25 YEARS OF THE NEW JERSEY ANTITRUST ACT

*Bruce D. Greenberg and Gary K. Wolinetz**

* Bruce D. Greenberg (B.A., University of Pennsylvania, 1979, J.D., Columbia University, 1982) and Gary K. Wolinetz (B.A., Rutgers University, 1984, J.D., Rutgers Law School—Camden, 1987) are partners at the law firm of Greenbaum, Rowe, Smith, Ravin & Davis, Woodbridge, New Jersey. That firm represented the named plaintiff in Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515, 602 A.2d 733 (App. Div. 1991), one of the largest antitrust cases in New Jersey history, and has litigated numerous other antitrust cases under the Act in state and federal court. *See, e.g.*, Venture Resources Group, Inc. v. Greater N.J. Regional Multiple Listing Serv., Inc., Civil Action No. 95-0401 (D.N.J. August 24, 1995); Pomanowski v. Monmouth County Bd. of Realtors, 89 N.J. 306, 446 A.2d 83 (1982) (*amicus curiae*), *certif. denied*, 459 U.S. 908 (1982); G & W, Inc. v. Borough of East Rutherford, 280 N.J. Super. 507, 656 A.2d 11 (App. Div. 1995); Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc., 196 N.J. Super. 262, 482 A.2d 186 (App. Div. 1984), *certif. denied*, 99 N.J. 234, 491 A.2d 722 (1985); *see also* Village Supermarket, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224, 634 A.2d 1381 (Law Div. 1993) (applying *Noerr-Pennington* antitrust exemption in common law tort case).

I. INTRODUCTION

The New Jersey Antitrust Act[1] ("the Act") has now turned twenty-five. As befits a citizen of that age, the Act has matured greatly. This Article will look back on the law already developed under the Act and ahead to issues still remaining.[2] Special attention will be given to the effect of federal antitrust law upon the Act and any differences that have emerged between federal and New Jersey law.

Initially, it must be emphasized that while New Jersey courts have published a number of far-reaching opinions under the Act (and several important unpublished decisions)[3] in its first twenty-five years, section 56:9-18 requires that the Act, at least as to substantive rather than procedural law, "be construed in harmony with judicial interpretations of comparable Federal antitrust statutes."[4]

---

1 N.J. STAT. ANN. § 56:9-1 *et seq.* (West 1989). The Act became effective on May 21, 1970.

2 Two early surveys of the Act provide some useful background. *See generally* Michael J. Perrucci & Joseph A. Mussomeli, *New Jersey Antitrust Law: An Overview*, 2 SETON HALL LEGIS. J. 134 (1977) (emphasizing enforcement of Act by State); Lionel J. Frank, *An Overview of the New Jersey Antitrust Act*, 108 N.J.L.J. 293 (1981). For a general overview of the Act, see Arthur R. Schmauder & Francis R. Sheehan, *Antitrust Overview for the General Practitioner*, 139 N.J. LAW. 18 (1991).

3 *See, e.g.*, Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. ATL-C-000052-89E (March 25, 1993).

4 N.J. STAT. ANN. § 56:9-18 requires that the Act "be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact [the Act]." *See* Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 186-87, 659 A.2d 904, 926 (App. Div.), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995) ("[O]ur antitrust statute should be construed in consonance with federal law."). *But see* Belmar v. Cipolla, 96 N.J. 199, 219, 475 A.2d 533, 544 (1984) (noting without resolving potential conflict between federal and New Jersey law concerning standard governing tying arrangements). Even as to substantive issues, the Supreme Court of New Jersey has not considered itself bound to obey the decisions of lower federal courts where the supporting reasoning for those decisions appears "cursory." In *Pomanowski*, the court found that several such decisions "lack[ed] persuasive force and amount[ed] to no more than a respected source of opinion." *Pomanowski*, 89 N.J. at 314 n.3, 446 A.2d at 87 n.3. Though such a result accords with the normal rule that state courts are not bound by, but should give respect to, the opinions of intermediate federal courts even on issues of federal law, Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 79-80, 577 A.2d 129, 143-44 (1990), it is cause to wonder whether section 56:9-18 has any effect whatsoever. *See* Perrucci & Mussomeli, *supra* note 2, at 141, 151 n.103 ("Section 18 cannot give federal precedent a stare decisis effect on the state act, but the section does show a legislative intent to seek uniformity. . . . Section 18, however, should not be interpreted as giving *post-enactment* federal case law a stare decisis

Thus, analysis of New Jersey's treatment of antitrust issues will often involve a discussion of federal law.[5]

In summary, the Act prohibits illegal restraints of trade and monopolies. Specifically, New Jersey section 56:9-3 parallels § 1 of the federal Sherman Act[6] and provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." Section 56:9-4(a), which is comparable to § 2 of the Sherman Act,[7] provides that it shall be unlawful for "any person to monopolize or attempt to monopolize, or to combine or conspire with any person or persons, to monopolize trade or commerce in any relevant market within this State." Prior to discussing New Jersey's treatment of alleged restraints of trade and monopolies, however, a general discussion of the purposes and fundamental concepts under the Act is appropriate.

II. THE PURPOSES OF THE ACT

A. *Protecting the Public*

Like its federal antitrust counterpart, the Sherman Act,[8] the purpose of the Act is to ensure that the public obtains "the benefits ordinarily derived from a competitive market."[9] Though a private

---

effect on state courts," because that could constitute unlawful delegation of state power to another sovereign).

Decisions of other state courts are rarely relied upon in cases under the Act, despite the statement of section 56:9-18 that such cases are as persuasive as federal authorities. However, in *Pomanowski*, the Supreme Court of New Jersey found "useful" "other state court decisions construing state antitrust acts in accordance with federal interpretations of the Sherman Act." 89 N.J. at 314, 446 A.2d at 87. *Pomanowski* and *Ideal Dairy* are among the only cases under the Act to cite decisions under other state antitrust statutes.

The New Jersey Appellate Division has made clear that the requirement of section 56:9-18 governs only substantive, rather than procedural, law. *See Boardwalk Properties*, 253 N.J. Super. at 529, 602 A.2d at 740 (quotation omitted); *see also infra* notes 191-93 and accompanying text.

5 *See* Robert J. Clark, *Antitrust Law in New Jersey After Lawn King*, 108 N.J.L.J. 1, 9 (1981) ("Most antitrust cases are decided in the federal courts, and most antitrust 'enforcement' occurs in attorneys' offices, where sensitivity to federal precedents abounds."). Where a discussion of federal law is appropriate this article emphasizes decisions from the United States Supreme Court and the Third Circuit.

6 15 U.S.C. § 1 (1994).

7 15 U.S.C. § 2.

8 15 U.S.C. §§ 1-7.

9 Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515, 530, 602 A.2d 733, 741 (App. Div. 1991); *see also* Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 88, 401 A.2d 722, 732 (Law Div. 1979) (quoting Travelers Ins. Co. v. Blue Cross of W. Pa., 361 F. Supp. 774, 778 (W.D. Pa. 1972), *aff'd*, 481 F.2d 80 (3d Cir. 1973), *cert. denied*, 414 U.S. 1093 (1973)), *aff'd*, 176 N.J. Super.

litigant may benefit financially from an antitrust suit, "the overriding purpose of the Act is to advance the public policy in favor of competition."[10] Absent harm to competition, the fact that a challenged restraint injures an individual competitor is "irrelevant."[11]

Stated another way, the antitrust laws were enacted for "the protection of competition not competitors."[12] In language equally applicable to the Act, the United States Supreme Court explained:

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.[13]

Because the protection of the public is the central focus of the Act, even illegal conduct by an antitrust plaintiff (provided the conduct is unrelated to the antitrust laws) will not bar a private antitrust suit that benefits the public.[14] Such a rule is necessary because enforcement of the antitrust laws outweighs punishing a potential antitrust plaintiff for its wrongdoing, especially where that plaintiff may be the only party with standing to bring suit.[15]

B. Encouraging Interbrand Competition

The public benefits from the existence of *inter*brand competition, that is, competition among entities manufacturing or distributing similar products.[16] In the television market, Sony and RCA are examples of companies engaged in interbrand competition.

320, 423 A.2d 311 (App. Div. 1980) (explaining that the antitrust laws are designed to preserve competition among sellers and to "'prevent unreasonably high prices to the purchasers and users' of the goods or services in question").

10 *Boardwalk Properties*, 253 N.J. Super. at 530, 602 A.2d at 741 (citations omitted).

11 Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 176, 659 A.2d 904, 920-21 (App. Div.), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995).

12 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

13 Spectrum Sports, Inc. v. McQuillen, 113 S. Ct. 884, 891-92 (1993).

14 Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6, 19, 433 A.2d 780, 787 (App. Div. 1981) (rejecting application of clean hands doctrine to antitrust suit); Health Corp. of America, Inc., v. New Jersey Dental Ass'n, 424 F. Supp. 931, 932-34 (D.N.J. 1977) (rejecting clean hands application to claims under both the Act and Sherman Act).

15 *Glasofer*, 180 N.J. Super. at 17, 433 A.2d at 786.

16 *See* State v. Lawn King, 84 N.J. 179, 194, 417 A.2d 1025, 1033 (1980); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977); Monmouth Chrysler-Plymouth, Inc., v. Chrysler Corp., 102 N.J. 485, 497, 509 A.2d 161, 167 (1986) (citation omitted) ("The central focus of modern antitrust analysis is the recognition that business efficiency and interbrand competition enhance consumer welfare.").

Significant interbrand competition often results in lower prices and more choices for the consumer.

In contrast, *intra*brand competition is the competition between distributors of the same product of a particular manufacturer.[17] In the tire market, two Goodyear dealers located in the same general vicinity are engaged in intrabrand competition.

Encouraging interbrand competition is the major concern of the antitrust laws because such competition limits the potential for consumer exploitation.[18] In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[19] Justice Powell explained:

> The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.[20]

Because interbrand competition is necessary to protect the consumer, agreements among competitors restricting such competition (known as horizontal restraints),[21] such as agreements to allocate customers and territories, are deemed per se illegal without any analysis of the alleged competitive justification for the restraint.[22] In contrast, certain non-price agreements between a manufacturer and its distributors (known as vertical restraints), such as those granting exclusive sales territories, are analyzed under a reasonableness standard because these restraints may encourage interbrand competition.[23]

---

17 *Sylvania*, 433 U.S. at 52 n.19.

18 *Id.*

19 433 U.S. 36 (1977).

