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Consistency and Predictability: Supreme Court Antitrust Decisions During the 1978 Term

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ARTICLES

CONSISTENCY AND PREDICTABILITY: SUPREME COURT ANTITRUST DECISIONS DURING THE 1978 TERM

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An article which discusses the Supreme Court's antitrust decisions during a term is necessarily general in nature, because temporal and spatial constraints do not allow in-depth treatises on each issue raised in each case. Rather, the writing should explain each decision, analyze the Court's reasoning, and assess the holding's effect on future cases and antitrust enforcement in general. Perhaps, however, the most crucial requirement is that it explain judicial philosophies and trends that aid counsel in advising their clients.

During this term there was no "blockbuster" case which can be pointed to as blazing a new road in antitrust or as greatly affecting antitrust analysis or enforcement for years to come. This, though, is not to say that decisions this term teach us nothing or result in our not being able to glean trends. The Court decided six cases, and each adds an increment to our antitrust jurisprudence. Most importantly, its decisions, especially when read together with those of its last two terms, clearly evidence that two key words describe the Court's selection of cases, its analysis and its holdings: consistency and predictability. The Court continues to hear cases involving the same broad issues, analyzes them in the same manner and reaches results substantially similar to those of the immediately preceding two terms.

Consider, for example, that the Court decided six antitrust cases this term. Of the six, two involved substantive principles,[1] two involved exemptions,[2] and two involved procedure,[3] just as two years

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The opinions herein are those of the author and do not necessarily represent views of the Department of Justice.

1. *See* text accompanying notes 14-15 *infra.*
2. *See* text accompanying notes 21-23 *infra.*
3. *See* text accompanying notes 18-20 *infra.*

ago.[4] The Court dealt with the state action exemption (albeit briefly) for the fifth straight term.[5] It decided cases involving who can recover under antitrust law and involving the McCarran-Ferguson Act, the Robinson-Patman Act, a state economic regulatory scheme, and a proper Sherman Act analysis,[6] just as it did last term.[7] As was true of the last two terms, none of its selections dealt with issues of statutory construction.

Comparison of this term's opinions with those of the previous two indicates that the Court's results are becoming easier to predict. Exemptions from antitrust coverage continue to be construed narrowly;[8] liberal ability to bring private actions is inferred;[9] states are given broad leeway to establish and operate regulatory programs which affect competition so long as such programs are mandated by statute;[10] esoteric theory takes a back seat to business practicalities;[11] and short-cut labeling of certain practices is eschewed for more detailed economic analysis.[12] The Court's decisions also evidence an unusual degree of reliance on its own recent decisions—a reliance that indicates that the Court is comfortable with its analysis and that the results in many future cases may be foregone conclusions.[13]

4. *See generally* Miles, *Socking It to Plaintiffs: Supreme Court Antitrust Decisions in the 1976-77 Term,* 12 U. RICH. L. REV. 1, 22-23 (1977) [hereinafter cited as Miles].

5. *See generally* Miles & Russell, *Economic Competition and the Supreme Court: Decisions in the 1977 Term,* 13 U. RICH. L. REV. 1, 26 (1978) [hereinafter cited as Miles & Russell].

6. *See* text accompanying notes 14-19, 21-23 *infra.*

7. *See* Miles & Russell, *supra* note 5, at 5-15, 34-40, 46-48, 48-55.

8. *Compare* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), decided this term, *with* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978), decided last year.

9. *Compare* Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979), *with* Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

10. *Compare* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) *with* Exxon Corp. v. Maryland, 437 U.S. 117 (1978).

11. *Compare* the discussion of the "meeting competition defense" of section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b) (1970), in Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979), *with* that in United States v. United States Gypsum Co., 438 U.S. 422 (1978).

12. *Compare* the Burger Court's recent decisions in Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 440 U.S. 1 (1979); National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); and Continental T.V., Inc. v. GTE Sylvania, Inc. 433 U.S. 36 (1977), *with* its older decision in United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

13. A good example is McLain v. Real Estate Bd., 583 F.2d 1315 (5th Cir. 1978), *cert. granted,* 99 S. Ct. 2159 (1979), which involves the degree of interstate commerce necessary

I. An Overview of the Term

The Court's two decisions interpreting substantive provisions of the antitrust laws were *Broadcast Music,. Inc. v. Columbia Broadcasting System, Inc.,*[14] and *Great Atlantic & Pacific Tea Co. v. FTC.*[15] In the former, the Court held that granting blanket licenses covering copyrighted musical compositions was not a per se illegal price-fixing agreement prohibited by section 1 of the Sherman Act.[16] In the latter, it determined that where a seller can sustain the "meeting competition" defense of the Robinson-Patman Act,[17] the purchaser is not guilty of knowingly inducing or receiving an illegal price discrimination.

In its two decisions involving procedure, the Court dealt with "standing" (in a broad sense) and the acquisition of grand jury transcripts by private litigants. *Reiter v. Sonotone Corp.*[18] held that consumers adversely affected by antitrust violations are injured in their "business or property" within the meaning of section 4 of the Clayton Act[19] and thus may sue for treble damages. In *Douglas Oil Co. v. Petrol Stops Northwest,*[20] the Court reaffirmed general standards which should be applied in determining whether to grant private litigants access to grand jury transcripts and also stated that, where the forum of civil litigation is not that in which the grand jury sat, the judges of both jurisdictions should jointly decide whether access is proper.

Lastly, the Court was confronted with the limited exemption from antitrust coverage afforded the business of insurance and the state action exemption. In *Group Life & Health Insurance Co. v. Royal Drug Co.,*[21] it held that provider agreements between a Blue Shield plan and participating pharmacies were not exempted from chal-

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to trigger Sherman Act jurisdiction. In light of Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976), and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), it appears that the Court will find sufficient commerce.

14. 441 U.S. 1 (1979) (discussed in Part II *infra).*
15. 440 U.S. 69 (1979) (discussed in Part V *infra).*
16. 15 U.S.C. § 1 (1976).
17. 15 U.S.C. § 13(a) (1976).
18. 99 S. Ct. 2326 (1979) (discussed in Part III *infra).*
19. 15 U.S.C. § 15 (1976).
20. 440 U.S. 211 (1979) (discussed in Part VI *infra).*
21. 440 U.S. 205 (1979) (discussed in Part IV *infra).*

lenge under the McCarran-Ferguson Act.[22] And in *New Motor Vehicle Board v. Orrin W. Fox Co.*,[23] the Court held that California's regulatory scheme governing establishment of retail automobile franchises passed muster under both the fourteenth amendment and the Sherman Act.

II. THE ROLE OF EFFICIENCY IN DETERMINING WHETHER A PRACTICE IS PER SE ILLEGAL: *Broadcast Music, Inc.*

Conventional antitrust wisdom makes clear that not all agreements between competitors which restrain trade are illegal per se under the Sherman Act,[24] even when they affect price. For example,

22. 15 U.S.C. §§ 1011-15 (1976).

23. 439 U.S. 96 (1978) (discussed in Part VII *infra).*

24. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), prohibits "[e]very contract . . . or conspiracy, in restraint of trade or commerce among the several States. . . ." In Standard Oil Co. v. United States, 221 U.S. 1 (1910), the Court rejected a literal reading of the statute and held that only practices "unreasonably" restraining trade are illegal. Thus, the so-called rule of reason was born. The nature of the analysis necessary to determine reasonableness has been explained in several of the Court's opinions. In Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), for example, the Court said:

> To determine [reasonableness] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

The test for reasonableness was refined last term in National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978) [hereinafter cited as *Professional Engineers*], where the Court noted that the ultimate question is the degree of the adverse economic impact caused by the restraint. Often, the Court stated, this cannot be assessed without an "elaborate study of the industry." *Id.* at 692. The Court also noted last term that the analysis will focus primarily on the purpose and effect of the restraint: "[A] civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978).

Although the ultimate question is always the reasonableness of the restraint, there are certain practices which are so clearly unreasonable on their face that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers* 435 U.S. at 692. As such, they are "in and of themselves unreasonable," United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927), and thus illegal per se. This means they are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused [effect] or the business excuse for their use [purpose]." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) [hereinafter cited as *Northern Pacific*]. In Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977), the court explained the importance of the per se rule to plaintiffs:

horizontal mergers, which obviously end price competition between the acquiring and acquired firms are tested under the rule of reason.[25] The rule of reason also is often used to test joint ventures or joint selling agencies, where competitors establish a new entity, effectively ending price competition among them.[26]

These arrangements are not automatically held illegal for the reason that they often achieve economic efficiencies which offset anticompetitive effects and which can be determined only after a detailed study of the industry's characteristics.[27] Only where previous experience with, and study of, a particular practice has shown that adverse competitive impact almost always outweighs any procompetitive benefits, is a practice declared illegal per se.[28] Typically, courts have applied the per se rule where a course of conduct fits within a certain label, such as horizontal price-fixing,[29] horizontal customer or geographic market allocation,[30] or certain group boycotts[31] and tying arrangements.[32]

> The *per se* label indicates that a plaintiff need not demonstrate that the effects of the [violation] are unreasonable. Indeed, not only is the plaintiff relieved from establishing that the effects are unreasonable, but in addition, the defendant is not free to demonstrate that the effects are reasonable or even affirmatively desirable. The competitive impact of the arrangement simply is not an issue for trial.

Id. at 374-75.

The Court has explained when use of the per se rule is proper. In *Northern Pacific,* 356 U.S. at 5, for example, it noted that the agreement should have a "pernicious effect on competition and . . . lack . . . any redeeming virtue. . . ."Accordingly, "the potential competitive harm plus the administrative cost of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result." United States v. Container Corp., 393 U.S. 333, 341 (1969) (Marshall, Harlan & Stewart, JJ., dissenting). *See also* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977) [hereinafter cited as *GTE].* The practice must be "manifestly anticompetitive" with a "demonstrable [adverse] economic effect." *Id.* at 59. Finally, courts must have had considerable experience with the challenged practice before the determination of almost universal anticompetitive impact can be made. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

25. *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

26. *See, e.g.,* United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960); *see also* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), "which is widely regarded as an anomoly." F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 431 (1970).

27. *See* note 24 *supra.*

28. *See generally* White Motor Co. v. United States, 372 U.S. 253 (1963), and note 24 *supra.*

29. *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

30. *See, e.g.,* United States v. Flom, 558 F.2d 1179 (5th Cir. 1977).

31. *See, e.g.,* United States v. General Motors Corp., 384 U.S. 127 (1966).

32. *See, e.g.,* International Salt Co. v. United States, 332 U.S. 392 (1947).

The Burger Court, however, has eschewed the mechanistic application of the per se rule, as was evident in Warren Court decisions,[33] and has emphasized economic analysis before deciding what standard is proper.[34] Nowhere is this more evident than in its decision this term in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[35] where it held that the rule of reason should be applied in assessing the legality of blanket licenses to use copyrighted musical compositions.

The facts of the case and the industry in which it arose are incredibly complex.[36] Broadcast Music, Inc.[37] and the American Society of Composers, Authors and Publishers[38] are entities which serve as clearinghouses for their musical composer and publisher members. Their primary functions are to obtain licenses from their members for the members' copyrighted musical compositions and, in turn, license users to perform the compositions, collecting fees which are distributed to members. They also maintain a system of surveillance of radio and television broadcasts to detect unauthorized use and thus copyright infringement.[39] ASCAP has some 22,000 members and approximately three million compositions in its repertory, while BMI has 10,000 publishing companies, 20,000 composer affiliates and some one million compositions. The Court found that "[a]lmost every domestic copyrighted composition is in the repertory of either ASCAP . . . or BMI. . . ."[40]

ASCAP relies primarily on blanket licenses in licensing compositions to users. Under a blanket license, the user pays ASCAP a flat

33. *Compare* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *with* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

34. *See generally* Miles, *supra* note 4, at 51.

35. 441 U.S.1 (1979) [hereinafter cited as *BMI*].

36. The facts are set forth at length in Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, Authors and Publishers, 400 F. Supp. 737 (S.D.N.Y. 1975).

37. Hereinafter referred to as BMI.

38. Hereinafter referred to as ASCAP. Because most of what is said about ASCAP applies equally to BMI, and because each court hearing this case focused primarily on ASCAP, ASCAP's activities are discussed in the text and should be interpreted as including those of BMI unless otherwise noted.

39. The Supreme Court noted that ASCAP was formed in 1914, "because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that . . . it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." *BMI*, 441 U.S. at 4-5.

40. *Id.* at 5.

fee, negotiated between it and ASCAP, for a nonexclusive license to use all compositions in the repertory as often as it wants for a fixed period of time. However, two antitrust consent decrees with the government, require ASCAP (1) to obtain only non-exclusive licenses from its members (thus allowing them to negotiate directly with users if they wish), (2) to issue per program licenses (which allow the user to use any composition in the repertory on any one program) if the user desires, (3) to not discriminate in price between similarly situated users, and (4) to allow a court to set a reasonable fee for the blanket license if it and the user cannot agree on one.[41]

In 1969, the Columbia Broadcasting System,[42] one of ASCAP's largest users, brought suit, alleging that the use of blanket licenses violated sections 1 and 2 of the Sherman Act.[43] While the complaint contained a litany of antitrust theories, including monopolization, attempted monopolization, group boycott, tying and price-fixing,[44] CBS's primary complaint was that, through use of blanket licenses, "ASCAP and BMI are illegal combinations whose purpose and effect is to exact royalties from CBS for music it does not wish to license."[45] Neither damages nor relief prohibiting members from combining with ASCAP were sought. Rather, CBS sought relief which would require ASCAP to offer per use licenses (*i.e.*, licenses

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41. The United States sued ASCAP in 1941, charging that the blanket license restrained trade. In a consent decree, United States v. ASCAP, [1940-43] TRADE REG. REP. (CCH) ¶ 56,104 (S.D.N.Y. 1941), ASCAP was prohibited from acquiring or asserting any exclusive performing right on behalf of any copyright owner, and from discriminating in price. The decree was modified in 1950. United States v. ASCAP, [1950-51] TRADE REG. REP. (CCH) ¶ 62,595 (S.D.N.Y. 1950). In addition to other requirements and prohibitions in the 1941 decree, ASCAP was required to issue per program licenses when requested by users and required to allow the United States District Court for the Southern District of New York to set a "reasonable fee" for blanket licenses (with ASCAP having the burden of persuasion on reasonableness) if ASCAP and the user could not agree.

42. Hereinafter referred to as CBS.

43. 15 U.S.C. §§ 1, 2 (1976).

44. CBS claimed that by the establishment of ASCAP, and by composers' authorizing ASCAP to collectively license their compositions, price competition between composers had been effectively eliminated and the prices for compositions fixed. In addition, it alleged that through the use of a blanket license, ASCAP had "tied" the licensing for desirable music to that of undesirable music, because to obtain the former, CBS had to pay for the latter. Finally, it alleged that ASCAP's members, by using ASCAP as their licensing agent, had concertedly refused to deal with CBS. CBS v. ASCAP, 400 F. Supp. 737, 745 (S.D.N.Y. 1975).

45. *Id.* Thus, the primary theory appeared to be that the blanket license constituted a "tying" arrangement.

which would require that payments be based on actual use).

ASCAP argued that blanket licenses were reasonable because they are allowed under the consent decrees. CBS responded that (1) obtaining copyrights directly from composers, given the tremendous number of necessary transactions, would be impracticable, (2) a per program license would still require it to pay for music it did not want or use, and (3) a federal judge's availability to fix a reasonable fee if the parties could not agree was immaterial to its charges.[46]

Aside from any anticompetitive effects which the use of a blanket license might have, ASCAP clearly provides both its members and users of copyrighted compositions with substantial benefits. It furnishes a surveillance and enforcement mechanism against infringement, which individual members could not provide for themselves. Moreover, its activities reduce members' transaction costs by collectively licensing their works and then collecting and distributing royalties. ASCAP's activities also reduce the transaction costs of users. They find it unnecessary to deal with each composer individually, and, as the district court noted, the license "gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered. . . ."[47]

In 1971, ASCAP moved for summary judgment, basing its motion on *K-91, Inc. v. Gershwin Publishing Corp.*,[48] a superficially similar

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46. CBS did not allege that ASCAP had violated the consent decrees.

47. 400 F. Supp. at 742.

48. 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). There, the publishing company sued a radio station operator for copyright infringement. The defendant admitted infringement but claimed that the plaintiff had misused its copyrights by fixing prices with ASCAP through the blanket license. The court found no antitrust violation because of the district court's power under the consent decree to fix a reasonable price and because users could negotiate directly with copyright owners if they wished.

The United States opposed plaintiff's petition for a writ of certiorari:

> The parties stipulated that it would be virtually impossible for broadcasters and copyright holders to arrange separate licenses and payments for each performance on radio of a copyrighted composition. . . .
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> . . . The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to record music.

case. The court, however, distinguished *K-91* on the ground that there the plaintiff set forth no alternative to the blanket license, while in the instant case, CBS alleged that a per use license was both feasible and less restrictive.[49] ASCAP's motion was denied.[50]

The case apparently was tried primarily on a tying arrangement theory rather than price-fixing. According to the court, CBS' claim was that it had to license undesirable music to obtain what it wanted. As the court put it, "The validity of the claim turns on whether CBS is in fact compelled to take a blanket license . . . to secure the performance rights it needs."[51] After a long and searching analysis, and even though the parties had stipulated that direct negotiations with composers were impracticable,[52] it concluded that no compulsion existed and found for ASCAP.[53]

> If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool.

Brief for the United States at 5, 10, K-91, Inc. v. Gershwin Publishing Corp., 389 U.S. 1045 (1968) (footnote omitted).

The government concluded that its view might have been different had plaintiff posited a less restrictive alternative to the blanket license which would have retained its benefits.

49. The court used an interesting but incorrect analysis based on the doctrine of "implied repeal." This doctrine holds that where action otherwise violative of the antitrust laws is necessary to allow a federal regulatory scheme to work, the antitrust laws are "implicitly repealed" to that extent. *See generally* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975); 1 P. Areeda & D. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 224d (1978). The court reasoned that the consent decrees between the government and ASCAP acted as a federal regulatory scheme which allowed blanket licensing. Thus, to the extent that CBS was unable to put forth a less restrictive alternative which would still allow the market to function (as was the case in *K-91)*, the blanket license was legitimate. But here, CBS had put forth such a proposal and thus implied repeal was unnecessary. Clearly, however, a consent decree negotiated between two parties cannot serve to establish federal regulation sufficient to oust the antitrust laws, as the Second Circuit later found. *See* note 58 *infra.*

50. CBS v. ASCAP, 337 F. Supp. 394 (S.D.N.Y. 1972).

51. CBS v. ASCAP, 400 F. Supp. 737, 745, (S.D.N.Y. 1975). CBS also based a claim of *per se* illegality on the so-called "patent package licensing cases," Automatic Radio Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950), and Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). In *Automatic Radio,* the Court upheld an arrangement whereby Hazeltine and Automatic Radio voluntarily agreed that the latter would accept a blanket patent license from the former. In *Zenith,* the Court refined the doctrine by holding that a *per se* violation occurred where the licensor *insisted* on a blanket license. In the instant case, the court held that such insistence by ASCAP was precluded by the consent decrees. Both the Second Circuit, see note 58 *infra,* and the Supreme Court minority, *see* BMI, 441 U.S. at 29, agreed with this result.

52. 400 F. Supp. at 751.

53. With respect to the stipulation, the court concluded that it delineated neither the

The Second Circuit agreed that compulsion was lacking but reversed dismissal because the district court failed to properly examine the price-fixing aspect of the case.[54] It recognized that the pricing structure was tampered with any time a number of sellers sold their products through a single agent at a single price, even though they also could sell individually through direct negotiations. Accordingly, use of the blanket license fell within the broad definition of price-fixing found in *United States v. Socony-Vacuum Oil Co.*[55] But, the court continued, while price-fixing normally is per se unreasonable and thus illegal, both CBS and the Department of Justice supported a "Per Se Rule with a Market-Functioning Exception"; that is, the per se rule applies except where, without a price-fixing agreement, there would be no market at all.[56] Admitting that any such exception is very limited and rare, the court nevertheless thought it necessary because the Sherman Act should not be construed "to prohibit the very trade it was intended to protect."[57] But

portion of the repertory for which direct negotiation was impracticable nor the extent of impracticability. In finding that CBS was not compelled to accept a blanket license, it emphasized that CBS had never sought an alternative until immediately prior to filing suit in 1969, that CBS could establish a process to promote direct licensing within a reasonable period of time, that CBS had not shown that individual composers would be disinclined to deal with it directly, or that, with respect to compositions, composers could exercise monopoly power. 400 F. Supp. at 779-83. In sum, the court said that there was "an astonishing lack of evidence that CBS considered . . . even the feasibility of direct licensing . . . before commencing suit." *Id.* at 780. The price-fixing claim was rejected on the seemingly immaterial grounds that "CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. . . . [T]he record establishes that CBS has always negotiated the price for its licenses with ASCAP. . . ." *Id.* at 781.

54. CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977). The court noted that while the district court's finding "that there is indeed a viable alternative to the blanket license disposes of the charge that the blanket license involves an illegal tie-in . . . it does not resolve the charge of restraint of trade by the fixing of prices." *Id.* at 135.

55. 310 U.S. 150 (1940). There, the Court held that a price-fixing agreement flows from any "combination formed for the purpose and with the effect of . . . stablizing the price," *id.* at 223, and that "[a]ny combination which tampers with price structures is engaged in an unlawful activity." *Id.* at 221.

56. 562 F.2d at 136. The court found support for this "market necessity" defense in the Department of Justice's brief in *K-91*. *See* note 48 *supra*. Note the box which CBS, who according to the court suggested the exception, is attempting to place the court in. If the court upholds the district court's factual determination that alternatives to blanket licensing are available, the exception does not apply and ASCAP has fixed prices. If, however, the court accepts CBS's original argument that feasible alternatives are not available, then the price-fixing may be legal but coercion is present and thus, there is an illegal tie-in.

57. 562 F.2d at 137-38.

it rejected the defense on the facts before it because, as the district court had found, there were feasible alternatives to the blanket license, and thus the market could function without it. ASCAP also argued that *its* product, *i.e.*, the right to perform *all* compositions, was different from that of its individual members, and thus it and its members had not fixed prices.[58] The court answered that the agreement still involved horizontal concerted action affecting price competition.

While the court found that the blanket license was illegal price-fixing, significantly, it noted that "[t]he blanket license is not simply a 'naked restraint' ineluctably doomed to extinction."[59] Rather than condemning blanket licenses in toto, it rejected the CBS claim that even the offering of a blanket license was improper and suggested that the district court consider requiring ASCAP to issue some type of per use license to networks that wished to obtain them.[60]

The Supreme Court reversed,[61] holding that the Second Circuit

58. This argument, which later was accepted to a great extent by the Supreme Court, *see* text accompanying notes 80-82 *infra,* was as follows:

> ASCAP argues . . . that the blanket license . . . in *all* the copyrights . . . is so different from the performing right in each separate copyright that the claim of trade restraint by price-fixing is precluded.
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> . . . .
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> ASCAP analogizes a blanket license to a symphony orchestra, in which the ensemble is different from the individual musicians and which may therefore lawfully command a price . . . higher than the price for each musician's performance. The fallacy is that when the orchestra plays as an ensemble it represents the only product of its kind. Here each composer, by contrast, records his own solo for separate broadcast. The musicians in an orchestra are not competitors; the contributors of copyrights for the blanket license in many situations are, and it is their price competition among themselves that is affected by the blanket license.

562 F.2d at 139-40.

The court also rejected three other arguments. It affirmed the district court's decision (albeit on different grounds) that *Automatic Radio,* 339 U.S. 827 and *Zenith,* 395 U.S. 100, did not support CBS's position. It noted that in both cases the package patent licensor was one entity which owned all the patents involved rather than a cooperative venture consisting of numerous inventors. Also rejected were two arguments from *K-91, supra* note 48, that first, price-fixing was precluded because the "fixer" was a district court in case of dispute, *see* note 41 *supra,* and second, that the consent decrees provided an implied repeal from antitrust coverage. *See supra* note 49.

59. 562 F.2d at 140.

60. *Id.* The court felt that per use licensing might induce composers to engage in price competition among themselves.

61. BMI, 441 U.S. 1.

had improperly applied the per se rule.[62] The majority began by explaining that a per se analysis is proper only when the practice is "plainly anticompetitive"[63] and "lacks any redeeming virtue."[64] While admitting that price-fixing by competitors on their individual goods is generally per se unreasonable, and that the blanket license constitutes price-fixing in the "literal sense,"[65] the Court cautioned against calling a practice price-fixing and then labeling it per se unreasonable too quickly. For example, it noted that partners literally "fix prices" on what they sell, and yet the per se rule is not applied to their activities. Rather than mechanically labeling an activity as price-fixing and automatically condemning it under the per se rule, the task is to examine the activity and ascertain whether it has those characteristics which justify per se treatment. The Court stated that such an examination is especially important when the particular practice is one of first impression, as was true of blanket licenses.[66]

The Court then discussed four factors which, although not dispositive, militated against quick application of the per se rule. First, while the previously entered consent decrees did not grant any immunity, they did evidence that the blanket license had been closely examined by the government and found to achieve certain benefits. This presented "a unique indicator that the challenged practice may have redeeming competitive virtues. . . ."[67]

Second, the Court was impressed with the government's amicus curiae argument, in both *K-91*[68] and in the case before it, that some form of central licensing authority is necessary, and thus that the

62. Justice White wrote the opinion for himself and seven others. Justice Stevens dissented in part.

There is doubt that the Second Circuit applied the *per se* rule at all. It never said it did and, indeed, considered defenses. Moreover, it had a full record from below which contained most, if not all, information necessary to make a rule of reason determination. Finally, as the Supreme Court itself noted, *see* text accompanying notes 71-72 *infra*, the Second Circuit's guidelines for relief were consistent with a rule of reason result.

63. BMI, 441 U.S. 1 (quoting Professional Engineers, 435 U.S. at 692).

64. BMI, 441 U.S. at 8 (quoting Northern Pacific, 356 U.S. at 5).

65. *Id.*

66. *See* notes 49 & 58 *supra.*

67. BMI, 441 U.S. at 13.

68. 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

per se rule should not be applied.[69] Third, the Court pointed out that when Congress enacted a new copyright scheme in 1976 it provided for use of common agents and compulsory blanket licensing in several instances.[70]

Finally, the Court felt that the Second Circuit's own guidelines to the district court on remand[71] showed that it felt that application of the per se rule was improper. The Court explained that if ASCAP's issuance of a blanket license constituted per se illegal price-fixing, *any* use of such a license, even in conjunction with a per use license, would also: "[T]he *per se* rule does not accommodate itself to such flexibility. . . ."[72]

The Court next turned to four affirmative reasons why a per se analysis was improper. Its first rationale is a striking cross between the market necessity exception, discussed by the Second Circuit,[73] and the implied repeal doctrine.[74] It reasoned that were it not for the copyright laws, the market (*i.e.*, performing rights to copyrighted music) would not even exist. Accordingly, where conduct is "reasonably necessary to effectuate the rights that are granted [by the copyright laws],"[75] logic dictates that such is not per se illegal, even though the copyright laws provide no antitrust immunity.

Next, the more traditional antitrust variables of purpose and effect were examined.[76] The Court found that, rather than the blanket

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69. A comparison of the government's brief, Brief for United States as *Amicus Curiae*, BMI, 441 U.S. 1 [hereinafter cited as *Amicus* Brief] and the Court's opinion shows the stock which the Court often gives such briefs. The Court's reasoning was almost identical to that of the government. Like the Court, *see* text accompanying note 82 *infra*, the government did not opine whether the blanket license could withstand a rule of reason analysis. *Amicus* Brief at 11.

70. For example, compulsory blanket licenses for cable television secondary transmissions are provided for, and an express antitrust exemption is granted for division of licensing fees by a common agent. 17 U.S.C. §§ 111(d)(5)(A) & 116(c)(4) (1976).

71. *See* text accompanying note 60 *supra*.

72. BMI, 441 U.S. at 17.

73. *See* text accompanying notes 56 & 57 *supra*.

74. *See* note 49 *supra*.

75. BMI, 441 U.S. at 19.

76. *See* note 24 *supra*. The Court stated its task as follows:

> [O]ur inquiry must focus on whether the effect and, here because it tends to show effect . . . the purpose of the practice is to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease

license being "a 'naked restraint[] . . . with no purpose except stifling of competition,' "[77] it achieved efficiencies through integration of functions,[78] such as the collective selling of licenses and distribution of royalties as well as the monitoring of copyright use. Any restraint of trade was ancillary to the primary transaction *(i.e.,* licensing in general), and thus a rule of reason analysis was proper.[79]

The Court also accepted ASCAP's argument (and that of the government)[80] that its product includes its services in addition to individual compositions and thus is different from the products of its individual members: "Here, the whole is truly greater than the sum of its parts. . . ."[81] ASCAP, indeed, sold a separate product of its own. The Court concluded that while the district court might ultimately decide that the blanket license, as presently used, is an unreasonable restraint of trade, this should be done only after a full-blown rule of reason analysis.[82]

The importance of the decision is not in its specific holding, *i.e.,* that the rule of reason should be used to test blanket licenses; if this were the case, the Court simply could have affirmed the Second Circuit's ruling because it, in substance if not form, used a rule of reason analysis.[83] Indeed, even if such were not the case, the Court

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output . . . or instead one designed to "increase economic efficiency and render markets more rather than less competitive."

BMI, 441 U.S. at 19-20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

77. BMI, 441 U.S. at 20 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

78. *See* note 24 *supra.*

79. *See generally* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). In *BMI,* 441 U.S. 1, the Court noted that "a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established." *Id.* at 21.

80. *Amicus* Brief, note 69 *supra,* at 17-20.

81. BMI, 441 U.S. at 21-22.

82. *Id.* at 24.

Justice Stevens, while concurring that a *per se* analysis was improper, dissented and argued that the record was sufficient for the Court to invalidate the blanket license under the rule of reason. He noted that the market for music is dominated by blanket licenses; that ASCAP and BMI are clearly the dominant firms; that blanket licenses are discriminatory because the price paid is not based on use; that there is no price competition among copyrighted compositions; and that the district court had found that per use licenses were feasible and thus that the market could be competitive. *Id.* at 27-33.

83. *See* note 62 *supra.*

could have disposed of the case in fewer words than it used. Rather, the importance of *BMI* is much broader: Just as it did in *Professional Engineers*[84] last term, where it used that case to explain a fundamental principle of antitrust analysis,[85] the Court used *BMI* as a tool to explain another fundamental lesson—a lesson that can be explained in just three sentences from the Court's opinion: (1) "But easy labels do not always supply ready answers";[86] (2) "[l]iteralness is overly simplistic and often overbroad";[87] and (3) "it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.' "[88]

The Court is warning not to take a set of facts, label them, and place them in a static antitrust "pigeon-hole," *e.g.*, price-fixing or group boycott, and then determine whether the per se rule or rule of reason traditionally has been applied.[89] Rather, the beneficial and detrimental competitive effects of the conduct should be assessed first. Only then, and only if it can be determined that procompetitive effects are negligible and likely to be negligible in similar situations, should the practice be labeled per se unreasonable.

The philosophy shown by the Court in *BMI* is perfectly consistent with that shown two years ago in *GTE Sylvania*[90] where it made clear that the legality of a practice can be determined only after a detailed economic analysis of both procompetitive and anticompetitive effects. There, in discussing vertical territorial restraints, the Court found the possibility of significant procompetitive benefits and, therefore, held that a rule of reason analysis was necessary. Substance, not form, governed.

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84. *See* note 24 *supra*.

85. In *Professional Engineers*, 435 U.S. 679, the Court went to great length in explaining that competitive impact is the only consideration in a rule of reason analysis, when it could have decided the case quickly by simply stating that per se analysis was proper and voiding the practice on that ground.

86. BMI, 441 U.S. at 8.

87. *Id.* at 9.

88. *Id.*

89. For example, the definition given in *Socony-Vacuum*, 310 U.S. 150, is obviously so broad that many procompetitive or competitively neutral arrangements will fall within the literal definition.

90. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). *See supra* note 24.

While, as even government antitrust enforcers agreed,[91] application of the per se rule in *BMI* would have been improper, the Court's present and continued retreat from per se analysis[92] is of some concern for two reasons. First, as the Court itself has noted, the per se rule provides businessmen and their attorneys with a much greater degree of certainty than does the rule of reason.[93] Second, attorneys will have incentive to develop purported justifications with no merit just to confuse matters. While courts should not be too quick to pull the per se trigger, they also must remain alert to specious and dilatory justifications which do nothing but lengthen what already is often complex litigation. It is possible that what used to be naked, garden variety, horizontal price-fixing agreements will now, in the briefs of defense attorneys, become "joint ventures" with substantial "economies of partial integration."

III. Consumer Access to Treble Damages: *Reiter*

Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his *business or property* by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."[94] Given the inability of the government to detect, investigate and prosecute all violations of the antitrust laws, the Court has long recognized the crucial role of treble damage actions by "private attorneys general"[95] in recovering the ill-gotten gains of violators and in deterring future violations.[96] While section 4 appears to be straightforward and broad in its coverage, the Court has been called upon to examine its parameters in three cases during the two terms preceding that discussed here.[97]

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91. *See supra* note 48.

92. *See generally* Miles & Russell, *supra* note 5, at 26.

93. *See Northern Pacific,* 356 U.S. at 5.

94. 15 U.S.C. § 15 (1976).

95. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 135, 147 (1968) (Fortas, J., concurring).

96. *See, e.g.,* Pfizer, Inc., v. Government of India, 434 U.S. 308 (1978); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 135 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964); Brief for the United States as *Amicus Curiae,* Reiter v. Sonotone Corp., 440 U.S. 955 (1979).

97. *See* text accompanying notes 102-09 *infra.*

Cases interpreting section 4 appear to focus on two broad questions. First, *who* can sue for treble damages? And second, what *types of injuries* will be recompensed? More specifically, the cases have centered on defining "any person," "injured," "business or property," and "by reason of" an antitrust violation, as those words or phrases are used in section 4.

Last term, the Court was asked to determine whether a foreign country is a "person" within the statute and thus able to recover under section 4.[98] Because the statute has an "expansive remedial purpose,"[99] because foreign corporations may sue,[100] and because prior decisions held that sovereignties are persons and may sue,[101] the Court held that foreign countries also were "persons."

Two terms ago the Court decided two cases involving the concept of "injury" as used in section 4. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[102] it held that an injury which would have occurred whether or not the antitrust laws had been violated was not an "antitrust injury" properly recompensable under section 4.[103] More significant, perhaps, was its decision in *Illinois Brick Co. v. Illinois,*[104] that indirect purchasers from price-fixers are not "injured" for section 4 purposes and thus cannot recoup treble damages.

98. Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

99. *Id.* at 313.

100. *See* 15 U.S.C. §§ 7, 12 (1976).

101. *See* Georgia v. Evans, 316 U.S. 159 (1942) (state is a person within meaning of § 7 of the Sherman Act).

102. 429 U.S. 477 (1977).

103. In *Brunswick,* the plaintiff was a competitor of several bowling centers which Brunswick acquired in violation of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976), which prohibits certain anticompetitive mergers. Plaintiff claimed that, but for the mergers, the acquired centers would have failed and gone out of business, and plaintiff would have obtained their former customers. The Court noted that plaintiff's alleged injury would have occurred even if the centers had been acquired in an acquisition not violative of § 7; therefore, any damages awarded would be a windfall. It explained that "[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489. *See generally* Miles, *supra* note 4, at 4-9.

104. 431 U.S. 720 (1977). An indirect purchaser is one who purchases not from the price-fixer itself but, from some intermediary seller. The decision holds, somewhat arbitrarily many believe, that the direct purchaser suffers the full extent of any injury and that none of this damage is "passed-on" down the chain of distribution. *See generally* Miles, *supra* note 4, at 9-18.

This term, the Court dealt with another area of inquiry presented by section 4. In *Reiter v. Sonotone Corp.*,[105] a case described as "[t]he most significant antitrust ruling of the term,"[106] it held that consumers are injured in their "property" when they pay supracompetitive prices because of an antitrust violation, and thus they may bring suit for treble damages.[107]

Surely, this result comes as no shock to anyone. Indeed, the amazing thing about *Reiter* is not its result or the Court's analysis; the result was a foregone conclusion. What is amazing is that a court could reach the opposite result, causing the Supreme Court to have to waste its time dealing with this case rather than one of more importance.

105. 99 S.Ct. 2326 (1979).

106. Wall Street Journal, June 29, 1979, at 6, col. 1.

107. There appears to be a tendency to lump all questions arising under § 4 under the heading of standing. *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 333 (1978). Indeed, the Court's present interpretation of standing in general is broad, *i.e.*, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," and "whether the interest sought to be protected . . . is arguably within the zone of interests [sought] to be protected or regulated by the statute. . . ." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970).

Standing for antitrust purposes, however, appears to be a narrower concept centering on the idea of proximate cause or remoteness. *See generally* L. SULLIVAN, ANTITRUST LAW § 247, at 772 (1977). The prevalent antitrust standing test is the "target area" test, which asks whether plaintiff is "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry," Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952), or whether the plaintiff, if injured, was "aimed at" by the defendant. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).

Thus *Brunswick*, *see* text accompanying notes 102-03 *supra*, was not a standing case because the problem was not that plaintiff's injury was remote but that it was not an "antitrust injury." Neither was *Pfizer*, *see* text accompanying notes 98-101, a standing case because the issue there was whether foreign countries are "persons" as used in § 4. In *Illinois Brick*, *see* text accompanying note 104 *supra*, the Court made clear that the issue was not standing: "[T]he question of which persons have been injured . . . for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue. . . ." 431 U.S. at 728 n. 7.

Neither is *Reiter*, which involved the "business or property" concept, a standing case in the narrow sense. It concerned the type of interest involved rather than the remoteness of the injury or whether there was sufficient causal connectión between the violation and the injury.

Thus, it is true that in a broad sense § 4 grants private parties "standing" to sue for the treble damages. The important point is that interpretation of the statute can involve several separate and distinct issues, notwithstanding the label each is given.

The roots of *Reiter* are found in an unfortunate choice of words used by the Court in *Hawaii v. Standard Oil Co.*,[108] and two courts subsequently taking those words out of context. The State of Hawaii filed a price-fixing suit against several oil companies and requested damages both for itself as a purchaser, and as *parens patriae*, to obtain damages for injury to the state's "general economy."[109] Emphasizing that the question before it was not whether Hawaii was entitled to sue as *parens patriae* but whether injury to its general economy was an injury to Hawaii's "business or property," the Court held that business or property, as used in section 4, refers to "*commercial* interests or enterprises."[110]

This language, by itself, lends credence to the view that consumers are not entitled to bring an action unless their injury is to some business or commercial enterprise in which they are engaged. Other language in the case, however, belies any such interpretation. For example, the Court implied that the state would be injured in its business or property "[w]here the injury to the State occurs in its capacity as a consumer in the marketplace"[111] and noted that consumers could sue for much of what the state claimed were damages to its general economy.[112] Finally, in discussing section 4A,[113] which allows the United States to sue for damages, the Court noted that

108. 405 U.S. 251 (1972).

109. *Id.* at 264.

110. *Id.* (emphasis added).

111. *Id.* at 263 n.14. Indeed, if the rule were that those not engaged in a commercial enterprise are not injured in their business or property, the Court should have dismissed that portion of Hawaii's suit which requested damages arising from the sale of petroleum products to the state itself.

112. The Court noted that

> [a] large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4.
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> . . . .
>
> [P]rivate citizens are not as powerless, however, as the State suggests. Congress has given private citizens rights of action for . . . damages . . . . Rule 23 . . . provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.

Id. at 264-66.

While admittedly this language is not dispositive of the issue, it appears to envision actions by consumers, few of whom would be operating commercial enterprises.

113. 15 U.S.C. § 15a (1976).

the provision allows suits "not for general injury to the national economy . . . but only for those injuries suffered in its capacity as a consumer of goods and services."[114] Therefore, to the extent that any inference can be drawn from *Hawaii* about whether consumers are injured in their business or property by antitrust violations, the inference must be that they are.

