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# Comment

## Pennsylvania Antitrust Law: What is the Commonwealth's Policy on Competition?

There is no antitrust statute in Pennsylvania.<sup>1</sup> One may question whether there is *any* antitrust law in Pennsylvania. The Supreme Court of Pennsylvania recently stated that the Sherman Act<sup>2</sup> is an application of the common law doctrine of restraint of trade to the field of *interstate* commerce;<sup>3</sup> the next question, then, is whether the common law doctrines are sufficient to control unreasonable restraints of trade in *intrastate* commerce. A parallel question is which of the restrictive trade practices now considered to be under the Sherman Act are contemplated in the Pennsylvania court's statement.

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1. Pennsylvania and Vermont are the only states without statutory provisions prohibiting contracts and combinations in restraint of trade. *See generally* [1981] 4 TRADE REG. REP. (CCH) ¶¶ 30,000-35,585.

2. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), in part provides:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. "This Court has previously recognized that the Sherman Act . . . 'is merely an application of the common-law doctrine concerning the restraint of trade to the field of interstate commerce.'" *Collins v. Main Line Bd. of Realtors*, 452 Pa. 342, 349, 304 A.2d 493, 496 (quoting *Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187*, 339 Pa. 353, 359, 14 A.2d 438, 441 (1940)), *cert. denied*, 414 U.S. 979 (1973).

The purpose of this comment is to discern the Commonwealth's public policy with regard to the kind of conduct which federal courts hold to violate the federal antitrust statutes. The federal laws reach conduct which has a not insubstantial effect on interstate commerce.<sup>4</sup> Despite the wide reach of the federal statutes, there is room for state antitrust enforcement:<sup>5</sup> for example, where there is no impact on interstate commerce; where the United States government, hampered by limited resources, has to select which cases to investigate and prosecute; or where the activity has a particular effect on the state government itself, as in price-fixing through bid-rigging for public contracts.<sup>6</sup>

This comment will discuss Pennsylvania cases dealing with common law restrictive trade practices such as price-fixing, tying agreements, exclusive dealing, agreements not to compete, and monopolizing. It includes a glance at certain regulatory statutes to see what policy, if any, with regard to competition is expressed by the Pennsylvania state legislature. Finally, it provides a short description of Pennsylvania's various trade and commerce statutes, and attempts to find some expression of a specific legislative policy.<sup>7</sup>

## I. COMMON LAW RESTRICTIVE TRADE PRACTICES

### A. *Horizontal Price-Fixing*

Horizontal price-fixing can be described as an agreement among competitors the purpose of which is to affect prices in an artificial manner.<sup>8</sup> In federal courts it is considered a per se offense. Justice Black defined per se offenses as follows:

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4. The United States Supreme Court in *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980), re-emphasized that the reach of the Sherman Act corresponds to the reach of the commerce clause, and held that there was a sufficient interstate effect in the financing of residential property and in the insuring of titles to the property for an alleged price-fixing conspiracy among local real estate brokers to meet the interstate component of Sherman Act jurisdiction.

5. Where there are concurrent federal and state remedies for trade conduct it is important for the practitioner to be aware that a determination in either forum will be res judicata in the other. *Federated Dep't Stores, Inc. v. Moitie*, 49 U.S.L.W. 4687 (1981).

6. See Katz & Horwitz, *The Need For A Legislative Antitrust Policy in Pennsylvania*, 83 DICK. L. REV. 1 (1978); Note, *Reviving State Antitrust Enforcement: The Problems with Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 573, 579 (1979).

7. For a brief summary of case and statutory law, see ABA SECTION OF ANTITRUST LAW, *STATE ANTITRUST LAWS (1973-1974)*.

8. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the United States Supreme Court said: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *Id.* at 223.

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . . Among the practices which the courts have heretofore decreed to be unlawful in and of themselves are price-fixing, . . . division of markets, . . . group boycotts, . . . and tying arrangements . . .<sup>9</sup>

An early landmark Pennsylvania price-fixing case, decided two decades before the 1890 enactment of the Sherman Act, is *Morris Run Coal Co. v. Barclay Coal Co.*<sup>10</sup> Five Pennsylvania coal companies had agreed to divide the coal regions which they controlled and to sell only at prices agreed upon. Any excess received by any of the companies was to be shared amongst those who may have received less. The action was brought for an amount due under this equalization plan. The agreement had been made in New York and was found to be in violation of a New York statute prohibiting conspiracies to commit acts injurious to, *inter alia*, trade or commerce. The Pennsylvania Supreme Court found the agreement also to be void at common law. The court made a strong statement for Pennsylvania with regard to agreements such as this where the parties obtain and exercise the power to control the market. The court emphasized that it is the combination, the conspiracy, which makes the contract injurious to the public:

They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. . . . The influence of a lack of supply or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offence. . . . In all such combinations where the purpose is injurious or unlawful, the gist of the offence is the conspiracy. . . . It is the effect of the act upon the public which gives [this case] its evil aspect as the result of confederation; for any baker might choose to hold up his own bread, or coal operator his coal, rather than to sell at ruling prices; but when he destroys competition by a combination with others, the public can buy of no one.<sup>11</sup>

In reaching its conclusion that the agreement was illegal and void, the Pennsylvania Supreme Court cited as authority several early

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9. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

10. 68 Pa. 173 (1871).

11. *Id.* at 186-87.

English and American cases on the doctrines of restrictive covenants<sup>12</sup> and conspiracy.<sup>13</sup> The case seems to be laying down new law for Pennsylvania in that the contracts or conspiracies cited are not on the scale of the scheme which the coal operators devised. Perhaps the court was deciding to make it clear to growing industries that unreasonable restraints of trade are prohibited to large industries, such as these Pennsylvania coal companies, as well as to the parties to a restrictive covenant in an employment contract.<sup>14</sup>

A second nineteenth century price-fixing case is *Nester v. Continental Brewing Co.*<sup>15</sup> This was an action for an account and for payment of money due from an unincorporated association of brewers to one of its members. The brewers had agreed among themselves to control the price of beer in the Philadelphia area. Despite the brewers' contention that the restraint was only partial and thus not unlawful, the court indicated that the test was not how broad or narrow the restraint, but whether it was injurious to the public interest. A secret combination to stifle competition and to enable the parties to control prices was void as against public policy. The contract was illegal, and the court refused to enforce it. It is interesting to note the language of the court in the brewing company case, as it foretells the language and sense of the Clayton Act.<sup>16</sup>

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12. See, e.g., *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Ch. 1711) (enforcing because reasonable a covenant not to compete incident to a contract for the sale of a bakery); *Keeler v. Taylor*, 53 Pa. 467 (1866) (finding void and against public policy a covenant not to compete in any location during the lifetime of party).

13. See, e.g., *Rex v. De Berenger*, 105 Eng. Rep. 536 (K.B. 1814) (finding an illegal conspiracy in the combination to raise public funds on a certain day by spreading false rumors). (The case is erroneously cited by the Pennsylvania court as *Rex v. De Berenquetal*, 68 Pa. at 187.) See also *Mifflin v. Commonwealth*, 5 Watts & Serg. 461, 462 (Pa. 1843) (indictment for conspiracy to effect the elopement of a young girl because "there are acts which, though innocent when done by an individual, are criminal when done in concert").

14. See 68 Pa. at 185.

15. 161 Pa. 473, 29 A. 102 (1894).

16. Section 3 of the Clayton Act, 15 U.S.C. § 14 (1976), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

The test question, in every case like the present, is whether or not a contract in restraint of trade exists which is injurious to the public interests. If injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the *natural tendency* of such contracts is injurious.<sup>17</sup>

This seems to be a refinement of the view expressed in *Morris Run Coal*, where the court had said:

An important principle stated in [the early English] cases is that as to contracts for a limited restraint the courts start with a presumption that they are illegal unless shown to have been made upon adequate consideration, and upon circumstances both reasonable and useful. . . . The general rule . . . is that all restraints of trade, if nothing more appear, are bad. . . . Testing the present contracts by these principles, the restrictions laid upon the production and price of coal cannot be sanctioned as reasonable in view of their intimate relation to the public interests.<sup>18</sup>

There is a development from the earlier concept of a presumption of illegality, rebuttable with a showing of reasonableness, towards the concept that if the contract tends to bring injury to the public it is void, and further inquiry into reasonableness is unnecessary.

These two early price-fixing cases seem to say that price-fixing is a *per se* offense in Pennsylvania.<sup>19</sup> This assumption appears to underlie the decisions in two later lower court cases, *Philadelphia Cleaners & Dyers Association v. Dollar Cleaners & Dyers, Inc.*<sup>20</sup> and *Chapter No. 768, Associated Master Barbers v. Gambino.*<sup>21</sup> In *Philadelphia Cleaners* the plaintiff, suing to enforce a price-fixing agreement between the members of the association and two unions, argued that the minimum price schedule was reasonable, that cleaning and dying was not a trade but a service, and that the law against price-fixing was outmoded and should be changed. To the reasonableness argument the court responded that to determine whether a price schedule was reasonable would require a hearing and, thus, in effect, give the court the task of fixing wages and profits. To the trade/service argument the court replied by citing a recent United States Supreme Court decision<sup>22</sup> holding that the Sherman Act applied to the dry cleaning industry. As to the last argument, the court held that it was not up to the trial court to change the law, and even if it were, price-fixing was injurious to the public, and,

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17. 161 Pa. at 481, 29 A. at 104 (emphasis added).

18. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 185-86 (1871).

19. Agreements whose purpose or effect is to control the prices in the marketplace have been held to be unlawful *per se* under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). See note 8 *supra*.

20. 19 Pa. D. & C. 327 (1933).

21. 27 Northampton County Rep. 6 (1939).

22. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932).

therefore, the common law doctrine against price-fixing should not be changed.

Similarly, the agreements between barbers and a barbers' union setting prices for barbering were held to be invalid in *Gambino*. The union sued to compel a barber to charge the minimum price agreed to in his union contract and argued the state's policy in favor of collective bargaining. The court found no quarrel with the collective bargaining agreement but refused to enforce the minimum price provision. "In the absence of permissive legislation, we conclude that contracts tending to limit competition and create monopolistic prices in favor of one group to the detriment of the public remain against public policy and are unenforceable."<sup>23</sup>

This conclusion by a lower court was reinforced more recently by the Pennsylvania Supreme Court in *Shuman v. Bernie's Drug Concessions, Inc.*<sup>24</sup> "[The plaintiffs'] conduct constitutes an unprotected price-fixing conspiracy in restraint of trade, illegal *per se* under section 1 of the Sherman Antitrust Act and unlawful at common law."<sup>25</sup> Horizontal price-fixing, therefore, can be said to be against the law in Pennsylvania.

### B. Vertical Price-Fixing

Vertical price-fixing occurs when manufacturers impose minimum or maximum prices on their sellers; in other words when those higher up in the chain of distribution attempt to control the market even though they have moved their product into the flow of commerce. Vertical price-fixing in interstate commerce is prohibited by the Sherman Act.<sup>26</sup> It has a complicated history in Pennsylvania because of the fair trade law<sup>27</sup> which was in force for a number of years pursuant to the Miller-

23. 27 Northampton County Rep. at 12.

24. 409 Pa. 539, 187 A.2d 660 (1963). See text accompanying note 31, *infra*.

25. 409 Pa. at 544, 187 A.2d at 663.

26. Vertical price fixing was condemned by the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Supreme Court decided on a rule of reason analysis for vertical territorial restrictions. "When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act." *Id.* at 59. Under the rule of reason the factfinder weighs all circumstances of the case to determine whether the practice in question unreasonably restrains competition. Under the *per se* rule, certain practices are presumed unreasonable without inquiry as to reasonableness or justification. Vertical price-fixing, unlike vertical territorial restraints, still seems to be a *per se* violation. See *id.* at 51 n.18.

27. Fair Trade Act, No. 115, 1935 Pa. Laws 266, as amended by Act of June 12, 1941, No. 66, 1941 Pa. Laws 128 (codified at PA. STAT. ANN. tit. 73, § 7 (Purdon 1971) (repealed 1976) provided in part:

No contract relating to the sale or resale of a commodity which bears, or the

Tydings Amendment and McGuire Act.<sup>28</sup> Under fair trade laws, resale price maintenance was permitted between a manufacturer and retailers of name brand products which were in fair and open competition with others of the same general class. There seems to have been a judicial dislike of this law, however, and the Pennsylvania Supreme Court interpreted it very strictly. In *Gulf Oil Corp. v. Mays*,<sup>29</sup> for example, the court denied an injunction to a national gasoline distributor seeking to prohibit a dealer from selling below the minimum prices set by the oil company. The court remanded the case so that the company could establish that its gasoline was of the same general class produced by others. The court explained why it would not automatically enforce the oil company's fair trade claim:

It is important to bear in mind that absent the protective federal and state legislation minimum resale price maintenance contracts will be unenforceable as contrary to our basic anti-monopoly philosophy of unfettered competition in the market of goods and services. Eminent authorities are highly critical of this exempting legislation on the grounds that it relieves distributors whose inventory consists largely of "fair trade" products from the pressures and tribulations of price competition, and in general facilitates price fixing efforts on the manufacturing and distributive levels, contrary to the most elementary principles of a dynamic free enterprise system.<sup>30</sup>

In addition to requiring strict compliance with the statute, the court rendered ineffective any devices contrived to take advantage of the statute. For example, in *Shuman v. Bernie's Drug Concessions, Inc.*,<sup>31</sup> five retail drug store owners, in order to combat a cut-rate druggist underselling them, requested certain manufacturers to sign fair trade contracts with them. They then complained to the manufacturers about the cut-rate druggist, but the manufacturers did nothing. The retailers thereupon sued for an injunction to restrain the competitor from sel-

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label or content of which bears, or the vending equipment from which said commodity is sold to a consumer bears the trademark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed a violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

28. The Miller-Tydings Act, ch. 690, tit. VIII, 50 Stat. 673 (1937) (repealed 1975); McGuire Act, Pub. L. No. 82-542, 66 Stat. 631 (1952) (current version at 15 U.S.C. § 45(a) (1976 & Supp. III 1979)).

29. 401 Pa. 413, 164 A.2d 656 (1960).

30. *Id.* at 418-19, 164 A.2d at 659.

31. 409 Pa. 539, 187 A.2d 660 (1963).



ling below the minimum price. The court saw this as a horizontal price-fixing agreement which had nothing to do with the protection from predatory price-cutting or with the protection of a trademark, which were ostensibly the purposes of the fair trade laws.<sup>32</sup> Presumably, with the repeal of the Fair Trade Act, vertical price fixing has no *raison d'être* and is once again, as one of the common law restraints of trade, unlawful in Pennsylvania.

### C. Restrictive Covenants

Restrictive covenants are generally found in employment contracts or in contracts for the sale of a business. The promisor binds himself not to engage in the same business as the employer or buyer within a certain area for a certain period of time. The purpose of the agreement is to protect the business of the promisee. The unlawful restraint of trade occurs when the agreement is too extensive in time and space or when, instead of being ancillary to another contract, it is itself essentially a contract not to compete. To be lawful the contract must have a main purpose to which the restrictive covenant is ancillary.<sup>33</sup> This concept is known as the "ancillary rule" and is followed in Pennsylvania.<sup>34</sup> The Pennsylvania courts, incidentally, have adopted the *Restatement of Contracts* sections which prescribe the standards for determining when contracts in restraint of trade are reasonable<sup>35</sup> and therefore lawful.

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32. *Id.* at 544, 187 A.2d at 663.

33. This doctrine was explained by the United States Court of Appeals for the Sixth Circuit in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (an agreement between manufacturers of cast iron pipe to raise prices for pipe in an area covering 75% of the nation was void at common law and under section 1 of the Sherman Act because it was in restraint of trade and tending toward monopoly, despite the apparent reasonableness of the price).

34. *Piercing Pagoda, Inc. v. Hoffner*, 465 Pa. 500, 351 A.2d 207 (1976).

35. *Harris Calorific Co. v. Marra*, 345 Pa. 464, 29 A.2d 64 (1942). *RESTATEMENT OF CONTRACTS* § 515 (1932) provides:

A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it

(a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or

(b) imposes undue hardship upon the person restricted, or

(c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or

(d) unreasonably restricts the alienation or use of anything that is a subject of property, or

(e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment.

In *Pennsylvania Funds Corp. v. Vogel*, 399 Pa. 1, 159 A.2d 472 (1960), *RESTATEMENT OF CONTRACTS* § 516(f) (1932) was adopted. Section 516 provides:

There are many Pennsylvania cases dealing with this type of agreement. An early case is *Keeler v. Taylor*,<sup>36</sup> concerning an agreement not to compete embodied in an employment contract. The plaintiff had agreed to instruct the defendant how to make platform scales and to employ him for a daily wage. The defendant agreed to pay the plaintiff fifty dollars for every scale he sold to anyone else. After seven years' employment, the defendant set up his own business; the plaintiff sued for an accounting and for fifty dollars for every scale sold. The court refused to uphold the contract because it found the contract contrary to public policy and void, adding that were it not void, it would not be enforced at equity either, because it was prejudicial to the public.<sup>37</sup>

The covenant in a buy-sell agreement is apparently viewed with less severity than one in an employment contract, as is seen in *Alabama Binder & Chemical Corp. v. Pennsylvania Industrial Chemical Corp.*,<sup>38</sup> a case involving both types of contract. A corporation purchased the stock held by its fifty percent shareholder. Part of the buy-sell agreement was an employment agreement, one of the provisions of which restricted the seller from taking employment with any competitor of the corporation for five years after termination of employment. The court treated this as a covenant not to compete ancillary to a buy-sell agreement, not subject to a reasonableness test as stringent as that applied to an employment contract, and upheld the agreement as reasonable in time and space.<sup>39</sup>

There is nothing unusual in Pennsylvania's law of covenants not to compete: contracts in restraint of trade are unreasonable and will not be enforced, unless they are ancillary to employment or buy-sell agreements. They will be enforced where the purpose is to protect the covenantee's business and where the restrictions are limited in time and space.

#### D. Tying Arrangements

The United States Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on condition

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The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly:

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(f) A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

36. 53 Pa. 467 (1867).