20 *Id.* at 52 n.19.

21 *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 (1988) (footnote omitted) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

22 Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 177-78, 659 A.2d 904, 921-22 (App. Div.), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995); *see also infra* notes 30-35 and accompanying text.

23 State v. Lawn King, 84 N.J. 179, 194-95, 417 A.2d 1025, 1033-34 (1980); *see also Sylvania*, 433 U.S. at 51-52 ("The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition

III. RESTRAINT OF TRADE

The vast majority of antitrust claims under the Act arise under section 56:9-3, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." Unilateral action, even if designed to harm a competitor, will not violate section 56:9-3.[24] Instead, "there must exist a plurality of actors, that is, two or more persons, and concerted action."[25] As a result, a corporation cannot conspire with its officers or employees acting in the normal course of business.[26] Moreover, even if parties charge the same price for similar goods or engage in other similar conduct, an antitrust violation will not exist unless there is some evidence of concerted activity.[27] This is so even if the parties know that they are acting similarly to each other, a condition known as "conscious parallelism."[28]

As noted above, section 56:9-3 bars "every" contract in restraint of trade. Despite this broad language, which would outlaw virtually every commercial contract, the Act prohibits only *unreasonable* restraints of trade.[29] There are two principal methods of evaluating whether a restraint of trade is unreasonable: the "per se" rule and the "rule of reason."[30]

---

and stimulation of interbrand competition."); *infra* notes 138-52 and accompanying text.

24 *See* Exxon Corp. v. Wagner, 154 N.J. Super. 538, 545, 382 A.2d 45, 48 (App. Div. 1977) (holding that Exxon's unilateral termination of a service station lease did not violate the Act).

25 *Id.*, 382 A.2d at 48.

26 *Id.*; *see also* Petrocco v. Dover Gen. Hosp. and Medical Ctr., 273 N.J. Super. 501, 524-25, 642 A.2d 1016, 1028 (App. Div.) (rejecting antitrust claims against hospital because "a hospital is incapable of conspiring with its staff in deciding whether to grant staff privileges"), *certif. denied*, 138 N.J. 264, 649 A.2d 1284 (1994). This decision accords with the federal rule. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) (concerning federal antitrust act).

27 *See Lawn King*, 84 N.J. at 207, 417 A.2d at 1040 (citation omitted); *see also* Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 86-87, 401 A.2d 722, 731 (Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (App. Div. 1980).

28 *Chick's Auto Body*, 168 N.J. Super. at 86, 401 A.2d at 731.

29 Pomanowski v. Monmouth County Bd. of Realtors, 89 N.J. 306, 315, 446 A.2d 83, 87 (1982) (quoting Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911)) (other citations omitted). If § 56:9-3 were strictly construed to bar every restraint of trade, it would "outlaw the entire body of private contract law." National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978). This is necessarily true because virtually every commercial contract, whether it is a restrictive covenant or a franchise agreement, restrains trade in some fashion. *Id.*

30 Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 175, 659 A.2d 904, 920 (App. Div.), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995). In addition to the per se rule and the rule of reason, courts have recognized an interme-

A. *The Per Se Rule*

Per se analysis applies to "plainly anticompetitive conduct" that courts have presumed is always harmful to competition.[31] Once challenged conduct is characterized as a per se violation, it is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use."[32] Examples of conduct traditionally (though not always) analyzed under the per se rule are price fixing, horizontal restraints, tying arrangements, group boycotts, and bid rigging.[33]

An antitrust plaintiff employing the per se rule "need only prove the existence of the illegal agreement and anticompetitive intent on the part of defendant."[34] The plaintiff is not required to demonstrate that the concerted activity actually harmed competition. That harm is presumed by the very nature of the act, such as price fixing.[35]

---

diate approach to analyzing antitrust claims known at the "quick look" rule. *Id.* at 179, 659 A.2d at 922; United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)). The quick look rule is designed to mitigate the harshness of applying the per se rule. In *Ideal Dairy*, the appellate division explained that even "inherently suspect" activity may pass antitrust muster if the defendant can offer legitimate justifications for the restraint:

> In "quick look" cases, a court determines that the challenged restraint, although inherently suspect, should not necessarily be regarded as illegal per se. Although the court presumes anticompetitive effect, it nonetheless will balance this adverse effect against any procompetitive justification advanced by defendant. If defendant can offer no legitimate justifications for the restraint, the presumption of anticompetitive effect prevails without a detailed market analysis showing the restraint to be harmful. If defendant can offer a legitimate justification, a full-scale rule of reason test will be utilized, requiring a detailed market analysis.

Id. at 179-80, 659 A.2d at 922 . The court declined to employ "quick look," *id.* at 192, 659 A.2d at 929, and it is not yet clear when that rule should be applied.

31 *Id.* at 177-78, 659 A.2d at 921-22.

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

33 *Ideal Dairy*, 282 N.J. Super. at 177-78, 659 A.2d at 921-22 . Courts consider the per se rule beneficial because it "provide[s] guidance to the business community and minimizes the burden on litigants and the judicial system of the more complex rule-of-reason trials." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977). Moreover, condemning a given restraint as per se illegal acknowledges the reality that "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 343 (1982) (citation omitted). Tying arrangements may no longer be in the per se category. *See infra* notes 73-84 and accompanying text.

34 *Ideal Dairy*, 282 N.J. Super. at 178, 659 A.2d at 922.

35 *See id.* at 186, 659 A.2d at 926 . Very few published cases under the Act have employed the per se rule. *See, e.g.*, Kugler v. Koscot Interplanetary, Inc., 120 N.J.

B. The Rule of Reason

In most cases, particularly where the issue is "novel and complex,"[36] New Jersey courts apply the rule of reason analysis to determine whether concerted action is "unreasonable" and, therefore, violates section 56:9-3.[37] Unlike per se rule cases, where anti-competitive effects are presumed,[38] courts applying the rule of reason focus on whether the "challenged conduct adversely affects competition."[39] Factors a court may consider include "the circumstances peculiar to the defendant's business, the conditions before and after the restraint, and the nature of the restraint and its effects, either actual or probable, on competition."[40] Once a plaintiff demonstrates that the challenged restraint adversely affects competition, the burden shifts to the defendant to offer proof that its conduct was procompetitive.[41]

In *Pomanowski v. Monmouth County Board of Realtors*,[42] the New Jersey Supreme Court explained that the rule of reason involves a balancing test:

> The rule [of reason] envisions a balancing process that scrutinizes the competitive significance of a given practice: if the procompetitive benefits of that practice exceed any anti-competitive effects, the restraint will pass muster under the Sherman Act, 15 U.S.C. §1, and likewise under N.J.S.A. 56:9-3. This balancing process calls for two steps: first, a definition of the relevant market or markets in which the questioned restraint operates; and second, an evaluation of the "evils" inherent in the challenged practice and a weighing of those anti-competitive influences against any procompetitive justifications.[43]

Thus, the first step in evaluating a case under the rule of rea-

---

Super. 216, 293 A.2d 682 (Ch. Div. 1972); Oates v. Eastern Bergen County Multiple Listing Serv., Inc., 113 N.J. Super. 371, 273 A.2d 795 (Ch. Div. 1971).

36 Belmar v. Cipolla, 96 N.J. 199, 219, 475 A.2d 533, 544 (1984).

37 Pomanowski v. Monmouth County Bd. of Realtors, 89 N.J. 306, 315, 446 A.2d 83, 87 (1982); *Ideal Dairy*, 282 N.J. Super. at 177, 659 A.2d at 904 ("The rule of reason has become the 'prevailing standard of analysis' in [Sherman Act] §1 cases . . . [and t]he [United States] Supreme Court has made clear that departure from this standard should be based on 'demonstrable economic effect rather than . . . upon formalistic line drawing.'") (quoting *Sylvania*, 433 U.S. at 59).

38 *See supra* notes 31-35 and accompanying text.

39 *Ideal Dairy*, 282 N.J. Super at 176, 659 A.2d at 920; *see also Pomanowski*, 89 N.J. at 315, 446 A.2d at 87.

40 *Ideal Dairy*, 282 N.J. Super. at 176, 659 A.2d at 921 .

41 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

42 89 N.J. 306, 446 A.2d 83 (1982).

43 *Id.* at 315-16, 446 A.2d at 88 .

son is to identify the relevant market.[44] A discussion of the principles involved in that process follows.

1. Defining the Relevant Market

A relevant market is composed of geographic market and product market components.[45] Analysis of the geographic market often focuses on the conduct of the buyer, not the seller.[46] The Third Circuit has explained:

> [T]he geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product. Further, the size of the relevant geographic market will differ depending upon the price, durability and size of the product; in practical terms, one would comparison shop in a larger geographic market for a tractor, as compared to a grocery item.[47]

Expert testimony is generally necessary to prove a geographic market.[48] A party's failure to prove a geographic market will doom its antitrust claims.[49] For example, in *Boardwalk Properties, Inc. v. BPHC Acquisition, Inc.*,[50] defendants filed a third-party complaint that alleged, among other things, that Donald Trump had restrained trade in a geographic market of Atlantic City described as the "Central Boardwalk Market." According to defendants, that market included an area comprising only three of the many hotel/casinos in Atlantic City, and excluded a number of hotel/casinos

---

44 *See Ideal Dairy*, 282 N.J. Super. at 176, 659 A.2d at 921; Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. ATL-C-000052-89E, slip op. at 65 (March 25, 1993) ("No one disputes that a market definition is a critical step in an antitrust analysis and must be undertaken even before one can evaluate the impact of conduct claimed to have been wrongful.").

45 *Ideal Dairy*, 282 N.J. Super. at 176, 659 A.2d at 921.

46 *Boardwalk Properties*, slip op. at 63 (quoting Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa., 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)) (stating that the geographic market is "'the area in which a buyer may rationally look for the goods and services he or she seeks'").

47 Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 3034 (1992).

48 Miller v. Indiana Hosp., 814 F. Supp. 1254, 1264 (W.D. Pa.), *aff'd*, 975 F.2d 1550 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 122 (1993). *But see* Exxon Corp. v. Wagner, 154 N.J. Super. 538, 547-48, 382 A.2d 45, 49 (App. Div. 1977) ("assum[ing]" that Red Bank, New Jersey, was the relevant geographic market as asserted by antitrust plaintiff, and granting summary judgment dismissing claim).

49 *See* Belmar v. Cipolla, 96 N.J. 99, 218, 475 A.2d 533, 543 (1984) (dismissing tying claim against a hospital because, among other reasons, plaintiffs "offered no evidence of the market area for anesthesiological services").

