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Julian C. Dewell

Wayne Gittinger

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The following articles, the work of the faculty of the School of Law, the Attorney General, two members of the Washington Bar and a student, constitute the first academic comment on the laws of 1961. For obvious reasons, these articles are not represented to the reader as a complete survey of the legislative session. Rather, they are a compilation of comments on acts which the writers have found to be important, timely, or merely interesting.

ANTITRUST

THE WASHINGTON ANTITRUST LAWS

JULIAN C. DEWELL* AND D. WAYNE GITTINGER**

With the passage of the 1961 "Consumer Protection Act,"[1] the field of antitrust law takes on new meaning in the State of Washington. The new act, in addition to article 12, section 22 of the Washington Constitution, the Unfair Practices Act,[2] and other business regulation statutes which have been effective for many years,[3] provides a comprehensive set of laws which are designed to more fully "foster fair and honest competition."[4]

* Associate, Howe, Davis, Riese & Jones, Seattle, Washington. Member, California (1958), Washington (1957), Federal and American Bar Associations. Trial Attorney, Antitrust Division, U. S. Department of Justice 1957-59.

** Associate, Evans, McLaren, Lane, Powell & Beeks, Seattle, Washington. Member, Washington (1958) and American Bar Associations. Teaching Fellow, Northwestern University School of Law (1957-1958).

[1] Wash. Sess. Laws 1961, ch. 216.

[2] RCW 19.90.010-920.

[3] *E.g.*, Insurance Combinations, RCW 48.30.020; Fishery Associations, RCW 24.36.-070; Below Cost Sale of Cigarettes, RCW 19.91.020; Insurance Price Discrimination, RCW 48.18.480; Dairy Products Price Discriminations, RCW 15.32.780; Discounts to Insured, RCW 48.30.140; and the Fair Trade Act, RCW 19.89.010-910.

[4] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 20.

This article is designed to serve as an introduction and handbook for the large majority of lawyers to whom the antitrust field is unfamiliar. Comprehensive coverage of the cases has not been attempted.[5] Rather, the authors have undertaken to collect, summarize and briefly analyze the constitutional provision, the Unfair Practices Act and most particularly, the Consumer Protection Act. The other statutes, while important, are not broad enough in their coverage to warrant a detailed discussion. The Fair Trade Act[6] is also excluded, except to the extent that it may be incidental to a discussion of the Consumer Protection Act. While the constitutional provision and the two basic acts have been treated in separate sections, appropriate comparisons have been made where applicable or important.

THE WASHINGTON CONSTITUTION

Article 12, section 22 of the Washington Constitution prohibits monopolies and trusts. It also prohibits incorporations, co-partnerships or associations which directly or indirectly combine or contract for the purpose of fixing prices, limiting production or regulating the transportation of any commodity or product. Unlike the United States Constitution, the Washington Constitution is a limitation upon the power of the legislature,[7] not an affirmative grant of power. Enactment of the Unfair Practices Act was found to be consistent with this limitation[8] and it appears that the Consumer Protection Act is equally consistent. The new act does not purport to make those activities lawful which are prohibited by the constitutional provision.[9] Prompted by an early decision that this constitutional provision was not designed to be self-implementing,[10] the legislature has passed statutes which make its violation a misdemeanor[11] and authorize the forfeiture of corporate franchises as a penalty for its violation.[12] In addition, a private party

[5] The following are helpful research and background materials: ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. (1955); CCH TRADE REG. REP.; TOULMIN, ANTI-TRUST LAWS (1949); VAN CISE, UNDERSTANDING THE ANTITRUST LAWS (1958); NEALE, THE ANTITRUST LAWS OF THE U.S.A. (1960).

[6] RCW 19.89.010-910.

[7] Clark v. Dwyer, 156 Wash. Dec. 440, 353 P.2d 941 (1960); Sears v. Western Thrift Stores, 10 Wn.2d 372, 116 P.2d 756 (1941). *Compare* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

[8] State v. Sears, 4 Wn.2d 200, 103 P.2d 337 (1940).

[9] Sears v. Western Thrift Stores, 10 Wn.2d 372, 116 P.2d 756 (1941); State v. Sears, 4 Wn.2d 200, 103 P.2d 337 (1940); Uhden, Inc. v. Greenough, 181 Wash. 412, 43 P.2d 983 (1935); Olympia Milk Producers' Ass'n v. Herman, 176 Wash. 338, 29 P.2d 676 (1934).

[10] Northwestern Warehouse Co. v. Oregon Ry. & Nav. Co., 32 Wash. 218, 73 Pac. 388 (1903).

[11] RCW 9.22.010.

[12] RCW 9.22.030.

injured by acts in violation of this provision can maintain a suit for an injunction and damages.[13]

To establish a violation of the constitutional provision, three elements must be proven: (1) a combination or contract; (2) dealing with a product or commodity; (3) the purpose of which is to fix prices, limit production or regulate transportation.[14] The words "product or commodity" have been interpreted to include medical services and apparently, the services of all "service trades and professions."[15] The words "contract or combination" have not received detailed interpretation under this provision, but it seems that they should have their normal meaning and receive the same interpretation given them under the Sherman Act.[16]

The Washington court has not interpreted the third element to mean that all restraints of trade are illegal,[17] even though one of the purposes of the restraint is to fix prices.[18] The court has held that only those restraints which are unreasonable and are not ancillary to another lawful contract[19] and which operate to bring about monopolies and trusts or move in that direction,[20] are unlawful. This seems contrary to the interpretation of section 1 of the Sherman Act and section 3 of the Consumer Protection Act, each of which makes any price fixing arrangement unlawful, regardless of its reasonableness or ancillary qualities.[21]

The Washington court's interpretation that this provision prohibits only those restraints which operate to bring about monopolies and trusts indicates that future use of this provision will be limited. The

[13] Group Health Co-op. v. King County Medical Soc'y, 39 Wn.2d 586, 237 P.2d 737 (1951).

[14] *Ibid.*

[15] *Id.* at 638, 237 P.2d at 765.

[16] The Washington courts are not bound by the federal courts' interpretation, especially since the Washington Constitution predates the Sherman Act and is an embodiment of the common law as the Washington courts construe it. Group Health Co-op. v. King County Medical Soc'y, 39 Wn.2d 586, 237 P.2d 737 (1951); American Export Door Corp v. Gauger Co., 154 Wash. 514, 283 Pac. 462 (1929).

[17] See Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144 (1913), where the Washington court distinguishes between "restraints of trade" and "restraints on competition."

[18] Group Health Co-op. v. King County Medical Soc'y, 39 Wn.2d 586, 237 P.2d 737 (1951); Fisher Flouring Mills Co. v. Swanson, *supra* note 17.

[19] Group Health Co-op. v. King County Medical Soc'y, *supra* note 18.

[20] Group Health Co-op. v. King County Medical Soc'y, *supra* note 18; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135 (1900). *But see* Powell v. Graham, 183 Wash. 452, 48 P.2d 952 (1935).

[21] See p. 244 *infra*, discussing § 3 of the Consumer Protection Act. The possible distinction between the Washington cases and the federal cases, if there is one, may be that in the Washington cases the actual purpose or effect of the scheme was not to fix a price, but was to achieve a result which was either beneficial to the public or the participants. For a discussion of the federal aspects of this problem, see Maple Floor Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925).

more stringent restrictions imposed by sections 2, 3 and 4 of the Consumer Protection Act will be available[22] to the attorney general or a private plaintiff seeking damages.

THE CONSUMER PROTECTION ACT

The Consumer Protection Act draws its basic prohibitions from three federal antitrust acts.[23] With few exceptions, which will be discussed later, the state and federal prohibitions are identical. Consequently, construction of The Consumer Protection Act should not be difficult, especially in view of its provision which specifies that "the Court [is to] be guided by the interpretation given by the Federal Court" to the federal counterparts of the Consumer Protection Act.[24]

One of the basic requirements which is a condition precedent to the application of the federal antitrust laws is necessarily eliminated by the Consumer Protection Act. Under the Washington act it need not be shown that the violation took place in the course of interstate commerce, had a substantial effect upon interstate commerce or that the violator is engaged in interstate commerce. A showing of "commerce" which "directly or indirectly" affects the people of the State of Washington is sufficient to bring the act into operation.[25] "Commerce" includes not only sales of assets but also services.[26] This is an innovation since conduct with respect to "services" is not subject to many of the provisions of federal antitrust law.[27]

Like the federal statutes,[28] the Consumer Protection Act specifically exempts labor, agricultural and horticultural organizations.[29] This exemption, generally, applies only when the organization is acting individually to carry out its lawful objectives.[30] When the organization combines with outsiders to carry out certain other objectives, the exemption may not apply.[31] In addition, if the organization becomes too aggressive and engages in violent and fraudulent conduct, generally

[22] See the discussions of these three sections *infra*.

[23] The Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-8 (1958); The Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958), 29 U.S.C. § 52 (1958); Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958).

[24] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 20.

[25] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 1(2).

[26] *Ibid.*

[27] *E.g.*, The Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

[28] The Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958), 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).

[29] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 7.

[30] Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[31] Allen-Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945); United States v. Hutcheson, 312 U.S. 219 (1941); United States v. Borden Co., 308 U.S. 188 (1939); United States v. Dairy Co-op. Ass'n, 49 F. Supp. 475 (D. Ore. 1943).

classified as an activity outside of the legitimate functions of such an organization, it may fall under the provisions of the Consumer Protection Act.[32] Care should be taken in examining all federal cases in this area. A number of other federal statutes pertaining to labor and agricultural organizations re-define the original Clayton Act exemptions.[33] In addition, the Washington statutes in the area should be examined to clarify the exempt organization's scope and functions.

Federal court decisions hold that under certain circumstances supervised industries are not subject to the antitrust laws.[34] Although the Consumer Protection Act gives supervised industries some immunity,[35] it appears reasonable to assume that its prohibitions are applicable unless the regulatory statutes which guide the supervising body specifically deal with the conduct under consideration. A determination that conduct in a particular industry is exempt from the Consumer Protection Act may depend upon whether or not the supervising body has the power to permit, prohibit or regulate the particular conduct which appears to violate the antitrust act, and whether in fact the supervising body has ruled with respect to such conduct.[36]

The Consumer Protection Act deals both generally and specifically with a wide spectrum of activities which may be anti-competitive in their operation or effect. The general prohibitions are those copied from sections 1 and 2 of the Sherman Act[37] and section 5 of the Federal Trade Commission Act.[38] Specific prohibitions are those patterned after sections 3 and 7 of the Clayton Act.[39] There is a good deal of interplay between these prohibitions, and conduct which is prohibited by one section may also be prohibited by another. For example, a person's activity in causing his competitor's customers to break their contract with the competitor and his making false statements about his competitor's business or product, may constitute a violation of both

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[32] Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[33] *E.g.*, Capper-Volstead Act, 42 Stat. 388 (1922), 7 U.S.C. §§ 291-92 (1958) (agriculture); Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1958) (labor).

[34] For discussion see McGovern, *Antitrust Exemptions for Regulated Industries*, 20 FED. B.J. 10 (1960).

[35] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 17.