37. *Id.* at 470.

38. 410 Pa. 214, 189 A.2d 180 (1963).

39. *Id.* at 219-20, 189 A.2d at 184.

that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."<sup>40</sup> These agreements are illegal under the Sherman Act and under section 3 of the Clayton Act.<sup>41</sup> Although research has yielded no tying cases in the Pennsylvania state courts, a case where one of the counts was brought under Pennsylvania and common law has been heard in federal court.<sup>42</sup> Homeowners brought suit against mortgage lenders who required the borrower to deposit every month with the lender a sum equivalent to one-twelfth of the estimated annual local property tax levy plus an amount equal to one-twelfth of the annual fire insurance. These amounts were held by the lender until all taxes and insurance premiums were paid; the lenders paid no interest on the installment payments, nor did they make any allowance for them when calculating the interest due on the unpaid principle. As all the local lenders were alleged to follow this system and no mortgages could be obtained without the borrower agreeing to this arrangement, the plaintiffs asserted conspiracy and tying under the Sherman Act. They also asserted a pendent claim under the common law of restraints of trade. The defendants moved to dismiss the latter on the grounds that there was no such cause of action under Pennsylvania law. The court disagreed, citing the statement by the Pennsylvania Supreme Court that the Sherman Act was merely an application of the common law doctrine of restraints of trade to the area of interstate commerce.<sup>43</sup> The court found that the operative facts, the rights allegedly violated, and the theories of relief were identical for both the Sherman Act and the common law restraint of trade counts. One may question whether the plaintiffs would have had a cause of action had they brought suit in the state courts under the counts of conspiracy and tying. The answer depends on whether the court's statement in *Collins* concerning the Sherman Act is simply dictum or an affirmative statement of the law.<sup>44</sup>

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40. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958).

41. See notes 2 and 16 *supra*. See also United States v. Loew's, Inc., 371 U.S. 38 (1962); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947).

42. Beck v. Athens Building Loan and Savings Ass'n, 65 F.R.D. 691 (M.D. Pa. 1974).

43. See note 3 *supra*.

44. See, e.g., Note, *Collins v. Main Line Board of Realtors: "Open Door" Policy for Real Estate Multiple Listing Services*, 35 U. PITT. L. REV. 323 (1973). The suggestion is made that the language and conclusions in *Collins* would apparently allow a plaintiff alleging an unreasonable restraint of trade to bring suit under the common law. He would then argue the case under the federal decisions. The effect might be that Pennsylvania would have a judicially created "little Sherman Act" which would provide a remedy for the business person injured by unreasonable restraints of trade. *Id.* at 332-34.

A contradictory point of view was expressed in Cooper, *Attempts and Monopolization:*

A statute that expressly prohibited tying agreements would eliminate this uncertainty.

### E. *Exclusive Dealing*

When a buyer agrees not to use or deal in the goods of the competitors of his seller, the agreement is an exclusive dealing contract. Such contracts can be attacked under the Sherman Act and the Clayton Act.<sup>45</sup> In Pennsylvania the state of the law as to exclusive dealing is not clear, but there are a few cases which uphold this type of agreement.

The earliest Pennsylvania case is *Delaware and Hudson Canal Co. v. Pennsylvania Coal Co.*<sup>46</sup> The case involved a suit to cancel a contract whereby the canal company was bound to furnish the use of its canal to the coal company in return for a toll calculated on the basis of the price at which the coal was sold. The contract was upheld by the Supreme Court of Pennsylvania. A few years later, by special act of the legislature, the attorney general was directed to bring both parties before the court to investigate whether the agreement was in excess of their corporate powers.<sup>47</sup> One of the objections to the contract was that the canal company was bound to keep half of the capacity of the canal for the exclusive use of the coal company. Because there was no evidence of injury to the public, the court found no fault with the contract.<sup>48</sup>

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*A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 375 (1974).

[S]ome state courts [including the *Collins* court] announce that their common law embraces the principles that have been developed under the Sherman Act. . . . Even if this sort of statement may be taken at face value, as seems highly dubious, it is, of course, far from any reflection of what state law would have become even in such states without the impetus provided by federal legislation and decisions.

*Id.* at 431 n.214.

45. Under federal law, exclusive dealing arrangements can be attacked under section 1 of the Sherman Act and more specifically under section 3 of the Clayton act. See note 16 *supra*. "In practical application [of section 3], even though a contract is found to be an exclusive dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). *But see* section 2-306 of the Uniform Commercial Code codified at PA. STAT. ANN. tit. 12A, § 2-306 (Purdon 1970) (repealed and republished as 13 PA. CONS. STAT. ANN. § 2306 (1979)) and Pennsylvania Bar Association Notes thereunder, stating that requirement and output contracts are enforceable in Pennsylvania.

46. 21 Pa. 131 (1853).

47. *Commonwealth v. Delaware & Hudson Canal Co.*, 43 Pa. 295 (1862).

48. *Id.* at 302.

Other cases upholding exclusive dealing include *Bald Eagle Valley Railroad v. Nittany Valley Railroad*<sup>49</sup> where the court issued an injunction restraining the defendant from shipping iron ore from his furnace on any railroad other than the plaintiff's, as he had agreed by contract. In *Arons v. Kopf*<sup>50</sup> an agreement between a supplier and a retailer that the supplier not sell through any other retailer in town was upheld. The court found that it was not against public policy, that rather than a public injury, such an agreement giving one dealer exclusive control of a line of goods could be a community convenience.<sup>51</sup> Similarly, a contract of a manufacturer of spray paint, giving a distributor exclusive world-wide rights to distribute the paint, was held not unlawful.<sup>52</sup> From these cases, the most that can be said is that exclusive dealing is not forbidden in Pennsylvania without a showing of injury to the public. Once again, a statute providing specific guidance would tell Pennsylvania lawyers and businessmen exactly what they may not do, rather than leaving them in the imprecise world of common law doctrines which may or may not be the law in Pennsylvania.

#### F. Monopoly and Monopolizing

Monopoly is unlawful, at least where it involves an intent to control the market and to exclude competitors. It is specifically prohibited by section 2 of Sherman Act, although the precise nature of the violation is not defined. The courts have struggled with the tests to be used for finding a violation, as is shown in Judge Wyzanski's opinion in *United States v. United Shoe Machinery Corp.*<sup>53</sup>

In analyzing monopolization, the basic inquiries are two:

- (1) how much market power is necessary to constitute "monopoly power"; and (2) what additional element, if any, of conduct or "intent" is necessary to establish the monopolization offense. The related subsidiary questions are these: (3) If § 2 requires more than monopoly power, what kinds of conduct or intent transform monopoly into unlawful monopolization; and (4) what defenses, if any, save monopoly power from condemnation.<sup>54</sup>

It is not within the scope of this comment to analyze monopolization beyond the point of emphasizing that it is an area of great complexity which has evolved considerably in the last century.<sup>55</sup> It is a part of the

49. 171 Pa. 284, 33 A. 239 (1895).

50. 21 Pa. Super. Ct. 123 (1902).

51. *Id.* at 125-26.

52. *Maxwell v. Schaefer*, 381 Pa. 13, 112 A.2d 69 (1955).

53. 110 F. Supp. 295, 341-46 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

54. III P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 600 (1978).

55. *See Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). *See also* Levi, *The Antitrust Law and Monopoly*, 14 U. CHI. L. REV. 153 (1947).

common law tradition, although that tradition itself has been subject to a certain flux and flow.<sup>56</sup> And it is an area which seems to call for a statute. In Pennsylvania the cases do not give any guidance: *Morris Run Coal Co. v. Barclay Coal Co.*<sup>57</sup> speaks strongly against monopolistic practices, basing its decision on the common law doctrines, but there are later cases startling in their contradiction of the view expressed in *Morris Run Coal*. In *Monongahela River Consolidated Coal and Coke Co. v. Jutte*<sup>58</sup> the plaintiff corporation had bought nearly all the coal mines along the Monongahela River. He acquired most of the boats and most of the coal landings. As a result, he shipped eighty-five to ninety percent of all coal shipped by river out of the Monongahela valley. The defendant organized a corporation to mine and ship coal along the Monongahela, Ohio, and Mississippi rivers, despite a contract with the plaintiff that he would not mine or ship coal on the three rivers for ten years except in conjunction with the plaintiff. The lower court issued an injunction against the defendant. The Pennsylvania Supreme Court affirmed as to the intrastate activity but it stated that because of the Sherman Act it could not enjoin the mining and marketing of coal outside Pennsylvania. The policies of the Sherman Act apparently had no impact on the court's perception of restrictive covenants. The decision provides further evidence of the need for a Pennsylvania statute expressing the state's policy without equivocation.