50 253 N.J Super. 515, 602 A.2d 733 (App. Div. 1991).

within walking distance. After a lengthy trial, the court rejected defendants' claimed geographic market and dismissed their antitrust claims. The court principally relied on the fact that casino customers could easily visit other casinos outside the alleged Central Boardwalk Market.[51]

In addition to proving a geographic market, an antitrust plaintiff must also define and prove the product market. The Third Circuit has recognized that a product market consists of those "commodities reasonably interchangeable by consumers for the same purposes."[52] Moreover, commodities in a product market are "characterized by a cross-elasticity of demand. . . . [I]n other words, the rise in the prices of a good within a relevant product market would tend to create a greater demand for the other like goods in that market."[53]

Only one published New Jersey decision, *Exxon Corp. v. Wagner*,[54] has rejected a plaintiff's proposed product market. In *Exxon*, a terminated service station lessee asserted that Exxon had monopolized or attempted to monopolize the market in Exxon products.[55] The appellate division held that the lessee's product market definition failed because "Exxon products are not unique and are interchangeable with those of other petroleum suppliers."[56]

Once the relevant geographic and product markets are defined, an antitrust plaintiff in a case governed by the rule of reason must demonstrate that competition, not just an individual competitor, has been harmed by the challenged conduct.[57]

2. Demonstrating Anticompetitive Effects

Proving anticompetitive effects requires a showing that the defendant controlled or manipulated the relevant market.[58] Simply stated, the antitrust plaintiff must prove that the concerted activity adversely "affected the prices, quantity or quality 'of goods or

---

51 Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. ATL-C-000052-89E, slip op. at 65 (March 25, 1993).

52 Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 399 (1956)), *cert. denied*, 112 S. Ct. 3034 (1992).

53 *Id.* at 722.

54 154 N.J. Super. 538, 382 A.2d 45 (App. Div. 1977).

55 *Id.* at 542, 382 A.2d at 47.

56 *Id.* at 548-49, 382 A.2d at 50.

57 *See* Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 188, 659 A.2d 904, 927 (App. Div.), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995).

58 *Id.* at 189, 659 A.2d at 927.

services.'"[59]

These principles were discussed at length in *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*[60] Ideal, a milk distributor, alleged, among other things, that Farmland, a milk processor, and its distributors violated the Act because they purportedly conspired to drive Ideal out of business.[61] The trial court concluded that Farmland's conduct constituted a per se violation of the Act and awarded Ideal compensatory and punitive damages exceeding $2.8 million.[62]

The appellate division reversed. Finding that the trial court should have applied the rule of reason instead of the per se rule,[63] the appellate division held that Ideal's "failure to provide market analysis evidence and proof of injury to competition was fatal to its antitrust claim."[64] The court explained that even a party's efforts to destroy a competitor could not sustain an antitrust claim without proof that competition was harmed:

> Relying at trial on the per se theory, Ideal offered no market analysis of the milk industry in the relevant geographic area and presented no evidence that Farmland's conduct had the ability to control and manipulate the market to the detriment of competition generally. Neither did Ideal offer proof of Farmland's market power as an alternative to proof of actual or probable anticompetitive effect. To the contrary, the record clearly shows that Farmland competed in the same market as Tuscan, a major processor, and that Farmland was involved in ongoing and heated competition with Tuscan for retail customers at every level. There was nothing in the proofs to indicate that Farmland had the ability to control and manipulate the milk market.[65]

One lesson of *Ideal Dairy* is that antitrust plaintiffs should not place all their eggs in one basket and fail to introduce proofs of

---

59 *Tunis*, 952 F.2d at 728 (quotation omitted). Because of the difficulty in proving anticompetitive effects in certain cases, however, courts "may allow proof of defendant's market power in lieu of proof of actual or probable anticompetitive effects." *Ideal Dairy*, 282 N.J. Super. at 188, 659 A.2d at 927. A defendant has market power if it "has the ability to raise prices above those that would prevail in a competitive market." *Id.*

60 282 N.J. Super. 140, 659 A.2d 904 (App. Div.), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995).

61 *Ideal Dairy*, 282 N.J. Super. at 152, 659 A.2d at 909.

62 *Id.* at 155-56, 659 A.2d at 911.

63 *Id.* at 180-81, 659 A.2d at 923.

64 *Id.* at 190, 659 A.2d at 928.

65 *Id.* at 189, 659 A.2d at 927-28 .

anticompetitive effects[66] in anything but the clearest per se case.[67]

C. *Substantive Antitrust Violations*

After the proper method of analysis is selected (per se, rule of reason, or "quick look"[68]), the court will then focus on the substantive antitrust violation alleged. New Jersey courts have confronted a variety of substantive issues under the Act.

1. Illegal Tying

A tying arrangement is an agreement by a party to sell one product (the tying product) to a buyer on the condition that the buyer also purchases another product (the tied product).[69] Tying arrangements are disfavored because the seller is able to advance sales in the tied product for reasons other than the product's competitive merits.[70] To commit a tying violation, the seller must have "'appreciable economic power'" in the tying product market and the arrangement must affect a substantial volume of commerce in the tied market.[71]

The United States Supreme Court has emphasized that coercion is the fundamental element of a tying claim:

> [T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is

---

66 The record indicates that Ideal "lost some of the most important records pertaining to damages while the case was pending." *Id.* at 155, 659 A.2d at 911. Thus, counsel may not have had any evidence of anticompetitive effects available.

67 *See* Belmar v. Cipolla, 96 N.J. 199, 218-19, 475 A.2d 533, 543 (1984) (dismissing antitrust claim because plaintiffs failed to demonstrate that consumers were harmed by alleged tying arrangement); Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc., 196 N.J. Super. 262, 271-72, 482 A.2d 186, 191 (App. Div. 1984) (rejecting an antitrust claim against a supermarket because "even assuming a predominant purpose to reduce competition by eliminating a competitor," plaintiffs offered no "relevant market data" and no evidence showing how competition was harmed), *certif. denied*, 99 N.J. 234, 491 A.2d 722 (1985); Finlay & Assoc., Inc. v. Borg-Warner, Corp., 146 N.J. Super. 210, 229, 369 A.2d 541, 551 (Law Div. 1976) (dismissing antitrust claim because terminated distributor presented no evidence demonstrating "harm to the trade in the area, to competition, or to the general public"), *aff'd*, 155 N.J. Super. 331, 382 A.2d 933 (App. Div.), *certif. denied*, 77 N.J. 467, 391 A.2d 483 (1978).

68 For a discussion of the new "quick look" standard, which has not yet been applied in New Jersey, see *supra* note 30.

69 Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461 (1992).

70 State v. Lawn King, 84 N.J. 179, 209, 417 A.2d 1025, 1041 (1980).

71 *Eastman Kodak*, 504 U.S. at 462 (quoting Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969)).

> present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.[72]

Several New Jersey cases have analyzed tying arrangements under the Act. In *Belmar v. Cipolla*,[73] certain anesthesiologists alleged that a hospital's exclusive contract with an anesthesiological group constituted an illegal tying arrangement.[74] According to plaintiffs, the hospital "unlawfully tied the sale of other hospital services, particularly surgery (the tying service), to the sale of anesthesiological services (the tied service)."[75] Noting that plaintiffs had offered little if any market data,[76] the New Jersey Supreme Court affirmed the appellate division's dismissal of plaintiffs' restraint of trade claim. Relying heavily on *Jefferson Parish Hospital District No. 2 v. Hyde*,[77] the court explained that plaintiffs had failed to demonstrate that the public, not just plaintiffs themselves as competitors, had been harmed by the exclusive contract:

> Under the New Jersey Antitrust Act, application of the rule of reason requires analysis of the competitive and anti-competitive effect of the challenged practice under all relevant circumstances.[78] Such an analysis requires insight into the economics of the industry to determine whether a given restraint is unreasonable. The record before us, which contains nothing more than a cryptic statement of the market share and some abstract testimony about alternative methods of providing anesthesiology, fails to provide any such insight. . . . This record is devoid of proof that patients were forced to purchase the services of de-

---

72 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

73 96 N.J. 199, 475 A.2d 533 (1984).

74 *Id.* at 206, 475 A.2d at 537. Tying arrangements have been analyzed under both the per se rule and the rule of reason. *See* discussion *infra* notes 77-84 and accompanying text; *see also* Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1574 (11th Cir. 1991) (discussing when each test is applied), *cert. denied*, 113 S. Ct. 295 (1992).

75 *Belmar*, 96 N.J. at 212, 475 A.2d at 540.

76 Plaintiff alleged that the tying arrangement was a per se violation of the Act. *Id.*

77 466 U.S. 2 (1984). That case had been decided shortly before *Belmar*.

78 *Belmar*, 96 N.J. at 218, 475 A.2d at 543 (citation omitted). While noting that the United States Supreme Court had applied a per se rule in *Jefferson Parish*, the New Jersey Supreme Court applied the rule of reason consistent with *Pomanowski* and *Lawn King*. *Id.* at 219, 475 A.2d at 544. The court explained that per se treatment of the alleged tie was unnecessary because it was not "manifestly anti-competitive and devoid of redeeming virtue." *Id.*, 475 A.2d at 543. The court made clear in *Belmar*, however, as it did in subsequent cases, that it had not decided whether the rule of reason should be applied in an antitrust action growing out of hospital privilege arrangements. *See id.*, 475 A.2d at 544; Desai v. St. Barnabas Medical Ctr., 103 N.J. 79, 98-99, 510 A.2d 662, 672 (1986); Petrocco v. Dover Gen. Hosp. & Medical Ctr., 273 N.J. Super. 501, 524, 642 A.2d 1016, 1028 (App. Div.), *certif. denied*, 138 N.J. 264, 649 A.2d 1284 (1994).

fendant doctors as the result of the hospital's market power.[79]

An alleged illegal tying arrangement was also at issue in *State v. Lawn King*.[80] There, the State of New Jersey brought various criminal charges under the Act against the corporate franchisor of an automated lawn care maintenance service ("Lawn King") and its president alleging, among other things, that Lawn King improperly required its franchisees to purchase chemicals and seeds from either a Lawn King distributor or an approved source.[81]

In affirming the appellate division's reversal of all convictions, the New Jersey Supreme Court emphasized that the complexity of the franchisor/franchisee relationship mandated use of the rule of reason, not the per se rule applied by the trial court.[82] Under that analysis, the supreme court agreed with the appellate division that the charges should be dismissed because the state failed to demonstrate that Lawn King's alleged product tie was unreasonable.[83]

In *Belmar* and *Lawn King*, the New Jersey Supreme Court applied the rule of reason to analyze tying arrangements. In both cases, the tying claims were rejected because no evidence of public harm was introduced. In light of these decisions, despite the traditional federal rule that tying arrangements will be considered per se illegal,[84] parties litigating tying claims under the Act should assume that tying claims will require proof that competition was adversely affected, at least where the issues surrounding the tying arrangements may be considered novel or complex, as in *Belmar* and *Lawn King*.

