. After making small profits from 1956 through 1958, the *Honolulu Advertiser* began to suffer losses each year, while the rival *Honolulu Star-Bulletin* grew stronger and stronger. The coup de grace was administered in 1960 when the *Star-Bulletin* began publishing a Sunday edition that seriously undermined the *Advertiser*'s circulation. The *Advertiser* was trapped in the downward spiral and appeared to be headed for extinction.

In May 1962, the Persis Corporation, publisher of the *Honolulu Advertiser*, and the Gannett Pacific Corporation, publisher of the *Honolulu Star-Bulletin*, entered into a joint operating arrangement. The agreement established the Hawaii Newspaper Agency, Inc. to publish a combined Sunday edition and to set individual and combination advertising rates.[99]

For seventeen years, the Hawaii JOA operated without challenge. On March 23, 1979, undoubtedly encouraged by the construction placed on the NPA in *Pacific Sun I* and by the plaintiff's near victory there in the first trial, the City and County of Honolulu filed a class action alleging that Persis, Gannett, and the Hawaii Newspaper Agency had violated sections 1 and 2 of the Sherman Act. The defendants raised the NPA as a defense and moved for dismissal on the ground that the Act effectively "grandfathered" the twenty-two JOAs in existence when the Act was passed. They also moved for dismissal on grounds that the statute of limitations had run.

After reviewing the legislative history of the Act, Judge Curtis denied the motion for dismissal, concluding that there was no congressional intent to grandfather the defendants so as to relieve them of the necessity of proving, if challenged, that they qualified for the NPA's limited exemption.[100] He also concluded,

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99. *See* S. OPPENHEIM & C. SHIELDS, *supra* note 7, § 56, at 205.

100. In denying defendants' motion to dismiss, the court relied almost exclusively on the legislative history of the Act. It emphasized the following statement by Senator Hruska:

> The language in [§ 1803](a) provides for a grandfather clause of sorts. But it is not a complete "grandfathering" of all joint operating arrangements now in existence without regard to the circumstances and situations which led them to enter into these arrangements. The existing joint operating arrangements would be subject to a testing by the courts under the definitions provided in this bill. If a court were to determine that one or more papers did not, at the time of entering a joint operating arrangement, meet the test, then such papers would be subject to existing antitrust law.

City of Honolulu v. Hawaii Newspaper Agency, Civ. No. 79-0138-JWC, slip op. at 7 (D.

without prejudice, that there was no statute of limitations bar, at least for the four years prior to the filing of the action. The case then proceeded to trial solely on the NPA exemption defense and the defense of laches.

b. The Honolulu *instructions.* Although the *Honolulu* court had the benefit of the instructions given in *Pacific Sun I* and *Pacific Sun II,* it formulated yet another standard for testing pre-Act JOAs. In certain of its instructions to the jury, the *Honolulu* court adopted much of the language used in instructing the *Pacific Sun II* jury. There were differences, however, the most dramatic of which concerned the crucial "financial soundness" test.

The *Pacific Sun I* and *Pacific Sun II* juries were permitted to consider whether the defendant newspapers could have become financially sound if different management decisions had been made and in effect were instructed to deny defendants the protection of the NPA if the juries found that the defendants had not considered (or had considered and rejected) reasonable alternatives to a JOA. By contrast, Judge Curtis determined that whether the *Advertiser,* the weaker newspaper, was likely to remain or become financially sound was a business judgment to be made at the time of the merger by the managing officers of the endangered publication, not by jurors with the benefit of hindsight. The judge instructed the jury that if it found "that the managing officers of the Honolulu Advertiser entered into the joint operating agreement in the honest belief that otherwise the Honolulu Advertiser was not likely to remain or become financially sound," then the jury must find that the defendants were entitled to the limited exemption of the NPA.[101] The court further advised the jury to examine the conduct of the *Honolulu Advertiser* using a reasonable man standard for the newspaper

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Hawaii Dec. 17, 1979) (quoting 116 CONG. REC. 2005 (1970) (remarks of Sen. Hruska)). Congressman MacGregor had added a more sharply defined comment, which was also quoted by the district court:

> This bill does not grant antitrust immunity to all 22 joint operating arrangements. Such an exemption attaches only if the requirement in . . . [§ 1803(a)] is satisfied that not more than one of the newspapers involved . . . [was] a publication that "was likely to remain or become a financially sound publication." Whatever this standard means, it applies only when a particular joint operating arrangement was created.

Id. at 8 (citing 116 CONG. REC. 23150 (1970) (remarks of Rep. MacGregor)).

101. City of Honolulu v. Hawaii Newspaper Agency, 559 F. Supp. 1021, 1027 (D. Hawaii 1983).

business, considering all the facts and circumstances existing at the time the JOA was formed. Thus, if the jury found that the managing officers of the Hawaiian newspapers had acted reasonably in a good faith exercise of their business judgment in entering into the JOA, the defendants were entitled to the protection of the Newspaper Preservation Act.