The *Jutte* case was followed a few years later in *Harbison-Walker Refractories Co. v. Stanton*.<sup>59</sup> In connection with a buy-sell agreement, the defendant agreed not to manufacture, buy, sell, or deal in silica brick or clay fire brick in Pennsylvania, Kentucky, New Jersey, Maryland, or Ohio for fifteen years without the plaintiff's consent. The plaintiff's purchase of the defendant's business brought about a consolidation of Pennsylvania fire brick companies and gave the plaintiff control of sixty to seventy percent of this type of brick sold in Pennsylvania and elsewhere. Incidentally, the prices of brick rose ten percent after the acquisition. If this were within the reach of the Sherman Act, there would be a question about the monopoly power—*i.e.*, the power to exclude competition or to control prices—being wrongfully wielded by these companies. The Pennsylvania Supreme Court, however, saw no monopolizing and no illegal restraint of trade, but rather a legitimate business transaction to which the restraint was incidental. In its rationale, the court distinguished between legitimate

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56. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

57. 68 Pa. 173 (1871).

58. 210 Pa. 288, 59 A. 1088 (1904).

59. 227 Pa. 55, 75 A. 988 (1910).

business transactions and combinations to stifle competition and arbitrarily increase prices.<sup>60</sup>

Both these cases concern restrictive covenants. They are mentioned in this section because the court in each case discussed, however briefly, the question of monopolizing. There are no cases where the plaintiff is a competitor being put out of business by the defendant's predatory monopolistic behavior. In each Pennsylvania case mentioned above the defendant breached a contract with the plaintiff and attempted to justify the breach by pleading the illegality of the contract. If there were a statute specifically forbidding monopolies, as there is in almost every other state, there would be more consistency and predictability as to what is lawful, and lawyers and businessmen would no longer have to depend on decisions rendered in cases brought against disgruntled contract breachers.

An interesting perception of the Sherman Act is presented in a law review article analyzing the historical development of the common law of monopoly:

[T]he Sherman Act went far beyond the common law where it authorized injured persons to sue, and the Attorney General to indict violators of the Act, making it possible to enforce competition actively. The Act was therefore much more an innovation than its authors realized. It did not, as they thought, merely declare the common law. It can almost be said to have helped create the common law, insofar as its authors' convictions helped spread the belief that the common law always expressed as much antagonism to monopoly as they wrote into the Sherman Act.<sup>61</sup>

In view of the Pennsylvania Supreme Court's description of the Sherman Act as merely the common law applied to interstate commerce, the question arises again: what common law? *Darcy v. Allein (the Case of Monopolies)*<sup>62</sup> has been described as the greatest single step in creating the modern common law on monopolies.<sup>63</sup> But there is

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60. The court said:

There should be and is a distinction between a consolidation of properties by purchase for legitimate business reasons in order to increase production and reduce cost, and a combination of owners and properties under one management which in many instances stifles competition and arbitrarily increases prices. As we read the cases construing the anti-trust statute the rule established seems to be that it has no application where the contract sought to be declared illegal concerns a legitimate business transaction and the unlawful restraint complained of is only incidental or collateral.

*Id.* at 63, 75 A. at 990. See also *City Ice Co. v. Easton Merchants Ice Co.*, 267 Pa. 500, 110 A. 350 (1920).

61. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 385 (1954) [hereinafter cited as Letwin].

62. 77 Eng. Rep. 1260 (K.B. 1603).

63. Letwin, *supra* note 61, at 363.

a question whether a case holding void a monopoly of the importation of playing cards into seventeenth century England is adequate to deal with schemes that twentieth century businessmen can devise.

A significant, oft-cited, more recent case is *Schwartz v. Laundry & Linen Supply Drivers' Union*,<sup>64</sup> involving a labor contract between laundry companies and the union. The companies agreed not to accept work from independent operators known as "bobtails," who were both competitors and customers of the companies in that they solicited business independently, but also contracted with the companies for laundry service. Only those bobtails already under contract would be dealt with. There were other restrictive provisions in effect cutting out business from the bobtails, who were a threat to the companies because they charged lower prices. The Pennsylvania Supreme Court invalidated the contract for various restraints of trade including illegal allocation of customers, attempting to keep newcomers to the field out of business, and price-fixing. The court held the contract in violation of the "common-law prohibition of monopolies and unreasonable restraints of trade."<sup>65</sup> Although the court cited certain Pennsylvania restraint of trade cases,<sup>66</sup> it did not cite either *Morris Run Coal* or *Jutte*. In *Jutte* the court had said that it doubted that the older ruling of *Morris Run Coal* would stand and asserted the public policy of Pennsylvania to be that of encouraging and promoting large aggregation of corporate capital for the development of all the Commonwealth's resources.<sup>67</sup> Perhaps the *Schwartz* court decided to avoid the embarrassment of switching positions by ignoring both cases and basing its

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64. 339 Pa. 353, 14 A.2d 438 (1940).

65. *Id.* at 362, 14 A.2d at 442.

66. Philadelphia Cleaners & Dyers Ass'n v. Dollar Cleaners & Dyers, Inc., 19 Pa. D. & C. 327 (1933); Chapter No. 768, Associated Master Barbers v. Gambino, 27 Northampton County Rep. 6 (1939); Ford Motor Co. v. Quinn, 70 Pa. Super. Ct. 337 (1918).

67. The Court said:

As we understand the public policy of this Commonwealth, both as disclosed in the constitution of 1874 and as apparent in all the legislation since, it is to encourage and promote large aggregations of corporate capital for the development of all the commonwealth's resources.

The last case in this state distinctly following the older rulings, is *Morris Run Coal Co.* . . . That case held to the principle that all restraints on trade are injurious to the public, and, therefore, presumably illegal and void on the ground of public policy. . . . While we have no doubt as to the soundness of the general principle laid down in that case, we doubt if today the court would hold on the particular facts developed, that the principle was applicable to those facts.

We think that perhaps at this day we would go further, and inquire whether in view of the purpose of the contract and the slight restraint it imposed on trade, it was unreasonable and therefore void, and not void solely because it to a certain extent monopolized the production of coal.

210 Pa. at 299-300, 59 A. at 1092.



decision on the new Sherman Act cases instead.<sup>68</sup> Although the case is not a monopolizing case, it seems to follow the fundamental abhorrence of anticompetitive monopolistic behavior expressed in *Morris Run* and the subsequent cases which most clearly express a free market policy in Pennsylvania.

### G. *Price Discrimination and Predatory Pricing*

Price discrimination occurs when a seller charges different competing reselling buyers different prices for the same merchandise. It is prohibited by the Robinson-Patman Act of 1936,<sup>69</sup> the purpose of which was essentially to prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among buyers, and to prevent large volume buyers from using their economic leverage to exact discriminatory prices from suppliers to the disadvantage of less powerful buyers.<sup>70</sup>

There is no such statute in Pennsylvania. Arguably, because price discrimination is a statutory offense, and Pennsylvania follows merely the common law tradition of restrictive trade practices, there is no cause of action in Pennsylvania for discriminatory pricing.

However, section 3 of the Robinson-Patman Act<sup>71</sup> prohibits predatory pricing, a type of conduct arguably also proscribed by section 2 of the Sherman Act.<sup>72</sup> The question becomes whether predatory pricing, if not coupled with price discrimination, is a common law offense. If it is, then predatory pricing arguably is against the law in Pennsylvania. Most of the cases where the Pennsylvania courts discuss predatory pricing are fair trade cases where the court explains that one of the reasons for fair trade laws was the prevention of predatory pricing.<sup>73</sup> This impliedly assumes that predatory pricing is unlawful. But even if predatory pricing is not presumptively unlawful, the Penn-

68. *Apex Hosiery v. Leader*, 310 U.S. 469 (1940); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932). See also note 44 *supra*.

69. The Robinson Patman Act, 15 U.S.C. §§ 13 to 13b, 21a (1976). See *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961).

70. E. KINTNER, *AN ANTITRUST PRIMER* 61 (2d ed. 1973).

71. 15 U.S.C. § 13a (1976) provides in pertinent part:

It shall be unlawful . . . to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

72. III P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 711 (1978).

73. See, e.g., *Gillette Co. v. Master*, 408 Pa. 202, 182 A.2d 734 (1962).

sylvania Unfair Sales Act<sup>74</sup> reaches the more blatant instances, as it prohibits sales below cost where the seller's intent is to injure a competitor or lessen competition. It is perhaps not incorrect to suggest that there is a similarity between the little-used section 3 of the Robinson-Patman Act, which subjects those engaged in malicious below-cost pricing to criminal penalties, and Pennsylvania's Unfair Sales Act, which makes a violation of the Act a misdemeanor subject to criminal penalties.

#### H. *Other Restrictive Trade Practices*

With regard to mergers, there is no statutory prohibition in Pennsylvania;<sup>75</sup> under federal law, mergers are controlled by section 7 of the Clayton Act<sup>76</sup> and by the Sherman Act. In order to challenge a merger in intrastate activity, one would need to use as authority the anti-monopoly language of such cases as *Morris Run Coal*,<sup>77</sup> *Jutte*,<sup>78</sup> and *Schwartz*.<sup>79</sup> Similarly, as to interlocking directorates, which are subject to section 8 of the Clayton Act,<sup>80</sup> the only prohibition in Pennsylvania is for insurance companies: section 337.2 of the Insurance Company Law of 1921<sup>81</sup> restricts interlocking directorates where there is a risk of monopoly or of substantially lessening competition. Otherwise, there is only the fiduciary duty<sup>82</sup> of corporate officers and directors as a restriction on misfeasance due to interlocking directorships.<sup>83</sup>

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74. PA. STAT. ANN. tit. 73, §§ 211-217 (Purdon 1971). Section 213 provides:

It is hereby declared that advertisement, offer to sell or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent of unfairly diverting trade from or otherwise injuring a competitor or with the result of deceiving any purchaser or prospective purchaser, substantially lessening competition, unreasonably restraining trade or tending to create a monopoly in any line of commerce is an unfair method of competition contrary to public policy and in contravention of the policy of this act.

