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Antitrust Law

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ANTITRUST LAW

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Antitrust developments this year continued the pace of past years, with interpretation of procedural requirements again dominating the field. In significant developments, the courts further refined the requirements of standing to bring suit and immunity for governmental action. In addition, the Supreme Court reaffirmed its *per se* approach to maximum price fixing, and the Justice Department announced its long awaited revision of guidelines for the enforcement of merger policy.

STANDING

Discharged Employees

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."[1] Two courts of appeals and several federal district courts considered whether this section confers standing to sue on an employee who is discharged for his refusal to cooperate in his employer's antitrust violation.

Although a person's interest in his employment may be classified as "property" for some purposes,[2] the language of section 4 has not been read literally.[3] Further, under traditional doctrine, an employee has no antitrust claim if his employment is terminated incidental to an antitrust violation directed principally at some other target, as long as the employee's job is not itself a "business,"[4] such as a commissioned salesman with his own territory.[5] The theoretical foundation for this position is that although the plaintiff is in fact injured by an act in furtherance of the employer's antitrust violation, the employee's injury is not caused by a destruction of competition in

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1. 15 U.S.C. § 15 (Supp. IV 1980) (emphasis added).

2. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 495-96 (1978). Despite some of the authority discussed in this section, the word "property" can be construed broadly under the antitrust statutes. *See* Blue Shield of Va. v. McCready, 102 S. Ct. 2540 (1982), discussed at notes 25-36 *infra*, and accompanying text.

3. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 247, at 770 (1977).

4. P. AREEDA, ANTITRUST ANALYSIS ¶ 160(c) (3d ed. 1981).

5. Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967).

a particular market; *i.e.*, it is not an *antitrust* injury, although it may be actionable under some other theory.[6]

The cases decided this year involve refinements on these concepts and application of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[7] the Supreme Court's leading case on the question of "antitrust injury." In that case, Brunswick unlawfully acquired bowling alleys which competed with the plaintiff's business and the plaintiff alleged that but for the acquisitions, the acquired bowling alleys would have failed and he would have profited by an increase in business. The Supreme Court held that the plaintiff did not suffer "antitrust injury," because the antitrust laws seek to compensate for injury caused by a damage to competition and the plaintiff's particular injury resulted from the preservation of competing bowling alleys.

The first case raising the question this year in the context of a discharged employee was *Ostrofe v. H.S. Crocker Co.*.[8] The plaintiff was the marketing director of H.S. Crocker Company, Inc., which, according to the allegations of the plaintiff's complaint, was engaged in a conspiracy with other manufacturers of paper lithograph labels to fix prices, rig bids, and allocate customers and territories. The conspiracy apparently was effectuated by Ostrofe's action on behalf of his employer, and when he refused to cooperate in the conspiracy and was threatened with the loss of financial benefits and further promotion, he resigned and was unable to obtain other employment in the label industry.

The district court dismissed Ostrofe's amended complaint on the ground that the agreement to fix prices, the antitrust violation alleged, was directed not at him, but at other "targets," and that any effect on the plaintiff was merely incidental.[9] This was an application

6. For example, the plaintiff may state a claim for relief on a theory of "wrongful discharge." *See generally* Note, *Employment At Will—Limitations on Employers' Freedom to Terminate*, 35 LA. L. REV. 710 (1975).

7. 429 U.S. 477 (1977).

8. 670 F.2d 1378 (9th Cir. 1982).

9. Two incidental issues disposed of by the court involved the requirement of an agreement under section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and the plaintiff's allegation of a group boycott of his services by all members of the price-fixing conspiracy. The agreement requirement was apparently satisfied by reliance on Albrecht v. Herald Co., 390 U.S. 145 (1968), in which the Supreme Court, in an alternative holding, suggested that the joint action requirement may be satisfied by the conduct of the plaintiff and the defendant, where the plaintiff initially cooperates in an anticompetitive practice and then withdraws. Whatever the merits of such a theory, *see Albrecht*, 390 U.S. at 161 (Harlan, J., dissenting), it would not seem to be available here since Ostrofe was a member of the same corporate enterprise and thus incapable of conspiring with his employer. *See* P. AREEDA, *supra* note 4, ¶ 334. The other issue, the plaintiff's allegation of a boycott of his services by Crocker and other members of the conspiracy,

of the "target area" standing test, by which only those within the area of the ecomomy affected by a breakdown of competitive conditions may sue under section 4 of the Clayton Act.[10] Ostrofe's amended complaint alleged only a conspiracy directed at the "product market" of his employer; *i.e.*, the market for sales of paper labels. Thus he was not within the class of persons protected by the antitrust rule violated by such a conspiracy, namely, purchasers of paper labels,[11] even though that conspiracy was furthered by Ostrofe's discharge.

The Ninth Circuit resolved this question by "balancing [the] competing policy interests, principally the interest in effective enforcement of the antitrust laws against the interest in avoiding vexatious litigation and excessive liability."[12] The court held that, on balance, the policy favoring vigorous enforcement of the antitrust laws called for granting standing to the employee in this case. The overwhelming factor counselling for this result was that the underlying antitrust violation, price fixing, is of a type that frequently goes undetected by its intended victims,[13] at least without the cooperation of insiders; in the absence of an effective federal remedy for such discharged employees, the court believed such cooperation would not be forthcoming.[14] The Ninth Circuit was especially motivated by the absence of any universal state remedy for wrongful discharge in such circumstances.[15]

Moreover, in the court's view, the considerations normally calling for a limited standing rule—unlimited liability and controlling the potential class of plaintiffs—did not outweigh the interests in pro-

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was found to have stated a claim under section 1, since on the pleadings at least, the defendant's actions were directed at restricting competition in the market for such services.

10. *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 334 (1978).

11. Again, this must be contrasted with Ostrofe's original complaint alleging a group boycott designed to eliminate competition in his employment market. See note 9, *supra*. *See also* 2 P. AREEDA & D. TURNER, *supra* note 10, ¶ 338c.

12. 670 F.2d at 1383. Avoiding "vexatious litigation and excessive liability" are two of the principal reasons for restricting standing to certain classes of plaintiffs. *See* 2 P. AREEDA, & D. TURNER, *supra* note 10, ¶ 333.

13. Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 847 n.172 (1977), *cited in* 670 F.2d at 1384 n.10.

14. 670 F.2d at 1384.