This standard was a dramatic reversal of the tests presented to the juries in *Pacific Sun I* and *Pacific Sun II*. It moved a step closer to the interpretation the newspapers had unsuccessfully urged upon the *Pacific Sun II* court—that in enacting the NPA, Congress was concerned that the citizens of a community might be deprived of two editorial points of view and, thus, was less concerned with how a newspaper got in trouble than with the fact that it was in trouble. Even under this new relaxed test, however, the *Honolulu* jury was unable to reach a unanimous verdict, and the court was forced to declare a mistrial.

c. *The motion for judgment notwithstanding the verdict: statute of limitations and laches.* Following the jury's inability to reach a verdict, the court proceeded to consider the previously submitted motion for a judgment notwithstanding the verdict. In a lengthy opinion, Judge Curtis concluded that the plaintiffs' ability to challenge the JOA's qualification for the NPA exemption arose the day the Act became effective. Consequently, this was not a situation falling within the traditional "continuing violation rule"[102] upon which the court's earlier rejection of the statute of limitations defense had been based, and plaintiffs had only four years from the effective date of the NPA to commence their action.[103] Since the case was not filed until nine years after the cause of action arose, it was barred.[104]

Judge Curtis's opinion then reviewed the evidence in light of congressional intent and reiterated his instructions to the jury. The likelihood of the *Advertiser*'s attaining financial soundness, wrote Judge Curtis, was "not a question of fact since it had not, nor could it ever occur." It was "a matter of judg-

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102. *Honolulu*, 559 F. Supp. at 1023-26 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), and *In re* Multidistrict Vehicle Air Pollution, 591 F.2d 68 (9th Cir. 1979)).

103. 15 U.S.C. § 15b (1976). This section provides that "[a]ny action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued."

104. *Honolulu*, 559 F. Supp. at 1026. Having found the action barred by the statute of limitations, the court concluded that the defense of laches, while overwhelmingly supported by the evidence, was unavailable. *Id.*

ment as to what might occur in the future." The crucial question, of course, was "Whose judgment controls?"[105] After analyzing the NPA's legislative history, the court concluded that whether the *Advertiser* was likely to become financially sound was a business judgment to be made by the newspaper's officers. As long as this judgment had a reasonable basis in fact and was made in good faith, it should not be disturbed. A review of the evidence showed that the decision by the *Advertiser* was reasonable and was made in good faith.[106] Accordingly, the defendants fell within the exemption of the NPA and were entitled to judgment as a matter of law.[107]

3. Significance for future cases

Since no appellate court has yet considered cases involving pre-Act JOAs, the meaning of the Act remains uncertain. Will the reasonable man and good faith business judgment test of the *Honolulu* court be adopted, so that the primary question of fact for the jury is whether the newspaper's officers acted in good faith? Or will an appellate court impose on participants in pre-Act JOAs the burden of proving, many years after the fact, that they had exhausted all reasonable alternatives and that they could not have achieved financial soundness by adopting different management policies?

Balancing the possibility of anticompetitive abuse against Congress's clear desire to preserve independent editorial voices, it seems clear that the good faith standard articulated by Judge Curtis is the most workable of the tests that have been articulated so far and should be approved and adopted when the issue reaches the appellate courts.

As a practical matter, the way in which the standard under section 1803(a) is articulated may not have far-reaching consequences if Judge Curtis's statute of limitations analysis is adopted. Congress probably did not intend or anticipate that the twenty-two JOAs that antedated the Act would continue to be subject to attack more than thirteen years after the Act was passed, particularly when filing, or failing to file, is exclusively

105. *Id.* at 1027.

106. *Id.* at 1028-32.

107. *Id.* at 1032. The named plaintiffs settled for a waiver of costs by the defendants. Subsequently, a group of intervenors moved the court for permission to appeal the case. This motion was granted, and the matter is now proceeding toward a hearing before the Ninth Circuit.

within the plaintiff's control. Put another way, the preservation-biased language of the Act does not readily support an interpretation that would permit a prospective plaintiff to delay filing until time erodes the defendants' capacity to shoulder their burden of proving they qualify for the NPA's protection.

A rejection of Judge Curtis's statute of limitations analysis would undermine the congressional purpose rather than promote stability. Even under the less stringent test articulated by the *Honolulu* court, the ability of newspapers (or of any other litigant) to establish good faith and reasonable business judgment decreases with the passage of time. The NPA's purpose would be subverted if JOAs were subject to attack by one plaintiff after another[108] until eventually, when witnesses had died or memories had faded to the point that defendants could no longer meet the burden of establishing their qualification under the Act, a plaintiff would at last succeed. The practical result reached by Judge Curtis's statute of limitations analysis is consistent with the purpose of the Act and provides the stability Congress intended for the twenty-two JOAs that antedated the Act.[109]

B. Proposed JOAs

1. The Cincinnati JOA

a. Factual background. In Septemher 1977, the independent *Cincinnati Enquirer* and the *Cincinnati Post,* published by the E.W. Scripps Company, entered into a typical joint operating arrangement. The newspapers applied for approval by the Attorney General, who referred the matter to Administrative Law

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108. Under traditional res judicata principles, only the named plaintiff and his privies would be barred from subsequent attacks on JOAs on the grounds that the criteria of § 1803(a) had not heen met. *See* Montana v. United States, 440 U.S. 147, 153 (1979). However, when the original action was a class action, or when potential plaintiffs could have intervened but chose not to, a different result may be justified. *See* Jackson v. Hayakawa, 605 F.2d 1121, 1125-26 (9th Cir. 1979).

109. Dictum in Judge Curtis's opinion suggested that a plaintiff who did not exist in 1970 would not be barred until four years had passed after the plaintiff came into existence. This invitation to further litigation is analytically unsound. The concept that 22 JOAs would have protection from everyone except newly formed husinesses is artificial and inequitable.

An alternative analytical hasis for barring future attacks on pre-Act JOAs would be to apply the four-year statute of limitations applicable to mergers. See *supra* text accompanying note 59, arguing that what is being attacked is, in effect, a merger of the economic activities of two or more newspapers.

Judge Donald Moore to conduct a hearing and to make recommendations regarding the application.