75. PA. STAT. ANN. tit. 15, § 1901 (Purdon 1967 & Supp. 1981-1982) authorizes the merger of any two or more business corporations.

76. 15 U.S.C.A. § 18 (1973 & Supp. 1980). See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

77. See note 10 *supra*.

78. See note 58 *supra*.

79. See note 64 *supra*.

80. 15 U.S.C. § 19 (1976).

81. PA. STAT. ANN. tit. 40, § 459.2 (Purdon 1971).

82. PA. STAT. ANN. tit. 15, § 1408 (Purdon Supp. 1980).

83. *Bowman v. Gum, Inc.*, 327 Pa. 403, 193 A. 271 (1937); *Evans v. Armour & Co.*, 241 F. Supp. 705 (E.D. Pa. 1965). See also Ward, *Some Notes on Transactions Involving Interested and Interlocking Directors in Pennsylvania*, 23 TEMPLE L.Q. 107 (1949) (transactions between corporations with interlocking directors are not void but merely voidable, although they are void when on close scrutiny fraud and unfairness is revealed).

### I. Summary

The *Collins* case tells the Pennsylvania lawyer that the Sherman Act is a codification of the common law.<sup>84</sup> The cases in the Pennsylvania courts tell us, in general, that certain restraints of trade are illegal. Price-fixing (horizontal and vertical), market allocation, customer allocation,<sup>85</sup> and monopoly are unlawful according to *Morris Run Coal* and *Schwartz*. Group boycotts and refusals to deal are arguably forbidden by *Schwartz*. There is also language in *Jutte* condemning monopoly. Tying, exclusive dealing, mergers, and interlocking directorates may or may not be illegal in Pennsylvania.

There is policy to be extracted from these cases, but the lawyer can probably find cases expressing whichever policy he chooses. It is not clear whether Pennsylvania is a strong pro-competition state. Certainly some judges have thought so. If one builds on the premise that price-fixing is consistently held to be illegal and that monopoly and unreasonable restraints of trade are said to be against public policy, it is arguable that there is a fundamental free competition policy in Pennsylvania. But without a statute making this unequivocally clear, there will be cases such as *Jutte* saying that, depending on the method chosen, competition may be lawfully hampered.<sup>86</sup>

One can argue that because Pennsylvania is a highly industrial state it should have, as do other such states, an antitrust statute, though the great industries in Pennsylvania are probably, by virtue of their national and multi-national character, comfortably within the purview of the federal statutes. It would be the smaller, particularly local, businesses which can escape the Sherman Act, but whose restrictive practices might well raise the cost of living for the residents of the Commonwealth, that would be the targets of a state statute. There is a need for antitrust enforcement power in Pennsylvania giving ability to the attorney general and private parties to move against local restraints of trade.<sup>87</sup> The need, specifically, is for legislation and for adequate funding to implement it.

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84. See note 3 *supra*.

85. Horizontal market division agreements are usually treated similarly to price-fixing agreements under the Sherman Act. See *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972). This practice involves agreements among competitors dividing a product or geographic market.

86. *Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. 288, 300, 59 A. 1088, 1092 (1904).

87. Katz & Horwitz, *The Need For A Legislative Antitrust Policy in Pennsylvania*, 83 DICK. L. REV. 1 (1978). See also Fellmeth, *Public Prosecution of Local Antitrust Violators: A Survey of State Laws*, [1975] 4 CLASS ACTION REP. 365.

## II. REGULATED INDUSTRIES

In order to ascertain whether there is any implicit or explicit legislative antitrust policy in Pennsylvania, a survey has been made of certain statutes governing regulated industries. This comment does not claim to be exhaustive. The scope is limited to statutes, arbitrarily selected, which touch on certain significant parts of intrastate commercial activity.

At the federal level, the regulated industries are deemed to be exempt, at least to some extent, from antitrust legislation.<sup>88</sup> The regulatory statutes substitute other controls and regulations for the antitrust laws, and as a result there is a separation of regulatory policy and antitrust policy according to the determinations made for the particular industry by the legislature.<sup>89</sup> Some federal regulatory statutes have provisions requiring the agency to give consideration to possible anti-competitive effects;<sup>90</sup> the Clayton Act gives some agencies the authority to enforce certain sections of the Act;<sup>91</sup> alternatively, the courts themselves will look at the anti-competitive behavior of an industry.<sup>92</sup>

A defendant may argue that a federal regulatory statute has impliedly repealed the Sherman Act with respect to his industry. Where Congress intended to repeal the antitrust laws, that intent governs.<sup>93</sup> But even substantial regulation does not in itself imply intent to repeal the antitrust laws. The United States Supreme Court recently held, in

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88. *But see* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), where the United States Supreme Court said that a power company was not immune from antitrust prosecution despite the regulation of the interstate distribution of power by the Federal Power Commission. *See generally* I P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 221-230 (1978); 3 H. TOULMIN, *A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES INCLUDING ALL RELATED TRADE REGULATORY LAWS* (1949 & Supp. 1980).

89. Professors Areeda and Turner have explained this dichotomy thus:

Competition enforced by the antitrust laws is sometimes thought impossible or inappropriate. Accordingly, special statutes have been enacted to modify, complement, or displace the competitive premises and rules of the antitrust laws. The normal antitrust standard may be expressly modified in relatively limited particulars. . . . Or the antitrust laws may be substantially displaced in varying degrees. . . . Or an industry may be subjected to direct and continuing regulation by an administrative agency whose jurisdiction affects the application of the antitrust laws in diverse and complex ways.

I P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 221, at 133 (1978) (footnotes omitted).

90. *See, e.g.*, Communications Act of 1934, § 313, 47 U.S.C. § 313 (1976) (Federal Communications Commission); 49 U.S.C. § 1302(a)(4) (Supp. III 1979) (Civil Aeronautics Board).

91. 15 U.S.C. § 21 (1976 & Supp. III 1979).

92. *See, e.g.*, *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

93. *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 710-20 (1975).

*National Gerimedical Hospital v. Blue Cross of Kansas City*,<sup>94</sup> that the Blue Cross Association, implementing health plans under the National Health Planning and Resources Development Act (NHPRDA),<sup>95</sup> was not immune from the antitrust laws. The plaintiff filed suit under the Sherman Act alleging refusal to deal and conspiracy. The court analyzed the purpose of the NHPRDA and reviewed its own decisions in the area of implied repeals of antitrust laws. The court reiterated the rule that antitrust immunity can be implied only where there is a clear repugnancy between the antitrust laws and the regulatory systems.<sup>96</sup> In this case not only was there no such conflict, but the anti-competitive action taken by Blue Cross was neither compelled nor approved by the regulatory body and, furthermore, there was no reason to believe that Congress intended to immunize the health care industry's private conduct from the antitrust laws under the NHPRDA.<sup>97</sup> This case is a further reminder to practitioners that immunity from the antitrust laws must be clearly indicated by Congress, in a regulatory statute, before anti-competitive behavior in the regulated industry will be permitted.

#### A. *Banking*

The banking industry had thought that banking was exempt from the antitrust laws. But in two cases the United States Supreme Court disabused bankers of that illusion, finding the consolidation of the banks in question to be violations of the Clayton Act and the Sherman Act.<sup>98</sup> Much banking activity has interstate ramifications, thus bringing itself within the purview of the federal antitrust laws. However, banking is subject to considerable state regulation, and purely local banking conceivably could be considered merely intrastate activity, or else be of insufficient significance for the federal government to choose to pursue it.<sup>99</sup> In Pennsylvania, banks are regulated by the Banking Code of

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94. 49 U.S.L.W. 4673 (1981).

95. 42 U.S.C. § 300l (1976).

96. 49 U.S.L.W. at 4675. *Accord*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

97. 49 U.S.L.W. at 4675.

98. *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964) (merger a violation of section 1 of the Sherman Act); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (merger a violation of section 7 of the Clayton Act; citing cases to the effect that repeal of the antitrust laws by implication from regulatory statutes is strongly disfavored).

99. See Katz & Horwitz, *The Need For A Legislative Antitrust Policy in Pennsylvania*, 83 DICK. L. REV. 1, 13 (1978); Note, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine In Old Wine Skins*, 4 J. CORP. L. 547, 573 (1979).

1965.<sup>100</sup> The declared purpose of the statute is to provide, *inter alia*, for banks to be competitive with each other and with other financial institutions.<sup>101</sup> The comment to the Banking Code by the Banking Law Commission explains the basic premise to be that banks must be able to meet competition.<sup>102</sup> This is protective language rather than competitive. Competition in the antitrust sense appears to be contemplated only in the section on mergers, where there is an instruction to consider the effects of a merger on competition.<sup>103</sup> The Banking Law

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100. PA. STAT. ANN. tit. 7, §§ 101-2204 (Purdon 1967 & Supp. 1980). See also Savings Association Code of 1967, PA. STAT. ANN. tit. 7, § 6020-1 to -254 (Supp. 1980).