2. Group Boycott/Refusals to Deal

A group boycott involves "'concerted action with a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive object, or both.'"[85] Tradition-

---

79 *Belmar*, 96 N.J. at 218, 475 A.2d at 543 . Compounding their failure to prove that competition was harmed, plaintiffs "offered no evidence of the market area for anesthesiological services." *Id.*

80 84 N.J. 179, 417 A.2d 1025 (1980).

81 *Id.* at 186, 417 A.2d at 1029. The state also alleged that defendants engaged in price fixing or resale price maintenance and improper vertical and horizontal territorial restraints. *Id.* at 187-88, 417 A.2d at 1029-30.

82 *Id.* at 210-13, 417 A.2d at 1042-43. The court also noted that the rule of reason was especially appropriate in a criminal prosecution because the courts should "proceed with even greater caution" in such cases. *Id.* at 212, 417 A.2d at 1043.

83 *Id.* at 213, 417 A.2d at 1043 (citation omitted).

84 *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 11 (1958).

85 Fuentes v. South Hills Cardiology, 946 F.2d 196, 202 (3d Cir. 1991) (quoting Pennsylvania *ex rel.* Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 183 (3d Cir. 1988)).

ally, group boycotts have been analyzed under the per se rule.[86] However, application of the per se rule in this context has engendered considerable confusion,[87] thereby suggesting that New Jersey courts may simply use the rule of reason.[88]

New Jersey courts have considered several group boycott cases. In *Chick's Auto Body v. State Farm Auto Insurance Co.*,[89] plaintiffs, a group of automobile body repair shops, alleged, among other things, that defendants, various automobile insurance companies, participated in a group boycott in connection with the resolution of certain insurance claims.[90] Essentially, the rates plaintiffs charged consumers for repairs exceeded the standard rates approved by the insurance companies, thereby leaving consumers in the position of paying the difference.[91] Consumers who refused to pay the differential were allegedly "diverted" by defendants to those shops that agreed to charge the prevailing rate.[92] Because plaintiffs lost business, they asserted that defendants' conduct indirectly resulted in an unlawful boycott of plaintiffs' shops.[93]

Focusing on the goal of antitrust laws to foster competition,[94] the court granted defendants' motion for summary judgment.[95] The court reasoned that plaintiffs sought to "use the antitrust laws as a shield" *from* competition.[96] The court explained:

> In trying to obtain the lowest prices defendants are doing no more than conducting their business as any rational employer would. An unlawful boycott will not result from a buyer's refusal to pay a higher price for goods or services where it can buy them

---

86 *See, e.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

87 F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 452-53 (1990) (Brennan, J., concurring in part and dissenting in part) (noting that the United States Supreme Court has applied the rule of reason to a host of group boycott cases); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 229-30 (1977) ("There is more confusion about the scope and operation of their per se rule against group boycotts than in reference to any other aspect of the per se doctrine.").

88 *See* Belmar v. Cipolla, 96 N.J. 199, 219, 475 A.2d 533, 544 (1984) (declaring that New Jersey was not bound to follow federal law regarding application of per se rule).

89 168 N.J. Super. 68, 401 A.2d 722 (Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (App. Div. 1980).

90 *Id.* at 73, 401 A.2d at 724. Plaintiffs also alleged that defendants conspired to fix prices. *Id.*

91 *Id.* at 84, 401 A.2d at 730.

92 *Id.*

93 *Id.*

94 *Id.* at 88, 401 A.2d at 732.

95 *Id.*

96 *Id.*

at a lower price.[97]

Group boycotts under the Act have also arisen in the real estate context. In *Oates v. Eastern Bergen County Multiple Listing Service*,[98] a multiple listing service ("MLS")[99] admitted only members who had belonged to a predecessor listing service.[100] A real estate broker who was not a member of the old listing service alleged, among other things, that defendant's refusal to admit him as a member constituted a restraint of trade.[101] The trial court, analyzing this dispute under the per se rule,[102] concluded that defendant's membership requirements were illegal because they constituted a "concerted refusal to deal" in the classic sense.[103] Focusing on the "realities of the situation," the court discussed the practical effects of denying plaintiff access to the MLS:

> Reducing the instant issue to the realities of the situation we find that plaintiff's success in obtaining listings or locating properties for sale—his "stock in trade"—is governed and limited by his own efforts, contacts and abilities. He has only a limited supply of "shoes on the shelves." His commissions on selling are limited by that supply, and if buyers come to him to find out what he has to sell the same limitations apply. On the other hand, the members of defendant corporation are not limited by their own efforts, contacts and abilities in the stock on hand. Rather, by reason of their membership in the MLS each such member broker has available to him not only the listings which he himself has obtained but also those obtained by more than 50 fellow members in the MLS and over 400 salespeople associated with them.[104]

---

97 *Id.* at 85, 401 A.2d at 730 . The court did not explicitly decide whether it was analyzing the group boycott claim under the rule of reason or the per se rule. *Id.*

98 113 N.J. Super. 371, 273 A.2d 795 (Ch. Div. 1971).

99 An MLS is essentially a clearing house for residential real estate listings. Pomanowski v. Monmouth County Bd. of Realtors, 89 N.J. 306, 318, 446 A.2d 83, 89, *cert. denied*, 459 U.S. 908 (1982).

100 *Oates*, 113 N.J. Super. at 378, 273 A.2d at 799. Though no proof was offered, the court intimated that the exclusion may have been racially motivated because plaintiff was "a Negro" and all members of the MLS were white. *Id.* at 374 & n.2, 273 A.2d at 796 & n.2.

101 *Id.* at 374, 273 A.2d at 796.

102 *Id.* at 382-89, 273 A.2d at 801-05. In light of the subsequent decision of the Supreme Court of New Jersey in *Pomanowski*, *see infra* notes 105-14 and accompanying text, which employed the rule of reason instead of the per se rule in judging MLS issues, *Oates* is severely limited.

103 *Id.* at 382, 273 A.2d at 801.

104 *Id.* at 381-82, 273 A.2d at 800. In dicta, the court also stated that defendant's membership requirements were unjustified under the rule of reason, rejecting defendant's claim that plaintiff's exclusion did not have a substantial impact on trade. *Id.* at 389-94, 273 A.2d at 805-07.

In *Pomanowski v. Monmouth County Board of Realtors*, decided eleven years after *Oates*, the New Jersey Supreme Court reached a very different conclusion about restrictions placed on access to an MLS.[105] There, the Monmouth County Board of Realtors® made an MLS available to its members.[106] A licensed real estate broker was denied access to the MLS because he voluntarily resigned from the Board of Realtors®.[107] The broker claimed that denying him access to the MLS because he was not a Realtor® violated the Act.[108]

Applying the rule of reason,[109] the supreme court held that the broker had not proven an antitrust violation.[110] Initially, the Court noted the procompetitive nature of an MLS:

> The procompetitive virtues of a multiple listing service are obvious; it is an ingenious mechanism for reducing the market imperfections inherent in the real estate industry. It operates as a clearing house of sorts in that the purchaser has access to a wide selection of properties and the vendor-broker is exposed to a larger market than could be reached through the unaided efforts of a single seller.[111]

In light of those procompetitive benefits, the court identified the relevant inquiry:

> [Would] the anticompetitive effects of conditioning [Monmouth County MLS] access on Board membership [be] outweighed by the procompetitive gains that flow from Board sponsorship of [the Monmouth County MLS]. If that competitive benefit would be lost, and if such loses would outweigh the negative effect of the access rule, then the rule is an acceptable limitation on competition.[112]

After reviewing an extensive record, including submissions from the Attorney General of New Jersey and the New Jersey Association of Realtors® as *amici curiae*, the New Jersey Supreme Court rejected the broker's claim that conditioning access to an MLS upon Realtor® membership constituted an antitrust violation.[113]

---

105 *See* Pomanowski v. Monmouth County Bd. of Realtors, 89 N.J. 306, 446 A.2d 83, *cert. denied*, 459 U.S. 908 (1982). The court did not explicitly discuss group boycotts or refusals to deal; however, the court's analysis was similar to the ones employed in such cases.

106 *Id.* at 310, 446 A.2d at 85.

107 *Id.*

108 *Id.* at 310-11, 446 A.2d at 85.

109 *Id.* at 315, 446 A.2d at 87.

110 *Id.* at 324, 446 A.2d at 93.

111 *Id.* at 318, 446 A.2d at 89.

112 *Id.* at 320-21, 446 A.2d at 90 (citation omitted).

113 *Id.* at 324, 446 A.2d at 92.

The court explained:

> [T]here has been no showing that the elimination of the access rule will effect any pro-competitive benefits—that [Monmouth County MLS] participation will be less expensive or even remain the same, or that a greater number of brokers will thereby be able to achieve access. Absent any showing of a true denial of access, the defendants should not be required to dismantle or significantly alter a trade association that provides procompetitive benefits in excess of any anticompetitive effects engendered. Accordingly, we conclude that in conditioning [Monmouth County MLS] access on [Monmouth County Board of Realtors®] membership, defendants have created a reasonable restraint of trade—one not in violation of our Antitrust Act.[114]

Pomanowski illustrates that an antitrust violation will not exist absent proof that competition is harmed. The fact that an individual broker is damaged by the restraint, without proof that the industry itself and, ultimately, the consumer suffers, is insufficient.

The need to prove harm to competition applies equally to medical group boycott claims. In *Desai v. St. Barnabas Medical Center*,[115] a physician who was denied access to a hospital staff alleged that the hospital participated in an illegal group boycott and/or refusal to deal.[116] Noting that New Jersey courts had never analyzed hospital staffing decisions under the Act, the New Jersey Supreme Court held that the issue should be reviewed under the rule of reason.[117] While the court declined to decide whether all hospital privilege cases should be governed by the rule of reason,[118] the court recognized that plaintiff's failure to offer "any proofs regarding market area or market power" was fatal to his claim.[119] As a result, plaintiff's "allegations of lost patient referrals"—that is, injury to himself—was insufficient absent harm to the public.[120]

---

114 *Id.*; *see also* Venture Resources Group, Inc. v. Greater N.J. Regional, Civil Action 95-0401, slip op. at 10 (D.N.J. Aug. 24, 1995) (denying a preliminary injunction to a broker who claimed, among other things, that conditioning access to a multiple listing service upon membership in a local board of Realtors and compliance with ethical standards violated the Act).