After seven weeks of hearings and consideration of more than 2000 pages of exhibits, Judge Moore concluded that the *Cincinnati Post* was a "failing newspaper" within the meaning of the Act. He recommended that the application be approved.[110] The Attorney General approved the application, adopting Judge Moore's findings and conclusions. No review of the Attorney General's approval was sought.

b. The Cincinnati *criteria.* In support of his recommendation, Judge Moore produced a detailed and scholarly opinion 143 pages in length. After commenting at length on the peculiar problems of the newspaper industry and the trends threatening the survival of competitive newspapers, Judge Moore observed that those general trends applied to the Cincinnati market. He noted the steady decline in the *Post's* circulation and advertising linage, as well as the *Post's* decline in percentage of market advertising revenues vis-a-vis the *Enquirer.* Judge Moore chronicled the *Post's* continuing and increasing operating losses of more than $13 million between 1970 and 1978. In addition, he cited testimony projecting future losses for the *Post* of an additional $14 million through 1982.

Judge Moore then proceeded to discuss the steps taken by the *Post's* owners in an effort to make the newspaper financially sound, concluding that none of these steps would have satisfactorily solved the *Post's* problems. Finally, he considered new ownership as a possible solution. Although he found that Scripps had rejected overtures from possible buyers, Judge Moore found no basis in the record for "a determination that any party, and, more specifically, those parties who have expressed interest in buying the Post, could operate the newspaper more efficiently than Scripps."[111] Consequently, he found that the *Post* was a failing newspaper under section 1803(b).

In articulating the criteria applied in reaching his conclusions, Judge Moore reviewed the history and purpose of the NPA. He quoted the Senate Judiciary Committee's statement that the phrase "is in danger of probable failure" was "taken from the Bank Merger Act and has been the subject of a Supreme Court opinion in *United States v. Third National Bank*

110. *See Cincinnati, supra* note 81.

111. *Id.* finding 315, at 110.

(390 U.S. 171 (1968))."[112] Judge Moore cited this discussion of the Bank Merger Act and of the Supreme Court's decision in *Third National Bank* and concluded, without expressly limiting his remarks to a prospective JOA (as distinguished from an existing JOA), "that a joint operating arrangement should be approved only if there are no alternative measures available that would permit continued publication of the allegedly failing newspaper."[113] On the other hand, in responding to the intervenors' argument that approval was precluded by Scripps's failure to explore the possibility of selling the *Post* to a competing buyer and its position that the *Post* was simply not for sale,[114] Judge Moore held that "the Post's failure to seek or to consider a noncompeting purchaser [was] not an absolute bar to approval of the joint operating arrangement"[115] when such an endeavor would have been futile, either because qualified purchasers were unavailable or the paper's condition would not have been materially improved by new ownership and new management.[116] Because the record failed to prove that qualified potential buyers existed or that new ownership would have improved the *Post*'s situation, Scripps's refusal to consider a sale of the paper in years past did not require rejection of the application.

Finally, Judge Moore addressed the Antitrust Division's argument that in deciding whether the *Post* was a failing newspaper, he should apply an "incremental analysis" of the *Post*'s operations by taking into account the extent to which Scripps realized tax benefits as a result of the *Post*'s losses. In effect, this analysis would require a judge to apply those tax savings back to the newspaper that generated them and to offset them against losses offered as proof of failing newspaper status. In a succinct and compelling discussion, Judge Moore observed that the incremental analysis approach contradicted the "regardless of its ownership or affiliations" language of the Act. In rejecting the

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112. S. REP. No. 535, 91st Cong., 1st Sess. 2 (1969). As discussed in the text accompanying note 159 *infra*, Judge Moore and the Senate Report are incorrect in so characterizing the *Third National Bank* case. *Accord* Note, *Seattle Application*, *supra* note 23, at 686 n.122. This error is one that, with the encouragement of the Justice Department, has refused to die.

113. *Cincinnati*, *supra* note 81, at 125.

114. *Id.*

115. *Id.*

116. *Id.* at 127.

incremental analysis theory, Judge Moore described it as "an artificial approach that does violence to the legislative intent."[117]

Judge Moore's recommendation was adopted by the Attorney General, although, as will be seen, the Antitrust Division was not discouraged from future attempts to assert the incremental analysis theory.[118] Because the intervenors chose not to carry the matter further, Judge Moore's analysis of the Act in the context of an application for a proposed JOA was not reviewed by any court. Nonetheless, the standards Judge Moore articulated have had an influence and life of their own that have extended far beyond the city limits of Cincinnati[119] and beyond the intended restriction to prospective arrangements under section 1803(b).

2. *The Seattle JOA*

a. Factual background. The *Seattle Post-Intelligencer* (*P-I*), a morning newspaper owned by the Hearst Corporation, is one of two major daily newspapers in Seattle. The other major daily is the *Seattle Times*, owned in large part by the Knight-Ridder group. The *Times* had been an afternoon newspaper until 1976, when it gradually began to be transferred into an all-day publication. By the end of September 1981, the *Times* exceeded the *P-I* in both circulation and operating revenues. The *P-I* had lost money steadily since 1969 and was clearly trapped in the downward spiral.

Following negotiations in 1980, the *P-I* and the *Times* agreed to enter a JOA in accordance with section 1803(b) of the NPA. They were to adopt joint advertising and circulation rates and to publish a single, combined Sunday edition. They agreed to pool profits and to share them according to a predetermined formula.

In March 1981, the Seattle Times Company and the Hearst Corporation submitted an application to the Attorney General for approval of their JOA. Pursuant to the Antitrust Division's recommendation, the Attorney General ordered that a hearing be scheduled and appointed Daniel H. Hanscom, a former Chief

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117. *Id.* at 135. *Accord* Note, *Seattle Application*, *supra* note 23, at 688-89.

118. *See infra* text accompanying notes 121-23.

119. *See supra* notes 89-97 and accompanying text (Moore's influence on pre-Act cases); *infra* notes 140-44, 147-50 and accompanying text (Moore's influence in *Independent P-I*).