15. For example, the court cited Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051 (5th Cir. 1981) (considering Georgia & Texas law), wherein the court denied a claim for relief for wrongful discharge of an employee terminated for giving truthful deposition testimony in antitrust litigation. Interestingly, California, which apparently would have supplied the applicable law in such an action by Ostrofe, *see* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 196 (1969), does provide a remedy for wrongful discharge. Nevertheless, the court believed effective enforcement of the federal antitrust statutes required a uniform federal remedy.

moting antitrust enforcement. Employees are readily identifiable, and their discharge should be easily traceable to a refusal to cooperate in an antitrust offense.[16] Also, although incidental to a primary purpose of limiting competition in a separate product (as opposed to the market for the employee's services), the employee in such cases is an intended victim of the employer's efforts to further his antitrust violation. This is obviously a different case than an employee who loses his job because the antitrust offense is successful in raising prices and restricting output, thus causing layoffs from less-than-capacity operations.[17]

Reading *Brunswick* broadly to deny standing to anyone not injured by a destruction of competion in the market in which such plaintiff buys or sells goods or services would have defeated Ostrofe's claim.[18] The *Ostrofe* court interpreted *Brunswick* very narrowly, however, to deny standing only to a plaintiff complaining of the preservation of competition, the very result the antitrust statutes are intended to achieve. So read, *Brunswick* would seem to seldom apply, since the peculiar facts are unlikely to recur,[19] and the standing doctrine articulated in *Ostrofe* is thus very broad, creating a claim for relief under the federal antitrust statutes whenever an employee is discharged in furtherance of an antitrust violation.

In contrast to the Ninth Circuit, the Seventh Circuit, in *Bichan v. Chemetron Corp.*,[20] took a more traditional position on this question when presented with facts similar to *Ostrofe*. In *Bichan* a salaried executive was fired for violating an apparently informal industry rule against soliciting the customers of competitors. The Seventh Circuit had earlier adopted the "target area" test for limiting standing in antitrust cases,[21] under which it would be necessary for a plaintiff to prove that he was within an area of the economy threatened by a breakdown of competitive conditions by reason of the antitrust violation.[22] Since the plaintiff's injury did not flow from the threat to competition in the industrial gas industry, his claim was dismissed for a lack of standing.

16. 670 F.2d at 1385, nn.15-17.
17. *See* 2 P. AREEDA & D. TURNER, *supra* note 10, ¶ 338e.
18. 670 F.2d at 1387.
19. See the criticism of the court of appeals' decision in *Brunswick* in Areeda, *Antitrust Violations without Damage Recoveries*, 89 HARV. L. REV. 1127, 1132 n.34, on the ground that if the merger therein involved "saved" companies that would otherwise have failed it would not have been illegal in the first place because of the "failing company" defense.
20. 51 U.S.L.W. 2017 (7th Cir. June 25, 1982).
21. Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978).
22. See note 10, *supra* and accompanying text.

In reaching this result, the Seventh Circuit criticized the Ninth Circuit's decision in *Ostrofe* as misinterpreting the Supreme Court's teaching in *Brunswick*, which the Seventh Circuit read as requiring more than a casual relationship with the antitrust violation. An injury flowing directly from the antitrust offense will be necessary in the Seventh Circuit to achieve standing and, presumably, an immediate injury caused by some act merely in furtherance of the antitrust violation will be insufficient. The Seventh Circuit found the interest in avoiding excessive antitrust litigation to outweigh the Ninth Circuit's concern for an additional enforcement tool.

Obviously, the Supreme Court's decision in *Brunswick* does not control this precise issue. Since the injuries in that case resulted from the preservation of competition, the Court was correct in holding that there were losses "which are of no concern to the antitrust laws."[23] But this is not the case with an employee who is discharged in furtherance of an antitrust conspiracy, although not technically within the group threatened by a breakdown of competition. In this respect, the court in *Bichan* goes too far in interpreting *Brunswick*. The cases, however, do identify correctly the two competing policies, and the issue will ultimately have to be considered by the Supreme Court.[24]

Indirect Purchasers

Some light was shed on the problem discussed above when the Supreme Court decided a related standing issue late in the court's term. In *Blue Shield of Virginia v. McCready*,[25] the plaintiff was a subscriber to a Blue Shield plan that reimbursed her for the expenses of psychologists only if the expenses were supervised and billed through physicians. The plaintiff had been refused reimbursement under the plan for treatment by a psychologist, and she alleged that Blue Shield's refusal to reimburse her was in furtherance of a conspiracy between Blue Shield and a society of neuropsychiatrists to boycott psychologists and exclude them from the market for psychotherapy services.

The District Court dismissed the complaint on the grounds that

23. *Brunswick*, 429 U.S. at 487.

24. Four district courts have also considered the issue this year, with the trend favoring the *Bichan* position. *See* McNulty v. Borden, Inc., 542 F. Supp. 655 (E.D. Pa. 1982); Callahan v. Scott Paper Co., 541 F. Supp. 550 (E.D. Pa. 1982); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387 (S.D. Ind. 1982). Only Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776 (W.D. Pa. 1982), sided with the Ninth Circuit. Because of the division within the Third Circuit created by the three Pennsylvania cases, *supra*, it is likely that the Third Circuit will render an opinion on the question soon, making a grant of certiorari by the Supreme Court even more likely.

25. 102 S. Ct. 2540 (1982).

if a conspiracy existed, it was directed only at the competing psychologists and that as an indirect purchaser of these services, the plaintiff lacked standing since she was not "within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws."[26] *McCready* thus raised, on slightly different facts, the issue presented in the *Ostrofe* and *Bichan* cases.[27] In an opinion which bears directly on the resolution of the "discharged employee" cases, the Court read section 4 of the Clayton Act broadly, in deference to Congress's "expansive remedial purpose,"[28] attributing to Congress a desire "to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions."[29] Further, the Court wrote: "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[30]

In implementing this policy, the Court rejected two limitations suggested by the defendants in *McCready*. The first was the rule announced in *Illinois Brick Co. v. Illinois*[31] that indirect purchasers may not sue for injuries sustained when their injuries have been passed-on by intermediate sellers who were injured directly. The purpose of this rule, as indicated in *Hanover Shoe v. United States Shoe Machinery*,[32] was to prevent double recovery, since the passing-on to the indirect purchaser did not bar an action by the passing-on intermediate seller. The Court, in *McCready*, held that the policy of *Illinois Brick* did not bar suit in this case by the indirect purchaser since she had paid the provider of services, thus eliminating the possibility of double recovery.[33] The second argument of the defendant rejected by the Court was that the plaintiff's injury was too remote to be cognizable under the antitrust statutes, since the con-

26. *Id.* at 2544 (quoting from Record at 17).

27. The facts are slightly different, however, in that the plaintiff's injuries in *McCready* flowed directly from the conspiracy, since the sole manner in which the direct market, the psychologists, would be injured would be through denying reimbursement to the plaintiff's class. In *Ostrofe* and *Bichan* the injury was caused by a separate act in furtherance of the conspiracy.

28. 102 S. Ct. at 2545.

29. *Id.*

30. *Id.* (citing Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948)).

31. 431 U.S. 720 (1977).

32. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

33. However, this analysis ignores one central theme of *Illinois Brick*—the direct purchasers as a group are "most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote." *McCready*, 102 S. Ct. at 2546. It also seems to ignore at least the policy of *Hanover* that allows recovery by an intermediate party even if damages are passed on.

spiracy was directed primarily at the psychologists and not their patients. In rejecting this argument, the Court again painted with a broad brush in language which portends some difficulty for standing tests which restrict the class of plaintiffs:

> Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause."[34]

Finally, in language particularly relevant to the employee standing cases, the Court wrote that respondent McCready "seeks to recover as damages the sums lost to her as the consequence of Blue Shield's attempt to pursue that scheme."[35] The Court agreed with petitioners "that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4."[36]

The Court's opinion in *McCready* is important for at least two reasons. First, it casts considerable confusion on the *Hanover-Illinois Brick* problem by suggesting that an indirect purchaser may bring an action when his seller's injury is passed through to him and that in these circumstances, the passing on will bar an action by the directly injured seller who passes on the injury.[37] Second, it suggests a broad interpretation of section 4 of the Clayton Act, which may sustain employee standing in cases such as *Ostrofe* and *Bichan*. The dissenters suggest as much by their reading of the majority opinion to allow an action by persons who suffer economic loss "as a necessary step in effecting a conspiracy to place third parties at a competitive disadvantage."[38] This clearly would cover an employee discharged in furtherance of a conspiracy directed toward a separate "target group," because it promotes Clayton section 4 as "a private enforcement mechanism,"[39] the precise theory on which the Ninth Circuit relied in *Ostrofe*.

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34. *McCready*, 102 S. Ct. at 2549 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 489).
35. *McCready*, 102 S. Ct. at 2551.
36. *Id.* at 2551 n.19.
37. See the apparent suggestion to this effect in the dissenting opinion of Justice Rehnquist. *Id.* at 2555 n.8.
38. *Id.* at 2553 (Rehnquist, J., dissenting).
39. *Id.* at 2545.

Assignment of Antitrust Claims

The standing issue also was addressed by the Fifth Circuit in *Martin v. Morgan Drive Away, Inc.*[40] in another context—the validity of assignments of federal antitrust claims. In this case, a corporation assigned its antitrust claim to one of its shareholders as a partial payment for his underlying agreement to purchase all of the shares of stock of the other shareholders. On review of a motion to dismiss on the ground that the individual was not the proper party in interest,[41] the Fifth Circuit affirmed its own rule that federal antitrust claims are assignable as a preliminary matter[42] and held that the form of the assignment, *i.e.*, whether it is champertous, must be judged by the law of the state where the assignment was executed and was to be performed—in this case, Louisiana. The Court held that Louisiana Civil Code article 2447 does not prevent the assignment to one not an officer of the court. Thus, although the assignment in this case was under suspicious circumstances, *i.e.*, to a purchaser who was to use the proceeds of the claim as part payment of the purchase price, the assignment was valid in both form and substance.

IMMUNITIES AND EXEMPTIONS

State Action

As usual, most of the work in the antitrust field during the past year involved the several exemptions and immunities from the statute, as the courts continued to define the outer limits of these barriers to liability. The "state action" exemption, first articulated in *Parker v. Brown*,[43] exempts the action of state governments from liability under the antitrust statutes, but apparently does not immunize private conduct where the state has delegated certain regulatory authority to a private group[44] or where the state has *permitted* certain private conduct in an area regulated by the state[45] but has not *compelled* the private conduct.

The extent of the availability of state action immunity for local governments remains in some doubt. In *City of Lafayette v. Louisiana Power & Light Co.*,[46] the Supreme Court held that a local government is immune only if its action is "directed or authorized" by the state

40. 665 F.2d 598 (5th Cir. 1982).
41. FED. R. CIV. P. 17(a).
42. Jefferson County City Pharmaceutical Ass'n, Inc. v. Abbott Laboratories, 656 F.2d 92 (5th Cir. 1981), *cert. granted* 102 S. Ct. 1629 (1982).
43. 317 U.S. 341 (1943).
44. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
45. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).
46. 435 U.S. 389 (1978).

under a state policy to substitute regulation for competition.[47] The Court returned to that question again this year in *Community Communications Co. v. City of Boulder*,[48] in which the city of Boulder, Colorado, a "home-rule" city under the Colorado Constitution, refused to allow expansion for three months by the city's existing cable television licensee, while the city drafted a new ordinance and invited new businesses to enter the market. The existing licensee filed suit under section 1 of the Sherman Act, alleging an illegal conspiracy, and the city invoked the "state action" immunity of *Parker v. Brown*[49] in defense.

In a 5 to 3 opinion, the Court held that state action immunity is available only where it is action by the state itself or action by a municipality in furtherance of a "clearly articulated and affirmatively expressed state policy."[50] In *Boulder*, although the action was not taken by the state itself but by the Boulder city government, Boulder nonetheless argued its action was in furtherance of the state policy expressed by the Colorado Constitution's "guarantee of local autonomy,"[51] which ceded to the city of Boulder the power to implement the regulation challenged by the plaintiff. The Court disposed of this argument by classifying Colorado's position on the *particular* regulation as "one of mere *neutrality*,"[52] since the state "allows its municipalities to do as they please."[53] In the future, state action immunity will require "an affirmative addressing of the subject by the State."[54]

The decision in *Boulder* continues the trend toward the limitation of the *Parker v. Brown* immunity which has proceeded through *Goldfarb*,[55] *Cantor*,[56] and *Lafayette*,[57] and apart from the decision's narrow holding, it signals further to the lower courts that on novel "state action" issues, the defense should be construed narrowly.

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47. *Id.* at 414.
48. 102 S. Ct. 835 (1982).
49. 317 U.S. 341 (1943).
50. 102 S. Ct. at 842.
51. *Id.* at 842.
52. *Id.* at 843 (emphasis in original).
53. *Id.*
54. *Id.* For example, in Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Comm'n, 403 So. 2d 13 (La. 1981), a party challenged the action of the state agency denying him a license to operate a car dealership. The Louisiana Supreme Court held the action was protected by the state action exemption since the state legislature "affirmatively addressed" this question of regulation in LA. R.S. 32:1253 (Supp. 1954), which gives the agency the power to regulate dealerships.
55. 421 U.S. 773 (1975). See also text at note 44.
56. 428 U.S. 579 (1976). See also text at note 45.
57. 435 U.S. 389 (1978). See also text at note 46.

In addition, *Boulder* creates a severe limitation, more so than *Lafayette*, on the flexibility with which a state may order its own affairs. The decision makes clear that, whereas a state acting individually would be immune from antitrust liability, the delegation of the same power to a local government through broad "home-rule" power[58] will not result in protection from liability. This is precisely the fear advanced by the city of Boulder, which the Supreme Court dismissed on the grounds that such delegation of power may still be made, but simply cannot be exercised in an anticompetitive way.[59] This may not be as simple a matter as the majority assumed, however, for it may not be easy for a city to determine that its conduct will not run afoul of the federal antitrust statutes. Indeed, unless its conduct violates one of the *per se* rules, a determination of liability under the "rule of reason" would likely come only after a protracted trial and a weighing of the economic evidence on both sides.[60] In addition, even if liability were found, it would not be clear that the same remedies imposed upon private parties would be available against a local government.[61]

Noerr-Pennington Doctrine

In *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*,[62] the Fourth Circuit Court of Appeals rejected an attempt by the defendants to turn the immunity of the *Noerr-Pennington* doctrine[63] into a general privilege which would protect defendants from discovery requests. The plaintiffs, electric cooperatives which were unsuccessful in building their own generating plants or buying power from sources other than the two defendant utility companies, filed

58. Even narrow subject matter delegation may not trigger immunity from antitrust liability, depending on the meaning of the Court's requirement that the state itself must have addressed the subject. *City of Boulder*, 102 S. Ct. at 843.

