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ANTITRUST

*Dando B. Cellini**

Introduction

Since 1977, the number of antitrust cases filed in federal district courts for the most part has declined each year. Despite this trend, a healthy number of such cases continue to be filed. In the twelve months prior to September 30, 1983, a total of 1,196 antitrust cases crossed the intake desks of federal district courts around the country. In the same twelve-month period, a wide range of noteworthy decisions were handed down by the United States Supreme Court and the various Courts of Appeals, the bulk of which dealt with issues of standing and immunity.

Antitrust Standing

Section 4 of the Clayton Act provides a treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."[1] On its face section 4 is very broad; read literally it is expansive enough to encompass any injury that can directly or indirectly be considered a consequence of an antitrust violation.[2] The Supreme Court has held, however, that Congress did not intend the antitrust laws to provide a remedy for all injuries that might conceivably be traced to an antitrust violation.[3] Rather, Section 4 claims are to be considered in light of the statutory purposes behind awarding treble damages: to deter antitrust violators, to deprive them of the fruits of their illegality, and to compensate their victims for injuries suffered.[4]

The Supreme Court has developed two types of limitations on the availability of the section 4 remedy which courts must consider when deciding whether a treble damage action may be maintained.[5]

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1. Clayton Act, Pub. L. No. 63-212, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15 (1983)).
2. Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 962 (3d Cir. 1983).
3. Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897 (1983); Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S. Ct. 885 (1972).
4. Pfizer, Inc. v. Government of India, 434 U.S. 308, 98 S. Ct. 584 (1978).
5. Blue Shield v. McCready, 457 U.S. 465, 473, 102 S. Ct. 2540, 2545-46 (1982).

Indirect Purchaser Rule

The first limitation on Section 4 damage actions is drawn from *Illinois Brick Co. v. Illinois.*[6] In *Illinois Brick*, the Court held that indirect purchasers in a chain of distribution were precluded from bringing a damage action based on overcharges passed through to them by the direct purchasers of the alleged price-fixing manufacturers.[7] The Court relied on two distinct policies to conclude that a section 4 action was unavailable. First, it focused on the risk of duplicative recovery created by allowing every person in a chain of distribution to claim damages arising from a single illegal transaction.[8] Second, it sought to avoid burdening section 4 actions with damages issues necessitating massive evidence and complicated theories, thereby discouraging vigorous private enforcement of the antitrust laws.[9] Applying these policies, the Court concluded that it was inconsistent with the broader remedial purposes of the antitrust laws to allow indirect purchasers to maintain a treble damage action.

In *In re Midwest Milk Monopolization Litigation*,[10] the State of Illinois brought suit against defendant milk cooperatives, alleging that they had conspired to fix the prices of raw milk in the Chicago marketing area. During the pendency of that case, *Illinois Brick* was decided. Thereafter, the lower court granted the defendants' motion for summary judgment on the basis of *Illinois Brick* and denied the plaintiff leave to file an amended complaint.

On appeal, the Eighth Circuit accepted that plaintiff desired to allege a vertical conspiracy among the cooperative and the suppliers from whom plaintiff purchased. The plaintiff argued that because the suppliers were alleged to be co-conspriators, the general rule of *Illinois Brick* barring proof of "passing on" could be avoided. The Eighth Circuit held that it need not decide the issue because the alleged co-conspirator middlemen were not named as parties defendant. Absent joinder of the middlemen, the Court reasoned that the rule forbidding one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect the defendants from the risk of duplicative recovery.[11] In so holding, the Court followed the Fifth Circuit in *In re Beef Industry Antitrust Litigation*[12] and at least one decision of the Ninth Circuit.[13] A different Ninth Circuit panel

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6. 431 U.S. 720, 97 S. Ct. 2061 (1977).
7. Id. at 746, 97 S. Ct. at 2075.
8. *Blue Shield*, 457 U.S. at 474-75, 102 S. Ct. at 2546.
9. Id. n.11.
10. 730 F.2d 528 (8th Cir. 1984).
11. Id. at 530.
12. 600 F.2d 1148 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980).
13. In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335 (9th Cir. 1982), cert. denied, 104 S. Ct. 972 (1984).

reached a contrary conclusion in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*,[14] holding that the plaintiff was not required to sue nor even to name all of the alleged conspirators inasmuch as antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy.[15]

In *Arizona v. Shamrock Foods Co.*,[16] the Ninth Circuit, virtually ignoring the issue of necessity of joinder, held that the *Illinois Brick* rule does not apply where a consumer class alleges a conspiracy among a supplier (who also distributes at the retail level) and intermediate suppliers to fix retail prices. *Shamrock* involved a suit by a class of consumers against several Arizona dairy product producers. Four other classes of plaintiffs, including a class composed of intermediate grocery stores, originally existed; all but the consumer class settled. The plaintiffs alleged claims for overcharges in sales of dairy products through grocery stores, and for overcharges in direct sales by the defendant in home delivery. The original focus of the complaint was on a wholesale price-fixing conspiracy.

Shamrock filed a motion for partial summary judgment on the claims for overcharges passed through grocery stores based on *Illinois Brick*. The plaintiffs responded that they had changed their theory of recovery to allege that the retail intermediaries, the grocery stores, were co-conspirators with the defendant producers to fix the price of dairy products at the retail level. The Ninth Circuit Court of Appeals agreed that in these circumstances recovery does not depend on a pass-on theory and that the *Illinois Brick* bar did not apply. The court reasoned that no danger of duplicative recovery existed since the consumers attacked only that overcharge resulting from a retail price-fixing conspiracy. Moreover, it found that for the same reason there would be no necessity for the complicated allocations sought to be avoided in *Illinois Brick*. Finally, it found that there would be no need to apportion the alleged overcharge because it was not passed on to the consumers through any other level in the distribution chain.

The *Shamrock* decision tears a wide hole in the fabric of the *Illinois Brick* bar to recovery. Especially in the pleading stage of litigation, plaintiff consumers now have a loophole to avoid dismissal by casting their pleadings not as a conspiracy among manufacturers, but as a conspiracy to fix retail prices involving intermediary suppliers selling directly to the plaintiffs.

Perhaps the *Shamrock* holding can be attributed to the fact that the defendant was engaged in dual distribution, and thus a horizontal competitor of its alleged co-conspirators. Horizontal price-fixing is a classic *per se* restraint of trade; the status of vertical price-fixing is less

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14. 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982).
15. Id. at 1052-53.
16. 729 F.2d 1208 (9th Cir. 1984).

clear.[17] Although the *Shamrock* court stated in *dicta* that *Illinois Brick* would be no bar even if the plaintiffs had claimed a two-tier or vertical conspiracy, allegations of this type would certainly present a weaker case for plaintiffs.

It is worth noting in passing that the *Illinois Brick* holding prompted Senator Slade Gordon (R-Wash.) to propose legislation which would allow the federal government and the states, indirect buyers for the most part, to bring suit to recover overcharges. The bill has naturally received strong support from state attorney generals, but has been opposed by the American Bar Association Section of Antitrust Litigation.[18]

Remoteness

The second limitation on section 4 damage actions identified by the Supreme Court is analytically distinct from the issue of what class of persons can sue for treble damages. It involves the "conceptually more difficult question 'of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue . . . .'"[19]

Limitation of this sort "has proven to be less than an empirical judicial science"[20] and has resulted in "doctrinal confusion."[21] Proof of causation-in-fact is insufficient to support a Section 4 action; beyond this, however, nothing is clear. Courts have adopted a variety of different, often conflicting, tests to determine when a plaintiff's alleged injury is to be considered remote from, or only indirectly caused by, the anticompetitive conduct.[22] One approach, adopted by the Fifth Circuit Court of Appeals, is the "target area" test, under which the plaintiff has to establish that it is within that area of the economy endangered by a breakdown of competitive conditions, and that the illegal activity was aimed at it.[23] Another test, referred to as the "direct injury test," focuses on the relationship between the plaintiff and the defendant. If the plaintiff is separated from the defendant by one or more intermediate

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17. See infra note 97 and accompanying text.

18. S. 915, 98th Cong., 1st Sess. (1983); 46 Antitrust & Trade Reg. Rep. (BNA) No. 1165, at 961-62 (May 17, 1984).

19. *Blue Shield*, 457 U.S. at 476, 102 S. Ct. at 2547.

20. Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1081 (6th Cir. 1983).