Administrative Law Judge for the Federal Trade Commission, to conduct the proceedings. A collection of interested parties, consisting of a number of suburban newspaper publishers and three citizens' committees, was permitted to intervene and to participate in the hearings through a single legal counsel. The hearings took place in November 1981. Thirty witnesses testified,[120] and more than a thousand pages of exhibits were introduced.

When proposed findings and supporting briefs were filed at the conclusion of the hearings, the Antitrust Division predictably[121] opposed the application, urging many of the same arguments it had unsuccessfully advanced before Judge Moore in *Cincinnati*. The Antitrust Division argued that the test for qualification should contain the following requirements, which employ language closely paralleling the *Citizen Publishing* case: (1) the weaker newspaper will be closed down if the joint operating agreement is denied; (2) the weaker paper can show that it has no reasonable alternatives to the JOA;[122] (3) the applicants can demonstrate that new management or ownership would not be

120. These witnesses included an expert who gave testimony similar to that given in *Pacific Sun* and who would later testify in *Honolulu*.

121. The Antitrust Division has not surprisingly been a troublesome thorn in the side of congressional intent, resisting inroads to the Sherman Act as if the NPA had never been enacted. Its efforts to date have been tenacious, if not always effective. In St. Louis, Missouri, however, Newhouse Publishing, the owner of the *Globe-Democrat* (a JOA participant with Pulitzer Publishing's *Post-Dispatch*, *see supra* note 62) announced in November 1983 that it was closing the *Globe-Democrat* at the end of the year, though retaining its interest in the joint agency, which would continue to publish the profitable *Post-Dispatch*. The Justice Department took the position that if the *Globe-Democrat* ceased publication, the joint operation would lose the protection of the NPA and the two owners would be evaluated under the merger standards of section 7 of the Clayton Act, thus requiring a twofold showing: (1) that the *Globe-Democrat* could not survive outside the JOA and (2) that it could not be sold to an independent competitor. The Department agreed that it would not oppose the closure if no potential buyer came forward within 15 days, *see* Wall St. J., Nov. 9, 1983, at 8, col. 1; N.Y. Times, Dec. 1, 1983, at A20, col. 3-4, and a buyer was sought. Jeffery Gluck, age 31, ultimately came forward and bought the *Globe-Democrat* which, in the tradition of Time, Inc.'s acquisition of the *Washington Star*, Charter Oil's purchase of the *Philadelphia Bulletin*, and Joseph Cole's taking over at the *Cleveland Press*, continues to lose money in the hands of its new owner.

While it can reasonably be argued that the Division's threat was both right and successful in barring a JOA newspaper owner from closing down its own paper without first trying to find a successor to compete with its other remaining interest in the market, the change in ownership did not "alter the fact that these papers were failing. It just means that the failing [will] go on a little longer at a cost of millions for the unfortunate buyers." Morton, *St. Louis*, *supra* note 22, at 16.

122. This was the only argument advanced by the Antitrust Division in the Seattle case that was adopted by Judge Moore in *Cincinnati*.

likely to materially improve the weaker paper's condition; (4) the weaker paper can show that any interested potential buyer was not in fact qualified to purchase the paper; and (5) the alleged losses cannot largely be erased by offsetting against them the tax benefits to the owner (the previously rejected incremental analysis theory).[123]

Despite the Division's attempt to block the application, the Administrative Law Judge provided the Attorney General with findings of fact and legal analysis supporting approval of the proposed JOA.[124] The Attorney General thereafter approved the JOA application, adopting all but one of the Administrative Law Judge's proposed findings of fact and adopting all of the recommended conclusions of law.

b. The findings and recommendations of the Administrative Law Judge and the Attorney General. Judge Hanscom's proposed findings began with a discussion of trends in the newspaper industry and an analysis of the economic forces affecting the publishing business in light of the specific characteristics of the Seattle market. The judge concluded that the *P-I*'s declines in circulation and advertising, together with its enormous increasing losses, epitomized the characteristics of a failing newspaper.[125] He found that the *P-I* had fallen into the downward spiral and that no newspaper had ever been able to reverse a trend like the *P-I*'s.[126] Accordingly, he concluded that losses for the *P-I* could be expected only to increase, that it was unlikely that any steps by Hearst or by a new owner could improve the newspaper's likelihood of survival, and that the *P-I* had "fallen so far behind, the probability is that its decline is irreversible."[127] Judge Hanscom rejected the claim of the intervenors and the Antitrust Division that new or different management could have solved the *P-I*'s problems.[128]

Proposed finding 158, however, provided some solace to the intervenors and a hook on which to hang future efforts to block the Seattle JOA:

> Considering that the Post-Intelligencer is not, and has not

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123. *See supra* note 117 and accompanying text.

124. Application of Seattle Times Co., Dep't of Justice Docket No. 44-03-26-6, slip op. at 103 (Jan. 14, 1982) (recommended decision of Hanscom, A.L.J.).

125. *Id.* findings 24-93, 131-36, at 19-48, 71-73.

126. *Id.* finding 123, at 66.

127. *Id.* finding 144, at 76; *see also id.* findings 110-15, 147-55, at 56-62, 78-82.

128. *Id.* finding 109, at 56.

> been for sale, and that all inquiries regarding possible purchase have been rebuffed by the Hearst Corporation with statements to that effect, and that responsible prospective purchasers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.[129]

However, in the memorandum opinion following his proposed findings of fact, Judge Hanscom flatly stated that despite proposed finding 158, the NPA did not require the Hearst Corporation to offer the *P-I* for sale, nor did the *P-I* have to prove that it could not be sold to a buyer willing and able to continue it in operation as an independent publication.[130] The Judge based this conclusion on the ground that Congress had specifically rejected the Supreme Court's requirement, stated in *Citizen Publishing,* that in order to fall within the failing company exemption, the failing newspaper's owner would have to make an effort to sell the paper.