Subsequent to *Hawaii,* two district courts held that a consumer, injured in a non-commercial interest, was injured in his business or property and thus could sue.[115] In one, *Theophil v. Sheller-Globe Corp.,*[116] the court explained that "[t]he antitrust laws were designed for the ultimate benefit not of business but of the consumer, and it would seem anomalous to read the Clayton Act to exclude an action by the very persons sought to be protected."[117] It relied primarily on *Chattanooga Foundry and Pipe Works v. City of Atlanta,*[118] where the Court had held that the City of Atlanta was injured in its "property" when the price of pipe it purchased for its waterworks was artificially high because of an antitrust violation. The Court there noted that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property."[119] The court in *Theophil* also pointed to the result in *Pfizer,*[120] which highlighted the broad remedial purpose of section 4,

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114. 405 U.S. at 265.

115. Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D. N.Y. 1978) (discussed in text accompanying notes 116-21 *infra);* Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977) (discussed in text accompanying notes 127-33 *infra).*

The Third Circuit reached the same result in dicta. In Braveman v. Bassett Furniture, Inc., 552 F.2d 90 (3d Cir.), *cert. denied,* 434 U.S. 823 (1977), the defendant argued that plaintiff must be a *competitor* before it could be injured in its business or property. The court rejected this argument, saying that "a general 'competitors only' rule simply cannot be the law, since such a rule would bar § 4 recovery by victimized customers of a price fixing conspiracy." *Id.* at 98-99. It concluded that "[t]he right of consumers to challenge price fixing conspiracies is well established." *Id.* at 99 n.23.

116. 446 F. Supp. 131 (E.D.N.Y. 1978).

117. *Id.* at 135.

118. 203 U.S. 390 (1906).

119. *Id.* at 396. The Court appeared to imply that "business" and "property" are separate concepts: "[The city] was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe." *Id.* That the pipe was used in the business of furnishing water, however, detracts from the decision's strength as authority for the proposition that the non-commercial interests of consumers are property within the meaning of section 4.

120. *See* text accompanying notes 98-101 *supra.*

and to a footnote in *Brunswick*, which discussed some of the legislative history of section 4, and which implied its aim was to benefit consumers.[121]

Three cases decided after *Hawaii*, all by the same judge, held that consumers were not injured in their business or property unless the antitrust violation adversely affected a commercial interest.[122] *Weinberg v. Federated Department Stores*[123] is representative. The court relied on legislative history which it interpreted as showing that Congress' primary concern was that businesses gain compensation for antitrust harm done them.[124] Reliance also was placed on the "commercial interests or enterprises" language in *Hawaii*. It rejected an argument that business *or* property should be read disjunctively "to encompass injuries to pure business interests and also to pure property interests,"[125] and distinguished *Chattanooga* by pointing out that the city's waterworks was, indeed, a business. Finally, it noted that Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[126] which had recently been passed, al-

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121. *See* text accompanying notes 102-03 *supra*. In *Brunswick*, the Court noted that the Senate had indicated that the treble damage remedy "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers."429 U.S. at 486 n.10 (quoting 21 CONG. REC. 1767-68 (1890) (remarks of Sen. George)). Moreover,

> [w]hen Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. . . . The initial House debates concerning provisions related to private damage actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered."

Id. (citations omitted).

122. Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977); Smith v. Toyota Motor Sales, Inc., [1977-1] TRADE REG. REP. (CCH) ¶ 61,251 (N.D. Cal. 1977); Weinberg v. Federated Dept. Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977).

123. 426 F. Supp. 880 (N.D. Cal. 1977).

124. For example, the court quoted the remarks of Rep. Taggart:

> A great many suits have been brought against trusts by the United States and many trusts have been dissolved. Some few have been punished, but the people whose *business* they destroyed have been practically without remedy. When this bill becomes a law, the person who willfully destroys another person's *business* will do so at the peril. . . . The bill is framed for the purpose of liberating *business* and not for the purpose of injuring or destroying any business. Its great purpose is to protect small *business* from big businesses.

51 CONG. REC. 9198 (1914) (emphasis added).

125. 426 F. Supp. at 884.

126. Pub. L. No. 94-435, 90 Stat. 1394 (codified as 15 U.S.C. § 15c (1976)). The court's mention of this as an alternative method of consumer recovery is interesting. Those positing

lowed state attorneys general, as *parens patriae,* to bring suit on behalf of injured consumers, and thus consumers were not without a remedy.

The district court decision in *Reiter*[127] came some two months after *Weinberg* and rejected all its reasoning. It arose when Kathleen Reiter, a hearing aid purchaser, brought an antitrust class action against five manufacturers of hearing aids for price-fixing.[128] The defendants argued that any violation did not injure Reiter in her business or property.

In rejecting this argument, the court first explained that the Supreme Court, in using the phrase "commercial interests or enterprises" in *Hawaii,* meant it to encompass "the interest of consumers who must pay more in the marketplace because of defendants' actions."[129] Next, relying on *Chattanooga,* it said that "property" includes the plaintiff's money, and then explained that, while the legislative history was not particularly enlightening, the Court had read it in *Brunswick*[130] as suggesting that consumers are entitled to sue.[131] Finally, it pointed out that the legislative history of the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act[132] indicated that Congress assumed that consumers, in theory but not in practice, could bring their own treble damage actions.[133]

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that consumer injury is injury to business or property argued that the *parens* remedy is vitiated if the opposite is true. Succinctly, their argument was that all the *parens* remedy did was let the state attorneys general step into the consumers' shoes. Thus, if an injury was not to business or property, neither the consumer nor the attorney general, acting on the consumer's behalf, could recover. The validity of this argument is questionable. *See* note 140 *infra.*

127. Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977).

128. According to the court, Ms. Reiter

> [was] not in any business related to that of defendants or their distributors and alleges no property interest other than that of an individual who, because of defendants' actions, was forced to part with more money to purchase a hearing aid than she would have had to pay had they not engaged in allegedly illegal business practices. She is the classic consumer plaintiff.

Id. at 934.

129. *Id.* at 936.

130. *See* note 121 *supra.*

131. 435 F. Supp. at 937.

132. *See* note 126 *supra.*

133. 435 F. Supp. at 938. The court relied primarily on a House report of a bill which later became the law and which stated, "Under § 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing . . . has a cause of action. In most

The Eighth Circuit reversed.[134] First, while conceding that "[c]ourts and commentators have been unable to agree on the precise congressional intent,"[135] and that "[t]he Supreme Court has noted that the legislative history is not very instructive,"[136] the court was able to conclude that "the legislative history indicates . . . that the antitrust laws would benefit the small business owner but would be of little value to the ordinary consumer."[137]

Next, the court examined judicial precedent. It pointed to the "commercial interests or enterprises" language of *Hawaii* without mentioning other language in the case which supported consumer entitlement to sue,[138] and distinguished *Chattanooga* on the ground that "the city's claim arguably sought recovery for a business injury."[139]

The court then examined the legislative history of the Hart-Scott-Rodino *parens patriae* provisions and, citing a Senate report, concluded incorrectly that Congress thought consumers were not permitted to maintain antitrust actions.[140] It then noted correctly that the *parens patriae* statute created no new substantive liability, and argued that, because Congress did not grant consumers the right to sue and, indeed, commented on the inappropriateness of consumer

instances, however, an individual lawsuit by an injured consumer is, as a practical matter, out of the question." H.R. REP. No. 499, 94 Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2575.

134. Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978).

135. *Id.* at 1079.

136. *Id.* at 1080.

137. *Id.* at 1081 (footnote omitted).

138. *See* text accompanying notes 111-14 *supra.*

139. 579 F.2d at 1082.

140. The court quoted S. REP. No. 803, 94th Cong., 2d Sess. 42 (1976), which stated, "Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], *standing, privity, target area, remoteness, and the like.*" (emphasis in the original.) *Id.* at 1085.

This very language argues against the court's conclusion. If the business or property requirement precluded consumer suits, there would be no problem of manageability. Moreover, *"standing, privity, target area, remoteness, and the like"* present analytically different questions than does the business or property issue. None presents an absolute bar to consumer suits as the court's holding on business or property does. Obviously, the quoted language refers to practical problems encountered by a consumer in filing a large antitrust suit because his individual stake is so low.

class actions,[141] Congress' intent must have been that consumers have no such right.

Finally, the court noted that large consumer class actions may be anticompetitive themselves because they are often meritless, may bankrupt small businesses, and lead to higher prices. It believed that consumer claims are better handled by the state attorneys general and thus concluded that section 4 requires a "commercial or competitive injury."[142]

The Supreme Court[143] took a common sense approach in unanimously reversing the Eighth Circuit. It emphasized the broad language of section 4, especially the expansive, every day meaning of property; held that a consumer's money is obviously property, relying on *Chattanooga;* said that nothing in *Hawaii* or section 4's legislative history militated against that reading; and noted that any anticompetitive or harassing effects of consumer actions were arguments properly directed to Congress and individual courts in particular cases.

The Court began by explaining, as it has in so many recent cases,[144] that its starting point is the language that Congress used in the statute. After noting that little restrictive language appears on the face of section 4, it focused on the word "property" and noted that the dictionary definition "comprehends anything of material value owned or possessed," including money.[145] Rejected was the defendants' argument that "business or property" meant "business activity or property related to one's business,"[146] because such an

141. The court cited H.R. REP. No. 499, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2576-77, which is a part of the Report's section entitled "The Consumer Has No Practical Means of Redress." The thrust of the report is not that consumer actions are inappropriate as such, but that because of his or her small damage and the technical requirements and expense of class actions, consumers sometimes lack incentive to sue.

142. 579 F.2d at 1086.

143. Reiter v. Sonotone Corp., 99 S.Ct. 2326 (1979).

144. *See, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

145. 99 S.Ct. at 2330.

146. *Id.* at 2330-31 (quoting Brief for Respondents at 11 n. 7, Reiter v. Sonotone Corp., 99 S.Ct. 2326 (1979)).

interpretation would read the disjunctive "or" out of the statute and turn the key phrase into "business property."

The Court read *Chattanooga* to support its conclusion that "property" has a significance independent from that of business. Realizing that the decision there could have turned on the fact that the city's waterworks operation was a business, the Court explained that the result definitely flowed from an injury to "property," *i.e.*, the city's having "to pay a higher price for the pipe than it otherwise would have paid."[147] From this, it concluded that a monetary injury per se is a sufficient injury to property under section 4.

The Justices implicitly chided the Eighth Circuit for reading the "commercial interests or enterprises" language of *Hawaii* too literally, noting that a decisions's language "is not always to be parsed as though we were dealing with language of a statute."[148] It pointed to its approval in *Hawaii* of *Chattanooga* and its clear recognition, evidenced by language in *Hawaii* mentioning consumers, that section 4 allows consumer recovery.[149]

The Court rejected the argument that the legislative history of section 4 supported a different result. Recognizing that little congressional intent could be gleaned from the history, it argued that what relevant legislative history there was, which was set forth in *Brunswick*,[150] supported the proposition that Congress intended section 4 to be a consumer remedy.[151]

Finally, the defendants' "practical considerations" arguments were rejected. To the propositions that consumer class actions would unduly burden crowded courts and that such suits could ruin small businesses and increase consumer prices, the Court put the ball in Congress' court. With respect to the crowded courts argument, it noted that Congress had decided to give injured parties a private remedy and thus it was up to Congress to provide sufficient

147. *Id.* at 2331.

148. *Id.* at 2332.

149. *Id.*

150. *See* note 121 *supra.*

151. The Court also recognized that in enacting the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress assumed the consumers were injured in their "business or property" by antitrust violations. Its views, therefore, were consistent with Congress'. 99 S.Ct. at 2333 n. 7.

judicial resources to handle the cases. With respect to the ruinous effect on small business argument, the Court said that, while this is an important consideration,[152] it is a policy matter more the business of Congress than the Court. Moreover, it said that trial courts should be able to prevent unmeritorious actions.[153]

Justice Rehnquist agreed with the Court's result and analysis but wrote a separate opinion to emphasize his concern that many large consumer class actions are not socially beneficial.[154] Indeed, this concern, may have been a factor in the Court's taking the case. Meritless suits, which themselves are anticompetitive, are a problem in antitrust enforcement,[155] and the Court appears to be signalling district courts to watch carefully and dispose of them quickly, and warning plaintiffs' attorneys that such suits will be dealt with forcefully.

The *Reiter* case, unlike many other of the Court's antitrust decisions during the last two terms, does not raise more questions than it answers.[156] The result, approval of consumer suits, was made crystal clear. Moreover, the holding was predicted correctly by almost all of the antitrust community. Prior decisions, the mood of the Court, the current emphasis on antitrust enforcement, the fact that the consumer may be the *only* injured party where retailers fix prices, the economic conditions plaguing the nation, the inherent

152. 99 S.Ct. at 2334.

153. For example, the Court stated:

> District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Rule 23 of the Federal Rules of Civil Procedure with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions.

Id.

154. *Id.* (Rehnquist, J., concurring). He noted,

> I think that the Court's observation . . . that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23" is a miracle of understatement; and in the absence of any jurisdictional limit, there is considerable doubt in my mind whether this type of action is indeed ultimately of primary benefit to consumers themselves, who may recover virtually no monetary damages, as opposed to the attorneys for the class, who stand to obtain handsome rewards for their services. Be that as it may, the problem, if there is one, is for Congress and not for the courts.

155. *See, e.g.,* Sims, *"ACDEA: Unworkable, Potentially Damaging,"* Legal Times of Wash., July 2, 1979, at 10, col. 1.

156. *See generally* Miles & Russell, *supra* note 5, at 68.

weaknesses both in law and common sense of defendants' arguments, and the positions of the two most widely read antitrust treatises,[157] all combined to leave little doubt how the case would be decided.

IV. ANOTHER NARROWING OF THE INSURANCE EXEMPTION: *Royal Drug*

It is, perhaps, an understatement to say that exemptions from antitrust coverage have not fared well recently in the Burger Court.[158] While the state action exemption has occupied the Court's time more than any other one issue in recent years[159] and presents the best example of the Court's hostile attitude toward exemptions, the partial exemption afforded the business of insurance by the McCarren-Ferguson Act[160] took a severe lump both this term and

157. 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 337b (1978); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 247, at 771 n. 3 (1977).

158. *See, e.g.,* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978); and cases cited at note 159 *infra. Cf.* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) (interpreting the solicitation of government action *("Noerr-Pennington")* exemption).

159. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

160. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1976) [hereinafter referred to as the McCarran Act] in pertinent part is as follows:

> Sec. 1. Congress hereby declares that *the continued regulation and taxation by the several States of the business of insurance is in the public interest,* and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2(a) The *business of insurance,* and every person engaged therein, shall be subject to the laws of the several States which relate to the *regulation* or *taxation* of such business.
>
> (b) No Act of Congress shall be construed *to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance,* or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, *shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.*
>
> . . . .
>
> Sec. 3(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

(emphasis added).

last.[161]

The McCarran Act, which is concerned not as much with providing an antitrust exemption as with assuring that state regulation and taxation are not voided under the commerce clause,[162] was passed in 1945, in response to the Court's decision in *United States v. South-Eastern Underwriters Association.*[163] There, the government indicted the Association, which was composed of some two hundred fire insurance companies, and charged it with fixing premium rates and agents' commissions, and with boycotting, coercing and intimidating non-member companies into joining it.[164] The defendants, relying on the Court's 1868 decision in *Paul v. Virginia*[165] where the Court said that "[i]ssuing a policy of insurance is not a transaction of commerce,"[166] argued that because insurance was not commerce, the Sherman Act was inapplicable to their activities. Rejecting this, the Court said, "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the commerce clause. We cannot make an exception of the business of insurance."[167]

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161. *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978).

162. U.S. CONST. art. I, § 8, cl. 3. *See generally* Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy,* 1978 DUKE L.J. 587, 598-602 [hereinafter cited as Weller].

163. 322 U.S. 533 (1944).

164. More specifically, the Court summarized the government's charges as follows:

> The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. Companies not members . . . were cut off from the opportunity to reinsure their risks. . .; independent sales agencies who defiantly represented non-S.E.U.A. companies were punished by a withdrawal of the right to represent the members of S.E.U.A.; and persons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage.

Id. at 535-36.

165. 75 U.S. (8 Wall.) 168 (1868).

166. *Id.* at 183.

167. 322 U.S. at 553. To understand *South-Eastern Underwriters* and the McCarran Act it spawned, a more detailed examination of the case is helpful. In *Paul,* as well as other cases involving whether the business of insurance was commerce, *see, e.g.,* Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918), the question had not been whether the antitrust laws applied to insurance or even whether the federal government could constitutionally regulate insurance. Rather, the question had been whether state regulation of insurance was

Congressional reaction began before the decision was handed down.[168] A first bill, which would have provided a total antitrust

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constitutional under the commerce clause. As the Court stated:

> In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce," its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint.

322 U.S. at 544.

The Court then found that insurance was "commerce" in the sense that it was a business "in which persons bought and sold, bargained and contracted," *id.* at 539, and "interstate commerce" because the business was nationwide in nature even though it might be "built upon sales contracts which are local in nature." *Id.* at 547. In addition to finding that insurance, therefore, could be regulated by Congress, the Court found nothing in the language or legislative history of the Sherman Act from which to conclude that Congress intended to provide insurance an exemption from antitrust coverage.

But the Court went to great pains to point out that Congress' power to regulate the interstate aspects of insurance did not preclude state regulation. Advancing classic preemption and state action exemption doctrines, the Court said:

> [T]here is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states . . . . And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid.
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> . . . .
>
> The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. *Cf. Parker v. Brown,* 317 U.S. 341, 350-352. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged,. . .

Id. at 548-49, 562.,

Several points are implicit in the Court's comments, and frankly makes one wonder whether the McCarran Act was even necessary. First, the Court made it clear that it supported state regulation and taxation to the extent that they did not conflict with federal law. Thus, Congress would have to legislate to oust state laws. Second, while state laws and federal antitrust statutes might conflict, the state action exemption of *Parker v. Brown* would dictate that state law prevail. Third, the McCarran Act specifically states that the antitrust laws were happenstance. Had the primary question presented in *South-Eastern Underwriters,* that is, whether insurance is commerce and thus subject to regulation by Congress, arisen in a context other than antitrust (under the securities laws, for example), insurance would have to rely on the state action exemption for any antitrust immunity.

168. Much of this discussion on the McCarran Act's legislative history is drawn from Weller, *supra* note 162, at 592-602.

exemption, was defeated. Then Congress considered legislation proposed by the National Association of Insurance Commissioners, a group primarily concerned with *South-Eastern Underwriter's* effect on the states' ability to tax and regulate insurance, and only secondarily with the applicability of the antitrust laws.[169] One version, similar to the present McCarran Act except for a section listing seven specific exempted activities,[170] was rejected for a version containing the more general language found in the proviso of section 2(b).[171]

Three questions arise in determining whether the McCarran Act shields an activity from antitrust scrutiny. First, is the practice "the business of insurance"?[172] If not, McCarran Act analysis ends, and the remaining question is only whether the activity violates an antitrust law. Second, if the practice is the business of insurance, is it "regulated by State Law"[173] to an extent sufficient to trigger the exemption?[174] And finally, even if the practice is the business of insurance and is regulated sufficiently by state law, is it an "agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation"?[175] If so, the exemption fails.

While the Court has been called upon to interpret the McCarran Act numerous times,[176] none of its cases until 1978 involved a McCarran Act issue in the antitrust context. Then, in *St. Paul Fire & Marine Insurance Co. v. Barry*,[177] the Court interpreted section 3(b)'s "boycott, coerce, or intimidate" language broadly to include an agreement by insurance companies not to sell insurance to poli-

169. *Id.* at 593.

170. *Id.* at 594.

171. *See* note 160 *supra.*

172. 15 U.S.C. § 1012(b) (1976). *See, e.g.,* Anderson v. Medical Service, No. 76-1438 (E.D. Va.), *aff'd,* 551 F.2d 304 (4th Cir. 1977).

173. 15 U.S.C. § 1012(b) (1976). *See, e.g.,* Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965), *aff'd,* 361 F.2d 870 (4th Cir.), *cert. denied,* 385 U.S. 930 (1966).