21. In re Industrial Gas Antitrust Litig., 681 F.2d 514, 515 (7th Cir. 1982), cert. denied, 460 U.S. 1016 (1983).

22. See id. at 515-16.

23. In re Municipal Bond Reporting Antitrust Litig., 672 F.2d 433 (5th Cir. 1982); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546 (5th Cir. 1980); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir.), cert. denied, 414 U.S. 1045 (1973); Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971).

tiers of victims, that plaintiff lacks standing.[24] The Sixth Circuit Court of Appeals, reasoning that both tests demanded too much from plaintiffs at the pleading stage, has adopted a less restrictive standing test under which a person pleading (1) injury in fact, and (2) an interest arguably within the zone of interests to be protected by the statute had standing.[25] This "zone of interests" test essentially engrafted a constitutional, or Article III, definition of standing into antitrust law.[26]

The Supreme Court stepped directly into the standing arena for the first time in *Blue Shield v. McCready.*[27] *McCready* involved a health plan authorizing reimbursement for psychotherapy services provided by psychiatrists, but not by psychologists. Plaintiff patient class sued Blue Shield, alleging that it had conspired with a group of psychiatrists to boycott psychologists. Although the Court took note of the varying tests for standing, it declined to evaluate or adopt any particular approach.[28] The Court held that the plaintiff class had standing, concluding that the plaintiff was within the area of the economy endangered by the breakdown of competitive conditions. It further held that the plaintiff's injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists," and therefore was "squarely within the area of congressional concern" since the injury was a "necessary step" and the "means" employed by the conspirators to achieve their anticompetitive end.[29]

The latest Supreme Court pronouncement on standing is contained in *Associated General Contractors, Inc. v. California State Council of Carpenters.*[30] The Court denied standing to a union of carpenters who had alleged that defendant building contractors had restrained trade in the market for construction contracting by coercing landowners and developers to enter into construction contracts with non-union contractors and subcontractors. This allegedly reduced the business of union contractors and subcontractors, which in turn diminished the business activities of plaintiff union. As in *McCready*, the Court reviewed the different standing tests, concluding that "these labels may lead to contradictory and inconsistent results," and that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case."[31]

The Court thus closed the door on further attempts to mold a cast-iron test and adopted a fluid approach, analogizing to the traditional

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24. See, e.g., Repp. v. F.E.L. Publications, Ltd., 688 F.2d 441 (7th Cir. 1982); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).
25. Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975).
26. *Southaven Land Co.*, 715 F.2d at 1082.
27. 457 U.S. 465, 102 S. Ct. 2540 (1982).
28. Id. at 475 n.11, 102 S. Ct. at 2546-47 n.11.
29. Id. at 484, 102 S. Ct. at 2551.
30. 459 U.S. 519, 103 S. Ct. 897 (1983).
31. Id. at 536 & n.33, 103 S. Ct. at 908 & n.33.

common law principles of proximate cause. The courts must evaluate, as in all common law damage litigation, the plaintiff's harm, the alleged wrongdoing by the defendants and the relationship between them.[32] The Court cautioned that the section 4 inquiry is distinct from the constitutional standing inquiry:

> The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.[33]

The factors identified as relevant include (1) the causal connection between the antitrust violation and harm to the plaintiff, and whether that harm was intended; (2) the nature of the plaintiff's alleged injury, including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.[34]

The *Associated General* test is "further illuminated by the Supreme Court's actions in three circuit cases in which certiorari had been requested."[35] In the two cases in which antitrust standing was upheld, the Supreme Court granted certiorari, vacated, and remanded for further consideration in light of *Associated General*.[36] The Supreme Court denied certiorari in the third case, in which the Court of Appeals affirmed a judgment for the defendants on the basis of lack of standing.[37]

The courts did not take the hint in the two cases vacated and remanded by the Court. In *Industrial Investment Development Corp. v. Mitsui & Co.*,[38] the plaintiffs alleged that the defendants had conspired to restrain trade between American competitors by preventing the plaintiffs from obtaining a source of supply of logs for their business of importation of lumber into the United States. The Fifth Circuit twice reversed the lower court's summary judgment for the defendants, the second time applying the target area test to hold that the plaintiff had standing.

32. Id. at 535, 103 S. Ct. at 907.
33. Id. at 535 n.31, 103 S. Ct. at 907 n.31.
34. Id. at 537-46, 103 S. Ct. at 908-13.
35. McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374 n.4 (8th Cir. 1984).
36. H.S. Crocker Co. v. Ostrofe, 460 U.S. 1007, 103 S. Ct. 1244 (1983); Mitsui & Co. v. Industrial Inv. Dev. Corp., 460 U.S. 1007, 103 S. Ct. 1244 (1983).
37. Bichan v. Chemetron Coıp., 460 U.S. 1016, 103 S. Ct. 1261 (1983).
38. 671 F.2d 876 (5th Cir. 1982).

This decision was vacated by the Supreme Court and remanded for reconsideration in light of *Associated General.*[39] Although it had "no difficulty in reaffirming [its] former judgment," the Fifth Circuit did acknowledge that its prior discussion of standing "was faulty." "Whether or not the inquiry is termed 'antitrust standing,' the Court teaches the appropriateness of an initial evaluation of plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them tested by the Court's explication of relevant factors of antitrust redress."[40]

In *Ostrofe v. H.S. Crocker Co.*[41] *(Ostrofe I)*, the plaintiff, a former marketing director for the defendant, a manufacturer of paper lithograph labels, alleged that the defendant had engaged in an illegal conspiracy with other manufacturers to fix prices and allocate markets. The plaintiff further alleged that he was compelled to resign after refusing to cooperate in the conspiracy, and that he was boycotted from further employment in the market. The Court of Appeals originally reversed a summary judgment for the defendant based on a straightforward application of the target area test. The basis of the reversal was the Ninth Circuit's affirmation of the policy favoring vigorous enforcement of the antitrust laws, especially in the context of alleged price-fixing, an antitrust violation that frequently goes undetected by its victims.[42] The dissent agreed that the plaintiff had standing to challenge the alleged boycott, but strenuously took issue with his standing to attack the conspiracy to fix prices and allocate sales, since the plaintiff was neither a competitor nor a consumer in the relevant market.

One month after *Ostrofe I* was decided, the Seventh Circuit Court of Appeals, in an opinion essentially along the lines of the dissent in *Ostrofe I*, reached a contrary conclusion using the more traditional target area analysis. In *Bichan v. Chemetron Corp.*,[43] the court held that a president of a company who had been fired because he refused to adhere to a conspiracy to fix prices and allocate customers lacked Section 4 standing.

Following *Associated General*, the United States Supreme Court denied *certiorari* in *Bichan*,[44] and vacated and remanded *Ostrofe I.*[45] On remand in *Ostrofe*, the Ninth Circuit reaffirmed its prior holding in a tortuously reasoned opinion, relying essentially upon "*Associated General*

39. 460 U.S. 1007, 103 S. Ct. 1244 (1983).
40. 704 F.2d 785, 786 (5th Cir. 1983).
41. 670 F.2d 1378 (9th Cir. 1982).
42. See Conley, Developments in the Law, 1981-1982—Antitrust, 43 La. L. Rev. 283 (1982).
43. 681 F.2d 514 (7th Cir. 1982).
44. 460 U.S. 1016, 103 S. Ct. 1261 (1983).
45. 460 U.S. 1007, 103 S. Ct. 1244 (1983).

read in light of *Blue Shield*."[46] It reasoned that the Court's extension in *Blue Shield* of the right to sue persons whose injury is a "necessary step" and the "means" employed by the conspirators to achieve their anticompetitive end provided a basis for recognizing Ostrofe's right to sue, even though he was neither a competitor nor a consumer.

Judge Kennedy again strongly dissented, accusing the majority of disregarding the Supreme Court's mandate to reconsider based on *Associated General*. "We should instead read *Blue Shield* in light of the limitations placed on it by *Associated General*, the case we were instructed to consult."[47] The dissent reasoned that the problem with the plaintiff's claim for treble damages based on alleged price-fixing was that the measure of his damages did not reflect or respond to the breakdown in competition caused by the antitrust violation. By their nature, the plaintiff's damages would be the same regardless of the success of the price-fixing conspiracy. By contrast, the damages sought in a price-fixing suit are proportionate to the degree the conspiracy is successful. The dissent concluded that "[a]ntitrust enforcement becomes divorced from antitrust policy when treble damages bear no relation to the anticompetitive effects of the illegal conduct. Such awards threaten to make every business tort convertible into a treble-damage bonanza."[48]

Other Courts of Appeals confronting the standing question since *Associated General* have generally rejected the prior standing tests and implementated the new multifactor analysis.[49] In two opinions handed down the same day, the Fifth Circuit Court of Appeals affirmed summary judgments for defendants based on lack of standing. In *Transource International, Inc. v. Trinity Industries, Inc.*,[50] plaintiff procurer and lessor of railcars sued defendant manufacturer of railcars after a proposed joint venture to market gondolas fell through. The plaintiff contended that the non-competition clause in the agreement between the parties violated the antitrust laws.