Judge Hanscom also rejected the argument of the intervenors and the Antitrust Division that the failing newspaper test should be based on the test for qualification under the Bank Merger Act, as articulated by the Supreme Court in the *Third National Bank* case. In a long overdue analysis, he reviewed the relationship between the failing newspaper test and the standards set forth in the Bank Merger Act:

> There is nothing in the legislative history of the Newspaper Preservation Act as a whole to suggest that Congress intended that the standards used for judging bank mergers were to be applied to newspapers. The House Report contains no reference to the Bank Merger Act or to the Third National Bank case, and the Senate Report is, in fact, mistaken. There is no definition or discussion of the phrase "in probable danger of financial failure" in the Third National Bank case. Congress established certain standards for judging bank mergers in the Bank Merger Act, and established other standards for a joint operating arrangement in the Newspaper Preservation Act.
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> The fact that Congress legislated certain standards and modifications to antitrust doctrine in the two industries, banks and newspapers, provides no warrant for arguing that the stan-

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129. *Id.* finding 158, at 84.
130. *Id.* at 88-89.

> dards are the same, or that some of them are the same. This is obvious from the terms of the respective Acts. For example, the Bank Merger Act directs the weighing of potential anticompetitive effects of a bank merger against its probable effect in meeting the convenience and needs of the community to be served. 390 U.S. at 177. The Newspaper Preservation Act is quite different, providing that a newspaper in probable danger of financial failure can enter a joint operating arrangement with a profitable paper if the arrangement will preserve the failing paper as an independent editorial voice. The Bank Merger Act directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. 390 U.S. at 190. The Newspaper Preservation Act directs consideration of a newspaper's financial condition but makes no mention of its managerial resources. There is nothing in the legislative history to suggest that Congress intended to require the owner of a failing newspaper to sell it to others who then might enter a joint operating arrangement as permitted by the Act.[131]

With respect to the incremental analysis argument advanced by the Antitrust Division and the intervenors, Judge Hanscom took the same position as had Judge Moore in *Cincinnati,* holding that the incremental analysis approach contravenes the phrase "regardless of its ownership or affiliations."[132]

In an opinion dated June 15, 1982, Attorney General William French Smith adopted all of Judge Hanscom's findings and conclusions "with the exception of that portion of Finding 158 which provides that the P-I could be sold 'to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.' "[133] He concluded by saying, "I cannot find evidentiary support for such a finding in the record upon which my decision must be based,"[134] and by stating that this was a "fairly speculative conclusion [that was] simply without evidentiary support."[135] The Attorney General did note, however, that evidence of purchase offers or negotiations might be

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131. *Id.* at 91-92.

132. *Id.* at 98.

133. Opinion and Order of the Attorney General *in re* Application of Seattle Times Co., Order No. 979-82, at 5 (June 15, 1982).

134. *Id.*

135. *Id.* at 11 n.*.

pertinent in assessing the financial condition and prospects of the allegedly failing newspaper.[136]

c. The district court's opinion. The day after the Attorney General issued his opinion and order, the intervenors commenced a federal district court action challenging the decision.[137] A few days later, District Court Judge Barbara J. Rothstein issued an order postponing the effective date of the Attorney General's order for two months[138] and proceeded to entertain cross motions for summary judgment. On August 27, 1982, the afternoon of the last day of the postponement, Judge Rothstein granted the plaintiffs' motion for summary judgment, holding that the Attorney General's order was "contrary to law and therefore invalid."[139]

In reaching her conclusion, Judge Rothstein began with the proposition that "statutory exemptions to the antitrust laws . . . are to be narrowly construed." She then proceeded to address the prospective buyer issue. Noting that Judge Hanscom had found that the *P-I* had not been offered for sale despite serious inquiries from potential buyers,[140] Judge Rothstein found it arbitrary and capricious for the Attorney General to reject the portion of finding of fact 158 that concluded that the *P-I* "could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily." Adopting Judge Moore's derivation of the failing newspaper test from the standard for judging bank mergers under the Bank Merger Act, she cited the following language from *Third National Bank:* "The applicants for the merger must 'reliably establish the unavailability of alternative solutions.' "[141] She then determined that a sale to a willing, noncompeting buyer would have constituted an "available alternative." While agreeing with Judge Moore that consideration of

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136. *Id.*

137. Committee for an Indep. P-I v. Smith, 549 F. Supp. 985 (W.D. Wash. 1982).

138. Time is crucial in the formation of any merger, particularly a JOA, in which creative and emotional factors often lie in fragile equipoise with considerations of economic survival. *See* Note, *Seattle Application*, *supra* note 23, at 685-86; *see also* S. Oppenheim & C. Shields, *supra* note 7, § 52 (a newspaper in the downward spiral must be rescued quickly). The publishers could not have suspected that it would be over seven months before the Attorney General's Opinion of June 15, 1982, would be law.

139. 549 F. Supp. at 996.

140. *Id.* at 990.

141. *Id.* at 992 (quoting United States v. Third National Bank, 390 U.S. 171, 190 (1968)).

noncompeting purchasers was not an absolute prerequisite to the approval of a JOA, Judge Rothstein went on to hold that "[i]f an alternative solution might be the sale of the newspaper to someone else, that alternative must have been explored before approval may properly be granted."[142]

Noting that Judge Moore had recommended approval of the *Cincinnati* application "because the evidence did not support a conclusion that there was another party ready, willing, and able to purchase the Post and to improve its operating results so as to permit its preservation as an independent daily,"[143] Judge Rothstein cited Judge Hanscom's findings in *Seattle* to support her conclusion that there were ready and willing buyers and that the *P-I* had not met the burden of proving that some such buyer would not have been able to resuscitate the *P-I*.[144] With this single exception, Judge Rothstein left all other findings of the Attorney General undisturbed.