174. Under Section 2(b), the antitrust laws apply "to the extent that such business is not regulated by State Law." While there would appear to be an obvious similarity between this requirement and the state action exemption, courts have not required the specificity of regulation under the McCarran Act that has been required to sustain the state action exemption. *Compare* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (state action) *with* McIlhenny v. American Title Ins. Co., 418 F. Supp. 364 (E.D. Pa. 1976) (McCarran Act).

175. 15 U.S.C. § 1013(b) (1976).

176. *See* cases collected in Weller, *supra* note 162, at 587 n. 3.

177. 438 U.S. 531 (1978).

cyholders except on certain terms. This expansive reading of section 3(b),[178] of course, narrowed the exemption. On the other hand, none of the Court's cases until this term had focused on what constitutes the business of insurance for antitrust exemption purposes, and still, no case has shed light on the issue of how great a role the state must play before the exemption is triggered.

The case which led the Court to discuss what practices constitute the business of insurance and thus meet the first test of the McCarran Act was *Group Life & Health Insurance Co. v. Royal Drug Co.*[179] The case centered on the contracts between Group Life & Health Insurance Co., a Blue Shield plan, and so-called "participating pharmacists," by which Blue Shield provided its subscribers with prescription drugs. Blue Shield entered into a pharmacy agreement with each pharmacy that desired to participate. Each participating pharmacy agreed to charge Blue Shield subscribers two dollars per prescription, and Blue Shield reimbursed the pharmacy for its acquisition cost of the drug. While all pharmacies were given the opportunity to participate, some chose not to. When a Blue Shield subscriber used a "non-participating pharmacy," he or she had to pay whatever price the pharmacy charged and then seek reimbursement from Blue Shield, which would pay seventy-five percent of the pharmacy's usual and customary charge minus two dollars.[180]

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178. While this conduct might appear to be an obvious boycott and thus not an "expansive reading of Section 3(b)," a substantial line of lower court cases held that only boycotts by insurers of other insurance companies or their agents were within the meaning of Section 3(b). *See, e.g.*, Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). In *Barry*, the Court rejected this narrow approach, holding instead that boycott should be defined in terms of its broader, nonlegal definition and its definition for Sherman Act purposes. 438 U.S. at 552.

179. 440 U.S. at 205 (1979).

180. The government's *amicus curiae* brief filed with the Supreme Court gave the following examples of how reimbursement was determined:

> Suppose the usual and customary retail price for a quantity of Drug X charged both by "participating" Pharmacy A and "non-participating" Pharmacy B is $10.00, and the wholesale price (or acquisition cost) to both is $8.00. If an insured buys Drug X from Pharmacy A, the insured pays $2.00. Pharmacy A receives $2.00 from the insured and $8.00 from Blue Shield, or $10.00 total. If an insured buys Drug X from Pharmacy B, the insured pays Pharmacy B $10.00, and receives $6.00 (75 percent of the difference between the retail price and $2.00) from Blue Shield. While Pharmacy B receives the same as Pharmacy A, the insured must pay $4.00 for the drug and also must take steps to obtain reimbursement.
>
> If the pharmacy's acquisition cost for the drug is $5.00 rather than $8.00, the situa-

Eighteen independent, non-participating pharmacies brought suit against Blue Shield and three participating pharmacies, alleging that the pharmacy agreements violated section 1 of the Sherman Act.[181] The gravamen of the complaint was that the pharmacy agreements fixed the retail price of drugs which resulted in many Blue Shield subscribers not dealing with the plaintiffs, thus constituting a group boycott.[182] The plaintiffs argued that the two dollar "dispensing fee" was too low to allow small, independent pharmacies a profit, especially because many depend on auxiliary services, such as home delivery, to compete with the larger chains. Moreover, they argued that since subscribers must pay more for prescriptions at non-participating pharmacies and then complete the reimbursement form rather than having the pharmacy do it, subscribers are coerced into using participating pharmacies.[183] In short, the plaintiffs' complaint was that the Blue Shield program did not pay enough. The defendants, on the other hand, argued that the pharmacy agreements were the business of insurance, that the business of insurance was regulated by the state, and that the pharmacy agreements did not constitute a boycott, coercion or intimidation within the meaning of section 3(b).[184]

"Business of insurance," as used in the McCarran Act, has proved to be a slippery concept. For example, the question in *SEC v. Variable Annuity Co.*,[185] was whether Securities and Exchange Commission regulation of variable annuities was ousted by the McCarran Act. The defendant argued that variable annuities[186] were insurance and that states regulate them as such. The Court, however, held

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tion of Pharmacy B and the insured are unchanged. But now Pharmacy A will receive only $5.00 from Blue Shield, for a total of $7.00.

Brief for the United States at 4-5 n.1, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

181. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. at 207.

182. The allegations and arguments of plaintiffs are best articulated in the Fifth Circuit's decision, Royal Drug Co. v. Group Life & Health Ins. Co., 556 F.2d 1375 (5th Cir. 1977).

183. *Id.* at 1378-79.

184. *Id.* at 1379.

185. 359 U.S. 65 (1959).

186. According to the Court, variable annuities differ from regular "fixed" annuities in that, first, the investment philosophy behind them is more liberal as more equity securities are purchased and second, the amount of benefits paid varies directly with the success of the company's investment program. *Id.* at 69. Because of the latter feature, all risk is borne by the investor rather than by the company. *Id.* at 71.

that "the concept of 'insurance' involves some investment risk-taking on the part of the company,"[187] and since a company issuing variable annuities bore none,[188] the variable annuity contract was not insurance.

Somewhat more light was shed on what constitutes the business of insurance in *SEC v. National Securities, Inc.*,[189] although expressed in vague generalities. The issue was whether the McCarran Act precluded an action by the SEC to undo the merger of two insurance companies because of inadequate disclosure. Pursuant to an Arizona statute,[190] the Arizona Director of Insurance found the merger proper and approved it.[191] Conceding that the McCarran Act's legislative history does little to explain what Congress envisioned as the business of insurance,[192] the Court held that the Arizona statute, which protected "the interests of those who own securities in insurance companies,"[193] was not a statute regulating the business of insurance. Rather, it was a statute regulating securities. Regulation of the business of insurance would include such things as fixing rates, licensing companies and agents, and regulation pertaining to the insurance contract or dealing with the insurer-insured relationship. While other activities might be included, the Court explained that the business of insurance focuses on "the relationship between the insurance company and the policyholder."[194]

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187. *Id.*

188. *See* note 186 *supra.*

189. 393 U.S. 453 (1969).

190. ARIZ. REV. STAT. ANN. § 20-731 (Supp. 1969).

191. 393 U.S. at 457.

192. *Id.* at 459. The Court was able to glean from the legislative history that "[t]he McCarran-Ferguson Act was an attempt to turn back the clock [to before *South-Eastern Underwriters*], to assure that the activities of insurance companies *in dealing with their policyholders* would remain subject to state regulation." *Id.* (emphasis added).

193. *Id.* at 458.

194. *Id.* at 460. Because this analysis is the crux of the Court's holding and is relied upon so heavily by the Court in *Royal Drug,* (see text accompanying notes 242-43 *infra),* it is worth quoting in its entirety:

> The [McCarran Act] did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC v.*

The issue, then, is to identify, without substantial guidance from either Congress or the Court, those practices which are so inextricably related to the concept of insurance that they deserve an exemption. In general, and especially with regard to "provider agreements," that is, agreements between the insurance company and whatever entity provides services covered by the policy, lower courts have interpreted the business of insurance broadly. In *Travelers Insurance Co. v. Blue Cross,*[195] for example, Travelers, a for-profit insurance company, complained that service contracts between Blue Cross and participating hospitals violated the Sherman Act because Blue Cross was able to pay a much lower hospital rate for its subscribers than Travelers did for its policyholders. The court, however, held that the contracts were the business of insurance "[b]y reason of the interrelationship of hospital payments and Blue Cross subscriber rates."[196]

> *National Casualty Co.*, 357 U.S. 560 (1958), and the licensing of companies and their agents, *cf. Robertson v. California,* 328 U.S. 440 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

Id. at 459-60.

195. 361 F. Supp. 774 (W.D. Pa. 1972), *aff'd,* 481 F.2d 80 (3d Cir.), *cert. denied,* 414 U.S. 1093 (1973).

196. 361 F. Supp. at 777. The district court was swayed, at least to some extent, by the fact that both subscriber rates and rates of payment to hospitals were heavily regulated by the Pennsylvania Insurance Department. *See also* Frankford Hosp. v. Blue Cross, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd per curiam,* 554 F.2d 1253 (3d Cir.), *cert. denied,* 434 U.S. 860 (1977).

An interesting contrast to *Travelers* was presented in Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974). Liberty National, which sold burial insurance, entered a contract with its subsidiary by which the latter would furnish funerals for Liberty National's policyholders. In turn, the subsidiary contracted with individual funeral homes to provide the funerals. The court held that the addition of an intermediary, here the subsidiary, might be sufficient to negate the exemption. While such an arrangement was related to the business of insurance, it appeared that the scheme was more akin to the "business of providing funeral merchandise and services" and thus too remote from insurance to gain protection under the McCarran Act. *Id.* at 50.

A second instructive case is *Proctor v. State Farm Automobile Insurance Co.*,[197] which dealt with both a horizontal arrangement between five insurance companies to pay auto repair shops a standard fee to repair the cars of policyholders, and vertical provider agreements between the insurers and individual shops, which specified the rate agreed upon by the five companies. After reciting the *National Securities* standards,[198] the court had no trouble in determining that the intra-industry, horizontal arrangement, by which the companies agreed what they would pay the repair shops, was the business of insurance, remarking that this clearly affected the insurer-insured relationship.[199] More troubling, however, were the inter-industry, vertical provider agreements because they, arguably, were part of the business of automobile repair rather than the business of insurance.[200] Stating that "[t]he question is ultimately one of line-drawing,"[201] the court emphasized language in *National Securities* which explained that the nexus between the insurer and insured need be only indirect for the conduct to constitute the business of insurance,[202] and held that since the provider agreements ultimately affected the size of premiums paid by policyholders, they were within the *National Securities* penumbra of the business of insurance.[203]

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197. 561 F.2d 262 (D.C. Cir. 1977), *vacated and remanded,* 440 U.S. 942 (1979).

198. *See* note 194 *supra.*

199. The court said:

> The essence of the automobile insurance contract is the insurance company's agreement, in return for a premium, to make payments to or on behalf of the policyholder for losses arising out of the ownership, maintenance, of use of an automobile. The determination by the insurance company of the amount to be paid in discharge of this contractual obligation is at the heart of the relationship between insurer and insured, and is directly connected with the reliability, interpretation, and enforcement of the insurance contract.

561 F.2d at 267.

200. The court noted that "to the extent that these practices involve direct relationships between the insurance company and non-policyholders, and are less closely connected to the terms of the contract between the insurer and the insured, they are further from the core of the business of insurance." *Id.* at 268.

201. *Id.*

202. *See* note 194 *supra.*

203. The court reasoned as follows:

> [T]he fact that a practice may affect other types of business is not dispositive of whether it is sufficiently related to the business of insurance to come within the McCarran Act's protection.
>
> [T]he alleged agreements with preferred shops and the asserted group boycott of

The district court in *Royal Drug*[204] had little difficulty rejecting the plaintiffs' arguments that the provider agreements exceeded the business of insurance and that, even if Blue Shield were engaged in the business of insurance, the pharmacy defendants were not, and thus enjoyed no exemption. Relying on *Travelers*,[205] it held simply that the provider agreements related directly to the insured-insurer relationship because they were the method by which the insurer discharged its obligation under the policies.[206] Noting that the exemption applies to the business of insurance rather than to insurance companies, the court held that the defendant pharmacies were also exempt because their agreements with Blue Shield were the business of insurance.[207]

The Fifth Circuit reversed.[208] It began on an ominous note for the defendants, repeating the oft-stated principle that exemptions from antitrust coverage are construed narrowly.[209] The court then explained that all agreements which strengthen the financial status of insurance companies may benefit policyholders, but do not necessarily constitute the business of insurance. Moreover, nothing in the policy required Blue Shield "to fix prices or to produce other anticompetitive effects in the pharmaceutical industry."[210] Such action,

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noncooperative shops are connected closely enough to the contractual relationships between [the insurers] and their policyholders, and with the reliability, interpretation, and enforcement of those contracts, to qualify as the business of insurance. . . . Notwithstanding their effect on non-policyholders, the activities unquestionably grow out of, and are tied to, the claims adjustment and settlement process. . . .

Of central significance in this entire context is the close relationship between the cost of reimbursing damage claims, on the one hand, and the insurance rates charged by appellees, on the other.

. . . .

We need not decide whether the effect on insurance rates should be analyzed in terms of [the insurers'] "status as reliable insurers" or, instead, in terms of its connection with the relationship between insurer and insured; . . . For the purposes of this case, it is sufficient to say that the vital impact on [the insurers'] rates, found by the District Court, provides additional support for our conclusion that the disputed practices are a part of the business of insurance.

561 F.2d at 268, 269-70 (citations omitted).

204. Royal Drug Co. v. Group Life & Health Ins. Co., 415 F. Supp. 343 (W.D. Tex. 1976).

205. *See* text accompanying notes 195 & 196 *supra*.

206. 415 F. Supp. at 347-48.

207. *Id.*

208. Royal Drug Co. v. Group Life & Health Ins. Co., 556 F.2d 1375 (5th Cir. 1977).

209. *See, e.g.*, National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978).

210. 556 F.2d at 1381.

the court held, constituted the business of providing drugs rather than the business of insurance.[211]

Travelers was distinguished on the grounds that the court there had simply approved both action of the Pennsylvania Insurance Commissioner to reduce hospital costs and action by the legislature to regulate hospital rates.[212] The court did not appear to be disturbed by the fact that every other court presented with the issue had found that provider agreements were the business of insurance.[213] It explained that the conduct in quesion must be peculiar to the business of insurance for the exemption to apply,[214] emphasizing that an effect on premium rates was not sufficient. Finding that nothing in Blue Shield's attempts to contain costs through provider agreements was peculiar to the business of insurance, the court denied the exemption.[215]

211. *Id.*

212. *Id.* at 1382. These factors would appear to address whether, if the activity were the business of insurance, it was sufficiently regulated, rather than whether the activity was the business of insurance in the first place.

213. *See, e.g.*, Proctor v. State Farm Mutual Ins. Co., 406 F. Supp. 27 (D.D.C. 1975), *aff'd*, 561 F.2d 262 (D.C. Cir. 1977), *vacated and remanded*, 99 S.Ct. 1417 (1979); Anderson v. Medical Service, 551 F.2d 304 (4th Cir. 1977); Frankford Hosp. v. Blue Cross, 417 F. Supp. 1104 (E.D.Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977); Doctors Hosp. v. Blue Cross, 535 F.2d 1245 (3d Cir. 1976); Travelers Ins. Co. v. Blue Cross, 481 F.2d 80 (3d Cir. 1973), *cert. denied*, 414 U.S. 1093 (1973).

214. 556 F.2d at 1383.

215. *Id.* at 1386-87. Because it held that the provider agreements were not the business of insurance, the court did not address whether the defendants' conduct was a boycott triggering the section 3(b) exception. In addition, while not called upon to decide the question, dicta indicates that the court would have found sufficient state regulation upon which to sustain the exemption. 556 F.2d at 1385.

While not deciding whether the agreements violated section 1, the court did give some indication how it would hold:

> [O]ther cases have emphasized the favorable impact that price fixing and coercion have had on insurance premiums and the "reliability" of the insurers. It is conceivable that the public might benefit from price fixing arrangements as long as the parties to the arrangement agree to keep prices below free market levels. The Congress, however, has foreseen that the power to fix prices might not always be beneficially administered by those parties holding the power once their competition has been put out of business. It is quite clear that competitors can be destroyed by those whose financial resources permit them to reduce prices until their competition is eliminated, only for the purpose of raising prices in the long run. Whether such economic coercion is proper is not for a court to decide. It is a matter of national policy which has been addressed by the Congress, from which any change will originate only after appropriate investigation, hearings and deliberation.

556 F.2d at 1386-87.

The Supreme Court's decision indicates the difficulty of the case; in a five to four decision, it affirmed the Fifth Circuit.[216] Stating that "the starting point in any case involving the meaning of a statute, is the language of the statute itself,"[217] the Court first emphasized that the McCarran Act exempts only the business of insurance—not insurance companies—from antitrust coverage. From this springboard, the Court jumped directly to determining the basic features of insurance and, relying primarily on *Variable Annuity*,[218] explained that "[t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."[219]

The Court rejected Blue Shield's argument that its provider agreements underwrite the insured's risk of needing, or being unable to pay for, drugs. According to the Court, while the policies may underwrite this risk, the provider agreements do not; rather, they are simply a method of minimizing the insurer's costs. More importantly, the Court held that the fact that such agreements are a necessary part of a prepaid prescription program does not automatically mean that the agreement is the business of insurance.[220] The majority concluded that there was no difference between provider agreements and many other activities of insurance companies to lower costs which clearly are not the business of insurance. The agreements "are merely arrangements for the purchase of goods and services by Blue Shield."[221]

Next, the Court focused on the *National Securities* requirement that the questioned activity relate to the insurer-insured relationship.[222] Noting that the agreements were not between the company and a policyholder, the Court rejected Blue Shield's argument that the agreements, while not between the insurer and insured, affected the reliability of the insurer to the extent necessary to sustain the

216. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979). Justice Stewart wrote the majority opinion and was joined by Justices White, Blackmun, Rehnquist and Stevens. Justice Brennan, joined by Chief Justice Burger and Justices Marshall and Powell, dissented.

217. *Id.* at 210.

218. *Id.* at 211.

219. *Id.* at 211-12.

220. *Id.* at 214 n.9.

221. *Id.* at 214.

222. *Id.* at 215-16.

exemption. It explained that this was just another way of arguing that the agreements affected costs.[223]

The Court then turned to the McCarran Act's legislative history. It noted that the statute was a response to *South-Eastern Underwriters*;[224] that Congress' primary concern was to insure the continued validity of state regulation and taxation;[225] that Congress rejected a blanket exemption;[226] and that the legislation did not overrule the decision in *South-Eastern Underwriters* that the antitrust laws may be applied to certain practices of insurance companies.[227] Then, on what appears to be weak ground, it concluded, first, that Congress understood insurance to mean the spreading and underwriting of risk,[228] and second, that Congress, when it enacted the McCarran Act, did not understand insurance to encompass provider agreements.[229]

The first conclusion was derived primarily from two rationales. First, a House Report accompanying the McCarran Act stated that "[t]he *theory* of insurance is the distribution of risks according to hazard, experience, and the law of averages."[230] Second, the Court posited that "it is very difficult to underwrite risk . . . without intra-industry cooperation," and thus Congress was concerned primarily with exempting intra-industry agreements from antitrust challenge.[231] It concluded that because provider agreements had nothing to do with *intra*-industry cooperation, but rather were *inter*-industry arrangements, Congress did not intend them to be exempt. Indeed, Congress did not even mention provider agreements in its deliberations.[232]

Second, with respect to the McCarran Act's legislative history,

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223. *Id.* at 216.

224. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). *See* text accompanying notes 163-67 *supra*.

225. *See* notes 167, 169 *supra*.

226. *See* Weller, *supra* note 162, at 592.

227. 440 U.S. at 216.

228. *Id.* at 221.

229. *Id.* at 223 n.30.

230. *Id.* at 221 (quoting H. R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943) (emphasis added)).

231. *Id.* at 221.

232. *Id.* at 223 n.30.

the Court argued that, in 1945, pre-paid health care plans were not thought to be insurance at all "and thus were not subject to state insurance laws."[233] Rather, they were considered consumer cooperatives. But, the Court noted, even if such plans were the business of insurance, that did not mean the provider agreements were.[234]

Lastly, the majority invoked the axiom that exemptions from antitrust coverage must be strictly construed.[235] It thought the principle particularly applicable because the alleged conspiracy involved outside, non-insurance company entities and noted that "[i]n analogous contexts, [it had] held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties."[236]

Four justices strongly dissented.[237] While conceding that the McCarran Act's legislative history presented little enlightenment on the subject, they argued that Congress' rejection of the NAIC draft bill, which listed a narrow range of exempt activities, evidenced an intent that the exemption be broad.[238] They then emphasized that the purpose of the McCarran Act was to validate continued state insurance regulation, and that even in 1945 the states were regulat-

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233. *Id.* at 225-26 (citing Jordan v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939)).