The Fifth Circuit noted that "it is clear in this case that the plaintiff met the 'target market' aspect of the standing test."[51] However, although the plaintiff alleged injury, *i.e.*, increased cost of railcars, elimination from the market, and loss of sales, it failed to allege a sufficient causal relationship between the injury and the antitrust violation. The court

46. 740 F.2d 739, 744 (9th Cir. 1984).
47. Id. at 749 (Kennedy, J., dissenting).
48. Id. at 751 (Kennedy, J., dissenting).
49. But see Construction Aggregate Transp., Inc. v. Florida Rock Indus., 710 F.2d 752, 762 n.23 (11th Cir. 1983) (concluding that *McCready* implicitly sanctioned continued flexible use of the target area test).
50. 725 F.2d 274 (5th Cir. 1984).
51. Id. at 280.

reasoned that there was absolutely no allegation that the plaintiff had had any opportunity to manufacture or market railcars or gondolas with which the non-competitor clause could have interfered.

The plaintiff in *Bayou Bottling, Inc. v. Dr. Pepper Co.*[52] was a wholesaler and distributor of soft drinks, most notably Pepsi-Cola and Seven-Up, in the area of Lake Charles and Jennings, Louisiana. The defendants were the manufacturers of Dr. Pepper, and a Louisiana wholesaler and distributor of Coca-Cola and Dr. Pepper in the same area as the plaintiff. The plaintiff alleged that a former distributor of Dr. Pepper had orally committed to sell to the plaintiff, but had sold to the defendant instead. The district court granted summary judgment to the defendants based on lack of antitrust injury. The Fifth Circuit affirmed, holding that the plaintiff's failure to acquire the franchise did not constitute an antitrust injury.[53]

In *Crimpers Promotions, Inc. v. Home Box Office, Inc.*,[54] the court held that it was "compelled . . . to follow the approaches adumbrated by the Supreme Court in *McCready* and *Associated General* without concern whether the results are consistent with language in earlier Second Circuit cases."[55] Plaintiff cable television producer sued defendants Home Box Office and Showtime Entertainment Corp., dominant producers in the market, alleging that they had conspired to cause a boycott of its trade show. Meticulously applying each of the factors listed in *Associated General*, the court held that the case presented "a paradigm of standing."[56]

The Sixth Circuit Court of Appeals in *Southaven Land Co. v. Malone & Hyde, Inc.*[57] rejected its prior "zone of interests" test as too broad in light of *Associated General*. In *Southaven*, the plaintiff, a lessor of commercial space restricted to retail grocery use, sued defendant lessee who had subleased space to a grocery store that went bankrupt. The defendant was also a retail grocer in other areas and refused either to sublease the space again or to cancel the lease. The plaintiff alleged that the defendant intentionally sought to monopolize and control the retail grocery market. The complaint failed to aver that the plaintiff sustained any injury as a competitor, purchaser, consumer, or other economic actor in the grocery industry. The Sixth Circuit denied standing to the plaintiff, although it had clearly alleged a causal connection between its injury and an antitrust violation and that the defendant intended to cause that injury. If anything, this case presents a paradigm of lack of antitrust standing.

52. 725 F.2d 300 (5th Cir. 1984).
53. Id. at 304.
54. 724 F.2d 290 (2d Cir. 1983).
55. Id. at 293.
56. Id. at 297.
57. 715 F.2d 1079 (6th Cir. 1983).

Antitrust Injury

The concept of antitrust injury has been the elusive subject of numerous opinions.[58] It originated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[59] where the Court held that to recover treble damages under Section 4, plaintiffs must prove injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Prior to *Associated General*, it was unclear how this requirement related to the more traditional tests for standing. The Sixth Circuit Court of Appeals, for example, merely stated that it was an additional requirement.[60]

Following *Associated General*, it appears that the requirement of antitrust injury is not an isolated requirement, but rather is subsumed into the multifactor standing analysis,[61] more particularly, the factor of the nature or type of the plaintiff's alleged injury.[62]

STATE ACTION IMMUNITY

The doctrine of state action immunity stems from the Supreme Court's decision in *Parker v. Brown*,[63] holding that nothing in the language or history of the Sherman Act suggests that it was intended to apply to anticompetitive state activity. The Constitution provides that states are sovereign, save only as Congress may constitutionally subtract from their authority. Therefore, absent a clear indication from Congress, the Court found states to be entitled to immunity. The judicial debate over the boundaries of this immunity continues unchecked.

The doctrine has proven easy to apply where the specific anticompetitive activity is directed by the state legislature or the state supreme court. Problems have arisen where the state delegates general authority to entities such as municipalities and bar associations, which in turn engage in allegedly anticompetitive activity. To date, the Court has applied the same standards to private and public "delegates," regarding each simply as a "non-sovereign" entity. The repercussions for local governments have proved grave.

In *City of Lafayette v. Louisiana Power & Light Co.*,[64] the Court

58. Chelson v. Oregonian Publishing Co., 715 F.2d 1368 (9th Cir. 1983).

59. 429 U.S. 477, 489, 97 S. Ct. 690, 697 (1977).

60. Chrysler Corp. v. Feders Corp., 643 F.2d 1229, 1234-35 (6th Cir. 1981).

61. *Associated General*, 459 U.S. at 535-46, 103 S. Ct. at 907-13.

62. See Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300, 303 (5th Cir. 1984); Chelson v. Oregonian Publishing Co., 715 F.2d 1368, 1370 (9th Cir. 1983); McDonald v. Johnson & Johnson, 722 F.2d 1370 (8th Cir. 1984). But see Walker v. U-Haul Co. of Mississippi, 747 F.2d 1011 (5th Cir. 1984) (suggesting that issues of antitrust standing and antitrust injury should be considered separately).

63. 317 U.S. 341, 63 S. Ct. 307 (1943).

64. 435 U.S. 389, 98 S. Ct. 1123 (1978).

declined to extend the *Parker* immunity to cities "simply by their status as such."[65] *Parker* immunity will apply only where anticompetitive conduct is undertaken by a city pursuant to a "clearly articulated and affirmatively expressed"[66] state policy to displace competition with regulation or monopoly service. Following *City of Lafayette*, the Court held that a general delegation of home rule authority to a city authorizing it to act in one or more particular areas does not render anticompetitive conduct undertaken by a city pursuant to that authority immune from antitrust challenge. "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."[67]

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[68] the petitioners challenged price schedules set by private wine wholesalers. Although a state statute specifically authorized this activity, the state retained no direct control over the wine prices. Absent "active state supervision"[69] of activity clearly articulated and affirmatively expressed as state policy, the Supreme Court held that such activity would not be immunized under the *Parker* doctrine.

Over thirty-five states have made provisions for home-rule powers either through legislation or by constitution.[70] The foregoing line of cases has caused widespread concerns over the continued viability of local governmental autonomy. These concerns are clearly warranted. Recently, a jury verdict of $28.5 million was rendered against a county, village, and three individuals based on their refusal to permit the connection of sewer lines to the plaintiffs' proposed development.[71] An *en banc* panel of the Fifth Circuit Court of Appeals recently reversed itself and reinstated a jury verdict of $6.3 million against the City of Houston and former Houston officials in a case involving a scheme to divide the Houston market among cable franchise operators.[72]

The majority of lower court decisions, however, mirror municipality concern for the continued viability of local autonomy. Where a city's mandate is more specific than a broad home-rule power, lower courts have bent over backwards to shield allegedly anticompetitive municipal

65. Id. at 413, 98 S. Ct. at 1137.

66. Id. at 410, 97 S. Ct. at 1135.

67. Community Communications Co. v. City of Boulder, 455 U.S. 40, 55, 102 S. Ct. 835, 843 (1982).

68. 445 U.S. 97, 100 S. Ct. 937 (1980).

69. Id at 105, 100 S. Ct. at 943.

70. See Note, Home Rule and the Sherman Act after *Boulder*: Cities Between a Rock and a Hard Place, 49 Brooklyn L. Rev. 259, 262 n.24 (1983).