The Hearst Corporation and the Seattle Times Company proceeded to file an emergency motion with the Ninth Circuit. The court granted an expedited appeal, and the case was argued

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142. *Id.* at 993 (quoting *Cincinnati, supra* note 81, at 126-27).

143. 549 F. Supp. at 993.

144. Judge Rothstein's exact words were as follows:

> Where the record establishes that there are competent businessmen ready and willing to tackle the management problems of the P-I, the burden of proof rests upon the applicants for the JOA to demonstrate that the new owners could not make the P-I succeed. 28 C.F.R. Section 48.10(a)(4). There has been no fair opportunity for prospective buyers to prepare and present their plans to make the P-I profitable. The court wishes to make clear that it does not disagree with the ALJ that Hearst is not obligated to seek out buyers. Nevertheless, where there are ready and willing buyers who present themselves, if Hearst wishes to obtain the benefits of the JOA, it must carry the burden of demonstrating that none of those buyers could continue to operate the P-I as an independent daily.
>
> In short, in order for the P-I to qualify as a "failing newspaper" for purposes of a JOA, defendants must show that no other viable alternatives exist for maintaining the newspaper's independent editorial voice.

Id.

If the test is financial soundness and the theory is that the existence of a ready buyer is circumstantial evidence of financial soundness, why draw the line at refusing prospective buyers' phone calls? Why not require the newspaper to tactfully solicit interests, especially if it is posited that reasonable alternatives must be explored? A practical answer is that rumors of amenability to a sale can seriously damage the morale of a newspaper. The conceptual answer has two parts. First, Congress never intended to force owners to sell; indeed, Congress created the NPA to help preserve the current owners' independent editorial voices. Second, Congress realized that the downward spiral is essentially irreversible and that changing owners will only delay the inevitable loss of the paper.

on December 17, 1982. On April 21, 1983, the court issued its opinion reversing Judge Rothstein.

d. The Ninth Circuit's opinion. The Ninth Circuit saw the case as presenting four substantive issues for decision:

> First, what role, if any, is proof of interested third-party purchasers to play in the determination that a newspaper is in probable danger of financial failure? Second, must it be shown that the failing newspaper would probably close if the proposed joint operating agreement is not allowed? Third, must the Attorney General determine that the proposed JOA is not unnecessarily anticompetitive and that it would not impair the editorial voices of smaller newspapers in the affected market? Fourth, is the Newspaper Preservation Act unconstitutional under the first amendment?[145]

The court first addressed the prospective buyer issue. It held that, while "alternatives to a JOA are relevant to the determination that a newspaper qualifies under the Act[,] . . . Hearst met its burden of showing that the alleged alternatives did not offer a solution to the P-I's difficulties."[146] The court agreed with the Attorney General that the evidence did not require him to adopt finding of fact 158, pointing out that the evidence disclosed nothing more than a series of inquiries, not offers, from prospective buyers. The court went on to hold, however, that the analysis did not end there. In view of the undisputed evidence that Hearst did not cultivate inquiries regarding the sale of the *P-I*, the question of the availability of reasonable alternatives required further scrutiny. Although the Ninth Circuit apparently rejected the district court's holding that Hearst could not meet its burden of proof without at least pursuing sale of the *P-I* to any buyer who presented himself, the Ninth Circuit held that the existence of interested purchasers was relevant to the question of the availability of reasonable alternatives.

While the Ninth Circuit did not adopt Judge Moore's *Cincinnati* analysis in its entirety, the court was favorably disposed to his analysis of the failing newspaper standard.[147] The Ninth Circuit agreed with Judge Moore "that Congress intended the Supreme Court's interpretation of the Bank Merger Act in

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145. Committee for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 471 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983).

146. *Id.* at 475.

147. *Id.* at 477.

Third National Bank to be applicable to newspaper JOA's."[148] The Ninth Circuit then set forth the following test: "The pertinence of interested purchasers, as the Attorney General apparently concedes, may require a JOA applicant to prove that the 'new ownership and management could not convert the [paper] into a profitable enterprise without resort to a joint operating arrangement.' "[149] The court grounded its adoption of this test on the justification that it would

> prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA. A JOA applicant should not be allowed to engage in poor business practices or maintain inept personnel in anticipation that it may later qualify for an antitrust exemption in the future.[150]

Thus, although it disagreed with Judge Rothstein's factual determination that the record was insufficient to support the Attorney General's order, the Ninth Circuit had charted a legal course closer to the test proposed by Judge Rothstein than that proposed by Judge Moore. The moment that scholars and newspaper owners had awaited for twelve years—an appellate court's exposition of the NPA's meaning to prospective JOAs—had arrived, only to reveal that *Citizen Publishing* was alive again, if not entirely well.

In reversing the district court, the court found that the record contained substantial evidence to support Judge Hanscom's finding that new management would not be any more successful than Hearst had been in returning the *P-I* to profitability. The Ninth Circuit also pointed out that Judge Rothstein had misperceived the proper scope of the burden of proof under the Act. While the ultimate burden of persuasion indeed lay with the applicants, that burden was satisfied by a showing of "(1) the economic fact of probable failure (downward spiral, irreversible losses), and (2) reasonable management practices."[151] The burden of going forward, continued the court, was then shifted to opponents of the application to demonstrate that the losses were the result of unreasonable management practices or that, through proof of available alternatives, the paper was not actu-

148. *Id.* at 476.
149. *Id.* at 478 (quoting *Cincinnati, supra* note 81, at 127).
150. 704 F.2d at 478.
151. *Id.* at 479.

ally in probable danger of failure.[152] But because the applicants had proved that the paper had been reasonably managed and that "its trend toward failure [was] irreversible *under any management,*" the Ninth Circuit had no difficulty concluding that the applicants had met their burden of proof.[153]