234. *Id.* at 226 n.34; *see also id.* at 230 n.38.

235. *Id.* at 231 (citing, *e.g.* Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1 (1976)).

236. *Id.* at 231. Apparently the majority forgot its own admonition that it is the business of insurance rather than insurance companies which is exempt. *See* text accompanying note 218 *supra*.

While not called upon to judge whether provider agreements violate section 1 of the Sherman Act, a gratuitous footnote indicated that the Court was concerned with the agreements' possible anticompetitive effect, at least where providers have a strong hand in establishing the agreements:

> Moreover, exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences. Recent studies have concluded that physicians and other health care providers typically dominate the Boards of Directors of Blue Shield plans. Thus there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level. This domination of Blue Shield by providers is said to have resulted in rapid escalation of health care costs to the detriment of consumers generally.

Id. at n.40. *See generally* FEDERAL TRADE COMMISSION, MEDICAL PARTICIPATION IN CONTROL OF BLUE SHIELD AND CERTAIN OTHER OPEN-PANEL MEDICAL PREPAYMENT PLANS (1979).

237. 440 U.S. at 233 (Burger, C.J., and Brennan, Marshall & Powell, JJ., dissenting).

238. *Id.* at 234-35.

ing pre-paid medical plans which depended heavily on provider agreements.[239]

They next focused on "the proximity between the challenged transactions and those well recognized as elements of 'insurance,' "[240] and found the majority's focus on the spreading and underwriting of risk too narrow. For example, the McCarran Act's legislative history showed that agreements among insurance companies to fix rates, which do not spread risk, were intended to be exempt.[241]

In addition, they explained that *"[s]ome* kind of provider agreement becomes a necessity if a service-benefits insurer is to meet its obligations to the insureds."[242] The pharmacy agreements, according to the dissenters, were just such agreements rather than general business arrangements to reduce costs. The provider agreements are unique to insurance because they are the mechanism by which the insurer fulfills its contractual obligation to the policyholder. As such, the dissenters argued, they are an integral part of the business of insurance.[243]

Having found that some provider agreements are the business of insurance, the dissent turned to whether the specific agreements before them were within the exemption. This issue arose because the plaintiffs' objection was not to provider agreements in the abstract, but to provider agreements which fixed a set dispensing fee and thus, according to the plaintiffs, precluded competition among pharmacies.[244] The dissenters explained that the agreements under

239. *Id.* at 237-38. Unfortunately, the dissenters never quite tied these premises to the conclusion that the provider agreements, themselves, are the business of insurance.

240. *Id.* at 238.

241. *Id.* at 244.

242. *Id.* at 246 (emphasis in original).

243. *Id.* at 249.

244. The plaintiffs explained their position as follows:

> Despite [defendants'] assertion, [plaintiffs] are not challenging "direct contractual arrangements between an insurer and third parties to provide benefits owed to the insurer's policyholders." The Fifth Circuit expressly recognized that the particular activities challenged by [plaintiffs] are not "benefits owed to the insurer's policyholders" and are not "required by the policy of insurance." . . . [Plaintiffs] are challenging [defendants'] combination to eliminate price and other forms of competition in the retail pharmaceutical industry.

Brief for Respondents in Opposition to Petition for a Writ of Certiorari at 3 (citations omitexamination, because they fix reimbursement to pharmacies, affect the insurer's costs and therefore impact on both rate-setting and reliability. In addition, by reducing the effect of market fluctuations on the cost of drugs, they "reduce the unpredictable aspects of the risks assumed."[245]

They did concede, however, that not every provider agreement should be exempt. Rather, "[t]he process of deciding what is and is not the 'business of insurance' is inherently a case-by-case problem."[246] They noted that where the impetus for an anticompetitive scheme comes from the providers, or where an opportunity to participate in the program is not given all providers, the exemption might fail.[247]

Neither the majority nor the dissenting opinion is particularly satisfying from an analytical standpoint. In addition, neither is convincing. Given, however, the resources upon which the Court had to draw, this is understandable. The case was similar to *Reiter*[248] in that the legislative history appears neutral on the question, that precedent really dealt with substantially different factual situations, and that in the final analysis a general tenet of antitrust policy prevailed. In *Reiter,* strong private enforcement was found to be a necessary corollary to the government's work; in *Royal Drug,* exemptions from coverage were strictly construed.

Of course, the most important question has yet to be answered; that is, whether the provider agreements violate section 1 of the Sherman Act. The plaintiffs' argued that each provider agreement constituted a price-fixing agreement which violated it because the

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ted), Group Life & Health Ins. Co. v. Royal Drug Co, 440 U.S. 205 (1979). Interestingly, the majority found it unnecessary to address this distinction.

245. Justice Brennan summed up the dissent as follows:

> I would hold that the *concept* of a provider agreement for benefits promised in the policy is within the "business of insurance" because some form of provider agreement is necessary to fulfill the obligations of a service-benefit policy. I would hold that *these* provider agreements, Blue Shield's Pharmacy Agreements, are protected because they (1) directly obtain the very benefits promised in the policy and therefore directly affect rates, cost, and insurer reliability, and (2) themselves constitute a critical element of risk "prediction."

440 U.S. at 252-53 (footnotes omitted).

246. *Id.* at 252.

247. *Id.* at 253.

248. *See* part III *supra.*

price fixed was too low for independent pharmacists to make a profit.[249] They also intimated a horizontal conspiracy between the defendant pharmacies[250] but did not emphasize the theory. As a necessary corollary to the price-fixing claim, plaintiffs argued that they were injured because they were "boycotted" by Blue Shield subscribers who would patronize participating pharmacies because they charged less and would fill out reimbursement forms.

The "refusal to deal" charge appears particularly weak because participation was open on equal terms to any pharmacy that wanted to join. There was no agreement not to deal with or to boycott anyone. More colorable is the price-fixing argument, but unless plaintiffs can prove a horizontal conspiracy among the defendant pharmacies, this claim should fail.[251] Indeed, the Department of Justice opines that "[t]ransactions at a set price, through a series of voluntary, bilateral contracts [such as provider agreements], are not price-fixing even though large numbers of sellers of services may be involved."[252]

What really concerned the plaintiffs was not the alleged price-fixing agreements themselves; after all, had the price which was allegedly fixed been high enough, plaintiffs would have been happy to participate. Rather, their theory in reality was that Blue Shield was exercising monopsony power, *i.e.*, that Blue Shield was such a powerful buyer that it could force pharmacies to accept unreasonably low prices.

To the economist, a monopsony, *i.e.*, a market consisting of only one buyer, is as troublesome as a monopoly. Both result in resource

249. Brief for Respondents at 8-9, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

250. *Id.* at 9.

251. Of course, it is possible that, even absent a direct agreement between pharmacies, the evidence will support tacit collusion or an inferred agreement. For example, in Blue Cross v. Commonwealth, 211 Va. 180, 176 S.E.2d 439 (1970), the Supreme Court of Virginia found such an agreement in a case remarkably similar to this. While that court did not find that the pharmacists collectively established the dispensing fee, it found that each knew that others had to participate for the program to be successful. It held that under Interstate Circuit v. United States, 306 U.S. 208 (1939), this knowledge was sufficient to support the inference of an agreement.

252. Brief for the United States as *Amicus Curiae* at 11, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

misallocation; the monopsonistic market draws fewer resources than would a competitive market, pays those resources a lower return and produces a smaller output.[253] Thus, a true monopsonist concerns antitrust enforcers.[254] However, that a fringe of providers have costs in excess of what the purchaser wishes to pay is a poor indicator of monopsony power.[255] Ultimately it will not be surprising if the plaintiffs, having won the battle, lose the war.

V. Another Blow to Robinson-Patman Enforcement: *A&P*

In 1936, Congress enacted the Robinson-Patman Act[256] in response to complaints from small retailers that their suppliers were selling to them at higher prices than those charged the retailers' larger competitors, many of which were chain stores.[257] The

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253. *See generally* R. Lipsey & P. Steiner, Economics 389 (4th ed. 1975).

254. Professor Havilghurst has described the plight of health care providers facing a monopsonist third-party payor as follows:

> A monopsonist can exploit producers only where the latter have unrecoverable fixed costs, making it rational for them to stay in business even though their total costs are not covered by the price they obtain. By setting a price at least equal to out-of-pocket costs plus a fair return of recoverable capital, a monopsonist can keep his suppliers in business while denying them a return on their original investment. But, because little new capital will be invested in an industry facing a monopsonistic purchaser, the monopsonist will ultimately have to relax his grip in order to maintain a source of supply. Health professionals, particularly physicians, are potentially subject to monopsonistic exploitation because their considerable investment in education, including wages forgone, cannot be recovered and because their alternative employments are not likely to be as lucrative or personally satisfying. This means that most health professionals would stay in their professions even if their incomes were drastically reduced, and it might therefore be tempting to would-be monopsonists—including large purchasing groups, such as labor unions and perhaps the federal government as well—to take advantage of their vulnerable situation.

Havilghurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 Duke L.J. 303, 328 n.121.

On the other hand, health care providers themselves normally exhibit some degree of monopoly power which offsets any economic power of third-party payors.

255. The United States minced no words about this:

> Nothing in the antitrust laws requires drug purchasers (or Blue Shield acting as their purchasing agent) to offer the greater compensation necessary to satisfy less efficient pharmacies or suppliers interested in providing expensive but unwanted services at the point of sale. To the contrary, antitrust policy seeks to preserve to consumers the opportunity to obtain a better deal. Its goal is consumer welfare, not competitor welfare.

Brief of the United States as *Amicus Curiae*, note 252 *supra*, at 12.

256. 15 U.S.C. §§ 13, 13a, 13b, 21a (1976).

257. *See generally* F. Rowe, Price Discrimination under the Robinson-Patman Act 3-6

Robinson-Patman Act was aimed at eliminating price discrimination by sellers, even though the root of the problem was thought to be the inducement of discriminatory prices by powerful buyers.[258]

The focal point of the Robinson-Patman Act is section 2(a),[259] which prohibits vendors from selling "commodities of like grade and quality"[260] to different purchasers at different prices where the effect "may be substantially to lessen competition . . . with any person who either grants[261] or knowingly receives the benefit[262] of such discrimination, or with customers of either of them."[263]

(1962) [hereinafter cited as ROWE].

258. *See generally* E. KINTNER, A ROBINSON-PATMAN PRIMER 251 (1970) [hereinafter cited as KINTNER]; ROWE, *supra* note 257, at 421.

259. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), in pertinent part is as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . ., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery . . . . *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Section 2(a) sets forth not only that conduct which violates the law, but also two defenses. Thus, even where a price differential is given a purchaser, it may be "cost justified" where there are "differences in the cost of manufacturer, sale of delivery" between various purchasers. The so-called "cost justification" defense has been construed narrowly. *See, e.g.,* United States v. Borden Co., 370 U.S. 460 (1962). In addition, a price differential may be given to meet "changing conditions." *See, e.g.,* Moore v. Mead Service Co., 190 F.2d 540 (10th Cir. 1951), *cert. denied,* 342 U.S. 902 (1952).

260. The like grade and quality requirement is discussed in FTC v. Universal-Rundle Corp., [1963-1965 Transfer Binder] TRADE REG. REP. (CCH) ¶ 16,948 (1964), *aff'd,* 352 F.2d 831 (7th Cir. 1965), *rev'd on other grounds,* 387 U.S. 244 (1967).

261. This supports primary line or so-called "seller level" price discrimination cases where the price discrimination injures a competitor of the seller. *See, e.g.,* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). *See generally* ROWE, *supra* note 257 at 141-171.

262. This supports secondary line or "buyer level" price discrimination cases where a lower price to one buyer gives it a competitive advantage over its competitors. *See, e.g.,* FTC v. Morton Salt Co., 334 U.S. 37 (1948). *See generally* ROWE, *supra* note 257 at 172-195.

263. 15 U.S.C. § 13(a) (1976). This supports third-line injury cases. *See, e.g.,* FTC v.

Section 2(b)[264] provides the "meeting competition" defense, which allows the seller to escape liability if a discriminatory price was necessary to meet the price offered a customer by a competitor.[265] Section 2(c)[266] prohibits *de facto* price discrimination by the buyer paying the seller false brokerage payments.[267] Sections 2(d)[268] and 2(e)[269] are also aimed at what might be called indirect price discrimination and require that a seller who offers services, advertising allowances or similar payments to one buyer, make them available to that customer's competitors on proportionally equal terms.[270] And finally, section 2(f)[271] prohibits buyers from knowingly inducing or receiving a price discrimination. Interestingly, while the main concern of Congress in enacting the Robinson-Patman Act was the power of large buyers, section 2(f), the only section aimed at buyers, was a legislative afterthought.[272]

It takes little imagination to recognize the inherent tension between the Robinson-Patman Act and other antitrust principles. Naturally, any statute that prohibits certain price differentials will lead to a degree of price rigidity, an anathema to normal antitrust precepts. The Robinson-Patman Act has been criticized on this ground not only by the academic community[273] but by the Depart-

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Standard Oil Co., 41 F.T.C. 263, *aff'd,* 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds,* 340 U.S. 231 (1951). The Supreme Court has held that no cause of action arises for fourth-line injury. Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

264. 15 U.S.C. § 13(b) (1976).

265. The leading cases on the meeting competition defense for our purposes are FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945), and United States v. United States Gypsum Co., 438 U.S. 422 (1978). In *Staley,* the Court emphasized that the seller need not be sure that it is meeting a competitor's offer but must only exercise good faith; and good faith requires some effort (the degree of which varies, depending on the facts) to investigate and verify that a lower offer has been made and that any informant is reliable. *Gypsum* made clear that a good faith effort does not necessitate verifying prices with competitors in a manner which might violate section 1 of the Sherman Act.

266. 15 U.S.C. § 13(c) (1976).

267. *See, e.g.,* FTC v. Henry Broch & Co., 363 U.S. 166 (1960).

268. 15 U.S.C. § 13(d) (1976).

269. 15 U.S.C. § 13(e) (1976).

270. *See generally* FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968); FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959).

271. Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f) (1976), provides "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

272. Rowe, *supra* note 257, at 421, 423-28.

273. An outspoken critic of the Act, Professor Robert Bork of Yale, has said:

ment of Justice as well.[274] The Department has expressed particular concern about section 2(f) because of its narcotic effect on buyers:

> The buyer liability provision, moreover, strikes at a process which is fundamental to a competitive market: the process by which each buyer negotiates for itself the best possible price. It was, of course, the intent of the statute's drafters to discourage the user of coercive buyer pressure. Section 2(f), however, is not limited to such situations and operates without regard to the relative market power of the parties. The Section thus instills extreme caution in buyers negotiating for price breaks which, if obtained, might arguably subject them to liability under Section 2(f).[275]

Thus, the Robinson-Patman Act does not enjoy the almost universal support that the Sherman Act does.

The Supreme Court's decision this term in *Great Atlantic & Pacific Tea Co. v. FTC*[276] highlights the relationship between sections 2(a),[277] 2(b), and section 2(f) of the Robinson-Patman Act.[278] Few of

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> The attempt to counter the supposed threat to competition posed by price discrimination constitutes what is surely antitrust's least glorious hour. The instrument fashioned for the task was the Robinson-Patman Act, the mishappen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory. . . . Although it does not prevent much price discrimination . . . it has stifled a deal of competition.

R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 382 (1978).

274. *See* UNITED STATES DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977). One conclusion of the Department of Justice was that "[t]he Robinson-Patman Act has several significant costs to society. Its most pernicious effects are its reinforcement of pricing rigidity among sellers in oligopolistic industries, the introduction of pricing inflexibility, and the encouragement of price discussions among competitors which may lead to violations of the Sherman Act." *Id.* at 99.

275. *Id.* at 32-33. The Report also notes that:

> By discouraging bargaining on part of the buyers, Robinson-Patman decreases the possibility that a retailer will receive a lower price, pass it on to the consumer, and thus initiate a competitive struggle in the retailing sector which will ultimately result in more efficient operation and lower prices for the consumer.

Id. at 257.

276. 440 U.S. 69 (1979). It is somewhat ironic that the Court's major pronouncement to date on a buyer's liability under the Robinson-Patman Act exonerated A&P, for as Representative Patman said in 1956, "[O]ne certain big concern had really caused the passage of this act, the A. & P. Tea Co." *Proposed Amendments to Sections 2 and 3 of the Clayton Act: Hearings Before the Subcomm. on Antitrust of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 57 (1956).

277. It might be helpful to examine how a section 2(a) case is structured. The plaintiff, whether a private party or the Federal Trade Commission, must first prove four so-called "jurisdictional" elements. First, the seller must have made at least two *sales* to different

the facts were in dispute. The case centered on A&P's negotiations and contract with Borden, Inc., by which Borden was to supply dairy products under A&P's private label to some 200 A&P stores in portions of Illinois and Indiana.[279] Negotiations began in late 1964, when Borden made four offers for A&P's business, each one of which was refused. The last would have reduced A&P's cost for dairy products some $410,000.[280] A&P then decided to put the contract out on bid and received a bid from Bowman Dairy that would have saved some $737,000. An A&P buyer called and told Borden that its bid was much too high.[281] Borden recalculated and offered a contract which would save A&P some $820,000 per year, specifically telling A&P that it was "meeting competition."[282] A&P then told Borden to "sharpen your pencil a little bit because you are not quite there,"[283] and Borden then made an even slightly better offer[284]

purchasers within a reasonably short period of time. *See generally* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947). Second, the sales must be of *commodities. See generally* General Shale Prod. Corp. v. Struck Const. Co., 132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943). Third, the commodities must be of *like grade and quality.* Finally, at least one of the sales must be *in interstate commerce. See generally* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

Assuming the jurisdictional elements are shown, the plaintiff proves a prima facie case by showing in addition, first, a price discrimination (and "a price discrimination . . . is merely a price difference," FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960)), and second, that the price discrimination had the requisite anticompetitive effects at the primary, secondary or tertiary lines. *See* notes 261-63 *supra.*

The seller may rebut the prima facie showing by proving that its discrimination was cost justified or in response to changing conditions pursuant to the provisos of section 2(a), or that the discrimination was given in good faith to meet a competitor's offer. *See generally* KINTNER, note 258 *supra,* at 18-28.

278. One authority has noted that to prove a violation of section 2(f), plaintiff must "establish all the elements of a 2(a) violation" and "show that . . . the buyer deals in interstate commerce, . . . the buyer's purchase was in interstate commerce, and . . . that the inducing buyer knew or should have known that the price would cause the seller to violate the provisions of Section 2(a)." KINTNER, note 258 *supra,* at 252. *See generally* ROWE, note 257 *supra,* at 437-43.

279. The factual summary advanced here is drawn from the Administrative Law Judge's opinion in Great Atl. & Pac. Tea Co., 87 F.T.C. 962 (1976).

280. *Id.* at 974-77.

281. Testimony revealed that A&P told Borden that its bid was "so far out of line that it is not even funny. You are not even in the ball park. . . . [The Bowman] bid is so far different from yours that there isn't any comparison." *Id.* at 978.

282. *Id.* at 979.

283. *Id.*

284. The Borden negotiator testified that he told A&P that the offer was "given to you by us on the feeling and belief that *we are meeting a competitive bid. We knew of no other way to justify this.*" *Id.* at 980 (emphasis by FTC Administrative Law Judge).

which A&P accepted.

In 1971, the Federal Trade Commission filed a three-count complaint charging, first, that A&P violated section 5 of the Federal Trade Commission Act[285] by not telling Borden that its offer not only met that of Bowman, but substantially beat it.[286] The second count alleged that A&P knowingly induced and received a price discrimination in violation of section 2(f), and the third charged A&P with price-fixing.[287]

On the first count, the Administrative Law Judge found that A&P, knowing that Borden thought its bid just met competition, misrepresented the situation by not telling Borden that its bid not only met, but beat, Bowman's; thus he found a violation of section 5.[288] For the same reason, he found that A&P had induced and received a price discrimination violative of section 2(f).[289] A&P argued that, for it to violate section 2(f), Borden must have violated section 2(a). A&P claimed that section 2(a) was not violated because Borden thought it was meeting competition. Borden thus satisfied the section 2(b) defense of meeting competition, precluding a section 2(f) violation by A&P. The administrative law judge held, however, that it was far from clear that Borden could sustain the "meeting competition" defense because it had done little to verify Bowman's bid.[290] In addition, he held that, even if Borden could sustain the defense, A&P was not exonerated automatically.[291] This conclusion flowed, he said, from *Kroger Co. v. FTC,*[292] where the court had found a buyer liable under section 2(f), even where the seller had sustained the "meeting competition" defense, because the buyer had lied to the seller about other offers.[293]

285. 15 U.S.C. § 45 (1976).