59. *Id.* at 843-44.

60. Justice Stevens, in his concurring opinion, *id.* at 845, suggests that the liability issue would be a very difficult one, perhaps because a governmental defendant presents different antitrust considerations than would normally be involved. *See also* Posner, *The Proper Relationship between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974) (suggesting a different kind of rule of reason analysis where a governmental entity is a defendant).

61. The Court specifically avoided this question in *City of Lafayette*, 435 U.S. at 402 n.22 and accompanying text. *See also* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 217-17b (1978) (suggesting that only equitable remedies should be available against a governmental defendant).

62. 666 F.2d 50 (4th Cir. 1981).

63. This doctrine, arising from Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965), protects, under the first amendment, concerted attempts to influence governmental action.

a Sherman Act section 1 action and requested "each document relating to existing, contemplated or proposed state legislation affecting the area in which an electric utility may market electric power and each document relating to contemplated or proposed federal legislation regulating the supply of electric power in bulk or power exchange services."[64] The Fourth Circuit rejected the defendants' *Noerr-Pennington* objection to the discovery request on the grounds that the *Pennington* Court itself conceded the admissibility of certain evidence of legislative activity and only required a limiting instruction that such activity could not form the basis of antitrust liability. Indeed, such evidence would be discoverable under Rule 26(b) of the Federal Rules of Civil Procedure. Further, in response to the argument that to allow discovery of such evidence would have a "chilling effect" on the exercise of the defendant's first amendment rights, the court cited *Herbert v. Lando*,[65] which allowed discovery of the editorial judgment leading to the creation of a news story, and commented, "If discovery into the internal affairs of a news organization does not have a chilling effect, then neither would discovery in this case."[66]

Religious Exemption

In an interesting case in the District of Columbia Circuit, *Costello Publishing Co. v. Rotelle*,[67] that court considered whether a general religious exemption should be carved from the Sherman Act. The defendants in the case were the National Conference of Catholic Bishops and ten episcopal conferences that had joined forces to provide English translations from Latin liturgical texts following the approval by the Catholic Church of the use of native languages. When three episcopal conferences became dissatisfied with the pace of this project, they formed their own consortium to translate a certain Latin work and began distributing it through Costello Publishing Co., the plaintiff. The defendants then notified Catholic book dealers that the plaintiff's product was not an approved translation and asked that they not distribute it. This Sherman Act section 1 action followed.

Although the district court dismissed the complaint on the ground that the religiously motivated conduct was protected from Sherman Act liability by the first amendment, the court of appeals reversed, holding that no "blanket" religious exemption existed. The court of appeals remanded for a consideration of whether the boycott of the unauthorized product was "legitimately geared to the Church's pro-

64. 666 F.2d at 51.
65. 441 U.S. 153 (1979).
66. 666 F.2d at 53.
67. 670 F.2d 1035 (D.C. Cir. 1981).

tection of its liturgy rather than its survival in the marketplace of religious books."[68] Even if the motivation was purely religious, however, the court of appeals indicated that an antitrust violation could be sustained "by weighing the costs to the national antitrust policies against the needs of free religious exercise in this situation."[69]

McCarran-Ferguson Act

The Supreme Court this year affirmed the decision of the Second Circuit in *Union Labor Life Insurance Co. v. Pireno,*[70] discussed in last year's symposium.[71] A peer review committee of chiropractors which advised an insurance company of reasonable fees for chiropractic services had sought an exemption from antitrust liability under the McCarran-Ferguson Act.[72] The Supreme Court, relying on *Group Life & Health Insurance Co. v. Royal Drug Co.,*[73] held that to qualify for the exemption, it was necessary that the practice complained of be: (1) for the purpose of transferring or spreading the policyholders' risk; (2) an integral part of the relationship between the policyholder and the insurance company; and (3) limited to entities within the insurance industry.

The Court found that none of these elements was met in *Pireno.* First, the review of the fees charged was "logically and temporally" unconnected with the function of risk-spreading. Second, the policyholder was indifferent to the procedure by which it was determined that his fees were covered by his policy, as long as they were in fact covered. Third, although the exemption can extend to entities not technically within the insurance industry, the exemption in these circumstances was not of the type that concerned Congress in passing the McCarran-Ferguson Act.

Justices Rehnquist, Burger, and O'Connor dissented. They would have held that the peer review committees function as claims adjusters, a critical function in the operation of an insurance plan. Further, the committee considers the very question of whether a claim is paid, a question of deep interest to the policyholder and thus part of the relationship between the policyholder and the company.[74]

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68. *Id.* at 1049.
69. *Id.* at 1050
70. 102 S. Ct. 3002 (1982), *aff'g* Pireno v. New York State Chiropractic Ass'n, 650 F.2d 387 (2d Cir. 1981).
71. *See* Fontham, *Developments in the Law, 1980-1981—Antitrust Law,* 42 LA. L. REV. 484, 499 (1982).
72. 15 U.S.C. §§ 1011-15 (1976).
73. 440 U.S. 205 (1979).
74. 102 S. Ct. at 3013 (Rehnquist, J., dissenting).

In *Proctor v. State Farm Mutual Automobile Insurance Co.*,[75] a case decided before the Supreme Court announced its decision in *Pireno*, the Court of Appeals for the District of Columbia Circuit found that the exemption did apply. In *Proctor* the plaintiff complained of an agreement by five automobile insurance companies to pay damage claims based on an agreed "prevailing hourly labor rate" for repair shop services. The court held this arrangement to be within the business of insurance, reasoning that since a purely intra-industry enterprise was involved, the agreement was more in the nature of the "business of insurance" than an agreement between insurance companies and outsiders, as in *Royal Drug* and *Pireno*. Although the facts of *Proctor* appear slightly distinguishable from the *Pireno* facts,[76] much of the *Proctor* court's language is in direct conflict with the Supreme Court's opinion on claims adjustment in *Pireno*. Further, the Supreme Court expressly relied on *Royal Drug*, a case in which the Court condemned an agreement between an insurer and pharmacies to limit the price for which drugs would be sold to policyholders. The only possible distinction between the practices in *Royal Drug* and *Proctor* is that in *Royal Drug* the insurance contract provided a fixed fee for which a subscriber could fill a prescription; thus the insurer's agreements with the pharmacies for fixing prices on the drugs purchased had nothing to do with the benefits paid to a policyholder in an individual case. In *Proctor*, however, the agreement to pay "prevailing hourly labor wages" directly determined the insurance benefit received by a policyholder. The agreement in *Proctor* had a more direct impact on the process of claims adjustment than did the agreement in *Royal Drug*, where the amount was predetermined.

In *Pireno*, arguably, the use of a peer review committee to determine the amount of compensation payable on a claim also had a direct influence on the process of claims adjustment. The majority's only response on this issue, however, was that the peer review committee merely made recommendations that were not binding on the company. After *Pireno*, the only possible permissible practice seems to be a claims adjustment process which is binding on the company, rather than simply advisory, and on this question, *Proctor* may survive a challenge despite an apparent conflict with *Pireno*. However, a serious uncertainty remains over the question of whether the process of claims adjustment is within the "business of insurance" exception.