[36] See, United States v. Radio Corporation of America, 358 U.S. 334 (1959); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir. 1953); Dennison v. Payne, 293 Fed. 333, 341 (2d Cir. 1923).

[37] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1958).

[38] 38 Stat. 721 (1914), as amended, 15 U.S.C. § 45 (1958).

[39] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958); 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

sections 2 and 3 of the Consumer Protection Act.[40] Conduct constituting a "restraint of trade" under section 3 might also be an attempt or conspiracy to monopolize under section 4.[41] Similarly, a tying arrangement prohibited by section 5 may constitute a restraint of trade under section 3.[42]

The various sections will be discussed separately. A further section discusses briefly the enforcement and sanctions of the Consumer Protection Act.

Contracts, Combinations and Conspiracies and Restraint of Trade.[43] Section 3 of the Consumer Protection Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."

This prohibition is identical to that contained in section 1 of the Sherman Act,[44] except that "commerce" does not mean interstate commerce, and a fair trade proviso is not written into the section.[45]

Two elements are necessary to establish a violation of section 3.[46] The business conduct considered must constitute a "restraint of trade." If such a restraint exists, it must have been brought about by a "contract, combination, in the form of trust or otherwise, or conspiracy."

In determining whether a "restraint of trade" exists, it should be noted that only those restraints which are "unreasonable" are prohibited by section 3. Early interpretations of section 1 of the Sherman Act assumed that all restraints were illegal.[47] In 1911, however, the Supreme Court held that only those restraints which, from an examination of all of the facts and surrounding circumstances, including an analysis of the pertinent market and the effect of the conduct thereon,

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[40] Patterson v. United States, 222 Fed. 599, *cert. denied*, 238 U.S. 635 (1915).

[41] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[42] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1952). In addition, conduct violating the Consumer Protection Act may also violate the Unfair Practices Act, RCW 19.90.010-920. See United States v. Great A. & P. Tea Co., 173 F.2d 79 (7th Cir. 1949), in which sales below cost were charged under § 1 of the Sherman Act.

[43] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 3.

[44] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

[45] Washington has enacted a Fair Trade Act which makes vertical price fixing legal. RCW 19.89.020. Section 20 of the Consumer Protection Act specifically exempts such price fixing arrangements from its ban. On the topic of the Washington Fair Trade statute see generally, Remington Arms Co., Inc. v. Skaggs, 55 Wn.2d 1, 345 P.2d 1085 (1959).

[46] The relevant market is sometimes listed as a third requirement, but broadly speaking this is considered in determining whether there is a restraint of trade.

[47] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. E. C. Knight Co., 156 U.S. 1 (1895).

are "unreasonably restrictive [upon] competitive conditions," violate section 1 of the Sherman Act.[48]

Whether a specific type of business conduct constitutes an unreasonable restraint of trade is a question of fact. Such a factual determination requires a careful analysis of the purpose of the restraint and its effect, judged from the surrounding circumstances.[49] Where neither the purpose nor the effect of business conduct is to restrain competition, the conduct will not be unlawful. The situation is not to be considered in a vacuum, however. Many types of business conduct restrain trade or lessen competition, and yet may be reasonable on their facts. Included in these "reasonable" restraints are the activities of trade associations in formulating trade practices,[50] exclusive dealership arrangements,[51] tying arrangements (so long as there is not a disguised unreasonableness in the form of a false set of standards),[52] patent pools or patent interchanges,[53] refusals to deal,[54] and exclusive territorial franchises.[55]

While only unreasonable restraints are prohibited by section 3, certain restraints of trade are per se unreasonable and unlawful "because of their pernicious effect on competition and lack of any redeeming virtue"[56] and because they have "no purpose save the elimination of competition."[57] Included in the list of restraints which are per se unreasonable are price fixing,[58] allocation of customers,[59] division of mar-

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[48] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[49] Board of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, *supra* note 48, at 60.

[50] Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936); Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); Tag Mfrs.' Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).

[51] Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); Schwing Motor Car Co. v. Hudson Sales Corp., 239 F.2d 176 (4th Cir.), *cert. denied*, 355 U.S. 822 (1957).

[52] International Salt Co. v. United States, 322 U.S. 392, 398 (1947). *But see*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[53] Standard Oil Co. v. United States, 283 U.S. 163 (1931).

[54] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1952); Lipson v. Socony-Vacuum Corp., 76 F.2d 213, 218 (1st Cir. 1935); Powell v. Graham, 183 Wash. 452, 48 P.2d 952 (1935).

[55] United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Packard Motor Car Co. v. Webster Motor Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); Schwing Motor Co. v. Hudson Sales Corp., 239 F.2d 176 (4th Cir.), *cert. denied*, 355 U.S. 822 (1957).

[56] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[57] ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 12 (1955).

[58] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). See also Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960), which summarizes the types of conduct and prices considered under the heading of price fixing.

[59] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

kets,[60] limitations on production,[61] group boycotts,[62] concerted refusals to deal,[63] and channelization.[64]

If per se unlawful conduct is found to exist, the offending party will not be allowed to show good motive, purpose or economic reasonableness. Indeed, as the Supreme Court has said, the "reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."[65] No further inquiries are made by the Court once it has determined that the violator's conduct constitutes a per se unreasonable restraint in purpose or effect. For example, assume that a trade association is organized by various competitors in an industry and the members supply the association with statistical information relating to prices and areas of distribution. If the association in turn compiles the information and distributes it to the members, the inquiry might well be whether the purpose or effect of the activities is to maintain uniform prices or allocate the sales markets among the members of the association. If either such purpose or effect is found to exist, the trade association activities would be per se unreasonable, regardless of the innocence or good motives of the members.[66]

Once the conduct in question is found to constitute an unreasonable restraint of trade, it must then be determined whether the unreasonable restraint was brought about by a "contract, combination . . . or conspiracy."[67] While it would appear from this language that only those restraints brought about by more than one person can constitute a violation,[68] on several occasions the courts have come close to construing the conduct of a single person or corporation as unlawful.[69] For ex-

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[60] United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944).

[61] Hartford-Empire Co. v. United States, 323 U.S. 386, 324 U.S. 570 (1945).

[62] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[63] United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Associated Press v. United States, 326 U.S. 1 (1945).

[64] United States v. Minneapolis Elec. Contr. Ass'n, 99 F. Supp. 75, 79 (D. Minn. 1951).

[65] United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[66] For a good discussion see Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 572 (1925). *Compare* Olympia Milk Producers Ass'n v. Herman, 176 Wash. 338, 29 P.2d 676 (1934); Washington Cranberry Grower's Ass'n v. Moore, 117 Wash. 430 201 Pac. 773 (1921).

[67] It is only under § 3 and the second half of § 4 of the Consumer Protection Act that a plurality of actors is required. If the conduct of a single actor is flagrant enough it may violate § 2 or one of the other sections of the act if the conduct meets their requirements.

[68] Several recent cases have stated that only vertical conspiracies and combinations are illegal, unless the combination or conspiracy is a part of a monopoly plan. See Packard Motor Car Co. v. Webster Motor Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); Alexander v. Texas Co., 149 F. Supp. 37 (W.D. La. 1957).

[69] "But we are left wholly in the dark as to what the purported new standard is for establishing a 'contract, combination . . . or conspiracy.' " United States v. Parke, Davis & Co., 362 U.S. 29, 53 (1960) (dissent).

ample, it has been held that a corporation which conspires with its wholly owned subsidiary[70] and a corporation which conspires with its officers,[71] can be guilty of a Sherman Act violation. In other cases involving conspiracies of an intracorporate nature, the courts have sustained violations without comment on this point.[72] No case has been found in which the argument was advanced that a "combination, in the form of trust or otherwise" would include a large corporation which is in effect a "combination" of many smaller companies acquired over a period of years.[73]

Once it has been established that a contract, combination or conspiracy exists, the purpose or effect of which is to unreasonably restrain trade, illegality is established. No overt act is required.[74] Merely contracting or conspiring constitutes the violation. The fact that the purpose of the contract or conspiracy has never been carried out or achieved does not relieve the participants of its illegality. Thus, where *X* and *Y*, horizontal competitors, conspire to set a price on five/penny nails, a violation has occurred, regardless of the fact that *X* and *Y* decide to abandon the plan before putting it into effect or that they do not in fact follow the prices agreed upon.[75] In addition, the fact that one of several conspirators later withdraws from the conspiracy before the plan is put into effect does not exonerate the withdrawing party.[76] However, where a small business man is drawn into an unlawful conspiracy through the threats or economic pressures of the leaders in the industry, he is not relieved from liability for his unlawful acts, but it is possible that he may have a cause of action against the coercing parties for injury suffered.[77]

The most difficult area of proof is not establishing the illegality of the restraint, but rather establishing the fact of the combination or conspiracy. Direct evidence is rarely available to prove an agreed upon course of conduct. Rather, most combinations and conspiracies are

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[70] Kiefer-Steward Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[71] Patterson v. United States, 222 Fed. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915).

[72] United States v. New York Great A. & P. Tea Co., 173 F.2d 79 (7th Cir. 1949).

[73] This situation is probably met by §§ 4 and 6 of the Consumer Protection Act which deal with monopolies and mergers. These sections are discussed *infra*.

[74] RCW 9.22.020. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

[75] United States v. American Column & Lumber Co., 263 Fed. 147 (W.D. Tenn. 1920), *aff'd*, 257 U.S. 377 (1921); Lamar v. United States, 260 Fed. 561 (2d Cir. 1919).

[76] Orear v. United States, 261 Fed. 257 (5th Cir. 1919).

[77] Ring v. Spina, 148 F.2d 647 (2d Cir. 1945).

established exclusively by circumstantial evidence.[78] In many cases, facts which may exist in lawful as well as unlawful business situations are the only proof available to show that an unlawful combination exists.[79] Such facts may include an absence of competition by one competitor in another's market[80] or price leadership by a dominant competitor which is apparently followed by others.[81] These circumstances standing alone do not establish an unlawful combination. There must be a "conscious parallelism"[82] between "persons with knowledge that concerted action was contemplated and invited."[83] As the Supreme Court has stated, conscious parallelism "has not yet read conspiracy out of" section 3.[84] Even so, the fact that there is no formal agreement between the parties[85] or that there is an absence of actual meetings among the participants[86] will not necessarily negative a finding of a combination or conspiracy. The Supreme Court has said:

> Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of . . . commerce, is sufficient to establish an unlawful conspiracy. . . .[87]

Monopolization or Attempts, Combinations and Conspiracies to Monopolize. [88] Like section 2 of the Sherman Act, section 4 of the Consumer Protection Act provides: "It shall be unlawful for any person to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce."[89]

The relationship between sections 4 and 3 of the Consumer Protection Act might be likened to the doctrine of lesser included offenses in criminal law. While section 4 includes section 3 violations which have ripened to the point of constituting monopolization or attempts and conspiracies and combinations to monopolize, section 4 is not limited

[78] Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1913); Flintkote Co. v. Lysford, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

[79] United States v. U. S. Steel Corp., 251 U.S. 417 (1920).

[80] Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948).

[81] United States v. International Harvester Co., 274 U.S. 693 (1927).

[82] Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

[83] FTC v. Cement Institute, 333 U.S. 683, 716 n.17 (1948).