286. 87 F.T.C. at 965.

287. This count was dismissed by the Administrative Law Judge, 87 F.T.C. at 1032, and played no part in the Court's later decision; therefore, it is not discussed here.

288. According to the Commission, "There was no obligation upon A&P to divulge the name of the competitor or the actual price offered by a competitor. It was sufficient if it had informed Borden that the meeting competition defense was not available." *Id.* at 96-97.

289. *Id.* at 1022.

290. *See* note 265 *supra.*

291. 87 F.T.C. at 1021.

292. 438 F.2d 1372 (6th Cir. 1971). *See* text accompanying note 305 *infra.*

293. The Administrative Law Judge found that A&P misrepresented the Bowman offer to Borden. 87 F.T.C. at 1022. Because, however, later courts appeared to disregard any A&P misrepresentations, that matter is not discussed here.

Thus, the issues were set. First, must a violation of section 2(a) be shown before liability under 2(f) can flow? And second, could Borden sustain the "meeting competition" defense of section 2(b), thus negating a violation of section 2(a)?

To understand the tension created between sections 2(a) and 2(f), it is crucial to understand that a successful "meeting competition" defense depends on the *seller's* good faith, not that of the buyer.[294] Thus, even where the seller makes an offer substantially lower than that of its competitors, it will sustain the "meeting competition" defense if it acted in good faith and made a reasonable effort to "investigate or verify" its competitor's offer[295] (short of having to verify an offer with its competitors).[296] Where the seller knows the competitor's offer, he can meet but cannot undercut it.[297] Sometimes, however, as in this case, the seller may honestly believe he is meeting competition (thus sustaining the defense), but the buyer knows full well that the seller is not only meeting, but substantially beating, the competitor's offer. If section 2(f) cannot be violated without a section 2(a) violation, the buyer may be "culpable" in the sense that he knew he was receiving a discriminatory price which would be illegal *if the seller knew the true facts,* but escapes liability even so.

The argument that section 2(a) liability must precede section 2(f) liability rests in part on the language of section 2(f) itself, which requires the receipt of a "discrimination in price which is prohibited by this section."[298] Additional support is found in the Court's decision in *Automatic Canteen Co. v. FTC,*[299] which dealt with a totally different issue; that is, which party must go forward with evidence of a "cost justification," "meeting competition," or "changing conditions" defense in a suit under section 2(f).[300] While the result in

294. *See* note 278 *supra.* Moreover, the Supreme Court has made clear that meeting competition is a *complete* defense to a section 2(a) charge. Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

295. FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 758 (1945).

296. *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978).

297. *See, e.g.,* National Dairy Prod. Corp., 70 F.T.C. 79 (1966), *aff'd,* 395 F.2d 517 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968).

298. 15 U.S.C. § 13(f) (1976).

299. 346 U.S. 61 (1953).

300. In *Automatic Canteen,* the Commission showed that the buyer knew the prices it

Automatic Canteen is of little interest here, the Court's analysis provided language helpful to the argument that section 2(f) is not violated unless section 2(a) is. For example, the Court noted that section 2(f) is "roughly the counterpart, as to buyers, of sections of the Act dealing with discrimination by sellers. . . ."[301] More importantly, the Court concluded in dicta that "a buyer is not liable under section 2(f) if the lower prices he induces are either within one of the seller's defenses . . . or not known by him not to be within one of those defenses."[302] In addition, leading commentators have noted that section 2(f) liability is a derivative of section 2(a) liability[303] and that "it was the professed intention of Congress to have buyers liable for inducing any seller violation of the act. . . ."[304]

The only case which reaches an arguably opposite result is *Kroger Co. v. FTC*,[305] relied on by the Administrative Law Judge in *A&P*, in which the Commission expressly absolved the seller from section

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received were some one-third lower than those received by its competitors from the same supplier. It then rested, placing nothing about absence of cost justification in the record. Automatic put on no evidence of cost justification. The Seventh Circuit upheld the Commission's determination that a prima facie case was made, Automatic Canteen Co. v. FTC, 194 F.2d 433 (7th Cir. 1952), and said the Commission was under no obligation to show absence of cost justification.

The Supreme Court held that to show that the buyer "knowingly" received an *illegal* price discrimination the Commission must at least come forward with evidence negating Robinson-Patman defenses where information concerning such a defense (in this case, the seller's costs) could be obtained more easily by the seller than by the buyer. 440 U.S. at 82-84.

301. 346 U.S. at 63. In an understatement, the Court also noted that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act. . . ." *Id.* at 65.

302. *Id.* at 74. Prior to this conclusion, the Court had explained that

> the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. . . . For we are not dealing simply with a "discrimination in price"; the "discrimination in price" in § 2(f) must be one "which is prohibited by this section." Even if any price differential were to be comprehended within the term "discrimination in price," § 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the "defenses" available to sellers, such as . . . bona fide attempts to meet competition. . . .

Id. at 70-71 (footnotes omitted).

303. "[T]he legal status of the buyer is derivative from the seller's pricing legality under the Act, and is confined to a buyer's 'knowing' receipt of the seller's illicit price discrimination." ROWE, *supra* note 257, at 420.

304. KINTNER, *supra* note 258, at 252.

305. 438 F.2d 1372 (6th Cir. 1971). *See* text accompanying notes 292-93 *supra*. Interestingly, two judges of the three-judge panel were the late Justice Tom C. Clark and Wade H. McCree, Jr., present Solicitor General of the United States.

2(a) liability and yet held the buyer, Kroger, liable under section 2(f). The facts were similar to those in *A&P*. Kroger, too, had decided to market private label dairy products and requested bids. A major difference was that Kroger's purchasing agent clearly lied to one bidder about other bids which had been submitted, claiming others were lower when they were not. On the basis of this prevarication, a seller reduced his bid to a clearly discriminatory level.

The seller was charged with a violation of section 2(a) but sustained the meeting competition defense. Kroger argued that such a finding, by itself, meant that a 2(f) violation was impossible. The court held, however, that while this *may* ordinarily be true, Kroger's misrepresentations negated the argument.[306] It explained that the meeting competition defense, when relevant to a section 2(f) case, had to be examined from both the standpoints of what the seller knew, and what the buyer knew.[307] According to the court, "[T]o hold otherwise . . . would put a premium on the buyer's artifice and cunning in inducing discriminatory prices."[308] Thus, since Kroger's misrepresentation had induced a discriminatory price which *it* knew not only met, but substantially beat, any competitor's price, it could be held liable under section 2(f).

When the initial decision in *A&P* was reviewed,[309] the full Federal Trade Commission dismissed the first count, which had alleged that A&P had an affirmative duty to tell Borden that its price was lower than Bowman's. The Commission believed that such a disclosure obligation would stop buyers from bargaining for low prices.[310] While

306. 438 F.2d at 1374.

307. *Id.* at 1377.

308. *Id.*

309. Great Atl. & Pac. Tea Co., 87 F.T.C. 1047 (1976).

310. The Commission's logic was as follows:

> The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest.
>
> . . . .
>
> We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution. As the [REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 196 (1955)] stated, "Legalistic impediments to the normal bargaining process . . . might well deprive the public of gains that under effective competition it has a right to expect. . . ." We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such

it may not be wise to require the buyer to disclose that one offer beats another under section 5, evidently it is under section 2(f), since the Commission affirmed the initial decision.[311] It noted that the evidence must show, aside from any defenses, a violation of section 2(a), some "knowledge" of receiving an illegal price, and that the buyer can raise defenses which the seller could, including the meeting competition defense.[312] But the Commission agreed with the *Kroger* holding[313] that, in a section 2(f) case, the meeting competition defense must be viewed from the buyer's standpoint.[314]

The Second Circuit affirmed.[315] Explaining that the Commission's burden was to show that A&P received a lower price than its competitors, and that A&P knew the prices it received violated 2(a), it held that a prima facie case of section 2(f) liability had been made.[316] Then, after noting that the buyer could rebut the prima facie case by sustaining one of the seller's defenses, the court accepted the *Kroger* rationale and held that, since A&P knew Borden's bid beat the competition, A&P could not sustain the defense.[317] Indeed, the court went further than *Kroger* and held that no material misrepresentation by the buyer was necessary to trigger the *Kroger* rule.[318] Accordingly, it enforced the Commission's

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> bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid.

87 F.T.C. at 1050-51.

311. 87 F.T.C. at 1066.

312. *Id.* at 1051.

313. See text accompanying notes 305-08 *supra.*

314. 87 F.T.C. at 1055. The Commission noted that if A&P had believed that Borden's bid was no better than Bowman's, the meeting competition defense would be sustained. But, the Commission emphasized that, while the Administrative Law Judge had not decided whether Borden had a meeting competition defense, it felt it "very probable that Borden did *not* have such a defense." 87 F.T.C. at 1057 n. 19 (emphasis in original). This flowed from the Commission's belief that Borden made too little effort to verify Bowman's bid. "It should have asked A&P for more information about the competing bid." *Id.*

315. Great Atl. & Pac. Tea Co. v. FTC, 557 F.2d 971 (2d Cir. 1977).

316. *Id.* at 981. *See* note 277 *supra.*

317. Any other rule, according to the court, would mean "that large buyers could consistently play one seller off against another to the point where all bids are below sellers' costs and then in reliance upon the sellers' potential good faith and its 'meeting competition' defenses, thus vindicate the final price." 557 F.2d at 982-83.

318. The court stated:

> While Kroger did indeed involve a "lying buyer," we do not regard the Sixth Circuit's ruling as strictly limited to the situation where the charged buyer affirmatively lied to

order.[319]

The Supreme Court rejected the Second Circuit's approach[320] and held that if Borden was protected by the meeting competition defense, A&P was also.[321] Then, it went further and held that Borden would have sustained the defense,[322] notwithstanding the Commission's intimation to the contrary.[323]

Justice Stewart, writing for the majority,[324] first explained that the explicit language of section 2(f), its legislative history,[325] and the Court's only previous case interpreting the section, *Automatic Canteen*,[326] all indicated that no 2(f) violation could occur unless 2(a) were violated. Noting that 2(f) prohibits only discriminations which are prohibited "by this section,"[327] the Court stated categorically that "[u]nder the plain meaning of section 2(f), . . . a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense."[328] According to the Court, *Automatic Canteen* held the same thing; there, the Court had said that an illegal section 2(f) discrimination had to be "forbidden to sellers in other sections of the Act."[329] Thus 2(f) is not violated "if the lower prices received are justified by reason of one of the seller's affirmative defenses."[330]

> the seller. The rule that the "meeting competition" defense must be looked at from the buyer's perspective where the buyer is charged under § 2(f) is a salutary and correct one, whether the buyer lies or merely keeps quiet about the nature of the competing bid it has already been offered.

Id. at 983.

319. *Id.* at 988.

320. Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979).

321. *Id.* at 76.

322. *Id.* at 85.

323. *See* note 314 *supra.*

324. Burger, C.J., and Brennan, Blackmun, Powell & Rehnquist, JJ., formed the majority. White and Marshall, JJ., concurred and dissented in part in separate opinions. Stevens, J., took no part.

325. This prong of the Court's attack was quite brief, relying only on a brief statement from the House Conference Report which noted that 2(f) applied to discriminations that are illegal under "the first paragraph," or section 2(a), of the statute. 80 CONG. REC. 9419 (1936). 440 U.S. at 77 n.10.

326. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953). *See* notes 299-303 *supra.*

327. 15 U.S.C. § 13(f) (1970).

328. 440 U.S. at 76.

329. *Id.* at 77 (quoting Automatic Canteen Co. v. FTC, 346 U.S. at 70 (1953)).

330. *Id.* at 78

The Court specifically rejected the Commission's argument that, in a section 2(f) case, the meeting competition defense should rise or fall on what the *buyer* knows. First, as it explained above, the wording of the statute itself belied such an interpretation. But perhaps more importantly, the Court feared that requiring the buyer to notify the seller that its offer beat that of a competitor would "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"[331] by negating competitive bidding and causing competitors to match each other's prices.[332] Thus, if section 2(b) shielded Borden from liability, it shielded A&P also.

Interestingly, the Court relegated *Kroger,* and the question whether a "lying buyer" is more susceptible to a section 2(f) charge than one who simply says nothing about a discriminatory low price, to a footnote.[333] Finding that A&P had made no material misrepresentations, the Court found it unnecessary to accept or reject the *Kroger* result.[334]

Having determined that A&P could not be liable under 2(f) if Borden could sustain the meeting competition defense, the Court next examined whether Borden would have met section 2(b)'s burden of showing that its price "was made in good faith to meet an equally low price of a competitor"[335] if that issue had been tried. It first explained the *Staley-Gypsum*[336] test, *i.e.,* that the seller need

331. *Id.* at 80 (quoting *Automatic Canteen,* 346 U.S. at 63).

332. 440 U.S. at 80. Interestingly, the Commission brushed this major concern of the Court aside with a rather weak retort:

> A buyer that merely solicits bids and accepts the lowest offer would not violate Section 2(f); something more is necessary. The Robinson-Patman Act demands a showing of competitive injury as a prerequisite to a finding that a particular inducement or receipt of a discriminatory price is unlawful. The Act thus provides a built-in guarantee that enforcement of Section 2(f) will not produce anticompetitive effects.

Brief for the Federal Trade Commission at 40, Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979). What the brief fails to mention is that, once a discrimination is shown, the requisite competitive effect is almost a foregone conclusion, especially in a secondary-line case. *See* FTC v. Morton Salt Co., 334 U.S. 37 (1948). *See generally* UNITED STATES DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 10-11 (1977).

333. 440 U.S. at 81-82 n.15.

334. *Id.*

335. 15 U.S.C. § 13(b) (1970).

336. *See* note 265 *supra.*

only reasonably believe that it is meeting competition.[337] Then, it compared Borden's actions with those facts posited in *Gypsum* that might be relevant in determining the seller's good faith in investigating and verifying that a lower offer had been made. These included "[1] evidence that a seller had received reports of similar discounts from other customers, [2] threatened . . . termination of purchases if the discount were not met, [3] [e]fforts to corroborate the reported discount by seeking documentary evidence, [and 4] the seller's past experience with the particular buyer."[338] The Court found that Borden (1) was faced with losing A&P's business unless it lowered its offer, (2) attempted to obtain more information about its competitor's offer from A&P, and (3) had experienced a good relationship with A&P in the past and thus had no reason to doubt its veracity. In addition, Borden had specifically told A&P that, by its offer, it was meeting competition.[339] From these actions, it was clear to the Court that Borden had done all it could to assure that it was meeting competition. The Court concluded, since Borden would have sustained the defense, A&P did not violate section 2(f).[340]

Justice White agreed that a section 2(f) violation required a section 2(a) violation, but he objected to the majority deciding the meeting competition question when it had not been decided below. He would have remanded the case to the Commission for a hearing on that issue.[341]

Justice Marshall agreed with Justice White that the meeting competition issue should be remanded.[342] However he went further and also objected to the other prong of the majority holding—that a section 2(a) violation by the seller is always a condition precedent for a section 2(f) violation. Arguing that section 2(f)'s "prohibited by this section" language should be read more broadly, he posited that Congress meant that the same general affirmative defenses

337. The Court emphasized that "[s]ince good faith, rather than absolute certainty, is the touchstone of the meeting competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition." 440 U.S. at 83.

338. 438 U.S. at 455.

339. 440 U.S. at 84. *See* note 284 and text accompanying note 282 *supra*.

340. *Id.* at 85.

341. *Id.* at 85 (White, J. concurring in part and dissenting in part).

342. *Id.* at 90 (Marshall J., concurring in part and dissenting in part).

were available to buyer and seller—not that a buyer automatically escaped section 2(f) liability just because the seller escaped section 2(a) exposure.[343] Justice Marshall would follow the strict *Kroger* analysis and hold that where the buyer misrepresents a competitor's offer, it cannot claim the defense. Where, however, the buyer "acted in good faith to induce the seller to meet a competitor's price, regardless of whether the seller's price happens to beat the competitor's,"[344] the defense would apply.

Thus, for the second straight term, the Court has reduced the efficacy of the Robinson-Patman Act. Last term, in *Gypsum,* it held that the verification of prices by sellers with each other, ostensibly to meet the good faith test of section 2(b), was not insulated from attack as price-fixing.[345] As a matter of policy, the Court was not willing to let the Robinson-Patman Act lead to price stabilization by allowing competitors to exchange sensitive price information.[346] The Court went even further and held that, if such inter-seller verification were the only way to otherwise sustain the defense, the defense would not be available.[347]

The Court's *A&P* decision adds to the decline of the Robinson-Patman Act. It is difficult to envision a situation where the buyer cannot orchestrate a circumvention of 2(f) liability by simply refusing to discuss its offers from other sellers. A seller has two basic sources of information on competitors' offers—competing sellers and the buyer. Under *Gypsum,* it had best not talk to its competitors, and the buyer has no obligation to tell what it knows. Thus, by its own action, the buyer can insure that a seller sustains the meeting competition defense, while, at the same time, negate the buyer's exposure under section 2(f).

Given the economic conditions at the time of Robinson-Patman Act passage, and the statute's clear purpose to alleviate the effects

343. *Id.* Justice Marshall believed that, while the majority stated it was not deciding the *Kroger* lying buyer issue, it effectively held that the fact the buyer lied was irrelevant.

344. *Id.* at 88.

345. *See* note 265 *supra.*

346. 438 U.S. at 457. Interestingly, however, both *Kroger* and the Second Circuit's decision in *A&P* were cited with seeming approval. *Id.* at 455 n. 30.

347. *Id.* at 455-56. One gets the feeling, from the Court's discussion about why Borden met the 2(b) test, *see* text accompanying notes 338-39, *supra,* that it will find extremely few, or perhaps no, situations where good faith cannot be shown.

of chain store buying power on small business,[348] there is no doubt that Congress intended to prohibit conduct such as A&P's. Fortunately, in a different era "the often ambiguous Robinson-Patman Act,"[349] as Justice Marshall put it, could be interpreted to allow sellers to seek lower prices, which ultimately are passed-on to consumers through the competitive process.

VI. Access to Grand Jury Materials: *Douglas Oil*

Douglas Oil Co. v. Petrol Stops Northwest[350] was the only decision this term not similar to a case decided during the past two terms.[351] Perhaps this is because it was not an antitrust case in the sense that it raised issues that are not peculiar to the antitrust laws or antitrust enforcement. It discussed important questions that can arise in any criminal enforcement setting, especially where the scenario is such that civil damage suits often follow on the heels of a criminal prosecution. This pattern is most common in the antitrust arena.

The facts in *Petrol Stops* were straightforward.[352] In 1972, the Antitrust Division commenced a criminal price-fixing investigation of Douglas Oil, Phillips Petroleum and other oil companies. In 1975, after several employees of the targets had testified before a grand jury in the Central District of California, the grand jury returned an indictment to which the defendants pleaded *nolo contendere.*[353] Immediately before the plea, the defendants requested, and were given, grand jury transcripts of their employees' testimony pursuant to Fed. R. Crim. P. 16(a)(1)(A).

In December of 1973, Petrol Stops filed an antitrust suit in the District of Arizona,[354] charging the defendants with violating section 1 of the Sherman Act by conduct which led to the later criminal *nolo contendere* pleas. In response to interrogatories, the defendants de-

348. *See* text accompanying notes 257-58 *supra.*

349. 440 U.S. at 90 n.3 (Marshall, J., concurring in part and dissenting in part).

350. 441 U.S. 211 (1979).

351. *See* text accompanying notes 1-3 *supra.*

352. The factual summary which follows is from the Supreme Court's opinion. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 213-217 (1979).