Discovery of Grand Jury Proceedings

Rule 6(e) of the Federal Rules of Criminal Procedure provides that

75. 675 F.2d 308 (D.C. Cir. 1982).
76. Especially distinguishable is the intra-industry nature of the arrangement.

proceedings before a federal grand jury, although generally to be preserved in secrecy,[77] may be disclosed "when so directed by a court preliminarily to or in connection with a judicial proceeding."[78] Civil antitrust plaintiffs obviously are interested in obtaining information disclosed to a grand jury in a related grand jury investigation of the same antitrust conduct. In 1979, in the leading decision on the availability of grand jury proceedings to civil plaintiffs, the Supreme Court held that the petitioning plaintiff has the burden of demonstrating the following: (1) the material is needed to avoid a possible injustice, (2) the need for disclosure outweighs the need for continued secrecy, and (3) the request is structured to cover only the material so needed.[79] In cases decided this year by the courts of appeals, *In re Grand Jury Investigation of Cuisinarts, Inc.*[80] and *In re State of Illinois Petition to Inspect and Copy Grand Jury Materials*,[81] both now pending in the Supreme Court, several state attorneys general attempted to avoid the difficult standard of rule 6(e) by relying on section 4F of the Clayton Act, added by the Hart-Scott-Rodino Antitrust Improvements Acts of 1976, which provided that the United States Attorney General, upon the request of a state attorney general, "shall . . . make available to him, to the extent permitted by law, investigative files or other materials which are or may be relevant or material to the actual or potential cause of action."[82] The theory of the plaintiffs in these cases was that the Hart-Scott-Rodino directive was an exception to rule 6(e)'s requirement of a showing of "compelling and particularized need."[83]

The Second Circuit, in *Cuisinarts*, and the Seventh Circuit, in *Illinois*, held that the language of section 4F requiring the Attorney General to turn over "investigative files or other materials" did not include grand jury proceedings, which traditionally have been shrouded in secrecy and that, even if grand jury material was included in the definition, section 4F required the disclosure only "to the extent permitted by law," which both circuits concluded incorporated the rule 6(e) requirement for a showing of need. These decisions are squarely against the earlier decisions of the Fourth Circuit, in *United States*

77. FED. R. CRIM. P. 6(e)(2).

78. FED. R. CRIM. P. 6(e)(3)(C)(i).

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

80. 665 F.2d 24 (2d Cir. 1981), *petition for cert. filed sub nom.* Connecticut v. Cuisinarts, Inc., 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595).

81. 659 F.2d 800 (7th Cir. 1981), *cert. granted sub nom.* Illinois v. Abbott & Assocs., Inc., 102 S. Ct. 1708 (1982).

82. 15 U.S.C.A. § 15f (West Supp. 1982).

83. 665 F.2d at 28. The United States intervened in *Cuisinarts* in general support of the states' position for disclosure without a showing of need. *Id.* at 28 n.2.

v. Colonial Chevrolet Corp.,[84] and the Ninth Circuit, in *United States v. B.F. Goodrich Co.*[85] These circuits have held that section 4F is a general exception to the rule 6(e) requirement that was designed to put teeth into the simultaneously granted power to the states to sue under the antitrust laws in a *parens patriae* capacity for its citizens. With its grant of certiorari in *In re Illinois*,[86] the Supreme Court should resolve the conflict.

AGENCY—APPARENT AUTHORITY

In an important case of first impression, the Supreme Court held, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,[87] that a principal will be liable for the antitrust violations of its apparent agent even where the agent acts purely in his own self interest. The issue arose from the conduct of certain persons affiliated with McDonnell & Miller, Inc. (M & M), a leader in the market for low-water fuel cutoffs, who were also officers of a standard-setting subcommittee of the nonprofit American Society of Mechanical Engineers (ASME).[88] As a result of an inquiry initiated by M & M, the ASME issued an opinion that a device placed on the market by the plaintiff, Hydrolevel, one of M & M's principal competitors, was unsafe. The ASME opinion was prepared principally by the ASME subcommittee of which an M & M employee was the vice-chairman. As a result, Hydrolevel alleged its market position was injured and it ultimately won a jury verdict against the ASME on the theory that it was responsible for the conduct of its apparent agents, the M & M employees who designed the scheme to injure Hydrolevel.

The Supreme Court, over three dissents, adopted the common law doctrine of apparent agency and rejected the arguments of the ASME that liability should be predicated either on ratification by the ASME or upon acts intended to benefit the ASME rather than the agent itself. The Court held that the principal was responsible since the agent's acts were effective because they were done with the principal's economic force. The Court believed that such a rule would encourage the principal "to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit or the benefit of their employers."[89]

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84. 629 F.2d 943 (4th Cir. 1980).
85. 619 F.2d 798 (9th Cir. 1980).
86. See note 80, *supra*.
87. 102 S. Ct. 1935 (1982).
88. *Id.* at 1939 n.2.
89. *Id.* at 1946.

MAXIMUM PRICE FIXING

In the first case to raise the question in the Supreme Court since the landmark decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[90] the Supreme Court refused an invitation to reverse the traditional rule which prohibits agreements to set maximum prices.[91] The theory behind such a rule, although the practice is not as dangerous as minimum price fixing,[92] is that a maximum price often acts as a minimum because it pegs the price at which competitors will sell. In addition, a maximum price interferes with the freedom of retailers to set their prices as they choose.[93]

In *Sylvania*, the Court approved the application of the "rule of reason" to a scheme whereby a manufacturer restricted the territories in which his distributors could sell, despite the "market restriction" imposed from the top, because the system had the potential of promoting "interbrand" competition even at the expense of some "intrabrand" competition. Although the Court in *Sylvania* expressly said its opinion concerned only nonprice vertical restrictions,[94] some commentators thought the opinion left open a possible rule of reason analysis for price restraints as well,[95] at least for maximum prices.[96]

The Supreme Court was asked to approve such a scheme in *Arizona v. Maricopa County Medical Society*,[97] where two county medical societies formed "fee-for-service" medical plans as an alternative to existing health insurance plans and set maximum fees which could be charged by participating doctors to patients insured by the plans. The state of Arizona sued under section 1 of the Sherman Act, alleging an illegal agreement to fix prices, and moved for summary judgement on the ground that such agreements are *per se* illegal and cannot be saved by proof of any counterveiling competitive benefit. Although unsuccessful in both the district court and the court of appeals, the plaintiff was victorious in the Supreme Court. In a 4 to 3 opinion,[98] the Court reaffirmed its earlier decisions[99] which held that

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90. 433 U.S. 36 (1977).

91. Albrecht v. Herald Co., 390 U.S. 145 (1968).

92. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

93. *Albrecht*, 390 U.S. at 152-53.

94. 433 U.S. at 51 n.18.

95. *See id.* at 70 (White, J., concurring).

96. Indeed it has been argued that maximum price fixing should be encouraged because it promotes consumer welfare. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

97. 102 S. Ct. 2466 (1982).