115 103 N.J. 79, 510 A.2d 662 (1986).

116 *Id.* at 84, 510 A.2d at 664.

117 *Id.* at 98, 510 A.2d at 672.

118 *Id.* at 98-99, 510 A.2d at 672.

119 *Id.* at 99, 510 A.2d at 672.

120 *Id.*; *see also* Petrocco v. Dover Gen. Hosp. & Medical Ctr., 273 N.J. Super. 501, 523-25, 642 A.2d 1016, 1027-29 (App. Div.) (citation omitted) (dismissing chiropractor's group boycott claim against hospital because plaintiff failed to prove the existence of a conspiracy), *certif. denied*, 138 N.J. 264, 649 A.2d 1284 (1994).

These cases demonstrate that New Jersey courts will not mechanically evaluate group boycott/refusal to deal cases under the per se label. Even in *Oates*, a case decided under the per se rule, the court offered a lengthy analysis of defendant's conduct under the rule of reason.[121] Accordingly, as in any other rule of reason case, parties raising group boycott/refusal to deal claims must be prepared to demonstrate how the challenged practice adversely affects competition, not just themselves as competitors.

3. Price Fixing

The United States Supreme Court has recognized that "no antitrust offense is more pernicious than price fixing."[122] In fact, preserving a free market system without price fixing is "essential to economic freedom."[123]

There are two general types of price fixing: horizontal and vertical. Horizontal price fixing exists where "competitors at the same market level agree to fix or control the prices they will charge for their respective goods and services."[124] Vertical price fixing, often characterized as resale price maintenance, exists where a manufacturer requires the distributors of its product "'to observe fixed resale prices.'"[125]

New Jersey courts have considered price fixing claims in *Lawn King*[126] and *Chick's Auto Body*.[127] In *Lawn King*, the franchisor "recommended" and "suggested" that Lawn King franchisees charge

---

121 Oates v. Eastern Bergen County Multiple Listing Serv., 113 N.J. Super. 371, 389-94, 273 A.2d 795, 805-07 (Ch. Div. 1971).

122 F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 630 (1992).

123 *Id.* at 632.

124 United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993). Of course, not all agreements concerning price are illegal under the antitrust laws. Justice White has explained:

> Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 23 (1979).

125 State v. Lawn King, 84 N.J. 179, 201, 417 A.2d 1025, 1037 (1980) (quoting United States v. A. Schrader's Sons, Inc., 252 U.S. 85, 99 (1920)).

126 *See id.* at 201-05, 417 A.2d at 1037-39. For other discussion of *Lawn King*, see *supra* notes 80-84 and accompanying text, and *infra* notes 143-44 and accompanying text.

127 *See generally* Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 401 A.2d 722 (Law Div. 1979), *aff'd*, 176 N.J. 320, 423 A.2d 311 (App. Div. 1980).

certain prices.[128] In affirming the appellate division's reversal of vertical price fixing convictions, the New Jersey Supreme Court agreed that the state had failed to demonstrate beyond a reasonable doubt that the franchisees were coerced into accepting the franchisor's price demands.[129] The New Jersey Supreme Court also emphasized that "a determination that there was not illegal coercive price fixing is particularly compelling in the franchising situation where the franchisor and franchisee are in contractual agreement to maintain quality control and a uniform image."[130]

The court also rejected claims that the franchisor participated in horizontal price fixing by its franchisees.[131] The court simply found no evidence that the restraints were imposed or enforced horizontally.[132] Moreover, the court recognized that, absent "persuasive evidence" of an independent agreement among horizontal competitors, "retailers who adhere to suggested retail prices, knowing that compliance by competitors is expected by the manufacturer in consonance with its price maintenance policy, do not thereby, without more, become co-conspirators with the manufacturer."[133]

Price fixing claims were also rejected in *Chick's Auto Body v. State Farm Mutual Automobile Insurance Co.*[134] There, plaintiffs (auto body shops) alleged that defendants (insurance companies) conspired to establish the labor rate for certain automobile repairs.[135] Relying on the absence of an agreement among defendants, and the fact that insurance rates are common knowledge throughout the industry, the court granted summary judgment dismissing the price-fixing claims:

> Plaintiffs do not point to any facts which indicate or suggest that defendants had some agreement with respect to their dealing with plaintiffs, or that they had conspired or acted in concert on this subject. Apparently, plaintiffs only indicated that an inference in this regard may be drawn from the fact that defendants

---

For other discussion of *Chick's Auto Body*, see *supra* notes 89-97 and accompanying text.

128 *Lawn King*, 84 N.J. at 202, 417 A.2d at 1037.

129 *Id.* at 203, 417 A.2d at 1038.

130 *Id.*

131 *Id.* at 207, 417 A.2d at 1040.

132 *Id.* at 207-08, 417 A.2d at 1040.

133 *Id.* at 207, 417 A.2d at 1040. The court identified this pricing conduct as "conscious parallelism." *Id.* For a brief summary of "conscious parallelism," see *supra* notes 27-28 and accompanying text.

134 *Chick's Auto Body*, 168 N.J. Super. at 85-87, 401 A.2d at 730-31.

135 *Id.* at 85, 401 A.2d at 730.

> have acted similarly - *i.e.*, "conscious parallelism." But "conscious parallelism," without additional facts leading to an inference [of] concerted action, is not enough to satisfy the statutory requirements and get the plaintiff past a motion for dismissal or summary judgment.[136]

Both *Lawn King* and *Chick's Auto Body* properly recognized the doctrine of conscious parallelism and explicitly rejected the price-fixing claims in those cases because there was no proof of an agreement to fix prices. While these cases are older, the principles they espouse remain valid.[137]

4. Vertical Non-Price Restrainys

Recent New Jersey cases have recognized that many vertical non-price restraints are not per se illegal. In *Glasofer Motors v. Osterlund, Inc.*,[138] the New Jersey Superior Court, Appellate Division, explained the permissible boundaries of such restraints:

> It is not *per se* illegal for a manufacturer or distributor of a product acting unilaterally or independently to exercise his discretion as to the parties with whom he will deal; to restrict its sales to authorized dealers or franchisees; to grant exclusive dealerships in a particular territory, or to impose other nonprice restrictions. Nevertheless, whenever any such marketing decision of a manufacturer, distributor or franchisor is not taken unilaterally or independently, but rather in concert with one or more of its customers, dealers or franchisees, the action constitutes a horizontal restraint.[139]

Applying these principles, the appellate division recognized that a distributor's grant of an exclusive territory to a dealer and its refusal to deal with plaintiff did not constitute a restraint of trade under the per se rule.[140] The court emphasized that plaintiff had offered no evidence of "any motive to eliminate price competition, of a conspiracy between [defendants], or of a horizontal market allocation."[141] The court, without significant discussion, also concluded that plaintiff had not demonstrated that defendants' conduct was invalid under the rule of reason.[142]

---

136 *Id.* at 86-87, 401 A.2d at 736 (citation omitted).

137 *See* Brooke Group v. Brown & Williamson, 113 S. Ct. 2578 (1993) (discussing conscious parallelism).

138 180 N.J. Super. 6, 433 A.2d 780 (App. Div. 1981).

139 *Id.* at 23, 433 A.2d at 789 .

140 *Id.* at 23-25, 433 A.2d at 789-90.

141 *Id.* at 25, 433 A.2d at 790.

142 *Id.* at 26, 433 A.2d at 790; *see also* Finlay & Assoc., Inc. v. Borg-Warner Corp., 146 N.J. Super. 210, 226-30, 369 A.2d 541, 549-52 (Law Div. 1976) (footnotes and citations

Similarly, in *Lawn King*, the New Jersey Supreme Court held that numerous vertical non-price restraints imposed upon a franchisee (such as exclusive territorial restrictions, mandatory cooperative advertising, and the franchisor's right of first refusal should the franchisee decide to transfer the franchise) could not support a criminal violation of the Act and, in any event, should be analyzed under the rule of reason.[143] The court emphasized that the restraints, and particularly the territorial restrictions, did not adversely affect interbrand competition:

> There has been no demonstration in this case that the territorial restrictions, albeit more restrictive than those in *Sylvania*, had a "pernicious effect" on the interbrand competition or that they lacked any "redeeming virtues." The State made no showing that consumers were not free to choose among the various lawn care service companies competing with Lawn King. Indeed, there was trial testimony to the effect that several interbrand competitors competed heavily in Lawn King dealership territories.[144]

Two early New Jersey decisions invalidating vertical non-price restraints without analyzing how those restraints harmed competition may no longer be valid. In *Clairol, Inc. v. Cosmetics Plus*,[145] a manufacturer of hair products sought injunctive relief to prevent a distributor from selling the public certain products intended only for "professional" use.[146] The distributor claimed that the manufacturer's attempt to impose limitations on its sales constituted a per se illegal vertical restraint.[147] While the court ultimately granted injunctive relief to the manufacturer on other grounds, it concluded that the "vertical restraints imposed by the manufacturer on the buyer must fall."[148]

Similarly, the court in *Kugler v. Koscot Interplanetary, Inc.*[149] based its decision on the per se rule instead of the rule of reason. The state alleged that certain vertical restraints imposed by a manufacturer upon distributors of cosmetics violated the Act.[150] Even

---

omitted), *aff'd*, 155 N.J. Super. 331, 382 A.2d 933 (App. Div.) (finding that manufacturer's termination of distributorship agreement did not violate Act because competition was not harmed), *certif. denied*, 77 N.J. 467, 391 A.2d 482 (1978).

143 State v. Lawn King, 84 N.J. 179, 194-98, 417 A.2d 1025, 1033-35 (1980).

144 *Id.* at 195, 417 A.2d at 1034.

145 130 N.J. Super. 81, 325 A.2d 505 (Ch. Div. 1974).

146 *Id.* at 83-87, 325 A.2d at 506.

147 *Id.* at 95, 325 A.2d at 512.

148 *Id.* at 101, 325 A.2d at 515.

149 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972).