[84] Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); Sorkin, *Conscious Parallelism*, 2 ANTITRUST BULL. 281 (1956-57).

[85] American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

[86] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939).

[87] *Ibid.*

[88] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 4.

[89] There is a slight difference in the wording of § 2 of the Sherman Act and § 4 of the Consumer Protection Act, but it is one of reversed word structure only and does not change the meaning.

in scope so as to prohibit only those acts or conduct which can be labeled a restraint of trade.

Section 4 does not necessarily require a plurality of actors. The statute condemns "any person" who monopolizes or attempts to monopolize as well as those persons who combine or conspire with others to monopolize. Therefore, while the conduct of single persons could never constitute a violation of section 3, such conduct might well constitute a violation of section 4 if it constitutes monopolization or an attempt to monopolize.

In analyzing that type of business conduct which may result in a violation of section 4, it is first necessary to distinguish the term "monopoly" from "monopolization." Monopoly is an economic measure of size. Monopolization, on the other hand, is characterized both by monopoly power or size plus a certain element of deliberateness or purpose in obtaining or maintaining the monopoly position.[90] Dominant size alone does not constitute monopolization. It must be accompanied by an intent to exercise the power resulting from the size.[91] The so-called "thrust upon" monopoly is not encompassed by the prohibition of this section.[92] In order to establish that a person has been guilty of monopolization, it must be shown that the person had sufficient power to be able to "exclude actual or potential competition from the field" or to control prices. It must also be shown that a person had "the intent and purpose to exercise that power."[93]

In determining whether or not a person has obtained sufficient economic power to be guilty of monopolization, a careful analysis of the pertinent or relevant market must be made.[94] This analysis must take into consideration "the trade in products, field or services affected by the conduct, and the geographical areas within which such trade may

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[90] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[91] American Tobacco Co. v. United States, 328 U.S. 781 (1946).

[92] *Id.* at 785. See also United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954), in which a "thrust upon" monopoly is defined as one brought about by superior skill, superior product, natural advantage, efficiency, low margins of profit or natural patent or license monopoly. Nevertheless, where monopoly power is achieved by a combination or conspiracy, the defense of "thrust upon" is not available as intent and purpose are proven by the combination or conspiracy.

[93] American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946). See also United States v. Griffith, 334 U.S. 100 (1948).

[94] A more detailed analysis of the relevant market will be found under the discussion of § 6 of the Consumer Protection Act, *infra*. In addition, see United States v. Columbia Steel Co., 334 U.S. 495 (1948); Gesell, *Legal Problems Involved in Proving Relevant Markets*, 2 ANTITRUST BULL. 463 (1956-57); Stocking, *Economic Tests of Monopoly and the Concept of the Relevant Market*, 2 ANTITRUST BULL. *supra*, at 479.

be limited.[95] In other words, an economically significant geographic area in which the allegedly monopolized product or products are traded must be established in order to test the validity of the alleged offender's conduct. In *The Cellophane Case,*[96] the Supreme Court held that a determination of the product market must take into consideration substitutes for the product which is the subject of the alleged monopolization. The geographic market under section 2 of the Sherman Act is not limited by political boundaries. Any significant trading area may, in an appropriate case, constitute the relevant market. This judicial interpretation of the Sherman Act has been written into the Consumer Protection Act.[97] The relevant market under the state act may include areas without the State of Washington.[98]

Once the relevant market has been defined with product and geographic boundaries, it is then necessary to establish the percentage of that market which the alleged offender controls. While the Sherman Act and Consumer Protection Act do not define monopoly or monopolization in terms of market percentage, the federal courts have given some indication that this percentage must be substantial. In the *Aluminum Company* case[99] the court held that control of 90% of the relevant market constituted monopoly, and stated that 60% or 64% is probably insufficient and that 33% control cannot constitute a monopoly.[100] In the *United Shoe* case,[101] control of 75% of one market, plus an element of deliberateness, constituted monopolization. However, 50% control of another product market was held insufficient.

Although the conduct of an alleged offender falls short of actual monopolization, it may still be unlawful under section 4 if it constitutes an attempt to monopolize or a combination or conspiracy to monopolize. It is unnecessary to prove that the alleged offender or offenders actually achieved monopoly power if it can be shown that achievement was attempted or that it was the purpose of a combination or conspiracy. Proof of an attempt to monopolize requires proof of a specific intent, however.[102] Such proof is unnecessary where a combination or con-

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[95] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 45 (1955).
[96] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).
[97] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 20.
[98] *Ibid.*
[99] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
[100] *Id.* at 424.
[101] United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).
[102] Times-Picayune Publishing Co., 345 U.S. 594 (1953); Swift & Co. v. United States, 196 U.S. 375 (1904).

spiracy to monopolize is alleged.[103] Proof of attempted monopolization requires further evidence that the means employed, if successful, would accomplish monopolization. In the *American Tobacco* case, the Court said:

> The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.[104]

Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. Section 2 of the Consumer Protection Act enacts into state law the somewhat vague and all encompassing prohibitions of section 5 of the Federal Trade Commission Act.[105] While the phraseology of section 2 varies slightly from that of the federal act,[106] it appears that both acts prohibit the same types of business conduct.

Before presenting an analysis of the types of conduct prohibited by section 2, based upon the decisions under section 5 of the Federal Trade Commission Act, a brief review of the history of that act is necessary. The Federal Trade Commission Act was passed for the purpose of creating an administrative body whose function would be to complement the efforts of the Department of Justice in protecting the objectives of the existing antitrust laws. The statutory basis on which the Federal Trade Commission was authorized to proceed, under this act, was embodied in section 5. The standard was designed to prohibit conduct similar to that prohibited by the Sherman Act,[107] and, like the Clayton Act, section 5 was intended to prohibit practices which do not measure up to the proportions of a restraint of trade or monopolization. In the words of the Supreme Court:

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[103] Reference should be made to the discussion of combinations and conspiracies under § 3, *supra*, as the same rules apply.

[104] American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946), (quoting from instructions given by the trial court).

[105] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1958).

[106] Federal Trade Commission Act, § 5(A)(1), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 45 (1958), provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." Section 2 of the Consumer Protection Act provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

[107] *E.g.*, the classic examples of business conduct prohibited by the Sherman Act have been found to violate § 5 of the Federal Trade Commission Act. See Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (economic boycotts); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1927) (price fixing); Standard Container Mfr's. Ass'n v. FTC, 119 F.2d 262 (5th Cir. 1941) (agreements to curtail production); California Lumberman's Council v. FTC, 115 F.2d 178 (9th Cir. 1940), *cert. denied*, 312 U.S. 709 (1941) (agreements to divide business).

> The "unfair methods of competition" which are condemned by Section 5 (a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. . . . It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those acts. . . .[108]

As a result of an amendment to section 5,[109] it is clear that acts or practices having undesirable effects on the public, even absent anti-competitive effects of any kind, are prohibited. Previous decisions indicated that a violation of section 5 could only be established by showing that the undesirable conduct took place in the course of competition.[110] From a careful reading of the amended section, and the state act, one must conclude that sections 2 and 20 of the Consumer Protection Act prohibit a variety of business practices similar to those prohibited by the federal statute, regardless of their effect upon competitors or competition.[111] Therefore, with few exceptions,[112] all methods of competition, acts and practices prohibited in the course of interstate commerce by section 5 would likewise be unlawful under section 2.

The conspicuous failure of the legislature to incorporate regulatory measures into the act, such as those contained in the Robinson-Patman Amendment to the Clayton Act,[113] makes obvious the legislative intent that only general prohibitions were desirable. This intent may very well be frustrated, if, consistent with section 20 of the act, the courts should determine that section 2 prohibits *all* conduct prohibited by section 5 of the federal act. For example, the Federal Trade Commission has recently held in *Grand Union Co.*[114] that inducing the payment of discriminatory advertising allowances, the payment of which may result in the payor's violation of section 2(d) of the Robinson-Patman Act, constitutes an unfair method of competition under section 5 of the

[108] FTC v. Motion Pictures Advertising Co., 344 U.S. 392, 394-95 (1953).
[109] Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938).
[110] FTC v. Raladam, 283 U.S. 643 (1931).
[111] Section 2 does not require that the methods of competition acts or practices take place in commerce, but only in the course of conducting such commerce.
[112] Certain acts and practices are declared by statute to be unfair methods of competition under § 5 of the Federal Trade Commission Act. For example, violations of the Wool Products Labeling Act, 54 Stat. 1128 (1940), 15 U.S.C. § 68 (1958); Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. § 69 (1958); Textile Fiber Products Identification Act, 72 Stat. 1717 (1958), 15 U.S.C. § 70 (1958); Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. § 1191-1200 (1958). Section 12 of the Federal Trade Commission Act, added by 52 Stat. 114 (1938), 15 U.S.C. § 52 (1958), provides that false advertising of food, drugs, devices or cosmetics is an unfair or deceptive practice.
[113] 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).
[114] CCH TRADE REG. REP. ¶ 28,980 (1960).

Federal Trade Commission Act.[115] Other cases indicate that price discrimination is an unfair method of competition as well as a violation of the Robinson-Patman Act.[116] Despite the provision in section 20 of the act which states that the Washington courts shall be guided by the interpretation of similar federal statutes, it appears that it would be improper for the court to legislate a price discrimination law by the vehicle apparently available under section 2.

A complete treatment of section 2 in terms of the type of business conduct constituting unfair methods of competition and unfair or deceptive acts or practices would necessarily involve the individual treatment of hundreds of cases. It appears more useful to collectively summarize and amply footnote those general types of business practices which would fall within the prohibitions of section 5 under the existing case law. Also summarized are those business practices which, although not the result of fully litigated cases, would appear to constitute unfair methods of competition or false and deceptive practices. No effort has been made, however, to summarize those practices which are made unfair methods of competition by other regulatory federal statutes.[117]

(1) As indicated at the outset, it is logical to assume that all practices which violate sections 1 and 2 of the Sherman Act, (sections 3 and 4 of the Consumer Protection Act), constitute unfair methods of competition.[118] The nature of this conduct is discussed elsewhere.[119]

(2) False or misleading advertising, mislabeling and misbranding, and misrepresentation of one's product, person or status may constitute a violation of the Federal Trade Commission Act. While this type of conduct with respect to certain classifications of products is made unlawful by federal statute,[120] similar conduct in connection with other products is by its nature unfair or deceptive. Cases dealing with nearly every conceivable product and practice are collected and available for perusal in many sources.[121]

(3) The disparagement of competitors and their products by the circulation of false advertisements or statements has been held to con-

[115] It should be noted that receipt of discriminatory prices prohibited by § 2(a) of The Consumer Protection Act is specifically prohibited by § 2(f). Receipt of discriminatory advertising or promotional allowances or services is not prohibited by the Robinson-Patman Act.

[116] Cream of Wheat v. FTC, 14 F.2d 40 (8th Cir. 1926); Mennen Co. v. FTC, 288 Fed. 774 (2d Cir.), *cert. denied*, 262 U.S. 759 (1923).

[117] Note 112 *supra*. For a complete list of those practices thought to be violative of § 5 of the Federal Trade Commission Act, see [F.Y. 1946] FTC ANN. REP. 55.

[118] See cases cited in note 107 *supra*.