353. United States v. Phillips Petrol. Co., No. 75-377 (C.D. Cal. filed Dec. 3, 1975). A consent decree was entered later in the government's companion civil suit. United States v. Phillips Petrol. Co., [1977-2] Trade Reg. Rep. (CCH) ¶ 61,732 (C.D. Cal. 1977).

354. Several other plaintiffs later filed suit.

nied that they had communicated about prices with each other or had documents involving any such communications. The plaintiffs, believing that the responses were not consistent with the *nolo* pleas, filed document requests for the grand jury transcripts which had been given to defendants. When the defendants objected, the plaintiffs filed a motion in the California court under Fed. R. Crim. P. 6(e),[355] asking for access to the grand jury transcripts. The United States did not object.

The district court granted the motion over the defendants' objections and ordered the Antitrust Division to transmit to the plaintiffs the grand jury transcripts and documents. It required, however, that the information be disclosed only to counsel for the plaintiffs, that it be used only in connection with the pending civil antitrust

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355. FED. R. CRIM. P. 6(e), in pertinent part, is as follows:

(e) Secrecy of Proceedings and Disclosure.—

(1) General Rule.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

cases, that it be used only to impeach or refresh the recollection of a witness, that no information be copied, and that the materials be returned to the Antitrust Division after use. Thus, significant efforts were made to insure that all information encompassed by the order would not be circulated. Importantly, however, the Court did not ask the Arizona court, where the civil action was filed, to determine whether the plaintiffs needed the materials.

This factual background sets the stage for the Supreme Court's examination of two issues. First, what standards should be used to determine whether grand jury secrecy should be broken and materials turned over to private plaintiffs? And second, which court—that where the grand jury sat or that where a follow-up civil suit is filed—should determine whether the party requesting the materials has made an adequate showing?

The question of what justifications must be shown for disclosure of grand jury transcripts is of obvious importance and can appear in a multitude of settings. For example, the request can be made by a defendant in a criminal action,[356] a private plaintiff in a subsequent civil action,[357] a state bringing either a proprietary civil action[358] or a *parens patriae* action[359] under the recently enacted section 4C of the Clayton Act,[360] or even by a committee of the United States Senate.[361] The criminal action may be in progress or completed,[362] and have resulted in no indictment[363] or an indictment and conviction,[364] *nolo contendere* plea[365] or finding of not guilty. The movant may request all grand jury materials[366] or only a part

356. Dennis v. United States, 384 U.S. 855 (1966).

357. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

358. Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), *cert. denied sub nom.* J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977).

359. Montgomery County Real Estate Antitrust Litigation v. Jack Foley Realty, Inc., 452 F. Supp. 54 (D. Md. 1978).

360. 15 U.S.C. § 15c (1976).

361. In re Grand Jury Investigation of Uranium Industry, No. 78-0173 (D.D.C., filed June 8, 1979).

362. Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

363. United States v. Proctor & Gamble Co., 356 U.S. 667 (1958).

364. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

365. United States v. Colonial Chevrolet Corp., No. 78-106-N (E.D. Va. filed May 23, 1979).

366. Montgomery County Real Estate Antitrust Litigation v. Jack Foley Realty, Inc.,452 F. Supp. 54 (D. Md. 1978).

thereof;[367] his purpose may be to use the materials as a general discovery tool[368] or, more specifically, to impeach a witness[369] or refresh his recollection. The materials may[370] or may not[371] have already been turned over to the defendant. The witness whose testimony the movant wants may or may not have testified at trial[372] or otherwise be known to the defendant. The subsequent civil action may have been either filed[373] or still in contemplation when the request was made.[374] Thus, each situation where grand jury materials are requested, while perhaps not unique, will present a matrix of variables which must be closely examined before a determination can be made whether to release the requested materials.

The starting point in discussing when grand jury secrecy should be broken is *United States v. Proctor & Gamble Co.*[375] There, after a grand jury failed to return an antitrust indictment, the government filed a civil suit and used the grand jury transcript to prepare for trial. In discovery proceedings, the trial judge ordered the government to produce the transcript for Proctor & Gamble. Rather than comply, the government allowed the court to dismiss its complaint and then appealed.[376]

The Court began its analysis by explaining the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts."[377] Drawing from *United States v. Rose,*[378] it listed the reasons for grand jury secrecy:

1. To prevent the escape of persons who may be indicted;

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367. Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968) (subpoenas and witness lists).

368. ABC Great Stores, Inc. v. Globe Ticket Co., 309 F. Supp. 181 (E.D. Pa. 1970).

369. Dennis v. United States, 384 U.S. 855 (1966).

370. Texas v. United States Steel Corp., 546 F.2d 626 (5th Cir.), *cert. denied,* 434 U.S. 889 (1977).

371. United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

372. In the Matter of Grand Jury which Presented Criminal Indictments 76-149 and 77-72 (Anthracite Coal), No. 78-176 (M.D. Pa. filed No. 14, 1978).

373. United States Industries, Inc. v. United States District Court, 345 F.2d 18 (9th Cir.), *cert. denied,* 382 U.S. 814 (1965).

374. Application of Ca. to Inspect Grand Jury Subpoenas, 195 F. Supp. 37 (E.D. Pa. 1961).

375. 356 U.S. 677 (1958).

376. *Id.* at 680.

377. *Id.* at 681.

378. 215 F.2d 617 (3d Cir. 1954).

2. To assure freedom in grand jury deliberations;

3. To prevent outsiders from annoying the grand jurors;

4. To prevent witness tampering;

5. To encourage people with information about crimes to come forward; and

6. To protect exonerated grand jury targets from adverse publicity.[379]

The greatest emphasis was placed on the grand jury secrecy's effect of encouraging witnesses to testify fully without fear that their testimony might later be discovered and used to harm them. The Court noted that this possibility of retaliation was especially important in the antitrust context because "[t]he witnesses . . . may be employees or even officers of potential defendants, or their customers, their competitors, [or] their suppliers."[380]

Next, the Court advanced the proper standard. Grand jury secrecy, it said, should be broken only where a "compelling necessity" is shown; and moreover, such a necessity "must be shown with particularity."[381] In dicta, the Court explained that "particularized need" would include use of the transcript at trial to refresh recollection, to test credibility and to impeach, and that, in such situations, "the secrecy of the proceedings is lifted discretely and limitedly."[382] On the other hand, the fact that access would save time or reduce costs is not sufficient.

The following year, the Court decided *Pittsburgh Plate Glass Co. v. United States,*[383] which is important because of its dissenting opinion. After conviction under section 1 of the Sherman Act, the defendants appealed because they were not allowed to examine the grand jury testimony of a key government trial witness. Again, the Court emphasized the necessity for grand jury secrecy, especially, it said, "in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness."[384] The Court

379. *Id.* at 628-29.
380. 356 U.S. at 682.
381. *Id.*
382. *Id.* at 683.
383. 360 U.S. 395 (1959).
384. *Id.* at 400.

then noted that the defendants had not attempted to show a particularized need, arguing instead that they had a *right* to the material. It rejected the existence of any such right.[385]

In a sharp dissent, four Justices accused the Court of making secrecy an end in itself without examining the reasons for secrecy and determining if they applied in that particular case.[386] They examined the traditional reasons for secrecy, *i.e.*, preventing escape, protecting those not indicted, precluding retaliation, and encouraging uninhibited grand jury deliberation,[387] but concluded that "[t]he Court, while making obeisance to 'a long-established policy' of secrecy, makes no showing whatever how denial of . . . grand jury testimony serves any of the purposes justifying secrecy."[388] Because the grand jury and trial proceedings were concluded and the witness had testified, the possibility of escape, retaliation and the protection of those not indicted were insufficient reasons to maintain secrecy. In addition, portions of the transcript that mentioned grand juror names or contained grand jury deliberations or opinions could be removed from materials handed over. The dissenters concluded that "[t]he Court's insistence on secrecy exalts the principle of secrecy for secrecy's sake."[389]

If the dissent in *Pittsburgh Plate Glass* signalled some erosion in the totality of grand jury secrecy, the Court's decision in *Dennis v. United States*[390] showed that the dissent was taken to heart by the Court. *Dennis* was a non-antitrust criminal case in which the trial judge had denied the defendants' motion to require production of the grand jury testimony of four government witnesses. The trial court had held that the defendants' particularized need, the possibility of inconsistency between the witnesses' grand jury and trial testimony, was not sufficient to allow access. The Court disagreed and reversed, thus beginning a trend which has eased the *Proctor & Gamble* burden.[391]

385. *Id.* at 401.
386. *Id.* at 403 (Brennan, J., dissenting; Warren, C.J., Black & Douglas, JJ., concurring in the dissent).
387. *Id.* at 405.
388. *Id.* at 406.
389. *Id.* at 407.
390. 384 U.S. 855 (1966).
391. *See generally* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 108 (1969 & Supp. 1979).

The facts of each of these three Supreme Court decisions are significantly different from those in *Petrol Stops* and other treble damage actions following a government indictment. In each of these cases, it was the defendant in the criminal case (or, as in *Proctor & Gamble*, an analogous civil case)[392] who wanted the transcript rather than a third party who had filed a treble damage action. Such a defendant certainly presents a stronger case for access, and today, in light of *Dennis*, Rule 16, and other criminal procedural safeguards, a defendant normally may have access to grand jury materials. Furthermore, this often will work to the advantage of a treble damage plaintiff, because whether the defendant has the transcript is clearly material to whether the plaintiff will be given access.[393]

What constitutes a particularized need, enabling a plaintiff to obtain grand jury materials, is not clear. What is clear is that, with the possible exception of *parens patriae* suits by state attorneys general,[394] a need more compelling than the general helpfulness of the materials for discovery purposes is necessary.[395] Many cases evince a rather mechanistic approach in denying access. Others, however, appear to balance the policies underlying secrecy against

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392. *See* text accompanying notes 375-76 *supra*.

393. *See, e.g.*, Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), *cert. denied sub nom.* J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977).

394. *See* text accompanying notes 428-36, *infra*.

395. *See, e.g.*, Application of California to Inspect Grand Jury Subpoenas, 195 F. Supp. 37 (E.D. Pa. 1961). There California wanted to examine grand jury subpoenas in determining whether to file a civil antitrust action in the so-called electrical equipment conspiracy cases and argued that access would save it time and money and thus was in the public interest. This rationale was rejected.

Similarly, in Baker v. United States Steel Corp., 492 F.2d 1074 (2d Cir. 1974), the court rejected the "need" that access would provide plaintiff with leads and aid in general discovery, a rationale the district court had referred to as the "slight need test." Judge Lumbard, while dissenting on another ground, agreed with the court and said, "[W]hile the 'particularized need' test of Pittsburgh Plate Glass . . . and . . . Proctor & Gamble . . . has been eroded to some extent, no previous decision of this court has endorsed a standard which would permit the breach of grand jury secrecy merely for general discovery purposes." *Id.* at 1080 (Lumbard, J., dissenting). *See also* ABC Great Stores, Inc. v. Globe Ticket Co., 309 F. Supp. 181, 183 (E.D. Pa. 1970) ("[T]he law requires that before the veil of grand jury secrecy may be lifted, the party seeking disclosure must demonstrate a more compelling and particularized need than merely expediting civil discovery."). *See also* Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

In addition, the fact that the defendant has obtained his transcript or that of an employee is not, by itself, a sufficient particularized need. Texas v. United States Steel Corp., 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977).

need, even if the need is not tremendously "compelling" in the *Proctor & Gamble* sense, and also emphasize action a judge might take to reduce risks associated with disclosure. Perhaps the kernel of this reasoning flows from *United States v. Socony-Vacuum Oil Co.*,[396] where the Court said, in a somewhat different context,[397] that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[398]

U.S. Industries, Inc. v. United States District Court,[399] which was decided before *Dennis*,[400] exemplifies the more flexible approach. There the question was whether the plaintiffs in a civil case should have been given access to a government sentencing recommendation memo, which contained grand jury material and had been used in the prior criminal case. The defendants had inspected the memo, but it appeared that the plaintiffs put forth no particular compelling need, such as that the document was needed for impeachment, to refresh a recollection or to test credibility.[401] The court agreed with defendant that a particularized and compelling need should be shown[402] but emphasized that the necessary degree of need would vary, depending on the need for secrecy:

> [I]n making a determination of when to permit a disclosure of grand jury proceedings, we are to examine, not only the need of the party seeking disclosure, but also the policy considerations for grand jury secrecy as they apply to the request for disclosure . . . . In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party

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396. 310 U.S. 150 (1940).

397. The specific question about grand jury transcript access in *Socony* involved whether the defendants in a criminal antitrust case should have been able to use the transcript at trial. Thus, the question was more akin to that presented in *Pittsburgh Plate Glass*, *see* text accompanying notes 383-89 *supra*, than to that presented by post-indictment civil damage actions.

398. 310 U.S. at 234. This is not to say that judges in cases withholding grand jury materials were oblivious to this admonition. For example, the court in Texas v. United States Steel Corp., 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977), *see* note 395 *supra*, recognized that some policies underlying grand jury secrecy melted after indictment. It is fair to say, however, that cases discussed in the text accompanying notes 399-403 *infra*, were more sensitive to determining specific conditions under which disclosure was, or could be made, proper.

399. 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965).

400. *See* text accompanying notes 390-91 *supra*.

401. *See* text accompanying note 382 *supra*.

402. 345 F.2d at 21.

> seeking disclosure should not be required to demonstrate a large compelling need.[403]

Because the criminal matter had been completed, the court found that the only secrecy policy factor which existed was that of "insuring untrammeled disclosure by *future* grand jury witnesses."[404] While plaintiff argued that this retaliation rationale was negated because the corporate defendants had examined the document, the defendant argued that retaliation could come from elsewhere. The court recognized, as had the Supreme Court in *Proctor & Gamble,* that the corporate employer, indeed, was not the only source of retaliation but concluded that the district court could delete the names of witnesses or take other action that would uphold the grand jury secrecy policy involved and, at the same time, provide the plaintiff with much helpful information.[405]

A similar approach was taken in *Illinois v. Sarbaugh,*[406] where, in a treble damage action, Illinois requested transcripts which had previously been furnished to defendants in the prior criminal action under Fed. R. Crim. P. 16(a)(1)(A). The court recognized that the level of need diminishes as the reasons for secrecy diminish and that the only secrecy policy remaining was that of preventing retaliation. Following *U.S. Industries,*[407] the court expressed concern over retaliation by those other than the witness' employer but agreed that a protective order would obviate the problem.[408] Given the lack of strong reasons for grand jury secrecy, the court held that a sufficient particularized need was shown where the witness whose transcript was sought has a copy and where he or she is to testify at the civil

403. *Id.*

404. *Id.* at 22.

405. *Id.*

406. 552 F.2d 768 (7th Cir.), *cert. denied sub nom.* J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977).

407. See text accompanying notes 399-405 *supra.*

408. The court expressed the problem and its solution as follows:

> Once the employer has the transcript, all that remains of the reason for secrecy is the need to protect the witness, to the extent it is still possible to do so, from potential adverse effects on his future relationships with members of the industry other than his employer. This residual need cannot be dismissed as unworthy of any consideration, . . . but it can be adequately dealt with by a protective order.

552 F.2d at 775.

trial or deposition about matters discussed before the grand jury.[409]

The Ninth Circuit's *Petrol Stops* decision[410] followed the same general analysis. The court agreed that once a defendant corporation obtained the materials, the policy against disclosure due to the possibility of retaliation lost much of its force. There was no indication, for example, that witnesses would be exposed to other sources of retaliation. On the other hand, the court explained that "a civil litigant may not violate [grand jury secrecy] at his pleasure. It is not sufficient that the litigant might find it useful to do so."[411] The court was able to find what it called "a particularized need beyond the mere relevance of the materials."[412] The fact of indictment appeared to contradict discovery answers which stated that the defendants had not communicated about prices, the materials might be used for impeachment. "[P]etrol Stops did not seek the materials merely for a general fishing expedition."[413]

On appeal, the Supreme Court held that both the trial and appellate courts had applied proper standards in determining whether to grant the plaintiffs access to the grand jury materials. But the Court reversed, holding that in some situations, where the civil action is in a district different from that where the grand jury sat, judges in each district must decide jointly whether to release the materials.[414]

With respect to the first issue, the Court relied heavily on *Proctor & Gamble.*[415] It reemphasized the importance of grand jury secrecy, the traditional reasons underlying the policy, and that a showing of

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409. *Id.* at 777.

410. Petrol Stops Northwest v. United States, 571 F.2d 1127 (9th Cir. 1978).

411. *Id.* at 1129.

412. *Id.* at 1130.

413. *Id.* at 1131. It is interesting to examine how much the compelling and particularized need standard appears to have lessened in severity between 1959 and 1978. In *Pittsburgh Plate Glass,* discussed in text accompanying notes 383-89 *supra,* the *defendant* in a *criminal* case could not obtain the testimony of a *key government witness.* In *Petrol Stops,* a *plaintiff* in a *civil* case could, simply because an *indictment* had been handed down which *appeared* to conflict with answers given in civil discovery. As discussed in text accompanying notes 429-433 *infra,* some courts have held that in the context of *parens patriae* litigation under section 4C of the Clayton Act, 15 U.S.C. § 15c (1976), *no* compelling or particularized need must be shown. This is not to argue that the more liberal cases were decided incorrectly but only to indicate the different reasoning and philosophies of different courts at different times.

414. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

415. *See* text accompanying notes 375-82 *supra.*

need had to be made "with particularity" so that "the secrecy of the proceedings [may] be lifted discretely and limitedly."[416] From *Proctor & Gamble* (as well as *Dennis*[417]), the Court synthesized a three pronged test: "Parties seeking grand jury transcripts . . . must show [1] that the material they seek is needed to avoid a possible injustice in another judicial proceeding, [2] that the need for disclosure is greater than the need for continued secrecy, and [3] that their request is structured to cover only material so needed."[418] Thus, although lesser justification must be shown as the reasons for secrecy subside, in every case, including those where the grand jury has been terminated, the court must balance the need for the materials against the need for continuing secrecy.[419] Explaining that "[t]he District Court made clear that the question before it was whether a particularized need for disclosure outweighed the interest in continued grand jury secrecy,"[420] all Justices concluded that the correct standard had been applied.

The Court next turned to the question of *which* court should do the balancing. While it agreed that application for access should be made to that court where the grand jury sat, it held that where the judge of that court has little knowledge about the civil suit in another district, he cannot assess the need for disclosure. Thus, he can examine only one of the two relevant factors, *i.e.*, the necessity for continued secrecy.[421] In such a situation, the Court said that the judge of the court where the grand jury was sitting should assess in writing the necessity for continued secrecy and send this evaluation, together with the grand jury materials, to the judge in charge of the civil litigation to assess the plaintiff's need. "In this way, both the need for continued secrecy and the need for disclosure could have been evaluated by the courts in the best position to make the respec-

416. 441 U.S. at 221 (quoting United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958)).

417. Dennis v. United States, 384 U.S. 855 (1966). *See* text accompanying notes 390-91 *supra*.

418. 441 U.S. at 222. The Court emphasized, as it had done in *Proctor & Gamble*, 356 U.S. at 683, that the classic "particularized need" is that the material will be used to refresh recollection, impeach or test the witness' credibility. *Id.* n.12.

419. *Id.* at 223-24.

420. *Id.*

421. *Id.* at 226.

tive evaluations."[422]

The Court's action on this issue appears somewhat esoteric, especially on the facts before it. If the seeming inconsistency between the defendants' response to discovery and the indictment and *nolo* plea is a sufficient particularized need, as the Court found by upholding the lower court's application of legal standards to the facts,[423] surely the grand jury judge was as competent to realize this as the civil action judge was. More generally, the Court's opinion can be criticized because it is not clear which judge has the final say in whether access is granted and because the suggested procedure is going to add additional time to litigation in situations, such as *Petrol Stops,* where a formal, coordinated procedure simply is not necessary.

While the second issue presented to the Court was one of first impression,[424] the first, dealing with circumstances under which grand jury materials will be made available, is more important and interesting. A reading of the Court's discussion without consideration of the specific facts of the case, would indicate that the Court frowns on access. The Court emphasizes the importance of secrecy, even after the grand jury finishes its work, speaks of "occasional need" for disclosure, relies heavily on *Proctor & Gamble,* cautions against a "minimal showing of particularized need" test,[425] and implicitly agrees with other courts[426] that access should not be allowed as a "mechanism for general discovery."[427] Given the particularized need advanced by defendants, however, this seemingly hard-line approach may be a mirage.