98. Justices Blackmun and O'Connor did not participate.

99. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Albrecht v. Herald Co., 390 U.S. 145 (1945).

maximum price fixing must be judged by the same standards as minimum price fixing; *i.e.*, by the *per se* rule.

The dissenters would have remanded the case for a consideration under the rule of reason of whether the scheme in the long run promoted competition; for example, by giving consumers an additional alternative to the existing health insurance plans. They suggested such a plan should be given a price-fixing label only if it is a "naked restrain[t] of trade with no purpose except stifling of competition."[100]

The significance of the *Maricopa* case is that it is the first discussion of price controls by the Supreme Court since the reemergence of the rule of reason in *Sylvania*. The Court's decision may be sound on traditional principles since even though maximum prices do set a ceiling for consumers, where the agreement is purely horziontal it frequently will be motivated not by a desire to improve output and thus promote consumer welfare, but merely to advance the interest of the competitors. Significantly, the Court did not address directly the difference between horizontal price fixing and vertical price restraints, which are much more defensible on the ground that they reflect the decision by one who has the greatest interest in increasing output, the manufacturer.[101] The Court's refusal to rest its analysis on these differences does not bode well for vertical price restraints which were thought to have a chance after *Sylvania*. But, since *Maricopa* is a decision by a minority of the full Court[102] and since three members of the Court were willing to judge even horizontal maximum prices under the rule of reason, vertical price restraints may still have their day.[103]

MERGERS

The most significant development in the merger field in the past year, probably the last decade, was the issuance by the Department of Justice and the Federal Trade Commission of new merger guidelines[104] to replace those issued in 1968. The 1968 guidelines relied

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100. 102 S. Ct. at 2482 (Powell, J., dissenting) (quoting U.S. v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972), which was quoting White Motor Co. v. U.S., 372 U.S. 253, 263 (1963).

101. *See* Easterbrook, *supra* note 96, at 890 n.20.

102. See note 97, *supra*.

103. Assistant Attorney General William Baxter called the Court's descision in *Maricopa* "very, very stupid and unfortunately so," and said the Justice Department, through its exercise of prosecutorial discretion, would refuse to attack *vertical* arrangements which set maximum prices. Wall St. J., Sept. 10, 1982, at 4, col. 2.

104. *Justice Department Unveils Long-Awaited Revisions to Merger Guidelines; FTC Issues Statement on Mergers*, [Jan.-June] 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1069, at 1251 (June 17, 1982) (with special supp.).

on a four-firm concentration ratio as a measure of highly concentrated markets and generally called for a government challenge to mergers where the top four firms accounted for 75 percent or more of a market and the merger added as little as a one percent share of the market to a firm with as little as 15 percent.[105] In a less concentrated market, mergers between larger firms were permitted, but the guidelines were still very strict,[106] reflecting the Supreme Court's very strict interpretation of section 7 of the Clayton Act[107] in *Brown Shoe Co. v. United States*,[108] which suggested that a post-merger firm of five percent in even a "fragmented" market might be illegal.[109]

The new guidelines reflect a new sophistication in merger policy and, at least in government enforcement, a more permissive approach to the interpretation of section 7 of the Clayton Act. The new guidelines adopt the Herfindahl-Hirschman Index (HHI), which takes the size of all firms in a market into account in measuring concentration, rather than the top four only, or even the top eight firms, as did the old guidelines.[110] The HHI assigns an index to a market by adding together the squares of the market share of each firm in the industry.[111] In this manner, even smaller firms in an industry affect the concentration index, unlike the old guidelines. The difference between the before and after index represents the increase in concentration in the industry. For example, in an industry with ten firms, each possessing 10 percent of the market, a merger of two firms would increase the industry's index 200 points.[112] The increase in an industry's index caused by a merger would determine whether the Justice Department would file suit under section 7.

The Justice Department's guidelines suggest that in an industry with a post-merger index below 1000 points, challenges to any merger

105. *See* P. AREEDA, *supra* note 4, ¶ 664.

106. *Id.*

107. 15 U.S.C.A. § 18 (West Supp. 1982): "No person . . . shall acquire . . . the stock or . . . assets of one or more persons . . . where . . . the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly."

108. 370 U.S. 294 (1962).

109. In fact, in *Brown Shoe* the combined firm controlled as much as 57 percent of some local markets, but the definition of those markets seemed to ignore the factor of supply substitutability now addressed in the new guidelines. Thus, the markets in *Brown Shoe* were probably improperly defined.

110. P. AREEDA, *supra* note 4, ¶ 664, at 978.

111. An industry with ten firms, each possessing a 10 percent share of the market, would have an index of 1000: 10 squared or 100, added ten times.

112. Before the merger the two firms contributed a total of 200 points to the total index (10 squared added to 10 squared). After the merger the two firms are one, which contributes 400 points to the index, a combined market share of 20 percent squared (400).

would be unlikely.[113] In a market with a post-merger concentration index of between 1000 and 1800 points, the Department will challenge mergers only if the merger increases the index by at least 100 points.[114] In such a "moderately concentrated" market, an increase of 100 points would "more likely than not" be challenged by the Justice Department, depending on other factors, such as entry barriers. In a "highly concentrated market," one with a post-merger index of 1800 points or more, the Justice Department would challenge the merger if it added more than 100 points to the index, would "more likely than not" challenge an increase of 50 to 100 points, and "would not likely" challenge an increase of less than 50 points. Finally, the Department says it will challenge any merger between a firm with 35 percent of the industry market share and any other firm with as little as one percent market share, unless there is one other dominant firm in the market.[115]

In addition to the percentage guidelines, the Justice Department will place increased emphasis on substitutability of both supply and demand in defining the relevant market[116] and give apparently greater latitude to vertical and conglomerate mergers, challenging them only if they have significant horizontal effects.[117]

Since the Justice Department and the Federal Trade Commission have dual enforcement responsibilities under the Clayton Act,[118] the F.T.C.'s simultaneous review of its own merger policy was also significant this year. In response to the Justice Department's guidelines, the F.T.C. announced that it would give "considerable weight" to the Justice Department's view of horizontal mergers,[119] but reserved the right to consider nonmarket share factors. Chief among these would be considerations of efficiency, allowing some mergers that would be condemned by the Justice Department because increases in market shares of the merged firms may achieve economies of scale.[120] Second,

113. *See generally* 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1069, at S-6. The purpose of the guidelines is "to indicate regions of safe harbors where management can plan without having to worry about whether the Antitrust Division will pop out of the closet." *Statement of Assistant Attorney General William Baxter, id.* No. 1252.

114. One easy method of calculating the increase is to multiply the premerger market shares of the merger partners and double this figure. This will approximate the concentration index derived by the longer method. See notes 111 & 112, *supra.*

115. A dominant firm is classified as one at least half the size of the largest firm. 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1069, at S-7.

116. *Id.* at S-3-6.

117. *Id.* S-8-11.

118. *See* 15 U.S.C. §§ 21 & 25 (1976).

119. 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1069, at S-12.