71. LaSalle Nat'l Bank v. County of Lake, 579 F. Supp. 8 (N.D. Ill. 1984); accord Vickery Manor Serv. Corp. v. Village of Mundelein, 575 F. Supp. 996 (N.D. Ill. 1983).

72. Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984).

conduct from liability under the Sherman Act, reasoning that the city was acting in furtherance of a clearly articulated state policy.[73]

In *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*,[74] several neighboring municipalities entered into a cooperative arrangement to construct a waste disposal facility. This cooperative effort was permitted under a new Iowa statute authorizing political subdivisions of the state to join together to provide important and necessary services and facilities, including the provision of sanitary disposal projects. A private waste disposal service sued, alleging an exclusionary restraint of trade and monopolization of the disposal of solid waste. The district court found that the alleged anticompetitive arrangement was protected by the state action exemption.

The Eighth Circuit easily found a clear state policy encouraging cities to join together to provide common disposal facilities. It went on to observe that,

> [a]dmittedly, one must engage in some speculation to determine whether the State of Iowa genuinely intended to displace competition in the disposal of solid waste. We agree with the district court, however, that notwithstanding the statutes' silence on the specific matter of monopolization, it is possible to infer the existence of an affirmative state policy permitting anticompetitive practices in the operation of municipal landfills.[75]

Thus, the Court concluded that "the restraint on competition was a 'necessary or reasonable consequence' of engaging in the authorized activity of contructing a waste disposal facility . . . ."[76] A critical fact in the Court's analysis was that the state legislature had specifically considered and addressed the problem of waste disposal, unlike the case in *Boulder*, where the home rule provision in the Colorado constitution failed even to mention cable television.

The plaintiff contended alternatively that even if the alleged restraint was pursuant to a clearly articulated and affirmatively expressed state policy, the defendants' anticompetitive conduct still was not immunized from antitrust scrutiny because it was not actively supervised by the State. The Eighth Circuit correctly observed that the Supreme Court has not decided whether the active state supervision requirement announced in *Midcal*, involving a private restraint, also applies to anticompetitive activities of municipal governments. In *Central Iowa*, the

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73. See, e.g., Gold Cross Ambulance, Inc. v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), cert. granted, 104 S. Ct. 3508 (1984).

74. 715 F.2d 419 (8th Cir. 1983).

75. Id. at 426.

76. Id. at 427.

Eighth Circuit reaffirmed its position that it does not where the restraint represents governmental conduct in an area of "traditional" municipal activity. The rationale and holding of the *Central Iowa* case has recently been adopted by the Sixth Circuit Court of Appeals in a case with similar facts.[77]

In *Golden State Transit Corp. v. City of Los Angeles*,[78] the court ruled that the City's refusal to renew the plaintiff's taxicab franchise was shielded from antitrust attack by the *Parker* doctrine. The Ninth Circuit found that the California Constitution and the state public utility code contained a state policy to displace competition in this area with regulation, and also demonstrated that the legislature had contemplated the kind of actions alleged to be anticompetitive. Aligning itself with other courts, the Ninth Circuit further held that the city need not show active state supervision to invoke immunity since in franchising local public transportation utilities and regulating their charges, the city was performing a traditional municipal function under a clearly established and affirmatively expressed state policy:

> The state legislature has determined that public transportation by taxicab should be regulated and that preferably the regulation should be handled by local government. A requirement of active state supervision would erode local autonomy. It makes little sense to require a state to invest its limited resources in supervisory functions that are best left to muncipalities.[79]

Some of the questions left unanswered after *Boulder* should soon be answered by the Supreme Court, which has granted a petition for certiorari in *Town of Hallie v. City of Eau Claire*.[80] In *Hallie*, the court upheld the *Parker* exemption for a municipality that had conditioned extension of sewer service on annexation. A state statute provided that services could be refused if an adjoining area elected not to become annexed. The Seventh Circuit refused to apply the second prong of the *Midcal* test, the requirement of active state supervision, reasoning that this requirement was unnecessary where a city is performing traditional municipal functions.

A distinction based on private versus municipal activity has little, if any, support in the Supreme Court's previous decisions. Nonsovereign entities, whether private or public, do not share the states' constitutional immunity. The *Parker* doctrine is ostensibly based upon precepts of federalism and the judicial branch's deference to constitutional state

77. Hybud Equipment Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984).
78. 726 F.2d 1430 (9th Cir. 1984).
79. Id. at 1434.
80. 700 F.2d 376 (7th Cir. 1983), cert. granted, 104 S. Ct. 3508 (1984).

sovereignty in the absence of explicit congressional mandate.[81] The decisions of the lower courts largely reflect a disinclination to intrude the federal nose into local governmental decision making, whether state or municipal, a position fundamentally at odds with the Supreme Court's holding that there is no constitutional basis for extending the sovereignty afforded the states to municipalities.

Congress recently adopted the Local Government Antitrust Act of 1984 (the Act) in order to ease the plight of local governments and breathe life back into municipal autonomy.[82] In the Senate Report on Senate Bill 1578 (the senate version of the Act), the Committee reported that it had monitored the impact of *Lafayette* and *Boulder* on the operation of local government, and learned that more than one hundred federal antitrust suits seeking treble damages are now pending against cities, counties, townships and virtually every other type of local government. It further observed that dozens of local government activities are being challenged, ranging from zoning decisions to the regulation of garbage collection, airport concessions, and parking lots. "The practical impact of *Boulder* and *Lafayette* has been to paralyze the decisionmaking functions of local government."[83]

Senate Bill 1578 does not place municipalities on a par with states insofar as antitrust immunity is concerned; rather, it (1) flatly prohibits any award of damages against units of local governments under Section 4 of the Clayton Act, and (2) defines the circumstances under which private parties acting pursuant to the direction of local government can claim a parallel exemption. The sole private remedy against a local government violating the federal antitrust laws would be injunctive relief. House Bill 6027 also eliminates antitrust damage liability for official conduct of a local government and its officials. Essentially, both bills would eliminate certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law.

Contracts, Combinations and Conspiracies Under Section 1

In *Copperweld Corp. v. Independence Tube Corp.*,[84] the Supreme Court re-examined the intra-enterprise conspiracy doctrine in the context of an alleged conspiracy between a parent corporation and its wholly-owned subsidiary. The majority opinion, authored by Chief Justice

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81. *City of Lafayette v. Louisiana Power & Light*, 455 U.S. at 400, 98 S. Ct. at 1130.

82. Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 2750 (to be codified at 15 U.S.C. §§ 34-36).

83. S. Rep. No. 593, 98th cong., 2d. Sess. (1984), reprinted in 47 Antitrust & Trade Reg. Rep. (BNA) No. 1179, at 379 (Aug. 23, 1984).

84. 104 S. Ct. 2731 (1984).

Burger and joined by Justices Blackmun, Powell, Rehnquist and O'Connor, held that two such related entities are incapable of conspiring with one another within the meaning of Section 1 of the Sherman Act. Justice Stevens filed a dissenting opinion, in which Justices Brennan and Marshall joined. Justice White did not participate in the consideration or decision of the case.

As the original plaintiff, Independence filed suit based on an alleged conspiracy between Copperweld and a wholly-owned subsidiary company. The complaint alleged that Copperweld and its subsidiary, Regal Tube Company, had conspired to enforce a non-competition clause in a manner which violated Section 1 of the Sherman Act. The jury found that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act, and accordingly awarded treble damages in excess of $7.5 million, as well as attorney's fees and costs. The Seventh Circuit affirmed, holding that liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible."[85] The Supreme Court granted *certiorari* and reversed.

The significance of *Copperweld* lies in the majority's conservative analysis of the Sherman Act's prohibition against anti-competitive conspiracies, which led it ultimately to conclude that these parties were incapable of conspiring illegally under Section 1 of the Sherman Act.[86] In repudiating the intra-enterprise conspiracy doctrine, Justice Burger's opinion focused on a "basic distinction between concerted and independent action."[87] The Chief Justice reasoned that this distinction is the fundamental difference between Sections 1 and 2 of the Sherman Act.

By concentrating on the requirement under Section 1 that the anti-competitive actions be undertaken by two separate entities, the Court has effectively established a *per se* rule of antitrust immunity for a parent and its wholly-owned subsidiary. In concluding that entities so related should be viewed as a single enterprise within the meaning of Section 1, Chief Justice Burger said that agreements between such entities "do not suddenly bring together economic power that was previously pursuing divergent goals."[88] The Court stated that the coordinated activity of a parent and its wholly-owned subsidiary must be viewed as

85. 691 F.2d 310, 318 (7th Cir. 1982). The Seventh Circuit also held that the jury instructions took account of the proper factors in determining how much separation Copperweld and Regal actually maintained in the conduct of their businesses. Id. at 319.