150 *Id.* at 221-22, 293 A.2d at 684-85.

though the defendant had only a one percent share of the market,[151] the court found that restraints restricting (1) the persons from whom distributors could buy or sell defendant's products, (2) the manner in which the distributors could advertise defendant's product, and (3) the right of distributors to cooperate with other distributors in a retail sales effort were per se violations of the Act.[152]

Both *Kugler* and *Clairol* were decided before the United States Supreme Court's decision in *Sylvania* limiting the application of the per se rule concerning vertical non-price restraints. Today, in light of *Sylvania*, the claimed antitrust violations in those cases would be analyzed under the rule of reason.

5. Price Discrimination

Though it exists in many forms,[153] price discrimination occurs when "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."[154] Unlike federal law,[155] New Jersey law has no specific provision outlawing price discrimination.[156]

In *Gregory Marketing Corp. v. Wakefern Food Corp.*,[157] the New Jersey Superior Court, Appellate Division, made clear that parties are not permitted to assert price discrimination claims under the Act.[158] There, plaintiffs alleged that defendants engaged in price

---

151 *Id.* at 241, 293 A.2d at 695.

152 *Id.* at 248, 293 A.2d at 699.

153 Schmauder & Sheehan, *supra* note 2, at 20.

154 Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2587 (1993).

155 Price discrimination (as contrasted to "predatory pricing" *see* discussion *infra* notes 163-74 and accompanying text) is prohibited under federal law by the Robinson-Patman Act. 15 U.S.C. § 13 (1994). That Act provides in pertinent part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Id.

156 Gregory Marketing Corp. v. Wakefern Food Corp., 207 N.J. Super. 607, 613-14, 504 A.2d 828, 831-32 (Law Div. 1985).

157 207 N.J. Super. 607, 504 A.2d 828 (Law Div. 1985).

158 *Id.* at 610, 504 A.2d at 830.

discrimination in violation of section 56:9-3 because defendant Wakefern received preferential prices on apple juice products purchased from defendant Red Cheek.[159] Relying on the absence of a general price discrimination remedy under the Act or a specific remedy governing the sale of apple products, the court dismissed the claim.[160] Moreover, the court held that even though the Act must be "construed in harmony" with the Sherman Act, its federal counterpart, the Sherman Act did not regulate price discrimination—only the Robinson-Patman Act did.[161] Because the New Jersey Legislature had never elected to adopt its own version of the Robinson-Patman Act, the court concluded that it should not recognize a general price discrimination cause of action.[162]

6. Predatory Pricing

Like price discrimination, predatory pricing is characterized by a competitor's scheme to drive its rivals out of business by pricing its products in an unfair manner.[163] The elements of predatory pricing are: (1) proof that defendant had a rational economic motive, that is, evidence that defendant's losses caused by its pricing could later be recouped through monopoly profits,[164] and (2) a showing that the defendant's prices were set below "some appropriate measure of cost."[165]

In *Ideal Dairy*, the appellate division explained that "[t]he rationale underlying these requirements recognize that predatory prices represent an investment in a future monopoly. If the market conditions are such that monopoly pricing is later impossible, one can infer that prices are not predatory."[166]

Consistent with its focus on monopoly concerns, the court recognized that predatory pricing schemes are often pleaded

---

159 *Id.*

160 *Id.* at 614, 504 A.2d at 832 (citation omitted). The court noted that the New Jersey Legislature had enacted specific price discrimination statutes for certain industries, but not for the one at issue in *Gregory Marketing*. *See, e.g.*, N.J. STAT. ANN. § 17:29A-4 (West 1994) (insurance rates); N.J. STAT. ANN. § 33:1-89 (West 1994) (alcoholic beverages); N.J. STAT. ANN. § 56:6-22 (West 1989) (motor fuel).

161 *Id.* at 615-16, 504 A.2d at 832-33.

162 *See id.* at 616, 504 A.2d at 833.

163 Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993).

164 Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 193-94, 659 A.2d 904, 930 (App. Div.) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589-91 (1986)), *certif. denied*, 141 N.J. 99, 660 A.2d 1197 (1995).

165 *Id.* at 194, 659 A.2d at 930.

166 *Id.*

under § 2 of the Sherman Act.[167] However, the court "assume[d] that a conspiracy to engage in predatory pricing may also be actionable under section 56:9-3 as a conspiracy in restraint of trade."[168] Thus, Ideal did not lose its cause of action because it did not allege that defendants had violated section 56:9-4 of the Act, the corollary to § 2 of the Sherman Act.[169]

Ultimately, however, Ideal's predatory pricing claims failed because it did not offer any evidence that defendant, a milk processor, could have later recouped its losses incurred in a milk pricing war with Ideal "by raising prices to noncompetitive monopolistic levels in the future."[170] Rejecting Ideal's claims that such proof was "obvious," the court reasoned that market conditions in the milk industry, including "keen" competition among dairies and federal and state regulation, rendered it "particularly improbable" that defendant could achieve monopoly power.[171]

Lastly, the court emphasized that low prices alone do not suggest predatory pricing.[172] Instead, the court recognized that aggressive pricing strategies may benefit consumers by stimulating competition.[173] The fact that Ideal was harmed by such pricing was, the court held, "irrelevant" under the Act.[174]

IV. MONOPOLIZATION

Section 56:9-4(a)[175] of the Act makes it "unlawful for any person to monopolize, or attempt to monopolize, or to combine or conspire" to monopolize trade "in any relevant market" in New Jersey.[176] As is the case under the federal antitrust laws,[177] monopoly offenses[178] are governed by different rules from those applicable to restraint of trade claims.[179] Perhaps the most significant

167 *Id.* at 193, 659 A.2d at 929.

168 *Id.*

169 *See id.*

170 *Id.* at 197, 659 A.2d at 931.

171 *Id.*, 659 A.2d at 932.

172 *Id.* at 198, 204-05, 659 A.2d at 935.

173 *Id.* at 198, 205, 659 A.2d at 932, 935.

174 *Id.* at 176, 659 A.2d at 921.

175 The remaining subsections of § 56:9-4 deal with the monopoly implications of a corporation acquiring stock of one or more other corporations so as to "substantially lessen competition." No reported cases have cited or discussed those provisions.

176 N.J. STAT. ANN. § 56:9-4(a) (West 1989).

177 *Compare* 15 U.S.C. § 1 (restraint of trade) *with* 15 U.S.C. § 2 (concerning monopolization and attempt to monopolize).

178 The terms "monopoly offenses" or "monopoly claims" will be used in this section to encompass both monopolization and attempt to monopolize causes of action.

179 The same conduct, however, may be the subject of both restraint of trade and

difference between claims of monopoly and those alleging restraint of trade is that a single defendant may be guilty of monopoly offenses while restraint of trade claims require a "contract, combination or conspiracy."[180] The United States Supreme Court has stated the elements of monopoly offenses as: (1) predatory or anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power in the relevant market.[181] The reported New Jersey monopoly cases have generally followed these substantive principles of federal monopoly law.[182]

For example, in *Exxon Corp. v. Wagner*,[183] the appellate division affirmed a summary judgment dismissing claims of monopolization and attempt to monopolize, noting the absence of any intent to monopolize and the lack of proof that Exxon had a "dangerous probability" of obtaining monopoly power over the sale of the relevant products in the relevant geographic market.[184] In a more recent case, *Van Natta Mechanical Corp. v. DiStaulo*,[185] the appellate division also relied upon the federal criteria,[186] though the court subsequently dismissed the antitrust claims due to lack of antitrust standing.[187] Thus, as in many other areas of substantive antitrust

---

monopoly claims. State v. Scioscia, 200 N.J. Super. 28, 40, 490 A.2d 327, 334 (App. Div.), *certif. denied*, 101 N.J. 277, 501 A.2d 942 (1985).

[180] *Compare* N.J. STAT. ANN. § 56:9-3 (West 1989) (making unlawful every "contract, combination . . . or conspiracy in restraint of trade") *with* N.J. STAT. ANN. § 56:9-4(a) (making it unlawful for "any person" to commit a monopoly offense). As to the requirement that restraints of trade involve more than one offender, see *supra* notes 24-30 and accompanying text.

Section 56:9-4(a) expressly provides a cause of action for conspiracy to monopolize but does not provide for a claim for conspiracy to attempt to monopolize. Federal law similarly precludes any such cause of action. *See, e.g.*, Windy City Circulating Co. v. Charles Levy Circulating Co., 550 F. Supp. 960, 967 (N.D. Ill. 1982); Alabama v. Blue Bird Body Co., 71 F.R.D. 606, 609 (M.D. Ala. 1976), *modified*, 573 F.2d 309 (5th Cir. 1978); PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW, ¶ 839 at 359 (1978).

[181] Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 890-91 (1993). For a discussion of the concept of relevant market, see *supra* notes 45-56 and accompanying text.

[182] Reported federal cases in which monopoly claims under the Act were asserted along with causes of action under federal antitrust laws do not even discuss the New Jersey claims separately. *See, e.g.*, Regency Oldsmobile, Inc. v. General Motors Corp., 723 F. Supp. 250, 270 (D.N.J. 1989); Michael Halebian N.J., Inc. v. Roppe Rubber Corp., 718 F. Supp. 348, 355, 359 (D.N.J. 1989).

[183] *See supra* notes 54-56 and accompanying text.

[184] Exxon Corp. v. Wagner, 154 N.J. Super. 538, 548-49, 382 A.2d 45, 50 (App. Div. 1977).

[185] 277 N.J. Super. 175, 649 A.2d 399 (App. Div. 1994).

[186] *Id.* at 188-89, 649 A.2d at 406-07.

[187] *Id.* at 190, 649 A.2d at 407. For a discussion of antitrust standing, see *infra* notes 305-24 and accompanying text.

law, there is no substantial difference between the standards of the Act and those of the comparable federal statute in the area of monopoly offenses.[188]

V. PROCEDURAL ISSUES

Though section 56:9-18 requires that the Act "be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes," this requirement applies only to substantive law.[189] That was the conclusion of the appellate division in *Boardwalk Properties, Inc. v. BPHC Acquisition, Inc.*[190] In that case, the court held that although a jury trial was guaranteed under the federal Sherman Act, New Jersey's particular criteria for analyzing whether statutes create jury trial rights led to the opposite conclusion.[191] The court rejected the defendants' assertion that section 56:9-18 of the Act dictated the same result as did federal law, observing that jury trial rights are procedural ones that are determined by the internal law of the forum.[192]

As a result of *Boardwalk Properties*, procedural rulings under the Act need not follow federal law. Many such rulings, however, have conformed with federal practice, in recognition of the superior experience of federal courts with antitrust claims.