[119] See discussion beginning at page 244.

[120] Statutes cited in note 112 *supra*.

[121] 2 CCH TRADE REG. REP. ¶ 5081.

stitute an unfair method of competition and a false and deceptive practice.[122]

(4) Obtaining the trade secrets of competitors by commercial espionage, including the bribing of competitors' employees, constitutes an unfair method of competition.[123]

(5) Inducing the breach of a contract between a competitor and his customers or suppliers is an unfair method of competition.[124]

(6) Physical interference with a competitor or his goods and the commencement of vexatious, harassing or unfounded lawsuits designed to injure a competitor are unfair methods of competition.[125]

(7) The inability to fill orders for goods or the substitution of other goods for those ordered constitutes an unfair method of competition and a false or deceptive trade practice.[126]

(8) The use or sale of lottery schemes or devices in merchandising products is an unfair method of competition.[127]

(9) The use of patents beyond the scope of the monopoly which they grant, as in an effort to monopolize a broader market or product, or to require improper license agreements, constitutes an unfair method of competition.[128]

(10) Rewarding or paying "push money" to dealer's salesmen for the sale of goods, to the knowledge of the dealer, is prohibited by section 5 of the Federal Trade Commission Act.[129]

(11) Selling below cost has been prohibited as an unfair method of competition.[130]

(12) Shipment of unordered goods or goods in excess of those ordered is prohibited by section 5.[131]

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[122] E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Segal Lock & Hardware Co., Inc. v. FTC, 143 F.2d 935 (2d Cir. 1944), *cert. denied*, 323 U.S. 791 (1945); Perma-Maid Co., Inc. v. FTC, 121 F.2d 282 (6th Cir. 1941); Century Metalcraft Corp. v. FTC, 112 F.2d 443 (7th Cir. 1940); Chamber of Commerce v. FTC, 13 F.2d 673 (8th Cir. 1926).

[123] FTC v. United Rendering Co., 3 F.T.C. 284 (1921). See also, John T. Lloyd Labs. v. Lloyd Bros. Pharmacists, 131 F.2d 703 (6th Cir. 1942); Philip Carey Mfg. Co. v. FTC, 29 F.2d 49 (6th Cir. 1928).

[124] Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940).

[125] Hastings Mfg. Co. v. FTC, 153 F.2d 253 (6th Cir.), *cert. denied*, 328 U.S. 853 (1946); Chamber of Commerce v. FTC, 13 F.2d 673 (8th Cir. 1926); Waldes & Co., Inc., 8 F.T.C. 305 (1925).

[126] Consumers Home Equip. Co. v. FTC, 164 F.2d 972 (6th Cir.), *cert. denied*, 331 U.S. 860 (1947).

[127] FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934).

[128] FTC v. Real Prods. Corp., 90 F.2d 617 (2d Cir. 1937); Bond Crown & Cork Co. v. FTC, 176 F.2d 974 (4th Cir. 1949).

[129] Kinney-Rome Co. v. FTC, 275 Fed. 665 (7th Cir. 1921).

[130] Sears, Roebuck & Co. v. FTC, 258 Fed. 307 (7th Cir. 1919).

[131] Dorfman v. FTC, 144 F.2d 737 (8th Cir. 1944).

(13) Certain tying agreements and exclusive dealing arrangements have been held to constitute unfair methods of competition.[132]

As previously indicated, certain other practices, while they have not specifically been held to constitute unfair methods of competition or unfair or deceptive practices, appear subject to attack under section 5 of the Federal Trade Commission Act and therefore, section 2 of the Consumer Protection Act. Those which appear most significant are: (1) furnishing paid demonstrators to dealers;[133] (2) guaranteeing against price declines; (3) publishing confidential government information; and (4) simulating official stamps to indicate payment of taxes, or quality or origin.

Assuming that the policy of enforcing section 2 has as its primary purpose the prohibition of those practices which are detrimental to the consuming public, such as misrepresentation and false advertising, this section adds an extremely useful tool to the state's antitrust arsenal.

Exclusive Dealerships, Total Requirements Arrangements, and Tying Clauses.[134] Section 5 of the Consumer Protection Act is an embodiment of section 3 of the Clayton Act,[135] with one major change. The Washington act is applicable to business conduct with respect to the sale or lease of services as well as commodities. The Clayton Act provision is not applicable to conduct in connection with services.[136] Section 5 provides, in part:

> It shall be unlawful for any person to lease or . . . [sell] . . . commodities, or services . . . or fix a price charged therefore . . . on the condition . . . that the lessee or purchaser . . . shall not use or deal in the . . . . commodities or services of a competitor of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[137]

This statute, while it prohibits, in part, conduct which is made unlawful by sections 3 and 4 of the Consumer Protection Act, was designed to "reach the agreements embraced within its sphere in their

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[132] Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940). This type of business conduct may be unlawful under § 3 of the Clayton Act and § 5 of the Consumer Protection Act.

[133] This type of conduct, if discriminatory, is prohibited by § 2(e) of the Clayton Act.

[134] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 5.

[135] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

[136] Fleetway, Inc. v. Public Serv. Interstate Transp. Co., 72 F.2d 761 (3d Cir. 1934), *cert. denied*, 293 U.S. 626 (1935).

[137] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 5.

incipiency"[138] prior to their having ripened into violations of those sections.

An analysis of the statute indicates that three basic types of business conduct are made unlawful, namely, exclusive dealerships, total requirements arrangements and tie-in arrangements. Certain general principles are common to all three. First, the statute deals only with sales, contracts of sale and leases actually made.[139] It is not applicable to licensing arrangements,[140] offers to sell,[141] construction contracts[142] and agency arrangements.[143] In addition, section 5 is applicable only to those sales and leases which require that the purchaser or lessee refrain from doing business with a competitor of the lessor or seller.

Tying arrangements or clauses, generally speaking, include those business arrangements under which a lessee or purchaser is required to purchase or lease other products or services from the seller or lessee in order to obtain a purchase or lease of a desired item available only through the seller or lessor, or at least more readily available from that source. The validity of these arrangements may be questionable under other provisions of the Consumer Protection Act.[144] Provisions of the Unfair Practices Act may also be applicable[145] and are discussed elsewhere.

Early cases dealing with the validity of tying arrangements under section 3 of the Clayton Act indicated that such arrangements were prohibited only when the seller's reason for requiring a tie-in clause was unreasonable or unlawful.[146] Later cases indicated a judicial propensity to brand such arrangements as unlawful per se if the lessor or seller has substantial control or dominance in the tying product.[147] In *Northern*

[138] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922).

[139] Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

[140] Patent situations in which the patentee licenses the use of one patent only if the licensee will take licenses of less desirable patents have been prosecuted under § 1 of the Sherman Act; however, § 5 of the Consumer Protection Act would not encompass such situations. The area of patent problems under the antitrust laws is mentioned only in passing. For detailed discussions see, ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 229-60 (1955); NEALE, THE ANTITRUST LAWS OF THE U.S.A. 261-301 (1960).

[141] Hunter Douglas Corp. v. Lando Prods., Inc., 215 F.2d 372 (9th Cir. 1954).

[142] General Shale Prods. Corp. v. Struck Constr. Co., 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943).

[143] FTC v. Curtis Publishing Co., 260 U.S. 568 (1923).

[144] Tying arrangements may also violate § 3 of the Consumer Protection Act, except that the seller or lessor must have a monopolistic position in the tying product *and* a substantial volume of commerce in the tied product must be involved for a § 3 violation, while only one of these elements must be present for a § 5 violation. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

[145] See *infra* under discussion of the Unfair Practices Act, RCW 19.90.140(2).

[146] International Business Machs. Corp. v. United States, 298 U.S. 131 (1936); FTC v. Sinclair Refining Co., 261 U.S. 463 (1923).

[147] Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

Pac. Ry. v. United States, [148] a Sherman Act case, the Supreme Court held that sales and leases of land by the railroad involving agreements which contained a clause requiring the purchasers or lessees to ship all products derived from the land via the lessor-sellers' facilities were unlawful. The court said:

> [tying agreements] . . . deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. . . . They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. . . .[149]

In *International Salt Co. v. United States,*[150] the Court held a tying arrangement unlawful under section 3 of the Clayton Act, not as the result of finding that the lessor dominated the tying product, but on the basis that a substantial and significant volume of commerce in the tied products was affected. It appears that the present status of section 3 of the Clayton Act and consequently, section 5 of the Consumer Protection Act, is to prohibit those tying arrangements in which the lessor or seller dominates commerce in the tying product, as well as those arrangements having the effect of restraining a substantial volume of commerce in the "tied" product,[151] where the requisite competitive effects result.

Exclusive dealership arrangements and total requirements contracts are the other practices which must be reviewed in light of the prohibitions of section 5. This conduct includes arrangements whereby a supplier or lessor sells or leases his product to one purchaser or lessor. The seller agrees not to sell the same product to the purchaser's competitors and the purchaser in turn agrees not to purchase competing products from other sellers. In many instances, exclusive dealing and requirement arrangements have legitimate business purposes and may promote, rather than reduce, competition. Such arrangements may result in assuring a buyer a steady source of supply and facilitate long term business planning. They may also enable a weaker competitor to establish reliable outlets in a market. While it is clear that these arrangements are not per se unlawful,[152] the criteria and tests applicable

[148] *Ibid.*
[149] *Id.* at 6.
[150] International Salt Co. v. United States, 332 U.S. 392 (1947).
[151] See Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).
[152] Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949); Fred Johnson Cement Block Co. v. Waylite Co., 184 F. Supp. 855 (D. Minn. 1960); Fred Johnson

are not altogether clear. The line between lawful and unlawful arrangements can only be drawn after a complete analysis of the resulting effects upon competition.

Section 5 prohibits only those arrangements, the effects of which may be to substantially lessen competition or tend towards monopoly. The words "may be" have been interpreted to mean "not the mere possibility" of lessening competition. Rather, it must be shown that the conduct "would, under the circumstances . . . probably lessen competition, or create an actual tendency to monopoly."[153] The interpretation of the word "substantially" has plagued the courts and the Federal Trade Commission since the passage of the Clayton Act. It provides the key to any analysis of the legality of business conduct under sections 5 and 6 of the Consumer Protection Act, and is discussed in detail in the section dealing with mergers.[154]

Corporate Acquisitions and Mergers. Section 6 of the Consumer Protection Act enacts into state law the basic prohibitions embodied in section 7 of the Clayton Act,[155] commonly referred to as the "anti-merger" statute. Section 6 extends the prohibitions against mergers having the requisite anti-competitive effects, to corporate acquisitions not subject to section 7 of the Clayton Act and in this respect adds a useful supplement to the federal antitrust legislation.[156]

Section 6 provides, in part, that:

> It shall be unlawful for any corporation to acquire, directly or indirectly, the whole or any part of the stock or assets of another corporation where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce. . . .

Acquisition of stocks solely for investment purposes and conducting corporate business through the use of subsidiary corporations are excepted from this prohibition when the effect of substantially lessening

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Cement Block Co. v. Waylite Co., 182 F. Supp. 914, 918 (D. Minn. 1960); United States v. J. I. Case Co., 101 F. Supp. 856, 866 (D. Minn. 1951). See Lawlor v. National Screen Serv. Corp., 270 F.2d 146, 152 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960).