86. It is noteworthy that the antitrust division of the Justice Department filed an *amicus curiae* brief in which it took the position that the intra-enterprise conspiracy doctrine should be rejected.

87. 104 S. Ct. at 2740 (citing Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464, 1469 (1984)).

88. 104 S. Ct. at 2741.

that of a single enterprise for purposes of Section 1 of the Sherman Act, because their objectives are common and based on a unity of purpose. The majority also noted that the intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality, thereby posing the danger that overbroad condemnation under Section 1 could "deprive consumers of the efficiencies that decentralized management may bring."[89]

The majority acknowledged that the Court's holding clearly demonstrated that the Sherman Act does not prohibit a single firm's anticompetitive conduct which does not constitute threatened monopolization, but may be indistinguishable in economic effect from the conduct of two firms that would be subject to Section 1 liability. Chief Justice Burger addressed this issue by stating that Congress left such a "gap" so as to avoid subjecting a single firm's every action to judicial scrutiny for reasonableness that might ultimately "discourage the competitive enthusiasm that the antitrust laws seek to promote."[90] Burger stated that regardless of the wisdom of such a distinction, the Act's plain language "leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct."[91]

In a carefully reasoned dissent, Justice Stevens articulated his belief that the majority had overstepped its position in applying a *per se* rule of antitrust immunity. In arguing that the Court would be better advised to continue to rely on the rule of reason, Justice Stevens further stated that the majority opinion was actually an unjustified abandonment of binding Supreme Court precedent which has consistently upheld the intra-enterprise conspiracy doctrine.[92] Justice Stevens criticized the holding that agreements between parent and subsidiary corporations involve merely unilateral conduct as contrary to the Supreme Court's traditional understanding of the concept of a combination or conspiracy, and also as contrary to Congress' intent in enacting the Sherman Act. In support of this position, Justice Stevens cited the Congressional Record as evidence that the enactors of the Sherman Act were concerned with activities of combinations between such interrelated entities.

While acknowledging the potential efficiencies associated with corporate integrations of this type, Justice Stevens noted that the Court's

89. Id. at 2742. Chief Justice Burger noted that "[s]eparate incorporation may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests." Id. at 2743. In a footnote, he noted that separate incorporation may reduce federal or state taxes, facilitate compliance with regulatory or reporting laws, and may also improve local identification. Further, different parts of a business may require different pension or profit-sharing plans or different accounting practices. Id. at 2743 n.20.

90. Id. at 2744.

91. Id.

92. "Thus, the rule announced today is inconsistent with what this Court has held on at least seven previous occasions." Id. at 2748 (Stevens, J., dissenting).

per se rule of immunity leaves a significant gap in antitrust enforcement. Justice Stevens argued that the Court's holding, by elevating form over substance, ignored the fundamental economic policy against unlawful acquisition of market power underlying the Sherman Act.[93] The dissent maintained that the majority opinion should not have considered why a wholly-owned subsidiary should be treated differently from a corporate division; instead, it maintained that the question should be,

> why two corporations that engage in a predatory course of conduct which produces a market-wide restraint on competition and which, as separate legal entities, can be easily fit within the language of Section 1, would be immunized from liability because they are controlled by the same godfather. That is a question the Court simply fails to confront.[94]

In a case which is perhaps most noteworthy for what it did not decide, *Monsanto Co. v. Spray-Rite Service Corp.*,[95] the Supreme Court held that proof of a manufacturer's termination of a distributor following complaints on behalf of competing distributors is not in itself sufficient to support an inference of concerted action under Section 1 of the Sherman Act. Although the Court's actual holding only resolved this narrow evidentiary question, the original defendant (Monsanto) had further argued against the impropriety of applying a *per se* standard based on mere allegations that non-price restrictions, normally subject to the rule of reason under *Continental T.V., Inc. v. GTE Sylvania*,[96] are actually an integral part of a price conspiracy.

The Solicitor General, as well as several other *amici*, took the position that the Supreme Court should reconsider whether concerted action to fix resale prices should always be considered unlawful. These non-parties maintained that the difference between the economic effects of resale price maintenance and non-price restrictions is minimal. In a footnote Justice Powell, writing for the majority, declined to consider the argument that the rule of reason should apply to a vertical price-fixing conspiracy because neither of the parties had ever raised this contention previously.[97]

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93. Stevens has defined market power as the ability to raise prices above those that would be charged in a competitive market. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1566 n.46 (1984).

94. 104 S. Ct. at 2755 (Stevens, J., dissenting).

95. 104 S. Ct. 1464 (1984).

96. 433 U.S. 36, 97 S. Ct. 2549 (1977).

97. In a footnote which underscores the majority's discomfort with addressing this argument in the case before it, Justice Powell stated:

> Certainly in this case we have no occasion to consider the merits of this argument. This case was tried on *per se* instructions to the jury. Neither party argued in the District Court that the rule of reason should apply to a vertical price-fixing conspiracy, nor raised the point on appeal. In fact, neither party before this

In *NCAA v. Board of Regents of the University of Oklahoma*,[98] a case which generated widespread public interest, the Supreme Court held that the NCAA's plan for the televising of college football games for its member institutions during the years 1982 through 1985 violated Section 1 of the Sherman Act. Justice Stevens wrote for the majority, joined by Justices Burger, Brennan, Marshall, Blackmun, Powell and O'Connor. Justice White filed a dissenting opinion which Justice Rehnquist joined.

The district court had concluded that competition in the "live college football television market" had been restrained in three ways: (1) the NCAA fixed the price for particular football telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all of potential broadcasters, and its threat of sanctions against its own members constituted a threatened boycott of potential competitors; and (3) the plan placed an artificial limit on the production of televised college football.[99] The Tenth Circuit Court of Appeals affirmed, but remanded for modification of the injunctive decree, holding that the plan constituted *per se* illegal price-fixing, and that even if not illegal *per se*, the plan's anticompetitive limitations on price and output could not be justified on the basis of its allegedly pro-competitive effects when all the circumstances were considered.[100]

The Supreme Court affirmed. Although the majority acknowledged that application of a *per se* standard was inappropriate in this particular case because of industry characteristics in which horizontal restraints on competition are essential if the product is to be available at all,[101] the Court nonetheless decided under the rule of reason that the challenged restraints constituted horizontal price-fixing and output limitations which violated Section 1 of the Sherman Act. The majority opinion concluded that the NCAA did possess market power, which was defined as the ability to raise prices above those that would be charged in a competitive market.[102] The Court thus agreed that the lower courts were correct in finding a significant restraint upon the operation of a free market, and

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Court presses the argument advanced by amici. We therefore decline to reach the question, and we decide the case in the context in which it was decided below and argued here.

104 S. Ct. at 1469-70 n.7.

98. 104 S. Ct. 2948 (1984).

99. 546 F. Supp. 1276, 1293-95 (W.D. Okla. 1982).

100. 707 F.2d 1147, 1152 (10th Cir. 1983).

101. 104 S. Ct. at 2960-61.

102. Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming

proceeded to examine the NCAA's proffered justifications.

The NCAA argued that its television plan constituted a cooperative joint venture which assisted in the marketing of broadcast rights, and hence was pro-competitive. The Court rejected this argument outright, relying primarily on the district court's contrary findings that the production of televised collegiate football had been significantly limited. The Court also rejected the argument that the plan provided an attractive package sale which was necessary to penetrate the market, stating that broadcasting rights to collegiate football constituted a unique product for which there was no substitute, and therefore there is no need for collective action to facilitate competition against a non-existent competitor. Similarly, the Court rejected the argument that the NCAA's television plan protected live attendance as contrary to the factual conclusions of the district court. The Court also rejected this argument because it essentially proposed that competition between televised football and live football is itself unreasonable, a justification clearly inconsistent with the basic policy of the Sherman Act.[103]

Perhaps the most significant justification set forth by the NCAA was that its television plan promoted a competitive balance among the football programs of its various member institutions. Although the Court acknowledged that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important, the majority rejected the NCAA's arguments that the restraints contained in its television plan could be justified as serving that interest. The Court based this conclusion in large part on the district court's determination that more games would be televised absent the NCAA's restrictions, thereby conclusively establishing that the plan could not be defended on this basis.[104]

In his dissenting opinion, Justice White took issue with the Court's treatment of intercollegiate athletics under the NCAA's control "as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits."[105] The dissent

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> that can attract a similar audience. These findings amply support its conclusion that the NCAA possesses market power. Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product.