---

188 Other cases in which monopoly offenses were alleged and were addressed based on more brief discussions of federal law include Desai v. St. Barnabas Medical Ctr., 103 N.J. 79, 97, 510 A.2d 662, 671 (1986); G&W, Inc. v. Borough of East Rutherford, 280 N.J. Super. 507, 513-14, 656 A.2d 11, 14 (App. Div. 1995); Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc., 196 N.J. Super. 262, 271, 482 A.2d 186, 190-91 (App. Div. 1984), *certif. denied*, 99 N.J. 234, 491 A.2d 722 (1985); Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. ATL-C-000052-89E, slip op. at 24-27, 61-67 (March 25, 1993); Finlay & Assoc., Inc. v. Borg-Warner Corp., 146 N.J. Super. 210, 222-24, 369 A.2d 541, 547-49 (Law Div. 1976), *aff'd*, 155 N.J. Super. 331, 382 A.2d 933 (App. Div.), *certif. denied*, 77 N.J. 467, 391 A.2d 482 (1978); Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 248-50, 293 A.2d 682, 699-701 (Ch. Div. 1972). Except for *G & W*, in which summary judgment against the antitrust plaintiff was reversed, all of these cases rejected the monopoly claims asserted.

189 For a detailed discussion of the effect of § 56:9-18 on substantive issues, see *supra* note 4 and accompanying text.

190 *See* Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515, 602 A.2d 733 (App. Div. 1991).

191 *Id.* at 529-30, 602 A.2d at 740-41. For a detailed discussion of this issue, see generally Bruce D. Greenberg & Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 RUTGERS L. REV. 1461 (1995).

192 *Boardwalk Properties*, 253 N.J. Super. at 529, 602 A.2d at 740 (quoting Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62, 64 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943)).

A. *Jurisdiction*

Both the United States Supreme Court and New Jersey state courts agree that federal courts have exclusive jurisdiction over federal antitrust claims.[193] State antitrust claims, however, can be cognizable in either state or federal court.[194] If the facts support both a federal and a state antitrust claim, a party is free to confine its case to its cause of action under the Act and proceed in state court,[195] or assert only the federal claim (or both claims) in federal court.[196]

B. *Jury Trial Rights*

As described above, the Act has been held not to create a right to a jury trial.[197] Thus, where a claim under the Act is the sole cause of action, the case will not be triable to a jury if the case is brought in state court. Where a claim under the Act does not stand alone, however, the right to a jury trial in state court may vary depending on the overall nature of the action.[198] Thus, in cases otherwise primarily equitable in nature, and therefore not triable to a jury under New Jersey's doctrine of ancillary equitable jurisdiction,[199] a claim under the Act will not be triable to a jury either.[200] However, where the overall case is primarily legal, the antitrust claim will ordinarily be tried to a jury with the rest of the case unless it is completely independent of the equitable claims.[201] Plain-

---

193 *See, e.g.*, Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920); Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6, 20, 433 A.2d 780, 787 (App. Div. 1981).

194 In addition to the general jurisdiction of the New Jersey courts to enforce rights under New Jersey statutes, state court power to grant injunctive relief is expressly conferred by sections 56:9-10(a) and (b). Federal jurisdiction may be obtained if there is diversity of citizenship or, if the presence of other federal claims permit a claim under the Act to be encompassed in the same action, under the doctrines of pendent or ancillary jurisdiction. For a discussion of those latter doctrines, now codified at 28 U.S.C. § 1367, see David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 65 (1991).

195 *Glasofer Motors*, 180 N.J. Super. at 21, 433 A.2d at 788.

196 *See supra* note 191.

197 *See supra* notes 191-92 and accompanying text.

198 *See, e.g.*, Weinisch v. Sawyer, 123 N.J. 333, 343, 587 A.2d 615, 620 (1991) (holding that the right to jury trial attaches in legal but not equitable actions, and determination of whether case is primarily legal or equitable turns on historical basis for cause of action and requested relief).

199 For a discussion of this doctrine, see generally Greenberg & Wolinetz, *supra* note 191, at 1472-85.

200 Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515, 602 A.2d 733 (App. Div. 1991).

201 *See* New Jersey Highway Auth. v. Renner, 18 N.J. 484, 493, 114 A.2d 555, 559

tiffs under the Act who desire a jury trial can ensure that they get one if they are able to bring their cases in federal court, because the federal system will provide a jury trial on demand in such cases.[202]

C. *Summary Judgment*

Two cases from the appellate division have apparently adopted contrary views of the standards for summary judgment in cases arising under the Act.[203] Because summary judgment standards in general were until very recently evolving differently in the federal and New Jersey systems, there was room to argue that certain elements of the federal approach were not appropriate under the Act.

In *Kimmelman v. Henkels & McCoy, Inc.*,[204] the trial court granted summary judgment in favor of the state in its civil antitrust action. On appeal, one of the defendants argued that "summary judgment should be used sparingly in antitrust cases, relying on *Poller v. Columbia Broadcasting System.*"[205] *Poller* had indeed cautioned:

> Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."[206]

Kimmelman, however, rejected the hostile attitude toward summary judgment reflected in *Poller*, noting that the "concept does

---

(1955) (permitting a purely legal counterclaim to be tried to a jury though the complaint presented solely equitable, and therefore nonjury, issues). The *Renner* court so ruled because the issues of the counterclaim were considered so independent of the complaint as to stand on their own. Presumably, if an antitrust claim could be shown to be equally independent of the legal claims in a primarily legal action, the same principle would result in a denial of a jury trial on the antitrust claim despite the overall nature of the action.

202 *See generally* Greenberg & Wolinetz, *supra* note 191, at 1487-88.

203 *Compare* Kimmelman v. Henkels & McCoy, Inc., 208 N.J. Super. 508, 506 A.2d 381 (App. Div. 1986), *rev'd on other grounds*, 108 N.J. 123, 527 A.2d 1368 (1987) *with* G & W, Inc. v. Borough of East Rutherford, 280 N.J. Super. 507, 656 A.2d 11 (App. Div. 1995). For a discussion of these cases, see *infra* notes 203-18 and accompanying text.

204 208 N.J. Super. 508, 506 A.2d 381 (App. Div. 1986), *rev'd on other grounds*, 108 N.J. 123, 527 A.2d 1368 (1987).

205 *Id.* at 519, 506 A.2d at 387 (citing Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962)).

206 368 U.S. at 473 (footnote omitted).

not appear as prevalent a rule in more recent cases as in former years."[207] The absence of issues of motive and intent, and the uncontradicted evidence of a bid rigging conspiracy, satisfied the court that summary judgment was properly granted.[208]

Kimmelman, decided on March 11, 1986, foreshadowed the decision of the United States Supreme Court only fifteen days later in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[209] There, in a predatory pricing case, the Court adopted a far more generous attitude toward summary judgment in antitrust cases, though without specifically addressing *Poller*. The Court held that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of conspiracy."[210] The Court required evidence "that tends to exclude the possibility"[211] that the conduct complained of was undertaken for valid competitive reasons.[212] When read together with two other 1986 decisions of the United States Supreme Court, *Celotex Corp. v. Catrett*,[213] and *Anderson v. Liberty Lobby, Inc.*,[214] which generally lib-

---

207 *Kimmelman*, 208 N.J. Super. at 519, 506 A.2d at 387 (citing Weit v. Continental Illinois Nat'l Bank & Trust Co., 641 F.2d 457, 464 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Aladdin Oil v. Texaco, Inc., 603 F.2d 1107, 1111 (5th Cir. 1979)). The court might also have noted the Supreme Court's own decisions in First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968), and Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), both of which (contrary to *Poller*) upheld summary judgment, and emphasized its appropriateness in antitrust cases.

208 *Kimmelman*, 208 N.J. Super. at 520, 506 A.2d at 388.

209 475 U.S. 574 (1986).

210 *Id.* at 597 n.21 (citing *Monsanto*, 465 U.S. at 763-64).

211 Id. at 597.

212 *Id.* at 597-98 (citing *Monsanto*, 465 U.S. at 764). The Court went on to state that allegations of a conspiracy that was economically senseless would not defeat summary judgment. *See id.* at 588, 590, 593, 595, 597. In its most recent decision, the Court made clear that:

> The Court's requirement in Matsushita that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468-69 (1992) (footnote omitted).

213 477 U.S. 317 (1986) (holding that a party moving for summary judgment need not support that motion with affidavits if other materials in the record demonstrate that opponent of motion, who has ultimate burden of proof, cannot establish an essential element of claim or defense).

214 477 U.S. 242 (1986) (holding that if proofs offered by opponent of summary

eralized the availability of summary judgment under the Federal Rules of Civil Procedure,[215] *Matsushita* seemed to confirm the view of *Kimmelman* that the *Poller* reticence to grant summary judgment had been left behind.[216]

A more recent decision of the appellate division, however, seems to have revived *Poller* in New Jersey. In *G & W, Inc. v. Borough of East Rutherford*,[217] the court reversed a grant of summary judgment against an antitrust plaintiff and remanded the matter for trial. Though the evidence presented in opposition to the motion was ample,[218] so that summary judgment plainly was inappropriate even under the *Poller* view, the court stated that "[s]ummary judgment in antitrust cases is not favored," and quoted *Poller*'s hostile view of summary judgment in such cases.[219] Parties thus might

---

judgment motion would not satisfy burden applicable at trial, such as "clear and convincing evidence" in a defamation case like *Anderson*, summary judgment is appropriate even if some evidence in opposition to motion is presented). Until late 1995, New Jersey had not followed this rule of *Anderson*. *See infra* notes 223-33 and accompanying text. *Celotex* and *Anderson* were both decided on June 25, 1986.

215 Apart from the favorable substantive rules announced in *Celotex* and *Anderson*, the cases are more noteworthy for their generally hospitable attitude toward summary judgment. For example, *Celotex* declared that summary judgment is "not a disfavored procedural shortcut, but rather an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quotation omitted).