The Ninth Circuit then proceeded to deal with the other three substantive issues. First, it held that although an applicant must show that closure was probable in order to satisfy the failing newspaper standard, this test must be applied in light of the phrase "regardless of its ownership or affiliations." Accordingly, if the *P-I* would probably have been closed but for the ownership of Hearst, the applicants had met their burden.[154] The Ninth Circuit also flatly rejected the incremental analysis approach as had every previous tribunal to consider the question. Second, in response to plaintiffs' argument that the Seattle joint operating arrangement would harm competing suburban newspapers, the court stated that Congress had recognized that approval of joint operating arrangements could have anticompetitive ramifications, but that "[t]his was a national policy choice Congress was free to make."[155] Finally, the Ninth Circuit rejected the constitutional attacks on the Act, following the lead of the Seattle District Court and a second district court.[156]

e. Analysis. In requiring prospective JOA applicants to demonstrate that the adoption of alternative approaches to managing and operating the weaker newspaper would not solve its financial problems, the Ninth Circuit aligned itself with Judge Moore, Judge Hanscom, Judge Rothstein, and probably Congress as well. But the Ninth Circuit did not stop there. It also ruled that when interested purchasers appear and present plans purporting to show how new owners could make the failing newspaper profitable, the failing newspaper must prove that

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152. *Id.*

153. *Id.* The Ninth Circuit compared this situation to the *Third National Bank* case as follows: "[W]here proof adduced at trial showed [that the] 'failing' bank's problems were due to mismanagement, [the] bank had [the] burden of showing reasonable attempts to solve management difficulties were made, or that they would be unlikely to succeed." *Id.* As is discussed in more detail below, it was not claimed in *Third National Bank* that Nashville Bank and Trust was failing. Accordingly, the test articulated by the Supreme Court was unrelated to the "probable failure" language of the Bank Merger Act.

154. The finding of Judge Hanscom to this effect was approved. *Id.* at 480-81.

155. *Id.* at 482.

156. Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972); *accord* Heheman v. Bell, 1978-1 Trade Cases ¶ 61,975 (S.D. Ohio 1978).

"new ownership and management could not convert the [paper] into a profitable enterprise."[157] By so ruling, the court grafted onto the Act a test which was neither contemplated by Congress nor required by the Bank Merger Act and which has the potential for creating extremely troublesome practical problems.

If, for example, Rupert Murdoch had not simply expressed an interest in being considered as a buyer in the event the Seattle JOA was not approved[158] but had appeared at the hearing with a specific plan for transforming the *P-I* into a tabloid daily that he claimed would be profitable, what would the result have been? If we further assume that the newspapers had failed to prove that the Murdoch plan would not succeed, the Ninth Circuit's test would have required that the Seattle application be denied. But what would have happened then? Because Hearst would presumably have been unwilling to transform its serious, award-winning newspaper into a tabloid blaring headlines such as "MOTHER BOILS BABY—EATS IT"[159] (and because the Ninth Circuit does not purport to require it to do so[160]), would Hearst have been required to choose between letting the *P-I* continue in the downward spiral on the one hand and selling to Mr. Murdoch on the other? Furthermore, if Hearst had been required to sell, who would have set the price? If the JOA application had been rejected, Hearst would have lost all bargaining leverage and would have been forced to sell at fire-sale prices. Nothing in this scenario provides hope that either the preservation of editorial independence or the public interest would be served.

Further practical difficulties attend adoption of the Ninth Circuit's analysis. If the court's articulation of the prospective purchaser test is followed, hearings on future applications will be expensive, time-consuming, and counterproductive.[161] Pro-

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157. 704 F.2d at 478 (quoting *Cincinnati*, *supra* note 81, at 127).

158. 704 F.2d at 475 n.5.

159. *See An Analysis Of The Nation's Leading Newspaper Analysis*, AD WEEK, Apr. 26, 1982, at 44.

160. The Ninth Circuit denied that "a newspaper must explore the alternative of changing its editorial policies prior to entering a JOA." 704 F.2d at 478 n.8.

161. A newspaper applying for exemption under the NPA is likely to be suffering substantial losses. In the case of the *Seattle Times*' application, for instance, by the time the JOA was finally allowed to go into effect, the *P-I*'s loss rate had reached $500,000 a month. Telephone interview with John Morton, Washington, D.C. security analyst specializing in newspaper properties with the securities firm of Lynch, Jones, and Ryan (Oct. 5, 1983).

spective purchasers, seeing an opportunity to acquire a newspaper publication at a bargain price, can be expected to intervene, to propose elaborate plans for turning around the failing newspaper, and to impose on the applicants the extremely heavy burden of proving that the proposals would not be successful. Such "interested noncompeting buyers" can hardly be expected to be objective. Thus, the door would be opened for administrative judges and courts to be misled and confused by prospective purchasers' representations regarding new business disciplines, maintenance of editorial policies, and other management practices.

The Ninth Circuit's standard also contains some analytical deficiencies. For example, nothing in the NPA justifies adopting a construction of the failing newspaper test which would force the applicant publication to choose among conversion to a tabloid format, sale at a bargain price, and closure. A fair reading of the legislative history shows that Congress intended to preserve the editorial voices of the applicant newspapers, not the editorial voice of some prospective buyer looking for a bargain.[162] While evidence of alternative management practices that might enable the applicant newspaper to improve its performance would be relevant, evidence of what some prospective purchaser would do if it were permitted to take over is irrelevant and should not be admissible.