[153] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1922).

[154] See pages 267-69 *infra*. It is possible, because of Standard Oil Co. v. United States, 337 U.S. 293 (1949), that the interpretation of "substantially" could be more inclusive under this section than under § 6.

[155] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

[156] Single corporate acquisitions prohibited by § 7 of the Clayton Act must involve corporations which are either subject to the jurisdiction of the Federal Trade Commission or engaged in "commerce" as that term is defined by the Clayton Act. If the acquired corporation is engaged solely in intra-state commerce, § 7 is not applicable. See BURNS, A STUDY OF THE ANTI-TRUST LAWS 334-35 (1958).

competition is not present. Section 6 provides that the superior court may order any corporation to divest itself of the stock or assets acquired in violation of section 6.[157]

While the language of section 6 of the state act varies substantially from that of section 7 of the Clayton Act,[158] there seems to be little doubt that the tests of legality under each statute are identical. Section 20 of the Consumer Protection Act provides that the courts, in construing the act, shall "be guided by the interpretation given by the Federal Courts to the various Federal Statutes dealing with the same or similar matters." Thus, a review of cases decided under section 7 of the Clayton Act provides the only analytical basis available for understanding the limits placed on corporate acquisitions by the Consumer Protection Act.[159]

Section 7 of the Clayton Act was passed for the purpose of prohibiting corporate acquisitions not otherwise prohibited by the Sherman Act.[160] Like section 5 of the Federal Trade Commission Act, the statute was designed to prohibit "incipient" Sherman Act violations. Congress recognized that the effect of an acquisition, while perhaps not sufficient to amount to a combination "in restraint of trade,"[161] may amount to a significant reduction in the vigor of competition.[162] It is equally clear that section 6 of the state act, like section 7 of the Clayton Act, prohibits a corporation from acquiring its customers or suppliers, as well as its competitors. Prior to the 1950 Amendment to the Clayton Act, there was authority to the effect that an acquisition could be found unlawful only if substantial competition existed between the acquiring and acquired firm,[163] and only if that competition was substantially lessened.[164] If these facts existed, and the elimination of the competition was detrimental to the "public interest,"[165] the acquisition was pro-

[157] Section 9 of the act provides for private damage actions and by its terms is applicable to violations of § 6.

[158] The original § 7 of the Clayton Act did not prohibit corporate acquisitions of the assets of another corporation. This prohibition was the subject of the 1950 Amendment, 64 Stat. 1125 (1950), as amended, 15 U.S.C. § 18 (1958). For a full discussion see MARTIN, MERGERS AND THE CLAYTON ACT 226-42 (1958).

[159] Five states, Louisiana, Minnesota, Mississippi, New Jersey, and Texas, have statutory prohibitions against corporate acquisitions phrased in the same or similar terms as the prohibitions of § 7 of the Clayton Act.

[160] S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

[161] United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[162] H.R. REP. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).

[163] International Shoe Co. v. FTC, 280 U.S. 291 (1930).

[164] International Shoe Co. v. FTC, *supra* note 163; Temple Anthracite Coal Co. v. FTC, 51 F.2d 656 (3d Cir. 1931).

[165] International Shoe Co. v. FTC, *supra* note 163, at 297-98; V. Vivaudou, Inc. v. FTC, 54 F.2d 273 (2d Cir. 1931); United States v. Republic Steel Corp., 11 F. Supp. 117, 121 (N.D. Ohio 1935).

hibited by section 7. This defect was recognized by Congress. The House Report referring to the 1950 Amendment states that one of the purposes of the amendment was to make section 7 apply "to all kinds of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly . . . ."[166]

It is clear that mergers prohibited under the Clayton Act and section 6 of the Consumer Protection Act do not require a showing of adverse effects on competition between the merging corporations. It is equally clear that the competition, however defined, must be subject to some anti-competitive effects. In *Federal Trade Commission v. Morton Salt Co.*, [167] the Supreme Court was required to interpret similar effect-on-competition provisions under the Clayton Act. The court held that use of the word "may" in the statute means "a reasonable probability" of injury to competition, and not a mere possibility that adverse competitive effects would result. This interpretation was not changed by the 1950 Amendment.[168]

In determining the effect upon competition of any corporate acquisition, be it horizontal, vertical or conglomerate, the first problem is to define the area of effective competition upon which there may or may not be a "probability" of a substantial lessening of competition or tendency to create a monopoly. Section 6 itself provides a statutory starting point for determining the area of competition. It states that the unlawful effect may be "in any line of commerce." Section 20 of the act makes it clear that the affected "line of commerce" need not be confined to state boundaries. Although this extra-territorial proviso may raise certain constitutional issues,[169] it tends to effect harmony between section 6 and the Clayton Act.[170] Under both acts, an analysis of the probable effects on competition of any particular merger necessitates, in the first instance, a precise definition of the area of effective competition in terms of product and geographic markets.

[166] H.R. REP. No. 1191, 81st Cong., 2d Sess. 11 (1950).

[167] 334 U.S. 37 (1948).

[168] S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950).

[169] Assume that two corporations, *A* and *B*, whose principal places of business are in different states, maintain offices in Washington, and compete with a Washington corporation, *C*, in a mid-west market. If *A* acquires *B* and this results in a substantial lessening of competition in the midwest market to the detriment of *C*, could a Washington superior court order a divestiture of *B* by *A*? Could *C* maintain a treble damage action in this state?

[170] Section 7 defines the area of competition as being "in any line of commerce in any section of the country." In discussing this section of the Clayton Act at the time it was amended in 1950, the Senate Judiciary Committee recognized that the geographic market could not be determined by fixed geographic boundaries. S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950), stated: "What constitutes a section... [of the

Area of Effective Competition—Product Boundaries. The product market necessarily subject to effects of one type or another as a result of a corporate acquisition need not necessarily be limited to the level of competition in which the acquired or acquiring corporation is engaged. Acquisition by a competitor of a corporation engaged in competition at the manufacturing level may result in competitive effects at the level of the producer of raw material supplying the manufacturer. It may also result in injury to competition at successive levels of distribution. The product itself may change or become an integral part of another product through each level of production and distribution. The competitive effects upon all of the relevant products and levels of competition must be measured.

Product market delineation can, and has, resulted in surprisingly narrow classifications of relevant product markets. In the now famous *du Pont* case,[171] the Supreme Court was required to define the area of product competition upon which the effect of the du Pont stock ownership in General Motors was to be considered. The Government contended that the acquisition of 23% of the stock of General Motors by du Pont resulted in a substantial lessening of competition in the market of automobile finishes and fabrics. Rejecting du Pont's contention that the product market included all fabrics and finishes, the Court said:

> The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. . . . Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.[172]

In *Reynolds Metal Co.*,[173] the Federal Trade Commission was required to determine the effect on competition of the acquisition of Arrow Brands, Inc., a fabricator of aluminum florist foil, by Reynolds, an integrated producer and fabricator of aluminum products. The Commission held: ". . . that the production and sale of decorative alumi-

country] . . . will vary with the nature of the product. Owing to the differences in size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of sections, whether such a definition were based upon miles, population, income or another unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product such as milk."

[171] United States v. E. I. du Pont, de Nemours & Co., 353 U.S. 586 (1957).

[172] *Id.* at 593-95.

[173] CCH TRADE REG. REP. ¶ 28, 533 (1960).

num foil to the florist trade is a 'line of commerce' within the meaning of Section 7."[174]

In *A. G. Spalding & Bros., Inc.*,[175] the Commission was required to determine what products constituted the relevant lines of commerce involved in the acquisition of Rawling Manufacturing Co. by the respondent. Both the acquiring and acquired corporations were engaged in the manufacture and/or sale of 19 major types of athletic equipment.[176] The Commission held that not only did the 19 major products constitute individual lines of commerce, as did the athletic supply business as a whole, but also held that within each of the major product lines there was high and low price equipment, and each constituted a separate line of commerce. The Commission stated:

> We think it is clear from this testimony that in each of the various product lines for which . . . price categories were established there is a separate line of low priced items which is not sold in competition with other items in the same product line. . . . The products in each of these categories are physically distinct from those in the other; they are different in quality and price, as well as in the purpose for which they are made and used. There can be no doubt that these two categories within the various product lines can be distinguished competitively from each other and that they constitute separate and distinct lines of commerce within the meaning of Section 7.[177]

While the *du Pont, Reynolds,* and *Spalding* cases are indicative of the comprehensive analysis of product markets required, these cases are only illustrative. Their brief treatment is sufficient only to make obvious the necessity of understanding the competitive and economic factors used by the courts and the Commission in making a determination of the relevant product markets in any merger case.

In the *du Pont* case,[178] the Supreme Court stated that the test to be applied in determining the relevant product market requires a determination of whether the products involved have "sufficiently peculiar characteristics and uses" to make them so distinct from all other products as to constitute separate lines of commerce. It is clear that the distinction required is a competitive distinction. In *Brillo,*[179] the Com-

[174] *Id.* at page 37, 254.
[175] CCH TRADE REG. REP. ¶ 28, 694 (1960).
[176] Golf clubs (irons), golf clubs (woods), golf balls, baseballs, softballs, baseball gloves, baseman's mitts, catcher's mitts, soccer balls, volleyballs, footballs, football helmets, football shoulder pads, football hip and kidney pads, basketballs, tennis balls, tennis racket frames, strong tennis rackets, and badminton rackets (frames and strong rackets).
[177] CCH TRADE REG. REP. ¶ 28,694 at 37,352-53 (1960).
[178] United States v. E. I. du Pont, de Nemours & Co. 353 U.S. 586 (1957).
[179] Brillo Mfg. Co., 54 F.T.C. 1905 (1958).

mission held that not only must the products be distinguishable, they must be distinguishable competitively. At least one court has also recognized the competitive aspects of the "peculiar characteristics and uses" test set forth by the Supreme Court. In *United States v. Brown Shoe Co.*,[180] the court held that "women's," "children's, and "men's" shoes constituted separate lines of commerce for the purposes of section 7. The court refused to find separate lines of commerce within each of the above groups on the basis of descriptive physical characteristics and classifications such as "casual," "dress," "work," and "play." After reviewing the cases,[181] the district court stated the test and factors to be considered as follows: "... we must ... make a determination of the 'line of commerce' from the practices in the industry, the characteristics and uses of the products, their interchangeability, price, quality, and style."[182]

An important feature of the *du Pont* test which would appear to be inherent in its application was not mentioned in the opinion. Prior to the *du Pont* decision,[183] the basic test for determining relevant markets appeared to be that set forth by the Supreme Court in *du Pont Cellophane*,[184] a Sherman Act monopoly case. In that litigation, the Court was faced with the necessity of determining whether or not du Pont had monopolized the market for cellophane wrapping paper. In determining that the appropriate area of competition included not only cellophane but all other flexible wrapping paper (thereby reducing substantially the relative share of du Pont) the Court said:

> In considering what is the relevant market . . . no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.[185]

Any speculation concerning the applicability of the "reasonable interchangeability" test to section 7 cases (which may have arisen because the Supreme Court's failure to restate the test in the *du Pont-General Motors* case) has been laid to rest. The district court specifically held the cellophane test applicable in the *Brown Shoe* case.[186] In *American*

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[180] 179 F. Supp. 721 (E. D. Mo. 1959), *prob. app. juris. noted,* 368 U.S. 825 (1960).
[181] *Id.* at 729-30.
[182] *Id.* at 730.
[183] United States v. E. I. du Pont, de Nemours & Co., 353 U.S. 586 (1957).
[184] United States v. E. I. du Pont, de Nemours & Co., 351 U.S. 377 (1956).
[185] *Id.* at 395.
[186] United States v. Brown Shoe Co., 179 F. Supp. 721 (E. D. Mo. 1959), *prob. app. juris. noted,* 368 U.S. 825 (1960).