120. The Justice Department indicated it would not normally consider this factor because with higher thresholds to challenge mergers, such efficiencies will already have been achieved by the separate firms before merger. *Id.* at S-11.

the F.T.C. indicated its willingness to give consideration to the "failing company" defense[121] beyond its technical requirements. The Justice Department, however, indicated that it would construe the defense strictly.[122] Finally, the F.T.C. will give greater weight to firms which, although small and thus perhaps not significant under an HHI analysis, are potential threats to the power of larger firms in a market and thus have a disciplining influence.[123]

Although it is too early to tell what impact these new approaches will have in the long run, they have been applied in a couple of significant tender offer battles during the past year. The first of these was the offer by the Stroh Brewery Co. to buy the Jos. Schlitz Brewing Co. Stroh's was the seventh largest national brewer, with a market share of approximately 5 percent, and Schlitz was third, with 7.8 percent, in a market classified by the Justice Department as "barely . . . highly concentrated."[124] Thus, under the guidelines, this merger would more likely than not be challenged if it added 50 to 100 points to the industry's HHI.[125] The Stroh-Schlitz merger added approximately 75 points to the beer industry's index.[126] Although this merger would be subject to challenge under the guidelines, the potential for the post-merger firms to challenge the industry leaders, Anheuser-Busch Co. and Miller Brewing Co.,[127] apparently tipped the balance in favor of not challenging the merger.[128] Under the old guidelines, of course, this merger would undoubtedly have been challenged.[129]

In contrast, in late July the F.T.C. initiated a challenge to a proposed takeover of Cities Service Co. by Gulf Oil Corp., the nation's sixth largest oil company, which would have moved up to number five after the merger.[130] Although Gulf had a significant market share in a market considered sensitive by the F.T.C., the retail gasoline market in the South and along the East Coast, it is not clear that the market would be considered highly concentrated by the Justice Department,

121. *See* Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

122. *Compare* 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1069, at S-11 *with id.* at § 15.

123. *See, e.g.*, United States v. Aluminum Co. of Am., 377 U.S. 271 (1964).

124. Taylor, *U.S. Conditionally Permits Stroh to Buy Schlitz, Signaling New Merger Guidelines*, Wall St. J., Apr. 19, 1982, at 4, col. 2.

125. See text at notes 113-115, *supra*.

126. By the short form calculation, 5 times 7.8 percent doubled would be 78 points. See note 114, *supra*.

127. Anheuser-Busch Co. and Miller Brewing Co. together account for more than half of the industry sales. Garino, Ingrassia, Lancaster & Petzinger, *Growth of Anheuser-Busch, Miller Puts Squeeze on Smaller Brewers*, Wall St. J., Jan. 5, 1982, § 2, at 33, col. 3.

128. Taylor, *supra* note 124.

129. *See* P. AREEDA, *supra* note 4, ¶ 664, at 978.

130. Wall St. J., July 29, 1982, at 32, col. 2.

and since Cities Service ranked only 19th nationally, it is unlikely that the merger would have significantly increased the industry's index. But, the merger would have given Gulf the power to control capacity of Colonial Pipeline, the major transporter of petroleum products along the East Coast, and this apparently tipped the F.T.C.'s hand against the merger.[131]

The significance of both recent takeover cases, apart from perhaps signaling a tougher approach by the F.T.C., is to demonstrate that particularly in this area, the use of numerical cut offs will remain guidelines only. Thus, despite the attempt to create "safe harbors" and to facilitate planning, more subjective considerations will continue to form merger policy at both the Justice Department and the F.T.C.

ROBINSON-PATMAN ACT

A host of cases were decided this year under section 2 of the Clayton Act, the Robinson-Patman Act;[132] two Fifth Circuit decisions were significant.

In a case of first impression in the Fifth Circuit, the court addressed the question of whether under Robinson-Patman Act section 2(e), delivery is a "service" which must be provided to all purchasers on a nondiscriminatory basis. Section 2(e) of the Act prohibits a seller from discriminating "in favor of one purchaser against another purchaser . . . of a commodity bought for resale . . . by contracting to furnish or furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."[133] In *L & L Oil Co. v. Murphy Oil Corp.*,[134] the buyer claimed his seller violated section 2(e) by requiring the plaintiff to take delivery of diesel fuel in trucks rather than in barges as offered to other purchasers.[135]

The leading decision holding that a delivery is a "service" within the definition of 2(e) is the Seventh Circuit's *Centex-Winston Corp. v. Edward Hines Lumber Co.*,[136] which held that a seller illegally discriminated by consistently delivering lumber behind schedule to

131. *Id.*
132. 15 U.S.C. § 13(e) (1976).
133. *Id.*
134. 674 F.2d 1113 (5th Cir. 1982).
135. The significance of this discrimination was that the trucks held up to 8,000 gallons of fuel while the barges carried 100,000 to 350,000 gallons. Thus, if the plaintiff wanted to resell by barges, it had to store the fuel delivered by the seller until it accumulated barge capacity. *Id.* at 1116 n.4.
136. 447 F.2d 585 (7th Cir. 1971).

one purchaser while delivering on time to others. The court found the requirement that the services rendered must be in connection with the resale of the product by the buyer[137] was satisfied because lumber delivered late to the plaintiff would delay resale. The theory of the court's opinion on the delivery issue was that 2(e) prohibits any kind of "special favors."[138]

The overwhelming weight of judicial opinion and commentary, however, has been contrary to the Seventh Circuit's position.[139] The argument against the *Centex-Winston* approach is that the language "services or facility" refers essentially to advertising or promotional functions, which directly facilitate resale of the product by the favored purchaser.

In approving the dismissal of the plaintiff's 2(e) claim, the Fifth Circuit joined the ranks of those courts which have held that the definition of "services" must be so limited. In addition, the court held that even if the delivery in this case could be classified as a service, it would be a violation of 2(e) only if it were directly related to the resale of the product by the purchasers.[140] To meet this test, the court held the original seller "must become active in the resale of the product."[141] Since the court considered the delivery to be concerned only with the original sale and only indirectly related to the resale, it held 2(e) was not violated on this ground.

The Fifth Circuit also held during the past year that the Robinson-Patman Act does not apply where the discriminating sales are made to hospitals operated by agencies of the state government. In *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*,[142] the court affirmed, in a *per curiam* opinion, the opinion of the district court which held that the Robinson-Patman Act was never intended to regulate sales to governmental agencies. The district court rested its conclusion on the strong legislative history of the Act and the fact that the Robinson-Patman Act has a more restricted scope than the

137. Skinner v. United States Steel Corp., 233 F.2d 762 (5th Cir. 1956). In this case the court held that providing credit to the buyer was not within the scope of 2(e) because it was not in connection with resale and because the language "services or facilities" contemplated merchandising services.

138. 447 F.2d at 587, *cited in Murphy Oil*, 674 F.2d at 1117.

139. *See* Purdy Mobile Homes, Inc. v. Champion Home Builders Co., 594 F.2d 1313 (9th Cir. 1979); David R. McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974); Cecil Corley Motor Co. v. General Motors Corp., 380 F. Supp. 819 (M.D. Tenn. 1974). *See generally* W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 129-34 (1963); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 365-76 (1962).