101. PA. STAT. ANN. tit. 7, § 103(a) (Purdon 1967) provides that the purposes of the Act are:

- (i) The safe and sound conduct of the business of institutions subject to this act,
- (ii) The conservation of their assets,
- (iii) The maintenance of public confidence in them,
- (iv) The protection of the interests of their depositors, creditors and shareholders and the interests of the public in the soundness and preservation of the banking system,
- (v) The opportunity for institutions subject to this act to remain competitive with each other, with financial organizations existing under other laws of this Commonwealth, and with banking and financial organizations existing under the laws of other states, the United States and foreign countries,
- (vi) The opportunity for institutions subject to this act to serve effectively the convenience and needs of their depositors, borrowers and other customers, to participate in and promote the economic progress of Pennsylvania and the United States and to improve and expand their services and facilities for those purposes,
- (vii) The opportunity for the management of institutions to exercise their business judgment, subject to the provisions of this act, in conducting the affairs of their institutions, to the extent compatible with, and subject to, the purposes recited in the preceding clauses of this subsection (a),
- (viii) A delegation to the department of adequate rulemaking power and administrative discretion, subject to the provisions of this act and to the purposes stated in this subsection (a), in order that the supervision and regulation of institutions subject to this act may be flexible and readily responsive to changes in economic conditions and to changes in banking and fiduciary practices, and
- (ix) Simplifications and modernization of the law governing banking and governing the exercise of fiduciary and other representative powers by corporations.

102. See *id.* Comment—Banking Law Commission.

103. PA. STAT. ANN. tit. 7, § 1604 (Purdon 1967) provides in relevant part:

(a) Upon receipt of an application for approval of a merger or consolidation and of the supporting items required by subsection 1603(e), the department shall conduct such investigation as it may deem necessary to ascertain whether:

...  
 (iv) The merger or consolidation would be consistent with adequate and sound banking and in the public interest on the basis of

...  
 (D) The potential effect of the merger or consolidation on competition.

See also a parallel section directed to the merger of savings associations at PA. STAT. ANN. tit. 7, § 1609(e)(i)(E)(4) (Supp. 1979).

Commission's comment<sup>104</sup> to this section explains that the competitive test, new in 1965, is similar to a test applied by federal authorities under the Bank Merger Act of 1960.<sup>105</sup> The question to ask is how firm is the Pennsylvania legislative intent: is it reflective of a new antitrust awareness or is it merely lip service to a trend? Illinois, New York, and Tennessee have in their statutes<sup>106</sup> antitrust language which makes their statutes look seriously pro-competitive.

Although the Pennsylvania legislature has barely spoken, the courts seem to have some concern for protecting freedom of competition. In *Farmers Bank of Kutztown v. Commonwealth of Pennsylvania Department of Banking*<sup>107</sup> the court upheld the approval by the agency of a bank's application to establish a branch office. One of the points of apparent significance to the court was that the parties had extensively briefed the antitrust implications of the possibly anticompetitive result of the establishment of the new branch, and that the agency had shown its concern for the antitrust implications of the decisions it would be making.<sup>108</sup>

Often in such cases, the court is reviewing an agency decision to permit a new bank or branch to be put into operation. These are not cases of private plaintiffs complaining of restrictive trade practices

104. PA. STAT. ANN. tit. 7, § 1604, Comment—Banking Law Commission (Purdon 1967).

105. The Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129. The current version of the Act may be found at 12 U.S.C.A. § 1828 (1980).

106. The Bank Holding Company Act of 1967, ILL. ANN. STAT. ch. 16½, § 71 (Smith-Hurd 1972), provides: "It is held to be in the public interest that competition prevail in the banking system and to that end that the independence of unit banks be protected."

N.Y. BANKING LAW § 601-b(1)(iii) (McKinney 1971) provides that before approval or disapproval of mergers the agency should consider "whether such merger or acquisition may result in such a lessening of competition as to be injurious to the interests of the public or tend toward monopoly."

The Tennessee Banking Act, TENN. CODE ANN. § 45-1-102 (1980), provides in relevant part:

(b) This underlying purpose includes but is not limited to providing for:

...

(4) The opportunity for banks subject to said chapters to compete with other businesses including, but not limited to, other financial organizations. . . .

(c) It is not purpose of chapters one and two of this title to restrict the activities of banks for the purpose of protecting any person . . . from competition from banks and said chapters do not confer any right or cause of action upon any competitor. TENN. CODE ANN. § 45-2-205 (1980), in listing the factors to be considered in the determination of whether to grant an application for a charter includes: "(5)(A) The competition offered by existing banks and other financial institutions." See generally Note, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 YALE L.J. 502 (1962).

107. 17 Pa. Commw. Ct. 454, 333 A.2d 253 (1975).

108. *Id.* at 457-58, 333 A.2d at 255-56.

such as a uniformity of rates or of other arrangements with regard to loans, for example. The court as a rule simply reviews the agency decision under the substantial evidence test and defers to the expertise of the agency.<sup>109</sup> Because of this standard of review, and the fact that the issue of anti-competitive behavior arises only in the merger situation, it is submitted that it is the legislature's task to instruct the agency and the courts that regulation for the protection of the public and for the economic health of the banks is not incompatible with a free enterprise policy. There are plenty of practices from which banks should be barred and on which survival of the banks and protection of the public do not depend.<sup>110</sup>

### B. Public Utilities

Much has been written about antitrust policy and public utilities.<sup>111</sup> In *Otter Tail Power Co. v. United States*<sup>112</sup> the court made it clear that on the federal level regulation does not absolve public utilities from the duty to comply with the antitrust laws. It has been suggested that antitrust law "has sufficient sensitivity and flexibility to operate satisfactorily within the electric utility industry in the appropriate context,"<sup>113</sup> particularly under the rule of reason rather than the per se rule. Assuming that there are practices within the industry that are unnecessarily anti-competitive and that there is room for reconciliation of the two policies, a survey was made through Pennsylvania's public utility statutes to find any legislative awareness of or disregard for such antitrust policy.

The cases under the Public Utility Code tend, again, to refer to the legislative intent to leave decisions about competition to the sound discretion of the Public Utility Commission (P.U.C.).<sup>114</sup> And as with the

109. See, e.g., *First Nat'l Bank of Pike County v. Department of Banking*, 7 Pa. Commw. Ct. 603, 300 A.2d 823 (1973); *Blairsville Nat'l Bank v. Myers*, 409 Pa. 526, 187 A.2d 655 (1963).

110. See generally Berle, *Banking under the Anti-Trust Laws*, 49 COLUM. L. REV. 589 (1949); Cohen, *The Antitrust Laws Applied to Bank Mergers, Reciprocity and the Tie-In Arrangements*, 26 BUS. LAW. 1 (1970); Hablutzel, *State Regulation of Branch Banking*, 16 DUQ. L. REV. 679 (1978); Phillips, *Bank Mergers, Branch Banking, and Bank Holding Companies in Pennsylvania*, 115 U. PA. L. REV. 560 (1967).

111. See, e.g., Primeaux, *A Reexamination of the Monopoly Market Structure for Electric Utilities*, in PROMOTING COMPETITION IN REGULATED MARKETS (A. Phillips ed. 1975); Watson & Brunner, *Monopolization by Regulated "Monopolies": the Search for Substantive Standards*, 22 ANTITRUST BULL. 559 (1977).

112. 410 U.S. 366 (1973).

113. Shenefield, *Antitrust Policy within the Electric Industry*, 16 ANTITRUST BULL. 681, 723-24 (1971). The author analyzes the operation of the electrical industry at the wholesale level with respect to restrictive trade practices such as market division, refusals to deal, joint and individual, and joint venture.

114. See, e.g., *Philadelphia-Pittsburgh Carriers, Inc. v. Pennsylvania PUC*, 185 Pa.



bank cases cited above, there do not seem to be cases where private plaintiffs are suing other private parties for anti-competitive practices. An exception to the first statement is seen in a couple of cases involving motor carriers. In *Chemical Leaman Tank Lines v. Pennsylvania Public Utility Commission*<sup>115</sup> the court affirmed a grant of rights to three railroad motor carrier subsidiaries and an enlarging of existing rights of two independent motor carriers to transport cement. The carrier who already had these rights appealed the grant, asserting the error of the P.U.C. in allowing additional motor carriers. The court said that it was important to inject an element of competition into the industry, that the primary consideration of the P.U.C. was to serve the public interest, that the extent of competition was left to the discretion of the P.U.C., and that the injection of competition sponsored by consumers would further the public interest and tend to eliminate the trend towards monopolistic practices.<sup>116</sup> In a case where the Commission had found monopolization of the motor transport market for cement in eastern Pennsylvania, however, the court reversed the Commission, saying, "Although the commission does not have jurisdiction to determine whether a proposed application is in violation of the anti-trust laws, it may consider the policy of the antitrust laws in determining the issue of public convenience and necessity and the issue of competition."<sup>117</sup> Assuming that the laws referred to are the federal laws, were there an expressed legislative policy to the same effect in Pennsylvania, the Commission would have more precise guidance as to the factors it must consider, such as antitrust considerations, and perhaps there would be more consistency of result.