Crystal Sugar Co. v. Cuban-American Sugar Co.,[187] the circuit court of appeals affirmed the district court's application of the "reasonable interchangeability" test in holding that cane and beet sugar constitute a single and relevant product market. Recently, it has been recognized that the test of "reasonable interchangeability" and "peculiar characteristics and uses" are the same. In the *United States v. Columbia Pictures Corp.*,[188] the court was required to determine whether or not feature motion pictures (the subject matter of a partial assets acquisition) constituted a separate line of commerce or was but a part of a broader line, including all forms of television programming material. The court reviewed the authorities and concluded:

> The tests enunciated by the authorities are consistent. Effectively, the test 'reasonable interchangeability for the purposes for which (the products) are produced—price, use and qualities considered' and the test 'sufficient peculiar characteristics and uses to constitute these products sufficiently distinct . . . to make them a line of commerce within the meaning of the Clayton Act' are but different verbalizations of the same criterion.
>
> They require the same accumulation and scrutiny of facts and application of judgment. The task is to find the area of effective competition. The 'characteristics and uses' formulation does not limit the court's inquiry to physical attributes and foreclose inquiry into the competitive situation.[189]

After quoting with approval from the Commission's *Brillo* decision,[190] the court said:

> Inter-product competition has always been recognized where it has been found to exist in effective degree. Where it is not found in effective degree, the products are not competing and, therefore, cannot be included in the same market. Their failure to compete, one with the other, may be due to lack of suitability and interchangeability for the same uses, differences in characteristics and uses, or even because of psychological or other factors.[191]

Whether the tests reflect differences in judicial interpretation or only in judicial phraseology appears to be an open issue. In any event, the competitive and economic factors taken into consideration in determining relevant markets in all merger cases reflect far more consistency.

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[187] 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958).
[188] 189 F. Supp. 153 (S.D.N.Y. 1960).
[189] *Id.* at 183-84.
[190] Brillo Mfg. Co., 54 F.T.C. 1905 (1958).
[191] 189 F. Supp. 153, 185 (S.D.N.Y. 1960).

The attorney faced with advising his client concerning the legality of a proposed merger, or defending an acquisition long before consummated, can best approach the problem of relevant product market, not on the basis of selected tests or judicial declarations, but by viewing the prospective markets in terms of competitive characteristics. Not only the similarity (or lack of it) in the physical characteristics of the product should be considered, but also the price sensitivity between the products involved. The extent to which substitution between the products actually occurs should be considered. The manner in which purchasers choose between the products is of significant importance, as are similarities or differences in the methods of distribution, advertising, marketing and manufacturing of the products. Viewing the area of competition from these approaches should lead to a reasonable and sound delineation of the effective area of competition in terms of relevant product markets.

Area of Effective Competition—Geographic Boundaries. In addition to the necessity of determining the product boundaries of the "line of commerce," the geographic boundaries of the effective area of competition must be established before an acquisition can be judged in terms of prohibited effects on competition.

Unlike section 6 of the Consumer Protection Act, section 7 of the Clayton Act prohibits corporate acquisitions if they result in unlawful competitive effects in any line of commerce "in any section of the country." While section 6 of the state act contains no similar proviso, it seems clear that a determination of geographic markets under the act will be guided by the principles applicable to similar determinations under section 7 of the Clayton Act. As previously indicated, section 20 of the Consumer Protection Act declares, in part, that:

> It is the intent of the legislature that, in construing the Act, the Courts be guided by the interpretation given by the Federal Courts to various federal statutes dealing with the same or similar matters and ... in deciding whether conduct... may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the State of Washington.

It is equally clear under the Clayton Act that political boundaries bearing no "economic significance" are without importance.[192]

No significant generalizations concerning geographic boundaries can be drawn from the cases under section 7 of the Clayton Act. Indeed,

[192] United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959), *prob. app. juris. noted,* 368 U.S. 825 (1960).

no generalizations are necessary. Geographic markets will vary in location and size with the product market they encompass.

In *Brown Shoe Co.*,[193] and *Columbia Pictures*[194] the geographic market was found to coincide with the boundaries of a metropolitan marketing area. The entire nation was found to constitute the appropriate "section of the country" in *Brillo*.[195]

Compared with the determination of relevant product markets, the problem of determining the geographic markets is relatively simple. It consists of determining the geographic boundaries of the effective area of competition with the purpose of establishing a market which is "economically significant."[196] As the court stated in *United States v. Bethlehem Steel Corp.*,[197] concerning the defendant's attempt to divide the geographic market into smaller segments: ". . . an obvious gerrymandering of the country to meet the exigencies of the case."[198]

It seems well established that the geographic markets need not coincide with the areas in which the acquiring and acquired firms may have competed or done business.[199] A Senate Report reveals that:

> . . . [A]lthough the section of the country in which there may be a lessening of competition will normally be one in which the acquired or the acquiring company may do business, . . . [section 7] . . . is broad enough to cope with a substantial lessening of competition in any other section of the country as well.[200]

The judicial process of placing geographic boundaries on the effective area of competition should be related to the process of selecting the product market. Geographic boundaries should be established from the results of applying various factors to the evidence in each case. A proper determination can be made only by considering the results of inquiry regarding the geographic area of price sensitivity, the economic significance of freight and delivery costs, the existence or lack of consumer preference in particular areas, the location of competitors, and many other similar considerations. An evaluation of the answers to this sort of inquiry should lead to the delineation of a geographic market which is "economically significant."[201] It is assumed that regardless of

[193] 179 F. Supp. 721 (E.D. Mo. 1959), *prob. app. juris. noted,* 368 U.S. 825 (1960).
[194] 189 F. Supp. 153 (S.D.N.Y. 1960).
[195] Brillo Mfg. Co., 54 F.T.C. 1905 (1958).
[196] United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D.Mo. 1959), *prob. app. juris. noted,* 368 U.S. 825 (1960).
[197] 168 F. Supp. 576 (S.D.N.Y. 1958).
[198] *Id.* at 599.
[199] *Id.* at 600.
[200] S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950).
[201] 179 F. Supp. 721 (E.D.Mo. 1959), *prob. app. juris. noted,* 368 U.S. 825 (1960).

the generalities and judicial declarations which may emerge concerning the geographic market, the state courts will undertake this type of approach in determining the effective geographic area of competition.

Competitive Effects. Like section 7 of the Clayton Act, section 6 of the Consumer Protection Act prohibits corporate acquisitions only if the effect "may be to substantially lessen competition or tend to create a monopoly" in the relevant market.[202] The obvious fact that every horizontal merger lessens competition between the acquiring and acquired firms makes it obvious that the key to the statutory standard is whether or not competition may be substantially lessened. The judicial and legislative history of section 7 of the Clayton Act reveals a continuing conflict concerning the meaning of "substantial" as it appears in the statute. While it is not necessary to review this history in detail, the nature and present status of the conflict is indicated in order to anticipate the construction which will be given the state act.

Prior to the 1950 amendment to section 7 of the Clayton Act, the area of competition protected by the statute was that existing between the acquiring and acquired firms. If that competition was substantial, and it was substantially lessened by the acquisition, to the detriment of the public, the statute had been violated.[203] These decisions were interpreted to mean that only a quantitative determination, i.e., the volume or amount of competition affected, was involved in measuring the lessening of competition. Post amendment decisions under section 7 tended to reject "quantitative substantiality" in favor of judging an acquisition by the quality of competition remaining after the merger.[204] Other cases indicate that the rejection has not yet been complete.[205] In 1953, the Federal Trade Commission judged the acquisition on the basis of the quality of competition remaining after the merger.[206] In *United States v. Columbia Pictures Corp.*,[207] the court approved the application of a "qualitative" test, citing *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, which stated:

> ... [T]he parties are agreed that an acquisition is not illegal because of its impact on competition between the corporations involved; that the

[202] Section 7 cases rarely construe the "tendency to create monopoly" phrase independently of the lessening of competition standard. Further reference to the latter should be considered applicable to the second provision of the new standard.

[203] Standard Oil Co. v. United States, 337 U.S. 293 (1949); International Shoe Co. v. FTC, 280 U.S. 291 (1930); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935).

[204] Brillo Mfg. Co., 54 F.T.C. 1905 (1958).

[205] *Cf.* United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

[206] Pillsbury Mills, Inc., 50 F.T.C. 555 (1953).

[207] 189 F. Supp. 153 (S.D.N.Y. 1960).

> proper test is one of qualitative substantiality of the resulting effect on competition in the relevant market. We too agree . . . .[208]

In *Brillo,* the Commission rejected the hearing examiner's determination of illegality based solely on a showing of increased market share. In remanding the case to the examiner, the Commission said:

> In addition to the facts concerning market shares, likewise important is such evidence as was received herein pertaining to the general competitive situation, number of competitors and degree of concentration in the industry.[209]

While it has been suggested that as a result of these and other cases "the forces of quality appeared to be overcoming those of quantity,"[210] the issue is not yet closed. It is probable that the legislature had in mind that the competitive effect of any merger attacked under section 6 of the Consumer Protection Act should be viewed in the context of a thorough analysis of all competitive factors, and not solely on the quantity of competition affected. It is useful to summarize the competitive facts which appear to have been given substantial weight by the courts and the Federal Trade Commission in recent cases under section 7:

1) The market share of acquired companies;[211]
2) The number of competitors in the industry and their market shares;[212]
3) The ease of entry by a new competitor into the markets and industry;[213]
4) The prior merger history of the acquiring corporation;[214]
5) The ability of the acquired firm to compete prior to the merger;[215]
6) The existence and availability of raw materials and channels of distribution, before and after the merger;[216]

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[208] 259 F.2d 524, 527 (2d Cir. 1958).
[209] Brillo Mfg. Co., 54 F.T.C. 1905, 1907 (1958).
[210] Webster, *The Clayton Act Today: Merging and Marketing,* CCH ANTI-TRUST SYMPOSIUM 77 (1959).
[211] Brillo Mfg. Co., 54 F.T.C. 1905 (1958); Pillsbury Mills, Inc., 50 F.T.C. 555 (1953).
[212] United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).
[213] Scott Paper Co., CCH TRADE REG. REP. ¶ 29,278 (1960).
[214] *Ibid.*
[215] International Shoe Co. v. FTC, 280 U.S. 291 (1930); Beagle v. Thomson, 138 F.2d 875 (7th Cir. 1943), *cert. denied, 322* U.S. 743 (1944); United States v. Maryland & Virginia Milk Prod. Ass'n, 167 F. Supp. 799 (D.D.C. 1958); Pillsbury Co., CCH TRADE REG. REP. ¶ 29,277 (1960).
[216] United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D.Mo. 1959), *prob. app. juris. noted,* 368 U.S. 825 (1960).