An issue of considerable current interest, for which *Petrol Stops*

422. *Id.* at 231. While the Court argued that "such a procedure would [not] be required in every case arising under Rule 6(e)," *id.* at 231, it appears probable that it will be necessary in almost all cases where the civil action and grand jury are in different districts. For only where two districts are not involved will "the District Court having custody . . . have dependable knowledge of the status of, and the needs of the parties in, the civil suit." *Id.*

The Chief Justice and Justices Stevens and Stewart dissented from this portion of the decision, objecting especially to the Court's tampering in an area where judges have substantial discretion. *Id.* at 234 (Burger, C.J., and Stevens & Stewart, JJ., dissenting).

423. *See* text accompanying note 420 *supra.*

424. *See* 441 U.S. at 224.

425. *Id.* at 224 n. 14.

426. *See* note 395 and accompanying text *supra.*

427. 441 U.S. at 229.

offers little help, is whether section 4F(b) of the Clayton Act, which requires the federal government to provide state attorneys general with investigative materials,[428] by itself, is a sufficient compelling need for access. The requirement was part of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[429] which conferred standing on state attorneys general to sue as *parens patriae* on behalf of natural persons injured by antitrust violations.[430]

While an in-depth discussion of this issue is beyond the scope of this article, it is interesting that, at present, there is a difference of opinion among district courts. In *In re Montgomery County Real Estate Antitrust Litigation*[431] and *United States v. B. F. Goodrich Co.*,[432] the courts granted disclosure to state attorneys general, subject to protective orders. In the former case, the court held that the language of section 4F(b) and its legislative history[433] supported disclosure. In addition, the Antitrust Division of the Department of

428. Section 4F of the Clayton Act, ch. 323, § 4F, 38 Stat. 730 (1914) (currently codified at) 15 U.S.C. § 15f (1976), reads as follows:

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

429. Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 15c (1976)).

430. Section 4C(a)(1) of the Clayton Act, 15 U.S.C. § 15c(a)(1) (1976), the heart of the *parens patriae* provisions, is as follows in pertinent part:

> Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the sections 1 to 7 of this title.

431. 452 F. Supp. 54 (D. Md. 1978).

432. [1978-2] TRADE REG. REP. (CCH) ¶ 62,389 (N.D. Cal. Dec. 12, 1978).

433. The court relied upon the following language from the House Report:

> Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, § 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general "to the extent permitted by law." This means that the files are to be made available except where specifically prohibited.

H.R. REP. No. 499, 94th Cong., 1st Sess. 17 (1975).

Justice supports disclosure after its criminal proceedings are completed.[434] On the other hand, in *In re Grand Jury which Presented Indictments 76-149 and 77-72 (Anthracite Coal)*[435] and *United States v. Colonial Chevrolet Corp.*,[436] the courts refused disclosure. In the former case, the court was particularly concerned about the effect of disclosure on future grand jury witnesses, while, in the latter, the court expressed reluctance because of the effect on those who had testified. Thus, the question remains unsettled.

It appears questionable that either section 4F(b) or its legislative history support the argument that Congress intended grand jury materials to be disclosed to states or that section 4F(b), per se, constitutes a particularized need.[437] What is not questionable is the importance which Congress places on antitrust enforcement by the states. This is shown not only by enactment of the *parens patriae* provisions but also by the Crime Control Act of 1976,[438] by which Congress appropriated substantial funds to bolster (or in some states, start) state antitrust programs.

Section 4F(b) indicates that Congress did not intend that states be treated like other private plaintiffs and gives substantial credence to a theory that courts should give some special deference to states (especially with respect to *parens* actions, which should be extremely cost effective) in disclosing grand jury transcripts, even if the only "compelling and particularized need" is that the state, and thus its taxpayers, will save substantial time and money. On the other hand, neither section 4F(b), its legislative history, nor good policy dictate that courts automatically give state attorneys

434. Brief for the United States at 9, United States v. B. F. Goodrich Co. [1978-2], TRADE REG. REP. (CCH) ¶ 62,389 (N.D. Cal. Dec. 12, 1978), *appeal docketed*, No. 79-4009 (9th Cir. 1979). While, as a general rule, the Antitrust Division does not object to disclosure if its own action is complete, it assesses each case individually to ascertain if any policies dictating grand jury secrecy remain.

435. No. 78-176 (M.D. Pa. Nov. 14, 1978). While this was a proprietary action by Pennsylvania, rather than a *parens patriae* suit, the court specifically held that this difference was immaterial.

436. No. 78-00106-N (E.D. Va. May 23, 1979). Here, the Attorney General of Virginia had not filed a case and wanted materials to ascertain whether a *parens* action was warranted.

437. This seems true whether the state's civil action is a *parens* suit or a proprietary action. Whether section 4F(b) applies to both or to only *parens* actions is unclear. *Anthracite Coal*, note 372 *supra*, at 8.

438. Pub. L. No. 94-503, § 116, 90 Stat. 2415 (codified at 42 U.S.C. § 3739 (Supp. VI 1976)).

general access to all grand jury material. Where the movant is a state attorney general, the court should weigh this fact heavily in its decision, and affirmatively look for ways to grant access while paying due respect to policies underlying grand jury secrecy. In short, the court should go out of its way to establish a procedure by which the attorney general can obtain information that will make its job easier.

VII. More Anticompetitive State Regulation: *Orrin Fox Co.*

Last term, in *Exxon Corp. v. Maryland*,[439] the Court upheld, against substantive due process, commerce clause and supremacy clause challenges, a Maryland statute which (1) prohibited petroleum producers from owning retail gasoline stations and (2) required producers and wholesalers of gasoline to offer all retailers in Maryland a voluntary allowance[440] if it were offered to any.[441] Notwithstanding that the law might have an anticompetitive effect and thus present "a conflict between the statute and the central policy of the Sherman Act—our 'charter of economic liberty,' "[442] the Court refused to hold that the statute was preempted under the supremacy clause by the antitrust laws. Otherwise, "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."[443]

In commenting on this case last year, I explained that my concern was not with the Court's result or its analysis, but rather that similar protectionist legislation in different industries is common and that its approval by the Court would induce other groups to appear before state legislatures to ask for economic favors.[444] One industry mentioned was automobile retailing, and a protective statute for that industry was the subject of the Court's decision this term in

439. 437 U.S. 117 (1978).

440. Voluntary allowances are temporary price discounts given to retailers to allow them to compete more effectively in a local area.

441. Md. Ann. Code art. 56, § 157E (Supp. 1977). The case is discusssed in Miles & Russell, note 5 *supra*, at 48-55.

442. 437 U.S. at 133 (quoting Northern Pac. R.R. v. United States, 356 U.S. 1, 4 (1958)).

443. 437 U.S. at 133.

444. Miles & Russell, note 5 *supra*, at 53.

New Motor Vehicle Board v. Orrin W. Fox Co.[445] While not an antitrust case, *Orrin Fox* briefly discussed the state action exemption and thus deserves a brief mention.

At issue was the constitutionality of a California statute which prohibited auto manufacturers from franchising new dealerships until a hearing could be held, if an existing, competing dealer handling the same brand filed a protest with the New Motor Vehicle Board, a California state agency. The hearing was to determine if good cause existed for *not* allowing a new dealership.[446]

General Motors and two dealerships challenged the constitutionality of the statute when the establishment of a new dealership was

445. 439 U.S. 96 (1978).

446. CAL. VEH. CODE § 3062 (West Supp. 1978). The statute, in pertinent part, is as follows:

> In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify the Board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

CAL. VEH. CODE § 3063 (West Supp. 1978) establishes factors to be considered in determining whether good cause exists:

> In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:
>
> (1) Permanency of the investment.
>
> (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> (3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> (4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
>
> (5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

held up for some fifteen months because of the statutory procedure.[447] The plaintiffs claimed that the statute denied them procedural due process because it allowed an effective temporary injunction to be issued, precluding establishment of the new dealership for a time, without any hearing. In addition, they argued that the statutory scheme was anticompetitive, conflicting with policies underlying the Sherman Act, and thus invalid under the supremacy clause.[448]

The district court, after explaining the delays in dealership establishment which flowed from the procedure and the propensity of competitors to use the statute,[449] held that the failure to provide for some type of exercise of governmental discretion before barring establishment of the dealership denied procedural due process.[450] It did not reach the supremacy clause issue.[451] Mr. Justice Rehnquist, sitting as a Circuit Justice, then granted a stay of the district court's injunction.[452]

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447. According to the district court, Orrin W. Fox Co. signed a franchise agreement with General Motors in May of 1975. On May 22, several nearby dealers filed protests, and the Board sent notices of protest to General Motors on May 29. In July, the Board set the matter for hearing on August 11 and 12. Continuances granted to the protesters and arguments about pre-hearing depositions required that the hearing be reset for September of 1976. The instant suit was filed on April 13, 1976. In the case of a second dealer, the statute was even more effective in barring its entry into the market because a potential lessor cancelled the dealer's option to lease when the statutory proceedings became protracted. Orrin W. Fox Co. v. New Motor Vehicle Board, 440 F. Supp. 436, 439-40 (C.D. Cal. 1977).

448. U.S. CONST. art. VI, § 2.

449. The court explained:

> Little imagination is needed in order to visualize how appealing such a prospect [of delay] might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probable success, irreparable injury if his protest is not granted, or a bond or any other undertaking.

440 F. Supp. at 438-39.

450. *Id.* at 441. For its holding that, under the fourteenth amendment, some sort of hearing was required before the plaintiffs could be deprived of an interest, the court relied on Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach v. Family Finance Corp. 395 U.S. 337 (1969).

451. 440 F. Supp. at 441.

452. New Motor Vechicle Board v. Orrin W. Fox Co., 434 U.S. 1345 (Rehnquist, Circuit Justice, 1977). He explained:

> Because the case presumably will be coming to us by appeal and will therefore be within our obligatory jurisdiction, I feel reasonably certain that four Members of the Court will vote to note probable jurisdiction and hear the case on its merits, and I am also of the opinion that a majority of the Court will likely reverse the judgement of the District Court.

Id. at 1347.

The Supreme Court noted probable jurisdiction,[453] and the parties briefed and argued the supremacy clause issue, as well as the due process question. The plaintiffs urged that the interim "temporary injunction" constituted, in effect, a horizontal market allocation which stifled competition.[454] They compared the protest procedure to the veto given motel franchisees by the franchisor in *American Motor Inns, Inc. v. Holiday Inns, Inc.*[455] There, the Third Circuit applied the per se rule to a scheme whereby the franchisor, in determining whether to grant an additional franchise in an area, allowed already established franchisees to veto the new entrant.[456]

The plaintiffs' supremacy clause argument focused on *Schwegmann Brothers v. Calvert Distillers Corp.*,[457] where the Court had invalidated a Louisiana statute authorizing vertical price-fixing. The plaintiffs read *Schwegmann* to hold that when a state statute authorizes businesses to use the state to engage in per se violations of the antitrust laws, the statute is preempted.[458]

Obviously, *Exxon,* where the Court had said that an anticompetitive effect "in and of itself" was not sufficient to invalidate a state statute,[459] was a sizable hurdle. The plaintiffs attempted to circumvent it by arguing that here, unlike in *Exxon,* the anticompetitive effects flowed from private action.[460] On the slightly different state

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Justice Rehnquist's theory of probable reversal was grounded in his belief that automobile franchisors have no "liberty" interest in placing dealerships wherever they want. *Id.* at 1348. He did not address the plaintiffs' argument that the regulatory scheme conflicted with the antitrust laws. *Id.* at 1350 n. 3.

453. New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1060 (1978).

454. Motion to Affirm of Appellees at 25-26, New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978). Plaintiffs pointed out that a private agreement to allocate territories is per se illegal under United States v. Topco Assocs., 405 U.S. 596 (1972).

455. 521 F.2d 1230 (3d Cir. 1975).

456. The court explained:

> By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the Elizabeth-Newark market, [Holiday Inns] enabled its franchisees already in the Elizabeth-Newark area to divide the market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act.

521 F.2d at 1242.

457. 341 U.S. 384 (1951).

458. Motion to Affirm, note 454 *supra,* at 31.

459. See text accompanying note 443 *supra.*

460. The argument was couched as follows:

> The Court recently noted that "an adverse effect on competition [is not], *in and of*

action question,[461] they argued that no case went so far as to sustain the state action exemption where a state agency issues what in effect is a temporary injunction solely at the behest of private competitors.[462]

The defendants, on the other hand, argued that there was no antitrust violation because section 1 of the Sherman Act requires concerted action, and the dealers had acted unilaterally in filing their protests. This, by itself, they argued, differentiated the case from *American Motor Inns*[463] and *Schwegmann*,[464] where substantive antitrust violations were shown.[465] Moreover, the filing of a protest, defendants said, was protected by the *Noerr-Pennington*[466] doctrine. Finally, they argued that even if there were a violation, the state action exemption immunized it because "the protesting dealer possesses no ability to effectuate any anticompetitive result without the positive involvement of the state."[467] The regulatory scheme evidenced a clear state policy to substitute the judgment of the Board for that of franchisors in determining whether a new dealership should be allowed in the market.[468]

> *itself,* enough to render a state statute invalid" by reason of a conflict with "the central policy of the Sherman Act." *Exxon Corp. v. Governor of Maryland,* [437 U.S. 117, 133 (1978)] (emphasis added). Appellees make no such contention. They contend that the temporary injunction provisions conflict with the "central policy of the Sherman Act" not solely because those provisions adversely affect competition, but rather because the adverse effect on competition flows from the unsupervised use of state power by private individuals.

Brief for Appellees at 42-43 n. 35, New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978).

461. The exemption from antitrust for anticompetitive activity mandated by the state flows from Parker v. Brown, 317 U.S. 341 (1943). *See generally* Miles, note 4 *supra,* at 42-45.

462. Brief for Appellees, note 460 *supra,* at 48.

463. *See* notes 455-56 *supra,* and accompanying text.

464. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). See text accompanying notes 457-58 *supra.*

465. Reply Brief of Appellant, State of California, at 6-13, New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978).

466. United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents' Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The *Noerr-Pennington* doctrine holds generally that efforts to solicit government action, even with anticompetitive purpose and effect, are exempt from antitrust challenge. *See generally* Miles, note 4 *supra,* at 36 n. 161.

467. Reply Brief of Appellant, State of California, note 465 *supra,* at 20.

468. Brief for Appellants, Northern Cal. Motor Car Dealers Ass'n and Motor Car Dealers Ass'n of S. Cal., at 20, New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978). The appellants explained that the state action exemption applies:

The Supreme Court reversed the district court's procedural due process ruling and also held that California's regulatory scheme was not preempted by the antitrust laws.[469] With respect to the procedural due process issue, a majority of the Court[470] held that the effect of a protest was not similar to an injunction or an administrative order for which a hearing was required by constitutional principles.[471] In addition, they held that the Constitution did not prohibit California from enacting "a general scheme of business regulation that imposed reasonable restrictions"[472] on where and when new franchises could be established.[473] Finally, they made clear that there was no constitutional impediment in California's requiring the franchisor (or any other business) to obtain approval before establishing new dealerships.[474]

> where (1) private conduct is clearly authorized by a state statute, (2) that shows the clear intent on the part of the state legislation to displace competition (and the operation of the antitrust laws) in the operation of an industry and (3) there is adequate state supervision and final control over the permanent operation and effects of the private conduct.

Id. at 19.

469. New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978).

470. Burger, C.J., and Brennan, Stewart, White, Marshall & Rehnquist, JJ.

471. 439 U.S. at 105. The majority explained that the franchisor was not prohibited by the Board from doing something it otherwise had the right to do, *i.e.*, place dealerships where it wished, and that the Board's notice to the franchisor upon a protest being filed, that it could not establish the dealership until a hearing was held, did not involve the exercise of discretion by a state official and thus was not akin to an administrative order.

472. *Id.* at 106.

473. Thus, the majority appeared to treat the issue primarily as one of substantive due process rather than procedural due process. *See, e.g.*, Exxon v. Maryland, 437 U.S. 117, 124 (1978); Ferguson v. Skrupa, 372 U.S. 726 (1963).

474. 439 U.S. at 106. The majority's opinion is not a model of analytical clarity. More straight to the point was the concurring opinion of Justices Blackmun and Powell which concluded as follows:

> For me, the appellees have demonstrated the presence of no *liberty* or *property* interest; having none, they have no claim to procedural safeguards; and their claim to be free from state economic regulation is foreclosed by the substantive due process cases. Perhaps this is what the Court is saying in its opinion. I am, however, somewhat unsure of that.

Id. at 114 (Blackmun & Powell, JJ., concurring) (emphasis added).

Mr. Justice Stevens dissented, arguing that some action by the state was required for constitutionality because "[t]here is no blinking the fact that the California statute gives private parties, serving their own private advantage, the unfettered ability to invoke the power of the State to restrain the liberty and impair the contractual arrangements of their new competitors." *Id.* at 127 (Stevens J., dissenting).

The entire Court had no difficulty in quickly disposing of the argument that the antitrust laws preempted the California statute; only five short paragraphs were necessary.[475] First, it held that the general regulatory scheme was protected by the state action exemption because it is "[1] a system of regulation, [2] clearly articulated and [3] affirmatively expressed, [4] designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships."[476] Second, that part of the scheme which allowed existing dealers to unilaterally delay a new dealership resulted in only a short delay. Third, the case was not akin to *Schwegmann*[477] because there the state authorized *private* conduct which *violated* the antitrust laws. Under the California scheme, *public* conduct was authorized, *i.e.*, filing a protest with the state, and such conduct *did not* violate the antitrust laws because, even if otherwise violative, such action was protected by the *Noerr-Pennington* doctrine.[478] Finally, the Court reiterated and approved its language and holding in *Exxon* that a state statute is not preempted by the antitrust laws just because it is anticompetitive.[479]

Three points should be made about the Court's supremacy clause holding. First, it adds nothing new to the law. As should be obvious by now, this portion of the case is on all fours with *Exxon* and reemphasizes that the Court is not going to let a substantive due process case come through the back door dressed in antitrust garb. Second, while the state action exemption, per se, has shrunk considerably in recent years,[480] the Court draws the line at clearly articulated and pervasive statutory schemes such as those here and in *Exxon*. And finally, the regulatory program here is not nearly so anticompetitive as that in *Exxon*, which removed a whole class of

475. 439 U.S. at 109-11. While Justice Stevens dissented on the due process question, on this issue he stated that "[u]nquestionably, as the Court holds, the mere fact that statutory rules inhibit competition is not a reason for invalidating them." *Id.* at 116 (Stevens, J., dissenting) (footnote omitted).

476. *Id.* at 109.

477. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). *See* notes 457-58 *supra*, and accompanying text.

478. *See* note 466 *supra*.

479. *See* text accompanying note 443 *supra*.

480. *See generally* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

companies from the retail gasoline market and mandated a degree of price uniformity.[481] The fight here was not about the regulatory system as a whole but rather about a relatively short interim time period. Indeed, only about one percent of the protests were ultimately successful.[482]

Thus, it appears that California's dealership scheme will not significantly affect competition. We will be fortunate, however, if the same holds true of similar economic regulatory statutes "which merely confer[] a special benefit on a limited group of private persons."[483]

VIII. Conclusion

If one measures the importance of the Court's term by the significance of any one of its decisions, this term was not particularly interesting. Rather, as mentioned before, the term's importance was in showing that the Court is following consistent and predictable patterns: exemptions are construed narrowly, anticompetitive state regulatory schemes are upheld if specifically mandated and part of a well-defined regulatory scheme, "standing" is conferred liberally, and perhaps most importantly, a careful weighing of anticompetitive and procompetitive effects is necessary before a practice's legality can be determined. Accordingly, while the decisions themselves may not be particularly stimulating, counsel will be able to give better guidance in these areas, easing the burden of both their clients and government prosecutors.

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481. *See* text accompanying notes 439-41 *supra*.
482. 439 U.S. at 121 (Stevens, J., dissenting).
483. *Id.* at 120.