### C. *The Pennsylvania Liquor Code*

The twenty-first amendment to the United States Constitution gives the states substantial control over the sale and distribution of alcoholic beverages, although Congress also can regulate liquor under the interstate commerce power.<sup>118</sup> The United States Supreme Court in

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Super. Ct. 588, 138 A.2d 693 (1958); *Paradise v. Pennsylvania PUC*, 184 Pa. Super. Ct. 8, 132 A.2d 754 (1957); *Pittsburgh & Lake Erie R.R. v. Pennsylvania PUC*, 170 Pa. Super. Ct. 411, 85 A.2d 646 (1952).

115. 201 Pa. Super. Ct. 196, 191 A.2d 876 (1963).

116. *Id.* at 209, 191 A.2d at 882. The court cited *FTC v. Cement Inst.*, 333 U.S. 683 (1948) (brought under the Federal Trade Commission Act § 5, 15 U.S.C. § 45; a combination to employ a multiple basing point system of pricing was an unfair trade practice to be suppressed because it would result in complete destruction of competition and the establishment of monopoly in the cement industry).

117. *Chemical Tank Lines, Inc. v. Pennsylvania PUC*, 193 Pa. Super. Ct. 607, 626-27, 165 A.2d 668, 677 (1960), *aff'd*, 406 Pa. 359, 178 A.2d 698 (1962).

118. I P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 210 (1978).

*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*<sup>119</sup> recently clarified how far the states may go in controlling the liquor industry. In this case, California's statutory wine pricing plan, which allowed for resale price maintenance, was held to be subject to Sherman Act proscription and not shielded by state action immunity or the twenty-first amendment. The court said:

[T]here is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."<sup>120</sup>

Given this very strong federal interest, the state's policy behind the pricing system, promoting temperance and protecting small businesses, was not shown to be furthered by the system, and thus was not a "substantiated" state concern. For these reasons, the state interest had to give way to the federal policy favoring competition.

In Pennsylvania, wine and liquor are sold by state-run liquor stores. Beer is sold, subject to state restriction, by private distributors, and arguably under the rules that govern the marketplace. Over twenty years ago the United States brought suit in Pennsylvania under the Sherman Act against local beer distributors for conspiracy to eliminate competition in the sale of beer to consumers in Erie county.<sup>121</sup> The charges involved fixing prices, mark-ups, and delivery charges, and enforcing these by boycott. The distributors appealed their convictions on the theory that the federal government had no jurisdiction because of the twenty-first amendment, and that trade in beer and malt beverages had a special status, being regulated under the state's police powers. The United States Court of Appeals for the Third Circuit disagreed:

[T]he Code permits the functioning of a private entrepreneurial system in the sale and distribution of malt and brewed beverages by the authorization of the issuance of licensing to private persons for engaging in the business of purchasing and distributing such beverages. . . . No decision of the Pennsylvania Courts looks in the opposite direction. There is nothing in the law of Pennsylvania, decisional or otherwise, which authorizes the fixing of prices, uniform closing hours, save for week-end closings . . . or the enforcement of group action by boycott as charged and proved here.<sup>122</sup>

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119. 445 U.S. 97 (1980).

120. *Id.* at 110.

121. *United States v. Erie County Malt Beverage Distribs. Ass'n*, 264 F.2d 731 (3d Cir. 1959).

122. *Id.* at 733.

This view is reaffirmed by the *California Retail Liquor Dealers Association* case. That case, however, does not answer all questions that may arise. In *V. & L. Cicione, Inc. v. C. Schmidt & Sons*<sup>123</sup> action was brought under the Sherman Act by a beer distributor whose dealership had been terminated by the brewery. As to the counts of refusal to deal and monopolization, the court found no case to be made out. The other count charged territorial restraints and resale price maintenance. Here, the federal court looked to the Pennsylvania Fair Trade Act<sup>124</sup> which authorized resale price maintenance in certain circumstances, and then to the Pennsylvania Liquor Code, whose provisions not merely authorized territorial restraints, but actually required them,<sup>125</sup> and held that the dealer had no cause of action. The subsequent repeal of the Fair Trade Act and the *California Retail Liquor Dealers* case have definitively resolved the resale price maintenance issue, but there is a question as to whether the statutory requirement of vertical territorial restrictions would withstand an attack similar to that brought against California's resale price maintenance system. In sum, any state authorized activity, defended as privileged under the twenty-first amendment or state action immunity, may not withstand an attack under the Sherman Act if it is otherwise a per se offense. As to rule of reason offenses, one can only surmise that the Court would be unlikely to find the state purpose to be of the same stature as the goals of the Sherman Act, except where the state purpose is both "legitimate" and "substantiated."<sup>126</sup>

#### D. *Pennsylvania's Milk Marketing Law*

The stated legislative purpose of the Milk Marketing Law<sup>127</sup> is to regulate all stages of the milk industry for the protection of public health and welfare and for the prevention of fraud.<sup>128</sup> The Milk Marketing Board, an administrative agency created by the Act, is required to fix minimum wholesale and retail prices and is empowered to fix maximum wholesale and retail prices.<sup>129</sup> The legislative intent is emphasized as being to protect the industry and to ensure a stable supply

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123. 403 F. Supp. 643 (E.D. Pa. 1975), *aff'd*, 565 F.2d 154 (3d Cir. 1977).

124. Fair Trade Act, No. 115, 1935 Pa. Laws 266, *as amended by* Act of June 12, 1941, No. 66, 1941 Pa. Laws 266 (codified at PA. STAT. ANN. tit. 73, § 7 (Purdon 1971) (repealed 1976).

125. PA. STAT. ANN. tit. 47, § 4-431 (Purdon 1969 & Supp. 1980).

126. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. at 113-14.

127. PA. STAT. ANN. tit. 31, §§ 700j-101 to -1203 (Purdon 1958 & Supp. 1980).

128. PA. STAT. ANN. tit. 31, § 700j-101 (Purdon 1958).

129. PA. STAT. ANN. tit 31, §§ 700j-801 to -803 (Purdon 1958 & Supp. 1980).

of milk.<sup>130</sup> The categories of persons entitled to protection are the producers, the transporters, processors and sellers, and the consuming public.<sup>131</sup> The objectives of the statute, as seen by the Pennsylvania Supreme Court, include "maximum sharing of surplus and equal treatment for all producers," rather than the protection of public health or the maintenance of sanitary conditions for milk.<sup>132</sup>

In other words, the law is an administrative price-fixing statute making it unlawful to sell milk at prices below the designated price.<sup>133</sup> The law is so fundamentally contrary to the spirit of competition that it includes a section protecting combined activity from being construed as a conspiracy or combination in restraint of trade.<sup>134</sup> It has been questioned whether the economic judgments incorporated in the statute have any validity, and whether price-fixing is needed for the farmer to survive, for the processor to make profits, and for the consumer to be charged reasonable prices.<sup>135</sup> Yet a three-judge federal court has concluded that the establishment of minimum resale prices was a permissible exercise of the state police power.<sup>136</sup>

The case law is concerned mostly with the power of the legislature to regulate milk prices.<sup>137</sup> Although the case law upholds the power of

130. PA. STAT. ANN. tit. 31, § 700j-801 (Purdon 1958 & Supp. 1980).

131. See *City of Pittsburgh v. Milk Marketing Bd.*, 1 Pa. Commw. Ct. 300, 306-08, 275 A.2d 115, 119-20 (1971), *cert. denied*, 415 U.S. 902 (1974).

132. *Milk Control Comm'n v. Battista*, 413 Pa. 652, 656 & n.4 198 A.2d 840, 842 & n.4, *appeal dismissed*, 397 U.S. 3 (1964).

133. PA. STAT. ANN. tit. 31, § 700j-402 (Purdon Supp. 1980) provides for certain exemptions from the statute.

134. PA. STAT. ANN. tit. 31, § 707j-404 (5) (Purdon Supp. 1980) provides, *inter alia*, that the board may decline to grant a license to an applicant who:

Has been a party to a combination to fix prices contrary to law. A cooperative agricultural association organized under the laws of this Commonwealth, or a similar association or corporation organized under the laws of this or any other state, and engaged in making collective sales or marketing for its members or shareholders, or any producers' or farmers' union or organization, shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly; nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association or corporation, or the members, officers or directors thereof, in making such collective sales and marketing, and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce . . . .

135. Note, *Government Regulation of Prices: A Study of Milk Control in Pennsylvania*, 109 U. PA. L. REV. 555 (1961).

136. *United Dairy Farmers Coop. Ass'n v. Milk Control Comm'n*, 335 F. Supp. 1008 (M.D. Pa.), *aff'd*, 404 U.S. 930 (1971). Of course, the question now arises as to the effect, if any, of the *California Retail Liquor* case, note 119 *supra*, on this decision.