104 S. Ct. at 2966.

103. 104 S. Ct. at 2969.

104. "The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product." The Court thus concluded that the district court's finding that more games would be televised absent the NCAA's controls was a "compelling demonstration that they do not in fact serve any such legitimate purpose." 104 S. Ct. at 2970.

105. 104 S. Ct. at 2971 (White, J. dissenting).

disagreed with the majority's conclusion that the NCAA's television plan differed fundamentally from other apparently anti-competitive aspects of the organization's program of self-regulation. In a concise summary of the majority holding, Justice White noted that neither the Court of Appeals or the Supreme Court purported to hold that the NCAA may not: (1) require its members who televise their games to pool and share the compensation received with other schools and with the NCAA; (2) limit the number of times any member may arrange to have its games shown on television; or (3) enforce reasonable blackout rules to avoid head-to-head competition for television audiences.[106]

Justice White viewed these limitations on the Court's holding as significant, and stated that the majority merely reaffirmed the Court of Appeals' judgment that the NCAA may not limit the number of games that are broadcast, and that it may not contract for an overall price that ultimately has the effect of setting the price for individual game broadcast rights.[107] Further, Justice White questioned whether the district court employed the proper measure of output by distinguishing between output reflected in an increased number of games shown, and output measured in terms of total viewership of collegiate football; he maintained that the latter is "the more appropriate measure of output, or, at least, of the claimed anti-competitive effects of the NCAA plan."[108]

Another interesting point raised in the dissent concerned the majority's conclusion that the reduction in the number of televised college football games brought about by the NCAA's plan resulted in an anti-competitive increase in the price of television rights. Justice White stated that reductions in output by monopolists in most product markets enable producers to exact a higher price for the same product; however, Justice White reasoned that the NCAA had created a new product—exclusive television rights—that are "more valuable to networks than the products that its individual members could market independently."[109] He thus reasoned that the focus on higher prices for television rights, as opposed to a consideration of the nature and quality of the product delivered

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106. Id. at 2974.

107. The dissent concluded: "At the very least, the Court of Appeals should be directed to vacate the injunction . . . to accomodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games." Id. at 2979.

108. Id. at 2975. The dissent further stated:

> This is the NCAA's position, and it seems likely to me that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football. . . . In the absence of a contrary finding by the District Court, I cannot conclude that respondents carried their burden of showing that the television plan has an adverse effect on output and is therefore anticompetitive.

Id.

109. Id. at 2976.

by the NCAA and its member institutions, "may well have deemed anti-competitive a rise in price that more properly should be attributed to an increase in output, measured in terms of viewership."[110] Justice White also disputed the majority's conclusion that the uniqueness of NCAA football renders collective action to facilitate competition against "non-existent competitors" unnecessary. To the contrary, the dissent concluded that the maintenance or enhancement of the quality of NCAA football telecasts might well be necessary to enable those telecasts to compete effectively against other forms of entertainment, suggesting that the relevant market should be broadened to include other forms of entertainment. Finally, the dissent argued that the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives towards professionalism.

TIE-INS

In a controversial case which arose in Louisiana, the Supreme Court recently considered the propriety of applying the *per se* rule of illegality to tying arrangements challenged under federal antitrust laws. In *Jefferson Parish Hospital District No. 2 v. Hyde*,[111] the Court unanimously agreed that an exclusive contract for the provision of medical services between a group of anesthesiologists and a hospital did not constitute a *per se* violation of Section 1 of the Sherman Act. But in a five to four split, the members of the Court differed as to whether the *per se* rule should be employed in assessing the legality of such an agreement.

The plaintiff, an anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. Although his admission was approved by two medical committees at the hospital, the plaintiff's application was denied by the hospital board of directors because of an exclusive contract for anesthesiology services between the hospital and a professional medical corporation of anesthesiologists. The plaintiff commenced an action in the federal district court for the Eastern District of New Orleans in which he asserted that the exclusive contract constituted an illegal tying arrangement in violation of Section 1 of the Sherman Act. Following trial on the merits, the district court dismissed the plaintiff's suit. In rejecting the plaintiff's argument that the agreement was illegal *per se*, the judge ruled that the plaintiff had not shown that East Jefferson Hospital dominated the market in which it competed. Furthermore, the court found that the essential purpose of the exclusive contract was to enhance patient care.[112]

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110. Id.
111. 104 S. Ct. 1551 (1984).
112. 513 F. Supp. 532, 541 (E.D. La. 1981).

The Fifth Circuit reversed and held that the exclusive contract constituted a tying arrangement which was illegal *per se.*[113] In concluding that East Jefferson Hospital had sufficient market power in the tying product (general hospital services and operating room facilities) to coerce the purchase of the tied product (anesthesiological services), the Fifth Circuit relied upon the rationale that hospital patients tend to choose hospitals by location rather than price or quality. In addition to holding that East Jefferson Hospital possessed sufficient market power under this analysis, the Fifth Circuit also concluded that the arrangement had anti-competitive effects, notwithstanding the asserted business justifications for the contract.

Although the Supreme Court reversed and unanimously concluded that the contract did not constitute a *per se* illegal tying arrangement, the Court split on the important question of what standard should be applied in assessing the legality of an arrangement which has been challenged as an illegal tie-in. Writing for five members of the Court, Justice Stevens declared that a *per se* analysis is the appropriate standard by which such an arrangement should be considered.[114]

Relying on the holding in *Times-Picayune Publishing Co. v. United States,*[115] the majority in *Hyde* reaffirmed that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer to purchase another product which he did not want, or which he might have preferred to purchase elsewhere on different terms. The question of whether there is one integrated product or two separate products turns "not on the functional relation between them, but rather on the character of the demand for the two items," *i.e.*, whether there are two distinguishable product markets.[116] Further, the critical element of "forcing" is essential to an illegal tying arrangement. The majority opinion states that in order to find that a particular tying arrangement constitutes a *per se* violation of the antitrust laws, it must be demonstrated that forcing is probable, and that anti-competitive effects are a definite probability.

While adhering to the *per se* rule for scrutinizing tying arrangments, the majority focused on a study of the market in which each of the two products were sold. Although the Court concluded that the hospital did offer two distinct products, Justice Stevens concluded on a review of the record, that East Jefferson Hospital did not possess sufficient

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113. 686 F.2d 286 (5th Cir. 1982).

114. Justice Stephens stated that "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an 'unacceptable risk of stifling competition and therefore are unreasonbable 'per se.'" 104 S. Ct. at 1556.

115. 345 U.S. 594, 73 S. Ct. 872 (1953).

116. 104 S. Ct. at 1562.

market power in the relevant geographical market to force patients to purchase its package of hospital and anesthesiological services. Without proof of the essential element of forcing, the Court held that the arrangement did not constitute a *per se* illegal tying arrangement.[117]

The majority also held that the plaintiff had failed to prove that the exclusive contract unreasonably restrained competition among anesthesiologists because even without the exclusive contract at East Jefferson Hospital, the patient's choice of doctors would nonetheless be substantially curtailed by the nature of the service and the hospital's unquestioned right to determine the identity and number of doctors to whom it accords staff privileges. The Court held that there had been no showing on the record that the market for services of anesthesiologists as a whole had been adversely affected by the exclusive contract between East Jefferson Hospital and the medical corporation. In the absence of a showing that the market for anesthesiological services had been adversely affected by the exclusive contract, the Court concluded that there was insufficient evidence of an unreasonable restraint of trade.

The *Hyde* decision is perhaps most noteworthy for the concurring opinion of Justice O'Connor, joined by Justices Burger, Powell, and Rehnquist. In a novel and substantially different approach from the majority's analysis, Justice O'Connor said that the exclusive arrangement between East Jefferson Hospital and the anesthesiologists should be analyzed under the rule of reason. Justice O'Connor noted that the *per se* doctrine in tying cases had always required an elaborate inquiry into the economic effects of the tying arrangement; therefore, the application of the "*per se*" label was not appropriate. The concurring opinion sought to refocus the inquiry on the adverse economic effects and any potential benefits that the tying arrangement might have.[118] Significantly, Justice O'Connor's opinion dismissed the notion of "forcing," essential

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117. In concluding that the anticompetitive effects of the agreement in question did not warrant *per se* condemnation, the majority stated:

> There is, however, insufficient evidence in this record to provide a basis for finding that the Roux contract, as it actually operates in the market, has unreasonably restrained competition. The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist. The evidence indicates that some surgeons and patients preferred respondent's services to those of Roux, but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.