140. *Murphy Oil*, 674 F.2d at 1119 (citing *Skinner*, 233 F.2d at 765).

141. 674 F.2d at 1119.

142. 656 F.2d 92 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1629 (1982).

Sherman Act. It thus distinguished the Supreme Court's opinions in *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*,[143] which imposed liability on "non-profit" hospitals not operated by state agencies, and *City of Lafayette v. Louisiana Power & Light Co.*,[144] which refused to protect a political subdivision of the state from liability under the Sherman Act on the *Parker v. Brown* state action exemption.[145] The Supreme Court has granted certiorari.[146]

DAMAGES—TYING ARRANGEMENTS

In an important case involving the damages recoverable for an illegal tying arrangement, the Eleventh Circuit Court of Appeals continued the approach discussed in last year's symposium[147] of requiring proof of actual damages to support a claim under the Clayton Act. In *Kypta v. McDonald's Corp.*,[148] the court rejected the damage formulation for tying cases accepted in the leading case of *Siegel v. Chicken Delight, Inc.*,[149] in which a franchisee was given permission to use the franchisor's name free of charge but was required to buy supplies and materials from the franchisor at a price slightly above the prevailing market price for similar items. The plaintiff in *Siegel* requested damages in the amount of the difference between what he paid for these items and what they could have been purchased for in the market. The court approved this measure of damages, rejecting the defendant's argument that the real value of the franchisor's name should have been deducted from the preliminary damage calculation; *i.e.*, the plaintiff should have recovered only the excess over the market value of both the defendant's name and its supplies.

A similar claim was present in *Kypta*, where the plaintiff was granted a McDonald's franchise for $10,000 but was also required to execute a lease of premises owned by McDonald's at 7 percent of monthly gross sales. When the plaintiff was denied a second franchise, he sued McDonald's claiming an illegal tie between the grant of McDonald's name and the lease of its premises. As damages, he sought the difference between the rent paid to McDonald's and the rent he claimed he would have paid at an alternative site.[150]

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143. 425 U.S. 1 (1976).
144. 435 U.S. 389 (1978).
145. See discussion at notes 42-60, *supra*, and accompanying text.
146. 102 S. Ct. 1629 (1982).
147. Fontham, *supra* note 71, at 484-88.
148. 671 F.2d 1282 (11th Cir. 1982).
149. 448 F.2d 43 (9th Cir. 1971).
150. All of this of course assumes that the franchise and the lease constituted separate products. On that question, see Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), where the court held these were a single product. *See* Fontham, *supra* note 71, at 512.

The Eleventh Circuit rejected the plaintiff's claim. Since there was no evidence of the real value to the plaintiff of the McDonald's franchise given to the plaintiff for $10,000, it was not proven that "the entire package was noncompetitive."[151] Citing *United States Steel Corp. v. Fortner Enterprises, Inc.*,[152] the court held that a plaintiff complaining of an illegal tie suffers damages only if the price paid for the two products together is more than the price he would have paid if the two products had been offered for sale separately. Thus if a defendant has some economic power in the market for the tying product,[153] the defendant will be able to allocate the purchase price for the two products in any manner he sees fit. The significance of this approach is that very few tying arrangements will result in damage to a purchaser of the tied product, since in the garden variety tying cases, the plaintiff will pay only the total price which could have been extracted by the products separately.[154] This is precisely the fear expressed by the court in *Siegel.*[155]

STATE ANTITRUST LAW

In two decisions this year, the Fifth Circuit interpreted two significant state statutes which promote antitrust enforcement, the prohibition on noncompetition clauses,[156] and the conspiracy requirement of Louisiana's "little Sherman Act."[157]

The noncompetition clause arose in *Commonwealth Life Insurance Co. v. Neal.*[158] An employer in Louisiana is prohibited from requiring as a condition of employment that the employee promise not to enter a competing business upon the termination of employment.[159] In *Neal,* the precise question was whether an agreement by an employee-agent of an insurance company not to solicit the customers of the company

151. *Kypta,* 671 F.2d at 1286.

152. 429 U.S. 610 (1977) (Fortner II).

153. A defendant must have some economic power in the tying product for a tying case to be proven in the first place. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (Fortner I).

154. This is the monopoly price extractable for the tying product alone. *See* P. AREEDA, *supra* note 4, ¶ 530.

155. 448 F.2d at 52 n.11. This result apparently would not prohibit damage actions by competitors in the market of the tied product who have been injured by the defendant's use of his leverage in the tying product's market to obtain a higher market share in the market for the tied product.

156. LA. R.S. 23:921 (1950 & Supp. 1962).

157. LA. R.S. 51:122 (1950).

158. 669 F.2d 300 (5th Cir. 1982).

159. LA. R.S. 23:921. The statute contains an exemption permitting such agreements for two years following the termination of employment where the employer incurs an expense in training the employee or advertising the business.

upon termination of employment was within the scope of the statute. Although the issue had not been addressed directly by the Louisiana Supreme Court,[160] the Fifth Circuit found that two of the three state courts of appeal that had addressed the question decided it in favor of the employee[161] and interpreted the supreme court's attitude about the statute as generally promoting competition.[162] Therefore, the Fifth Circuit stated that the statute must be given its broadest possible reading and held that although the employee in *Neal* was not prohibited from competing totally, the nonsolicitation provision of his employment contract was unenforceable under the statute.

In the second case, *Dussouy v. Gulf Coast Investment Corp.*,[163] the Fifth Circuit held a conspiracy could be proven under the state's "little Sherman Act"[164] by evidence that the corporate defendant conspired with its own employees.[165] The decision is contrary to the prevailing rule under the Sherman Act that requires something more than "intracorporate" action.[166] Thus, proving a conspiracy in restraint of trade will be easier, at least on this issue, under the Louisiana statute than under the federal act.[167]

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160. A decision by the Louisiana Supreme Court on the issue would be binding on a federal court sitting in diversity. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

161. Alexander & Alexander, Inc. v. Simpson, 370 So. 2d 670 (La. App. 4th Cir. 1979); National Motor Club of La., Inc. v. Conque, 173 So. 2d 238 (La. App. 3d Cir. 1965). *Contra*, Delta Fin. Co. of La. v. Graves, 180 So. 2d 85 (La. App. 2d Cir. 1965).

162. In Orkin Exterminating Co. v. Foti, 302 So. 2d 593 (La. 1974), the Louisiana Supreme Court read the expenditure exception of the statute to require a "substantial" expenditure.

163. 660 F.2d 594 (5th Cir. 1981).

164. LA. R.S. 51:122 prohibits a "conspiracy" in restraint of trade.

165. This affirmed the Louisiana rule first announced in Tooke & Reynolds v. Bastrop Ice & Storage Co., 172 La. 781, 135 So. 239 (1931).

166. *See* P. AREEDA, *supra* note 4, ¶ 334, at 395-96 & n.56.

167. But see the opinion of the Supreme Court in Albrecht v. Herald Co., 390 U.S. 145 (1968), which seems to greatly facilitate proof of the conspiracy issue under the Sherman Act.