7) The existence of the power or use thereof to conduct predatory practices;[217] and
8) The advantages over competitors in market outlets[218] or sources of supply[219] as a result of the merger.

An evaluation of the competitive effects of corporate acquisitions after weighing the results of these and other similar inquiries should lead to a finding of illegality only in those cases where desirability of economic growth is outweighed by the undesirable competitive effects flowing from the acquisition in question.

Sanctions and Enforcement. While the Consumer Protection Act is patterned after the federal antitrust statutes with respect to substantive prohibitions against certain types of business conduct, it differs radically in the means and methods by which it is to be enforced. The enforcement procedure is contained in sections 8 through 16 of the state act.

The Consumer Protection Act is not essentially a criminal statute. Its primary purpose, like that of the Clayton and Federal Trade Commission Acts, is prospective; it is designed to prevent future unlawful conduct rather than punish for past offenses. Section 8 provides that the attorney general may bring an action to restrain and prevent unlawful acts. He may accept an assurance of discontinuance from those persons engaging in prohibited conduct[220] in lieu of pursuing an action to final judgment. Any person violating an injunction obtained in an action by the attorney general under section 8, or any person violating the provisions of sections 3 and 4 in the first instance, is liable for a civil penalty not to exceed $25,000.00.[221] Penalties for a violation of an injunction may be granted upon petition of the attorney general on behalf of the state by the court which issued the injunction in the first instance. In the case of violations of sections 3 and 4, the attorney general may seek recovery of the civil penalty in a civil action. The attorney general may also petition the court to order the dissolution, suspension or forfeiture of the corporation or its franchise if the corporation is found to have violated sections 3 or 4, or the terms of any injunction issued under section 8.[222]

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[217] United States v. Maryland & Virginia Milk Prod. Ass'n, 167 F. Supp. 799 (D.D.C. 1958); Reynolds Metal Co., CCH TRADE REG. REP. ¶ 28,533 (1960).
[218] United States v. E. I. du Pont, de Nemours & Co., 353 U.S. 586 (1957).
[219] Crown Zellerbach Corp., 54 F.T.C. 769 (1957).
[220] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 10.
[221] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 14.
[222] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 15.

The Consumer Protection Act also provides for private enforcement through actions for damages by persons injured by conduct prohibited by the act. Section 9 provides that any person (including counties, municipalities and political subdivisions of the state) injured by reason of a violation of sections 3, 4, 5 or 6, may maintain an action in superior court to recover actual damages, costs and attorneys fees. The court may, in its discretion, increase any award to an amount not exceeding three times the actual damages sustained.[223] A similar action may be maintained by the State of Washington, but the court may award only actual damages, plus costs and reasonable attorney fees. Actions under section 9 must be commenced within four years from the accrual of the cause of action, but this limitation is tolled during the pendency of actions by the attorney general under section 8 of the act.[224] The private plaintiff seeking damages may be aided by section 13. That section provides that any final judgment rendered in an action under section 8, commenced by the attorney general, which judgment has the effect of establishing that the defendant has violated sections 3, 4, 5 or 6, shall be prima facie evidence against the defendant in the action for damages.

The Consumer Protection Act removes one obstacle which has plagued enforcement of the Sherman Act by the Department of Justice for many years. Unlike the investigative procedures available to the Federal Trade Commission,[225] the Department of Justice is limited to the discovery procedures provided for by the Federal Rules of Civil Procedure in civil cases. This has resulted in the commencement of civil actions for violations of the antitrust laws without first having obtained sufficient information by investigation to determine the propriety of commencing the action. It has also resulted in the abuse of the grand jury procedure available to the Department of Justice as an investigative tool prior to the commencement of criminal actions.[226] All attempts to provide the Department of Justice with investigative procedures similar to those established by the Consumer Protection Act have failed.

The civil investigative demand provisions are contained in section 11 of the new act. In substance, the section provides that the attorney general may demand from any person, any records or documents which he believes may be relevant to an investigation of a possible violation

[223] Treble damages are awarded without discretion of the court for violations of the comparable federal statutes.

[224] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 12.

[225] Federal Trade Commission Act § 6, 38 Stat. 721 (1914), 15 U.S.C. § 46 (1958).

[226] See United States v. Proctor & Gamble Co., 356 U.S. 677 (1958); United States v. Proctor & Gamble Co., 174 F. Supp. 233 (D.N.J. 1959); United States v. Carter Prod., Inc., 27 F.R.D. 243 (S.D.N.Y. 1961).

of sections 3, 4, 5 or 6 of the act. Commencement of a civil proceeding is not a condition precedent to the issuance of such a demand. Unlike a subpoena duces tecum, the demand must state the general subject matter of the investigation and the statutory sections under which they are sought. It must also state a return date at which time, unless extended by court order or agreement, the documents must be supplied or made available for inspection and copying. The act provides for judicial review of the demand by way of a petition to extend the return date or modify or set aside the demand. Intentional failure to comply with the demand, or the destruction, withholding, falsification, alteration, mutilation or concealment of demanded documents subjects a person to the only criminal sanctions provided for by the act.[227]

THE UNFAIR PRACTICES ACT

Unlike the Consumer Protection Act, the Unfair Practices Act is not a local re-enactment of federal antitrust legislation. While its prohibitions against price discrimination,[228] sales below cost,[229] extension of special services and privileges to purchasers[230] and tying arrangements[231] appear consistent with the purposes of the federal antitrust laws, the latter are of little assistance as an aid to interpretation. The older provisions of the act are like the California law[232] and there is some case law there to draw upon. However, the guide line is the purpose of the act to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition. Any further analysis is difficult and somewhat speculative.

Violations of the Unfair Practices Act are subject to both civil[233] and criminal sanctions.[234] Any person is a proper party plaintiff to an action brought to enjoin the conduct of another which violates the provisions of the act, and, contrary to a damage action, the plaintiff need not prove that the wrongful acts have resulted in damage or injury to him.[235] The state is also authorized to bring an action to enjoin the

[227] A fine not to exceed $5000.00 and/or imprisonment not to exceed one year. Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 11(8).

[228] RCW 19.90.020.

[229] RCW 19.90.040.

[230] RCW 19.90.020, 040.

[231] RCW 19.90.140(2).

[232] RCW 19.90.020, 040.

[233] RCW 19.90.090. Any person can bring an action for an injunction and if injured, can sue for damages.

[234] RCW 19.90.100. Any violation of this act can be prosecuted as a misdemeanor, carrying with it a fine of not more than $1,000.00 and/or imprisonment in the county jail not to exceed six months.

[235] Unlike the Unfair Practices Act, which does not make out a prima facie case of violation for the private plaintiff seeking damages, § 13 of the Consumer Protection Act

defendant's unlawful conduct.[236] In addition, or as an alternative, the state may maintain a criminal action against the offender.[237] The commencement of criminal proceedings by the state does not prevent civil actions by the state or other persons, nor do civil actions operate to prevent a criminal prosecution. The act also provides that contracts made in violation of the act are illegal and no recovery can be had thereunder.[238] The criminal and civil sanctions applicable to an offender are equally applicable to the officers and agents of a principal[239] and to any person who solicits a violation by collusion or joint participation.[240] In the prosecution of an officer or agent, it is sufficient to allege and prove the unlawful intent of the principal.[241] The statutory sanctions also apply to solicitation, collusion or joint participation in prohibited acts by wholesalers, manufacturers, distributors, jobbers, contractors, brokers or retailers.[242]

Price Discrimination. The first substantive provision of the Unfair Practices Act makes it unlawful:

> . . . for any person, engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with the intent to destroy the competition of any regular established dealer . . . or to prevent the competition of any person, who in good faith, intends and attempts to become such dealer, to discriminate between different sections of the same community, city, town or village . . . by selling or furnishing such article or product at a lower price in one section than in another.[243]

While this section is aimed at prohibiting conduct similar to that prohibited by the Robinson-Patman amendment to section 2 of the Clayton Act,[244] significant differences are readily apparent. First, the state act prohibits discrimination with respect to services as well as commodities and products, while the Robinson-Patman Act applies

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provides that "a final judgment or decree rendered in any action brought . . . by the state of Washington to the effect that a defendant has violated sections 3, 4, 5, or 6 shall be prima facie evidence against such defendant in any action brought by any party against such defendant. . . ."

[236] RCW 19.90.130.

[237] RCW 19.90.100.

[238] RCW 19.90.080. The statute itself does not state whether such contracts are void or voidable, although the code revisers have labeled them "void."

[239] RCW 19.90.030.

[240] RCW 19.90.110 limits the provision to wholesalers, manufacturers, distributors, jobbers, contractors, brokers and retailers who solicit or collude .

[241] RCW 19.90.030, 060.

[242] RCW 19.90.110.

[243] RCW 19.90.020.

[244] Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

only to commodities.[245] Second, the Washington statute requires proof of intent to destroy competition. The federal act, on the other hand, requires that the discrimination have the effect of substantially lessening competition. While it would appear to be more difficult to prove such an intent that to prove adverse competitive effects, unlawful intent can be presumed if a discriminatory price and an injurious effect upon competition are shown.[246] The distinction remains significant, however. The Washington act also differs from the federal prohibition in its definition of discriminatory practices. To be discriminatory, pricing must vary between "different section(s) of the same community, city, town or village." It appears that unless one of the descriptive terms is given an extraordinary interpretation, a prohibited price discrimination could never result from differences in prices between two different cities or localities, regardless of the fact that competition may exist between the purchasers therein. The Robinson-Patman Act, on the other hand, does not define discriminatory pricing in terms of geographical localities. It prohibits discriminatory pricing between "different purchasers" and is sufficiently flexible to prohibit the charging of different prices in larger market areas.[247] At the same time, the Washington act is broader in one respect. While the Robinson-Patman Act is limited in its application to discriminatory pricing with respect to reasonably contemporaneous sales,[248] the Washington statute applies to offers to sell and advertisements, as well as sales.[249]

Like the federal statute,[250] the Washington statute makes several defenses available to a charge of price discrimination.[251] Differences in price are not unlawful under the Washington act if they are justifiably based on differences in the grade, quality or quantity of the products or services sold at different prices.[252] As under the Robinson-Patman Act,

[245] RCW 19.90.020. See also Fleetway, Inc. v. Public Serv. Interstate Transp. Co., 72 F.2d 761 (3d Cir. 1934), *cert. denied*, 293 U.S. 626 (1935).

[246] RCW 19.90.060. The California act provides a presumption of intent based upon discrimination in selling. CAL. BUS. & PROF. CODE § 1707.

[247] Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir.), *cert. denied*, 354 U.S. 910 (1957); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

[248] Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956); Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202 (10th Cir. 1954); American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 (5th Cir. 1951).

[249] RCW 19.90.010.

[250] For a detailed discussion of defenses under the Robinson-Patman Act, see ALI, PRICE DISCRIMINATION (1959).

[251] In addition to the specific defenses, certain industries are exempted from the prohibitions contained in the Unfair Practices Act. See RCW 19.90.020.