104 S. Ct. at 1567-68.

> 118. The law of the tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except for those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever. The change will rationalize rather than abandon tie-in doctrine as it is already applied.

104 S. Ct. at 1570 (O'Connor, J. concurring).

to the majority opinion, as irrelevant to proper analysis of a tying arrangement.[119]

There is little question after *Hyde* that the courts will often be required to engage in a detailed analysis of a defendant's market position when a tying arrangement is challenged under the Sherman Act, even though a *per se* standard will be applied. *Hyde* may represent a crossroads in the Supreme Court's analysis of tying arrangements generally, and perhaps suggests a retreat from the rigid application of a *per se* rule. Although the *Hyde* majority advocated the retention of the *per se* analysis in scrutinizing tying arrangements, its overall approach seems more akin to a rule of reason analysis. One vote currently separates the two sides of the court on fundamentally distinct approaches to this problem. The law on tie-ins continues to evolve on a case-by-case basis.

Several Circuit Court opinions rendered subsequent to *Hyde* indicate some potential problems which remain in analyzing the legality of tying arrangements. In *Konik v. Champlain Valley Physicians Hospital Medical Center*,[120] the Second Circuit also addressed the antitrust consequences of a contract between a hospital and a professional corporation for the practice of anesthesiology. The plaintiff, an anesthesiologist, alleged that the defendants had, with respect to providing anesthesiology services in the hospital, engaged in unlawful price-fixing (both vertical and horizontal), group boycott, tying, monopolization, and conspiracy and attempt to monopolize.

In affirming the district court's directed verdict dismissing the plaintiff's claims, the Second Circuit noted several factual reasons for concluding that the contract at issue was not illegal under the antitrust laws. In analyzing the terms of the contract, the court observed that there was no evidence of any attempt to exclude the plaintiff or any other physician from the practice of anesthesiology at the hospital. To the contrary, the court focused on the fact that the hospital and the professional corporation had negotiated with the plaintiff as an equal

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119. Justice O'Connor's emphasis on analyzing the actual competitive effects of such an arrangement underscores a fundamental dispute concerning the significance of "forcing:"

> The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the demonstrated economic effects of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to "force" the buyer to purchase the tied product. For when the seller exerts market power only in the tying product market, it makes no difference to him or his customers whether he exploits that power by raising the price of the tying product of by "forcing" customers to buy a tied product. . . . On the other hand, tying may make the provision of packages of goods and services more efficient. A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.

Id. at 1574 (citations omitted).

120. 733 F.2d 1007 (2d Cir. 1984).

third party to the contract, and the contract itself contained a provision for subsequent inclusion of any qualified physicians who might seek to enter the relevant market for anesthesiological services at a later date. Moreover, the court noted that the contract called for periodic review every six months, further evidence of its non-exclusive nature.

In addressing the issue of whether there was an illegal tying arrangement, the Court of Appeals cited the lack of evidence in the record to indicate the presence of anticompetitive forcing. The decision relied on *Hyde* for the proposition that a hospital retains the "unquestioned right to exercise some control over the identity and number of doctors to whom it accords staff privileges."[121] Although the Second Circuit acknowledged that a jury question was presented as to whether the hospital had sufficient market power, the panel concluded that evidence was lacking to prove that the hospital conditioned the sale of its operating room facilities on the purchase of anesthesiology services. The non-exclusive underpinnings of the agreement were thus held to be a defense to the claim that the contract resulted in the anticompetitive forcing addressed in *Hyde*, which could result in *per se* condemnation. The court dismissed all of the plaintiff's remaining claims as contrary to the evidence in the record on appeal.

In an interesting post-*Hyde* tying case, the Ninth Circuit upheld a finding of *per se* antitrust liability based on an illegal tying arrangement involving an intellectual property right. In *Digidyne Corp. v. Data General Corp.*,[122] the Ninth Circuit's application of a *per se* standard underscored the significance of the Supreme Court's five to four split on what analytical rule should be applied.

The plaintiffs brought suit against defendant Data General under Sections 1 and 3 of the Sherman Act based upon the defendant's refusal to license its NOVA operating system software except to purchasers of its NOVA central processing unit. Trial in the district court was limited to the issue of the defendant's market power and resulted in a jury verdict for the plaintiffs. The defendant's motion for a judgment notwithstanding the verdict or for a new trial was granted, but the Ninth Circuit reversed and held that the refusal to license constituted an illegal tying arrangement.

The Ninth Circuit concluded that the district court had erroneously read the Supreme Court's decision in *Fortner Enterprises v. United States Steel Corp.*[123] as requiring proof of power to fix the price of the tying product in the whole of the relevant market, as that term is defined

121. Id. at 1015 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1568 (1984)).
122. 734 F.2d 1336 (9th Cir. 1984).
123. 394 U.S. 495, 89 S. Ct. 1252 (1969).

in monopolization cases. Although such a showing would suffice to establish *per se* illegality, the Ninth Circuit stated that it was not required. Citing *United States v. Loew's, Inc.*,[124] the court concluded that the requisite economic power to establish an illegal tying arrangement may be inferred from the tying product's desirability to consumers or from its unique attributes.[125] Such reasoning unquestionably contradicts the spirit of *Hyde*, if not its express holding. But perhaps most importantly, the court relied upon *Loew's* and *Hyde* to find a presumption of market power when a statutorily granted monopoly such as a patent or copyright is involved.[126] This presumption has been criticized, and Justice O'Connor labels it a "common misconception."[127] The court thus looked to whether anticompetitive forcing was likely by analyzing such power only with respect to some of the buyers in the relevant market.

In focusing on the uniquely attractive characteristics of the tying software, the "lock-in" characteristics of a market which required the defendant's customers to continue purchasing the same product after the initial purchase for the sake of compatability, and the presumption of market power associated with a patent or copyright, the Ninth Circuit held that the anticompetitive leverage presented by an illegal tie-in had been established. In considering whether "substantial commerce" had been foreclosed within the meaning of *Hyde*, the court cited *Fortner Enterprises v. United States Steel Corp.*[128] for the proposition that a "'substantial volume' in this context means only an amount greater than *de minimis*, a requirement clearly satisfied here."[129]

The distinction between application of the *per se* standard and the rule of reason advocated in O'Connor's concurrence in *Hyde* is brought into sharp focus in a case such as *Digidyne*. Through the presumption

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124. 371 U.S. 38, 83 S. Ct. 97 (1962).

125. The Court of Appeals, quoting from *Loew's*, stated:

> Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power in the sense of § 2 of the Sherman Act, it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying [*sic*] product and into the corollary problem of the seller's percentage share in that market. This is even more obviously true when the tying product is patented or copyrighted, in which case, as appears in greater detail below, sufficiency of economic power is presumed.

734 F.2d at 1340 (quoting United States v. Lowe's, Inc., 371 U.S. 38, 45 n.4 (1962)).

126. "For example, if the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *Hyde*, 104 S. Ct. at 1560.

127. Id. at 1572 n.7 (O'Connor, J., concurring).

128. 394 U.S. at 501, 89 S. Ct. at 1257-58.

129. 734 F.2d at 1347.

of market power based upon a product's protection under intellectual property laws, and reference to the uniquely innovative characteristics of the tying product, the Ninth Circuit found a *per se* violation without any significant analysis of the overall competitive impact on the market as a whole. This reasoning suggests that the owner of innovative intellectual property which is the result of expensive research and development should consider seeking recovery for those costs through appropriate pricing, not through arrangements such as that presented in *Digidyne*, even though such a distinction may seem insubstantial. It is apparent that if Justice O'Connor's analysis gains support, what is now considered a *per se* antitrust violation might no longer be considered objectionable at all.

In *Jack Walters & Sons Corp. v. Morton Building, Inc.*,[130] the Seventh Circuit upheld the dismissal of plaintiff's claims under Section 1 of the Sherman Act alleging an illegal tying arrangement. The case is noteworthy because Judge Posner's opinion expresses some potential problems with the "separate markets" test propounded in *Hyde*. The Supreme Court's standard for determining whether the threshold requirement that two separate and distinct products are involved requires analyzing whether two separate demand markets exist for the products in question. The Seventh Circuit noted the potential difficulty with this approach in a case where a trademark is alleged to be the tying product.