137. See, e.g., *United Dairy Farmers Coop. Ass'n v. Milk Control Comm'n*, 335 F. Supp. at 1014-15; *Milk Control Comm'n v. Battista*, 413 Pa. at 655-60, 198 A.2d at 841-43; *Milk Control Comm'n v. Loudon Hill Farm, Inc.*, 87 Dauph. County Rep. 254 (1967), *aff'd*, 434 Pa. 189, 253 A.2d 630 (1969).

the legislature to regulate milk prices, there is barely a hint of approval of the legislature's wisdom in so doing.<sup>138</sup> As expressed in the statute, the legislature's determination is that competition, instead of being compatible with regulation, is to be strictly forbidden.

#### D. Summary

This comment has not exhaustively surveyed Pennsylvania's regulatory statutes, but it has looked at some of them to see if there is any legislative directive to take competitive behavior into consideration in the supervision of the regulated industries; to see if there is any basis in the existing law for competition advocacy in Pennsylvania's regulated industries. If one assumes that regulation and competition can co-exist, it would seem, from the absence of free market language in the above statutes, that the Pennsylvania legislature is oblivious of it.

### III. PENNSYLVANIA'S UNFAIR TRADE STATUTES

Although the Fair Trade Act<sup>139</sup> was repealed in 1976, it seems necessary to discuss it briefly. It was in existence for some forty years

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138. See *City of Pittsburgh v. Milk Marketing Bd.*, where the Commonwealth Court stated: "It is not within the purview of this Court to make the decision on whether or not there should be any regulation of the dairy industry. Only the Legislature can do that, and it has consistently been the sense of that deliberative body to continue the regulation." 1 Pa. Commw. Ct. at 308, 275 A.2d at 120. See also *Milk Control Comm'n v. Loudon Hill Farm, Inc.* 87 Dauph. County Rep. 254 (1967), *aff'd*, 434 Pa. 189, 253 A.2d 630 (1969).

139. Section 7 of the Act provided:

No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trademark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, or removed from the fair trade price schedule of the producer or owner of the trademark, brand or

and thus many cases dealing with vertical price fixing were dismissed because the activity in question was protected by this law.<sup>140</sup> The Act essentially provided that manufacturers by contract with their retailers could set the price at which their product was sold, provided it was a name brand product and was in fair and open competition with similar products. The purpose was ostensibly to protect the manufacturers and sellers and the owners of a trade mark from predatory price cutting, and from the use of loss leaders, and to protect the good will toward the product.<sup>141</sup> For a while even non-signatories to those contracts were bound by them.<sup>142</sup> But in *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*,<sup>143</sup> the Pennsylvania Supreme Court held the Act unconstitutional as applied to non-signers of the resale price maintenance contracts.

Throughout the life of the Fair Trade Act, commentators<sup>144</sup> and judges often criticized it, the courts enforcing it with notable ill grace<sup>145</sup> (or not enforcing it where they could avoid enforcement).<sup>146</sup> The

name, and notice is given the public thereof.

(c) By any officer acting under orders of any court or in the execution of any writ or distress.

For a reaction to the repeal of the fair trade laws in general, see Givens, *Mass Repeal of Fair Trade: Beginning of the End for Resale Price Maintenance?* 1975-76 ANTITRUST SYMPOSIUM 4, written after the repeal in 1974 of the Miller-Tydings Act provisos to the Sherman Act and the 1975 repeal of the McGuire Act.

140. See, e.g., *Gillette Co. v. Master*, 408 Pa. 202, 182 A.2d 734 (1962); *Lentheric, Inc. v. F.W. Woolworth Co.*, 338 Pa. 533, 13 A.2d 406 (1940).

141. *Sinclair Refining Co. v. Schwartz*, 398 Pa. 60, 63, 157 A.2d 63, 64 (1959); *Norman M. Morris Corp. v. Hess Bros.*, 243 F.2d 274, 278 (3d Cir. 1957).

142. *Burche Co. v. General Elec. Co.*, 382 Pa. 370, 115 A.2d 361 (1955).

143. 414 Pa. 95, 199 A.2d 266 (1964) (overruling *Burche*).

144. See, e.g., Schactman, *Resale Price Maintenance and the Fair Trade Laws*, 11 U. PITT. L. REV. 562 (1950) (although these laws are a weapon against price-cutting and thus a protection for the small retailer, they are inconsistent with antitrust policy in that they permit monopolistic practices; the author analyzes the effect and abuses of resale price maintenance and urges a reexamination of the fair trade laws); Note, *Monopolistic Competition and the Fair Trade Acts*, 14 TEMPLE L.Q. 95 (1939).

145. *Mead Johnson & Co. v. Martin Wholesale Distr., Inc.*, 408 Pa. 12, 15, 182 A.2d 741, 743 (1962), where Justice Musmanno stated:

The theory behind Fair Trade legislation is that when a meritorious product acquires a certain good standing with the public, it is necessary to uphold its standard by prohibiting its sale at prices which presumably would be below or close to the cost price. If one dealer cuts prices below or close to the cost price, another dealer may cut even lower. This, then, could be followed by still further lower cutting until the slashing would fall below the water line, sinking completely the ship of good trade. Whether this line of reasoning comports with good economics, good logic and the kind of rivalry which generally is upheld in our private enterprise system is, we repeat, not for this Court to pass upon.

146. *Sinclair Refining Co. v. Schwartz*, 398 Pa. 60, 157 A.2d 63 (1959) (denying an injunction to restrain a dealer from selling gasoline below the set price because the oil com-

Act was repealed in 1975,<sup>147</sup> but one should not infer from that an independent legislative policy in favor of competition, as repeal appears to have been prompted by the repeal of the federal fair trade laws.

One should also consider the Unfair Sales Act.<sup>148</sup> Originally called the Fair Sales Act,<sup>149</sup> it was held unconstitutional by the Pennsylvania Supreme Court in that it prohibited all sales below cost.<sup>150</sup> The court implied that it would be valid if restricted to sales below cost made with intent to destroy competition.<sup>151</sup> As a result, the statute was amended to include the element of intent.<sup>152</sup> The statute is apparently designed to prevent predatory price cutting.

The Unfair Trade Practices and Consumer Protection Law<sup>153</sup> is basically an anti-fraud statute for the protection of the consumer. It is modeled on the Federal Trade Commission Act.<sup>154</sup> It prohibits such practices as passing off, misleading advertising, disparagement, bait and switch, chain letters, and breach of warranty. An amendment enacted in 1978<sup>155</sup> provides for private actions and the award of actual damages and treble damages.

The Gasoline, Petroleum Products and Motor Vehicle Accessories Act<sup>156</sup> regulates the practices of suppliers, distributors, and dealers of those products for the purpose, *inter alia*, of fostering vigorous competition and promoting public safety. The Unfair Cigarette Sales Act<sup>157</sup> forbids the sales at less than cost with intent to destroy or substantially lessen competition. This latter statute together with the Unfair Sales Act provides for a presumption of unlawful intent from proof of sale or offer to sell below cost. It has been suggested that this presumption may mean that the law is still defective.<sup>158</sup> It has yet to be challenged in court, however. Perhaps a legislative direction in the form of a state antitrust statute would encourage and enable the bring-

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pany had not presented enough evidence to support its contention that its gasoline was in fair and open competition with other brands).

147. See note 139 *supra*.

148. PA. STAT. ANN. tit. 73, §§ 211-217 (Purdon 1971 & Supp. 1980).

149. No. 533, 1937 Pa. Laws 2672.

150. Commonwealth v. Zasloff, 137 Pa. Super. Ct. 96, 8 A.2d 801 (1939), *aff'd*, 338 Pa. 457, 13 A.2d 67 (1940).

151. *Id.* at 100, 8 A.2d at 804.

152. Act of August 11, 1941, No. 344, 1941 Pa. Laws 900.

153. PA. STAT. ANN. tit. 73, § 201 (Purdon 1971 & Supp. 1980).

154. Ch. 311, 38 Stat. 717 (1914) (codified in scattered sections of 15 U.S.C.).

155. PA. STAT. ANN. tit. 73, § 201-9.2 (Supp. 1980).

156. *Id.* § 202.

157. PA. STAT. ANN. tit. 73, §§ 231.1 - .6 (Purdon 1971 & Supp. 1980).

158. Hawkland, *The Pennsylvania Unfair Sales and Unfair Cigarette Sales Laws*, in PA. STAT. ANN. tit. 73 at 1 (1971).

ing of suits to challenge anti-competitive conduct that dealers currently may engage in under the umbrella of protectionist statutes.

#### IV. CONCLUSION

The pattern of trade regulation in Pennsylvania is frustratingly, sometimes bewilderingly, random. Because there is no one clear legislative enunciation of the Commonwealth's policy on competition, businessmen and lawyers must guess at what is proscribed and what is encouraged. The courts are given scant basis upon which to resolve disputes which, if brought in federal court under federal antitrust statutes, could be adjudicated quickly. Other states have been active in antitrust enforcement and, although it is beyond the scope of this comment to discuss their experience, California, New York, and Maryland<sup>159</sup> provide examples which the Pennsylvania legislature might follow. The Commonwealth's law makers might also find inspiration in this recent declaration of the United States Supreme Court:

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."<sup>160</sup>

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159. See Note, *Reviving State Antitrust Enforcement: The Problems with Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 609 (1979).

160. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110-11 (1980) (quoting *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972)). The Court went on to state:

Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932); see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 398. We must acknowledge the importance of the Act's pro-competition policy.

*Id.* at 111.