[252] Though the Robinson-Patman Act does not provide for justification based upon differences in quantity, this has been provided by judicial interpretation. See Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951).

price differentials can be justified on the basis that the lower price resulted from the seller's cost savings in the manufacture, sale, transportation or delivery of the commodity sold. The cost analysis required is often tedious "as too often no one can ascertain whether a price is cost justified."[253]

The Unfair Practices Act specifically provides that differences in price based on proper functional classification of purchasers such as brokers, jobbers, wholesalers or retailers are not unlawful. While the Robinson-Patman Act does not specifically permit or prohibit functional pricing,[254] proper functional pricing plans have generally escaped attack on the ground that different prices at different levels of competition do not have the prohibited competitive effects.[255] It seems logical to assume that the state act would be interpreted to allow a lower functional price to a purchaser who resells a product both as a wholesaler and a retailer, only on that portion sold at the wholesale level. Such an interpretation would be consistent with the interpretation of functional pricing under the federal act.[256]

RCW 19.90.020 and 19.90.070(4) allow a seller to justify a difference in price on the ground that the different price was necessary to meet, in good faith, a legal competitive price. A similar defense is available to a charge of price discrimination under the Robinson-Patman Act.[257] While the federal act does not require that the competitor's price be a legal price, dicta in several decisions have indicated that an unlawful price cannot be met "in good faith."[258] The requirement under the state act is significant in view of the sales-below-cost and loss-leader provisions of the same statute.[259] These differentials in price are justified only to *meet,* not beat, a competitor's lawful price.[260] In addition, the good faith requirement has been interpreted to mean that the defense is unavailable if differential in price is a part of another restraint of trade.[261] Further, certain sales are not subject

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[253] Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).
[254] FTC v. Rubberoid Co., 343 U.S. 470 (1952).
[255] See EDWARDS, THE PRICE DISCRIMINATION LAW 286-348 (1959).
[256] Standard Oil Co. v. FTC, 340 U.S. 231 (1951).
[257] See § 2(b) of the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).
[258] Standard Oil Co. v. FTC, 340 U.S. 231 (1951); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), *cert denied,* 350 U.S. 991 (1956).
[259] State v. Sears, 4 Wn.2d 200, 103 P.2d 337 (1940), makes this defense available so long as the person believes in good faith that his competitor's price is legal.
[260] Standard Oil Co. v. FTC, 340 U.S. 231 (1951).
[261] FTC v. Cement Institute, 333 U.S. 683 (1948); Gerber Prods. Co. v. Beech-nut Life Savers, Inc., 160 F. Supp. 916 (S.D.N.Y. 1958).

to the act, including sales of perishable or damaged goods, sales under court order or sales pursuant to a discontinuance of business.[262]

Like the Robinson-Patman Act, the state act reserves the right to the seller of any commodity or service to select his customers.[263] While a seller is ordinarily free to deal with whomever he desires, refusals to deal may be unlawful under other provisions of state and federal antitrust law if the refusal is accompanied by "unlawful conduct or agreement or conceived in monopolistic purpose or market control."[264]

Sales Below Cost and Loss Leaders. The Unfair Practices Act prohibits sales by a vendor below his cost or the conduct of a vendor in giving away merchandise or services[265] if such action is taken with the purpose of injuring competitors or destroying competition.[266] While federal antitrust laws contain no comparable provisions, the type of conduct prohibited by these sections may be prohibited by sections 2 and 3 of the Consumer Protection Act.[267]

Sales below cost or merchandise give-aways constitute violations of the act only when the alleged violator's unlawful intent or purpose is established.[268] However, proof of one or more acts of selling below cost or giving away merchandise together with evidence of the injurious effect create a presumption of intent to injure competitors or destroy competition.[269]

Proof of a violation as a result of selling below cost is predicated upon the plaintiff's ability to establish the "cost" of the merchandise allegedly sold unlawfully. "Cost" is defined by RCW 19.90.010 as having:

> . . . its normal meaning and in addition as applied to production includes the cost of raw materials, labor and all overhead expenses of the pro-

[262] RCW 19.90.070. This section also sets forth, in somewhat different language, the "meeting competition" defense.

[263] RCW 19.90.020 provides in part that nothing "shall prevent a selection of customers." See also Powell v. Graham, 183 Wash. 452, 48 P.2d 952 (1935), which recognizes this right under article 12, § 22 of the Washington Constitution.

[264] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

[265] Services are included by virtue of RCW 19.90.010, which also defines "loss leaders" and the requirements for establishing them.

[266] Section 3 of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. § 21(a) (1958), makes it illegal to sell or contract to sell at unreasonably low prices for the purpose of destroying competitors. Although this section does not deal specifically with sales below cost, its requirements of "purpose" are much the same as those under the Washington statute.

[267] See E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Sears, Roebuck & Co., v. FTC, 258 Fed. 307 (7th Cir. 1919).

[268] In State *ex rel.* Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 98 P.2d 680 (1940), the Washington court held that merely selling below the price of a competitor does not constitute a sale below cost.

[269] RCW 19.90.060.

> ducer, and as applied to distribution means the invoice cost or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

In addition, RCW 19.90.120 provides that the over-all cost of doing business, added to production, invoice, or replacement cost, provides presumptive evidence of cost. This section also provides that transportation rates fixed and approved by the department of public service shall be presumptive evidence of delivery cost. RCW 19.90.050 provides that the cost of goods purchased at forced sales shall not provide the basis for establishing cost unless the goods have been segregated from others not so purchased, and unless advertisements in connection with their sale indicate the conditions under which they were purchased. Other evidentiary procedures with respect to proof of cost are set forth in RCW 19.90.060. Despite these statutory aids, judicial proof of cost has remained elusive.[270]

Use of a "loss leader" method of selling below cost is prohibited by RCW 19.90.040. The term is defined by the act as meaning:

> . . . any article or product sold at less than cost . . . to induce, promote or encourage, the purchase of other merchandise, or which may have the tendency or capacity to mislead or deceive purchasers . . . or which diverts trade from or otherwise injures competitors.

"Loss leaders" conduct may violate the act even though not done with the purpose or intent of injuring competitors or destroying competition.[271]

Like the price discrimination provisions of the Unfair Practices Act, the prohibitions against "loss leaders" are not applicable to sales in the course of discontinuing a business, sales of perishable or damaged goods, sales by order of a court, or sales made in good faith to meet the legal prices of a competitor.[272]

Extension of Special Services or Privileges. To supplement the price discrimination and below cost sales provisions of the act, the

[270] See State v. Sears, 4 Wn.2d 200, 103 P.2d 337 (1940), and State *ex rel.* Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 98 P.2d 680 (1940), for discussions of cost proof in Washington.

[271] The California "loss leader" statute adds the word "purpose" before the words "induce, promote or encourage," and the word "effect" before the words "tendency or capacity" and "divert trade." CAL. BUS. & PROF. CODE § 17030. In Ellis v. Dallas, 113 Cal. App.2d 234, 248 P.2d 63 (1952), the California court added the requirement that "loss leader" sales be made with the purpose of injuring competition or destroying competition; however, the Washington court would not necessarily be bound by this ruling.

[272] RCW 19.90.070. See also the discussion of the "meeting competition" defense to price discrimination at p. 274 *supra.*

statute also prohibits the granting of any "special or secret rebate, payment, allowance . . . in the form of money or otherwise" or the extending to certain purchasers of special services or privileges not extended to all purchasers on like terms.[273]

While the statutory wording differs substantially from that of the Robinson-Patman Act, it appears that both statutes are designed to prohibit similar types of business conduct. The purpose of the federal prohibitions is to circumscribe all forms of indirect discriminatory pricing. This appears consistent with the stated purposes of the Unfair Practices Act.[274]

Unlike the price discrimination provisions of the Robinson-Patman Act, the prohibition against discriminatory services and facilities is not predicated upon a showing of adverse competitive effects[275] or proof of an unlawful intent. Nevertheless, it seems clear that competitive injury is a requirement under this section of the Unfair Practices Act.

The absence of case law under these provisions of the statute require a review of any arrangements involving special services or arrangements by using whatever guidelines appear applicable from the cases decided under the Robinson-Patman Act and the somewhat similar California statute.[276] The interpretation and application of the statute in Washington remains to be seen.

Tying Arrangements. RCW 19.90.140 provides, in part:

> . . . (2) The supplying of machinery, fixtures, or equipment to . . . a user thereof, at less than cost, conditioned upon the agreement of such user that certain goods . . . used or displayed in such machinery . . . or equipment in connection with user's business shall be purchased exclusively from the person supplying the machinery . . . for the purpose of injuring competitors or destroying competition, is against public policy . . . .

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[273] RCW 19.90.040. See also the last paragraph of RCW 19.90.020. Subsections 2(d) and (e) of the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(d) and (e) (1958), prohibit the rendering of or payment for services or facilities in connection with the sale of goods unless such payments or services are made available to all purchasers on proportionately equal terms.

[274] See RCW 19.90.910, which states that the purpose of the act is to prohibit any "unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." Further, RCW 19.90.020, provides that the prohibition against locality discrimination embraces any scheme whereby discrimination is effected in violation of the spirit of the act.

[275] See Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2nd Cir. 1946), *cert denied*, 331 U.S. 806 (1947); Great A. & P. Tea Co. v. FTC, 106 F.2d 667 (3rd Cir. 1939), *cert denied*, 308 U.S. 625 (1940).

[276] See ALI, PRICE DISCRIMINATION (1959); CALIFORNIA SPECIALTY HANDBOOK No. 2, LEGAL ASPECTS OF DOING BUSINESS UNDER THE ANTITRUST LAWS (1959).

The statute provides that provisions contained in contracts which require a user to purchase exclusively from the supplier are illegal and unenforceable.

Because there is no judicial interpretation of this section, no detailed analysis can be made. However, the prohibitions of this section may be duplicated by the enactment of section 5 of the Consumer Protection Act.[277] A successful attack on tying arrangements under that statute would not necessitate proof of an unlawful purpose but only a showing that the arrangement may substantially lessen competition. Nevertheless, where a tying agreement is being considered this section should not be overlooked.

CONCLUSION

Though the field of Washington antitrust law is now one with many facets, it seems apparent that some of its complexity will be resolved by a process of practical emphasis. Primary attention should fall on the Consumer Protection Act, with special attention on sections 2, 3 and 4, though the more specialized sections should not be overlooked. A short cross reference table showing the substantive sections of the Consumer Protection Act and their federal counterparts is footnoted in case it proves helpful.[278]

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[277] Because the wording of this statute speaks only of destroying competition or injuring competitors and does not limit itself to the competition of the supplier, as does § 5 (see p. 256 *supra*), this statute may cover the situation in which the competition eliminated is that of the user or lessee.

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Consumer Protection Act	Federal Statutes
Section 2 (§ 5, Federal Trade Comm'n Act)	15 U.S.C. § 45
Section 3 (§ 1, Sherman Act)	15 U.S.C. § 1
Section 4 (§ 2, Sherman Act)	15 U.S.C. § 2
Section 5 (§ 3, Clayton Act)	15 U.S.C. § 14
Section 6 (§ 7, Clayton Act)	15 U.S.C. § 18