The legal question presented was to what extent separate products are involved when it is alleged that a defendant has tied the use of its trademark to the sale of a product integrally associated with that trademark, in this case prefabricated housing. Such a basis for finding an illegal tying arrangement was rejected by the Seventh Circuit on the grounds that only one product was being offered to the consumer.[131] Posner went on to raise two significant post-*Hyde* issues with which the courts will likely struggle: (1) to what extent the "separate markets"

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130. 737 F.2d 698 (7th Cir. 1984).

131. In a cogent explanation of a key distinction in the area of alleged trademark tie-ins, Posner stated:

> [Plaintiff's] claim is that the Morton name, the Morton trademark, is the tying product and the building, the kit of prefabricated building components, is the tied product. The difficulty with this argument is that a product and its name are inseparable. It is one thing to say that a manufacturer of copying machines who requires his customers to buy from him the copying paper that is used in the machines is conditioning the sale of the machines on the customer's purchase of a distinct product; it is quite another to say that General Motors lets you use the name Buick on condition that you buy the car to which the name is attached. That is a fantastical description of the transaction, and the cases reject the proposition that a tie-in claim can be based on it.

Id. at 704 (citations omitted).

test will be accepted, and how easy it will be to implement,[132] and (2) to what extent the Supreme Court's emphasis in *Hyde* on the importance of proving that the owner of the tying product has real market power "may doom the franchise trademark cases, as they mostly involve highly competitive retail industries, such as the fast-food business."[133] This last question may prove especially troublesome when decisions such as *Digidyne* rely on earlier Supreme Court cases to find a presumption of market power when intellectual property is the alleged tying product and further limit consideration of the commerce affected to a determination of whether it is more than *de minimis*.[134] A case such as *Digidyne* presents significant questions which will require courts to engage in a careful balancing of the policies underlying both intellectual property law and antitrust laws.

PATENT-ANTITRUST DEVELOPMENTS

The interface between patent and antitrust law continues to evolve as the protection and exploitation of intellectual property assumes greater importance in the international marketplace. Because the courts are required to strike a delicate balance between promoting innovation through the granting of a limited statutory monopoly under the intellectual property laws, and the equally important protection of price competition through antitrust enforcement, jurisprudential developments in this area reflect important policy choices.

It is especially significant that the courts continue to impose a presumption that the owner of a patent possesses "market power," as that term is applied in a tie-in context. Although this issue is discussed more fully in the tie-in section,[135] it is interesting to note that the Supreme Court reiterated this presumption in *Hyde*.[136] But in a concurring opinion, Justice O'Connor criticizes the presumption.[137] The Supreme Court's five

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132. There may be overwhelming economies of joint provision for most customers and yet enough customers with idiosyncratic demands to encourage small markets tailored to their needs to emerge, as has happened with ornamental belt buckles. The separate market for ornamental buckles resembles the separate market for anesthesia, which exists because a patient can contract separately with the surgeon and with the anesthesiologist. We doubt that, even after *Jefferson Parish* [*Hyde*], belts are tie-ins of buckles to straps; yet we cannot be sure where the separate-markets test will lead.

Id.

133. Id. at 705.

134. 734 F.2d at 1347.

135. See supra text accompanying notes 122-29.

136. 104 S. Ct. at 1560.

137. A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffice to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will

to four split on this issue evinces a fundamental division within the Court of great significance to the owners and licensees of intellectual property alleged to have imposed illegal tying restrictions.[138]

An important recent decision from the Ninth Circuit Court of Appeals involved allegations of an illegal attempt to monopolize based upon bad faith institution of a patent infringement suit. In the second appellate decision arising from the ongoing litigation entitled *Handgards, Inc. v. Ethicon, Inc.*,[139] the Ninth Circuit upheld a jury finding that a violation of Section 2 of the Sherman Act had been established based on a series of bad faith patent infringement suits. The Ninth Circuit further upheld a damage award of $3,297,122 (before trebling), attorneys' fees of $1,064,943, and in excess of $3,000,000 in post-judgment interest.[140]

In *Handgards*, the plaintiff established facts which constituted "clear and convinving" proof of the defendant's bad faith. The plaintiff adduced evidence that the patent owner knew of the invalidity of his patent, thereby demonstrating the bad faith nature of the infringement suit. The plaintiff proved that the defendant knew that the patented product had been "on sale" or "in public use" more than one year prior to the patent application, thereby invalidating the patent.

Two ancillary points addressed in *Handgards* are worth mentioning. First, the Ninth Circuit expressly rejected the defendant's argument that the relevant inquiry should be whether its patent attorney knew of the grounds for invalidity, instead focusing on proof imputing such knowledge to the agents, officers, and directors of Ethicon who were responsible for bringing the infringement suit.[141] Second, the court specifically rejected the defendant's argument that the district court's

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> have no market power; for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product. . . .
>
> Nor does any presumption of market power find support in our prior cases.

Id. at 1572 n.7 (O'Connor, J., concurring).

138. See supra text accompanying notes 122-29.

139. 743 F.2d 1282 (9th Cir. 1984).

140. In the first appellate decision in this case, Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979), cert. denied, 444 U.S. 1025 (1980), the Ninth Circuit reversed an earlier jury damage award based on what it believed to be an incorrect burden of proof instruction. In the first decision, the Ninth Circuit held that to establish Section 2 liability, Handgards had to prove by "clear and convincing evidence" that Ethicon had prosecuted its patent suit in bad faith with specific intent to monopolize the relevant market, and that a dangerous probability of success existed. 601 F.2d at 994-6. The second jury award was based on the conclusion that these requirements of proof had been met.

141. The Court observed that evidence showing that the inventor/patentee/employee knew of the patent invalidity is "very probative of Ethicon's knowledge." 743 F.2d at 1290 (citation omitted).

refusal to instruct the jury on *Noerr-Pennington* immunity,[142] and to require a finding that the infringement suit constituted a "sham" proceeding effectively deprived the defendant's access to acknowledged antitrust immunity. The Ninth Circuit responded that the good-faith presumption "affords the equivalent of the *Noerr-Pennington* immunity while the requirement of bad faith litigation easily affords the equivalent of the sham exception," and that such instructions would therefore be merely "duplicative."[143]

Another noteworthy development is the passage of the National Cooperative Research Act of 1984,[144] commonly referred to as the Joint Research and Development Act. The act provides that in suits based on alleged antitrust violations resulting from joint research and development ventures, courts shall apply the rule of reason, impose only single damages, and permit recovery of attorney's fees by defendants in certain circumstances. The purpose of the bill is to promote research and development and to encourage innovation by stripping away unnecessary antitrust obstacles to the legitimate pooling of research and development resources. This approach is perhaps most important for projects which may prove too costly or inefficient for an individual firm to undertake. It is hoped that the competitiveness of U.S. products will be enhanced in the international marketplace.

MERGERS

On June 14, 1984, the Justice Department issued a new set of Merger Guidelines and an accompanying policy statement.[145] These Guidelines state the present enforcement policy of the U.S. Department of Justice concerning acquisitions and mergers subject to Section 7 of the Clayton Act.

One of the important advances of the 1982 Guidelines was the recognition that mergers can enhance efficiency. The 1984 Guidelines restate this theme even more strongly, stating that "[a]lthough they sometimes harm competition, mergers generally play an important role

142. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523 (1961) and United Mine workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585 (1965). "Under the *Noerr-Pennington* doctrine, bona fide efforts to obtain or influence legislative, executive, judicial or administrative actions are immune from antitrust liability [on the basis of the first amendment's guaranteed right to petition]." Clipper Express v. Rocky Mountain Motor Tarriff Bureau, Inc., 690 F.2d 1240, 1251 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).

143. 743 F.2d at 1294-95.

144. Pub. L. No. 98-462, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1815 (to be codified at 15 U.S.C. §§ 4301-4305).

145. Department of Justice Merger Guidelines, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1169 (Spec. Supp. 1984).

in a free enterprise economy."[146] The 1984 Guidelines also clarify the "restrictive, somewhat misleading tone" of the prior Guidelines which had indicated that the Department would consider efficiencies only in "extraordinary cases."[147] The revisions make it clear that the Department considers and gives appropriate weight to efficiency claims in all cases where such claims are established by clear and convincing evidence.

The 1984 Guidelines were considered relevant by the Second Circuit Court of Appeals in reversing a judgment after a bench trial that Waste Management, Inc.'s acquisition of a large competitor violated section 7 of the Clayton Act.[148] It will be interesting to see how the courts may strike down a merger or acquisition in the near future, given the imprimatur such activity has received from the Justice Department.

146. Id. at S-1.
147. Id. at S-16.
148. United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984).