Like Judge Moore and Judge Rothstein, the Ninth Circuit misread the Bank Merger Act and the *Third National Bank* case and thereby accorded an unjustified significance to the proposals of prospective purchasers. A close reading of the Bank Merger Act and *Third National Bank* compels the conclusion that comparisons with NPA standards are wholly unwarranted and that Judge Hanscom's analysis of the "prospective buyer issue"[163] should be adopted to eliminate the problems raised by the Ninth Circuit test. As Judge Hanscom pointed out, the fact that Congress provided for exemptions to the antitrust laws in two different industries does not imply that the same test should be applied in judging qualification for exemption, particularly when neither the industries nor the standards articulated in the Acts bear the slightest resemblance to each other. While it is

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162. The Ninth Circuit seems to agree, in apparent contradiction to the test it has articulated. *See* 704 F.2d at 478 n.8.

163. *See supra* note 131 and accompanying text.

true that the Bank Merger Act employs the phrase "probable failure," that phrase is contained only in provisions permitting the agency to dispense with certain notice and waiting period requirements if the agency finds that it must act immediately to prevent the probable failure of one of the banks involved. The actual standard for testing bank mergers provides:

> The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.[164]

The fact that the "probable failure" language is not part of the standard for testing bank mergers may account for the absence of such language in *Third National Bank*. In that case the Supreme Court merely discussed new ownership or management in the context of searching for alternatives to merger when one of the banks—one that was never suggested to be "failing"—was not "meeting the convenience and needs of the community to be served"[165] because of outmoded and unimaginative approaches to management.[166] Thus, contrary to the comments of several senators and the conclusions of Judge Moore, Judge Rothstein, and the Ninth Circuit, the "probable failure" language was not taken from the Bank Merger Act and had not been the subject of a Supreme Court opinion.

The dissimilarity in the tests set forth in the two acts is

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164. 12 U.S.C. § 1828(c)(5) (1982).

165. *Id.*

166. United States v. Third Nat'l Bank, 390 U.S. 171, 174, 176-77 (1968).

consistent with the differing objectives sought. The Bank Merger Act requires a balancing of anticompetitive effects against the needs of the community on an ad hoc basis. One of the banks need not be failing in order for the merger to be approved if other circumstances warrant approval. By contrast, the NPA neither requires nor permits such a balancing test. When it passed the NPA, Congress had already balanced the consequences of eliminating commercial competition against the benefits the public would derive from editorial diversity and had decided that preservation of independent editorial voices should take precedence over the antitrust laws. In addition, merger under the Bank Merger Act consolidates the management policies of two banks into a single bank (constituting a complete merger that justifies a tougher test), while the objective of the NPA is to permit only partial merger in order to preserve editorial and reportorial diversity.

Thus, while the Ninth Circuit arrived at the correct outcome in rejecting the attack on the Seattle application, its articulation of the standard for reviewing prospective JOA applications could impose an unjustified burden on future applicants and has created the potential for serious practical problems—precisely the result Congress tried to avoid.

III. The Future of the NPA

A. The Original Twenty-Two: Stability at Last?

In passing the NPA, Congress was motivated to preserve competing editorial voices in an industry in which competition was slowly dying. Congress acted by granting a limited immunity to the twenty-two preexisting JOAs. This immunity was to be a conditional shield against antitrust attacks on arrangements that had been entered into in a belief that they were lawful and that had operated without challenge from the Justice Department for very long periods of time. Because of the nature of the political process, however, the NPA is not as clear as it should have been, and the need for compromise blurred its language and intent. But whether or not an absolute grandfathering of the original twenty-two was intended, none of the proponents of the Act—and probably very few of its opponents—intended or contemplated that in 1984 the original twenty-two JOAs covered by section 1803(a) would still be vulnerable to attack.

In the absence of a court of appeals opinion or a definitive

pronouncement by the Supreme Court, the proper construction of the test for pre-Act JOAs under section 1803(a) is still in doubt, as is the resolution of the statute of limitations issue. If either the good faith test adopted by Judge Curtis in *Honolulu* or his analysis of the statute of limitations issue is followed by other courts, the original twenty-two JOAs will probably achieve at last the stability Congress intended.[167] In any event, in view of the costly failures of the plaintiffs in both *Pacific Sun* and *Honolulu,* even well-financed plaintiffs will think twice before mounting further challenges under section 1803(a).[168]

B. Prospective JOAs: An Unwarranted Burden

The Ninth Circuit has unwittingly and regrettably charted a road map for effective opposition to prospective JOAs that future intervenors will be unable to resist. As a result, applicants for approval of prospective JOAs under section 1803(b) can expect an expensive, time-consuming, and bitterly contested process, in which they will be forced to prove the unfeasibility of plans for achieving economic success submitted by prospective purchasers who have obvious ulterior motives. So long as a reviewing body, whether it be the Attorney General, a district court, or a higher court, considers the objective of the NPA to be the maintenance of any two newspapers rather than the preservation of the existing diverse editorial voices of the applicant newspapers, future applicants under section 1803(b) will have a difficult time.

Although the NPA has been generally as effective as Congress intended it to be, the electronic and telecommunication revolution of the 1980s is going to place new stresses on the struggling newspaper industry. These difficulties can be overcome only if the courts and the Antitrust Division accept the resolution of the competing interests of antitrust enforcement and newspaper preservation already made by Congress.

It is time the courts and the Antitrust Division recognize

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167. The authors believe that Congress did not intend to require proof of "good faith," but only that the newspaper was not likely to remain or become financially sound.

168. As a practical matter, the cost of prosecuting a challenge to a JOA and the probable lack of success will deter most attorneys from taking on future challenger's cases on a contingent fee basis. It is also doubtful that any plaintiff would have either the interest or resources to challenge an existing JOA. Enforcement of the NPA with respect to the 22 preexisting JOAs will thus likely be left where Congress intended it—with the Attorney General.

that Congress can carve out exceptions to its own statutes, because statutes are, after all, only statutes.