216 Even some cases after *First National Bank v. Cities Services*, but before *Matsushita*, declared that *Poller* had been superseded. *E.g.*, Savage v. Waste Management, Inc., 623 F. Supp. 1505, 1507 (D.S.C. 1985) (finding *Poller* "of questionable validity"); Ralph C. Wilson Indus., Inc. v. ABC, 598 F. Supp. 694, 699 (N.D. Cal. 1984), *aff'd*, 794 F.2d 1359 (9th Cir. 1986). Although *Anderson* involved libel rather than antitrust claims, *Anderson* itself criticized the notion that *Poller* permitted a case to go to a jury without any "concrete evidence" that would support a jury verdict, merely because the jury might disbelieve a defendant's denial of a conspiracy. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

217 280 N.J. Super. 507, 656 A.2d 11 (App. Div. 1995).

218 The evidence included the fact that although the plaintiff had sought a share of the towing business in East Rutherford for 10 years, the defendant competitor, Roadmasters, which made political contributions to public officials, and whose president was an "old and good friend" of the police chief (an influential figure in deciding who gets towing business), got municipal towing business without even paying for a towing license. *Id.* at 511, 656 A.2d at 13. Moreover, Roadmasters used municipal land for its towing business without paying any rent. *Id.* Finally, the Attorney General had advised the municipality in 1986 that its towing arrangements violated the antitrust laws, and followed that with a 1989 formal opinion that a municipality using private towing services must publicly advertise and bid the towing work. *Id.* at 511-12, 656 A.2d at 13. Despite that pointed advice, East Rutherford continued to maintain exclusive towing relationships with the defendant towing companies. *Id.*

219 *Id.* at 514, 656 A.2d at 14 (quoting Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962)). Ironically, the court also cited *Kimmelman*, though it stands for a diametrically opposite view of summary judgment than that expressed in *G & W*. *See supra* notes 203-07 and accompanying text.

now argue that *Poller* remains the attitude of New Jersey courts toward summary judgment motions in cases under the Act.

Summary judgment standards are procedural rules, so that New Jersey courts are free to differ with their federal counterparts on the issue. However, the current federal attitude of greater hospitality to summary judgment is the right one. *Poller* resulted in a virtual bar to summary judgment in antitrust cases even where a case was patently meritless. The mere invocation of the antitrust laws was often enough to force a trial.[220] Especially given the huge increase in antitrust cases (often motivated by the availability of treble damages and attorneys' fees),[221] and the effect of even unsupported allegations on pro-competitive conduct,[222] there is no reason to read summary judgment out of the panoply of available procedures in antitrust cases.[223] Instead, *Poller* should be viewed as doing nothing more than stating the unexceptionable rule, applicable in all contexts, that courts should be cautious in granting summary judgment where motive and intent are at issue.[224]

---

220 *See, e.g.*, White v. Hearst Corp., 669 F.2d 14, 16-17 (1st Cir. 1982) (quoting Mutual Fund Inv. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977)) (condemning the use of *Poller* as a "magic wand waved indiscriminately by those opposing summary judgment motions in antitrust actions"). As discussed *supra* note 213, the Supreme Court of the United States in *Anderson* found it necessary to observe that a party could not use *Poller* to defeat summary judgment, in the absence of concrete evidence in its favor, merely because of the possibility that a jury might disbelieve a defendant's sworn denial of any conspiracy.

221 N.J. STAT. ANN. §§ 56:9-10(b) (West 1989); 56:9-12(a) (West 1989); 15 U.S.C. § 12 (1994); *see* Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978) (noting the extraordinary temptation to sue created by the availability of treble damages and attorneys' fees), *cert. denied*, 440 U.S. 982 (1979).

222 *See* Capital Imaging Assoc. v. Mohawk Valley Medical Assoc., 996 F.2d 537, 541 (2d Cir. 1993); Apex Oil Co. v. DiMauro, 641 F. Supp. 1246, 1257 (S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 822 F.2d 246 (2d Cir. 1987); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (noting that mistaken inferences in antitrust cases can chill the very conduct that antitrust law is designed to protect).

223 Even *Poller* did not purport to do that. The statement from *Poller* quoted *supra* in text accompanying note 205 applied only to "complex antitrust litigation where motive and intent play leading roles." *Poller*, 368 U.S. at 473. On issues not involving motive or intent, *Poller* did not preclude summary judgment, as it might have had the Court inserted a comma between "litigation" and "where," thus arguably changing the meaning of its ruling to one that applied to *all* "complex antitrust litigation." The Court's willingness to uphold summary judgment in *Cities Service* and *Monsanto* makes this clear.

224 This position was apparently adopted in Exxon Corp. v. Wagner, 154 N.J. Super. 538, 541, 382 A.2d 533, 546 (App. Div. 1977), where the court noted that "where subjective elements, such as intent or motive, are involved, summary judgment is to be granted with caution." Because no such issues were involved there, the court was not deterred from granting summary judgment. The Eighth Circuit Court of Appeals has concurred. *See* City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 274

Ironically, until late 1995, the substantive federal summary judgment rule of *Matsushita* would not have been applied to the Act. That departure was due to the fact that New Jersey had diverged from the federal system in evaluating summary judgment motions on causes of action that involve burdens of proof different from the normal "preponderance of the evidence" standard.

In *Anderson v. Liberty Lobby, Inc.*, the Supreme Court of the United States announced that, in considering summary judgment motions, a court should take into account the ultimate burden of proof at trial and should grant the motion if its opponent has not adduced sufficient evidence to satisfy that burden.[225] Thus, *Anderson* would permit a court to grant the motion if, for example, a "clear and convincing" standard would apply at trial, and the evidence offered in opposition to the motion does not rise to that level. That holding is very much the lineal descendant of the ruling in *Matsushita* three months earlier, as both appear to entail the weighing of evidence at the summary judgment stage.[226]

The Supreme Court of New Jersey at first declined to adopt

---

n.5 (8th Cir. 1988). The idea, in *any* type of case, that summary judgment should be granted only with caution where motive or intent are at issue is fundamental in New Jersey in all courts. *See, e.g.*, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954).

Some federal cases, especially in the Ninth Circuit, continue to cite *Poller* for the idea that summary judgment in antitrust cases is disfavored, *see, e.g.*, High Technology Careers v. San Jose Mercury News, 996 F.2d 987, 989 (9th Cir. 1993) and Movie 1 & 2 v. United Artists Communications, 908 F.2d 1245, 1248-49 (9th Cir. 1990). Many more, however, now rely only on the statement of the "motive or intent" idea of *Poller*, and characterize the "disfavored" language as dictum that does not create a heightened standard for summary judgment in antitrust cases, especially where motive and intent are not at issue. *See, e.g.*, Flegel v. Christian Hosp., Northeast-Northwest, 4 F.3d 682, 685 (8th Cir. 1993); Capital Imaging Assoc. v. Mohawk Valley Medical Assoc., Inc., 996 F.2d 537, 541-42 (2d Cir. 1993); Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1362 (3d Cir. 1992); Oksanen v. Page Mem. Hosp., 945 F.2d 696, 708 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992); Texaco Puerto Rico, Inc. v. Medina, 834 F.2d 242, 247 (1st Cir. 1987); Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1110-12 (5th Cir. 1979); Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1166-67 (7th Cir. 1978); Advanced Health-Care Servs., Inc. v. Giles Mem. Hosp., 846 F. Supp. 488, 492 (W.D. Va. 1994). Because *Poller* has not been expressly overruled, that would seem to be a sound way of rationalizing that case with succeeding cases that encourage or grant summary judgment in the antitrust context.

225 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-57 (1986).

226 Justice Brennan was the only justice to dissent in both *Anderson* and *Matsushita*. Justice Brennan's dissent in *Anderson* equated the two cases, and criticized both for endorsing an evidence-weighing process on summary judgment. *See id.* at 261 n.2 (Brennan, J., dissenting). Coincidentally, the very first case cited in the legal discussion in *Anderson* was *Cities Service*, an antitrust case in which the Court upheld summary judgment despite *Poller*. *See id.* at 248-49.

the *Anderson* rule. In *Dairy Stores, Inc. v. Sentinel Publishing Co.*,[227] a defamation action in which a "clear and convincing" standard of proof would apply at trial, the court considered and rejected *Anderson* as the governing rule for New Jersey summary judgment practice.[228] The court concluded "that the clear-and-convincing test inevitably implicates a weighing of the evidence that intrudes into the province of the jury."[229] Thus, to the extent that any element of a claim or defense under the Act must be proven by any standard other than the normal preponderance of the evidence, the New Jersey Supreme Court appeared to have foreclosed reliance on the federal *Anderson* rule.

On October 24, 1995, the Supreme Court of New Jersey changed all that when it decided *Brill v. The Guardian Life Insurance Company of America*.[230] The court reviewed the entire landscape of summary judgment, including the New Jersey cases and the trio of 1986 federal rulings that included *Matsushita*.[231] Ultimately, the court adopted the federal summary judgment standard announced in the 1986 trilogy, noting that many other states had already done so[232] and that the court's Civil Practice Committee had recommended adopting that standard in New Jersey.[233]

After *Brill*, the substantive summary judgment standard applicable to the Act is now the same one (friendly to summary judgment) employed in federal antitrust cases. The more hospitable federal *attitude* toward summary judgment in antitrust cases should also be applied under the Act.[234]

D. "Exemptions"

Section 56:9-5, entitled "Exempt organizations and activities,"

---

227 104 N.J. 125, 516 A.2d 220 (1986).

228 *Id.* at 155-57, 516 A.2d at 235-36.

229 *Id.* at 156-57, 516 A.2d at 236. The four Justices who dissented in *Anderson* had expressed this same concern. *See Anderson*, 477 U.S. at 600 (White, J., dissenting).

230 142 N.J. 520, 666 A.2d 146 (1995).

231 *Id.* at 528-34, 666 A.2d at 150-53.

232 *Id.* at 538-40, 666 A.2d at 155-56.

233 *Id.* at 538, 666 A.2d at 155. In discussing its departure from *Dairy Stores*, which had expressly rejected the *Celotex/Anderson* standard, *see supra* notes 226-28 and accompanying text, the court noted that *Dairy Stores* had "involved actual malice as a common-law bar to the defense of fair comment, while [*Anderson*] involved actual malice as a constitutionally mandated component of a defamation action brought by a public official or public person." *Id.* at 534, 666 A.2d at 153. The court then observed that, eight years later, in Costello v. Ocean County Observer, 136 N.J. 594, 643 A.2d 1012 (1994), in which the plaintiff had been a public figure, the court had recited and applied a version of the *Anderson* test, while "[o]ffering no comment or criticism." *Id.*

234 *See supra* notes 219-25 and accompanying text.

contains a series of limitations on the scope of the Act. Contrary to its title, however, that section does not create any "exempt organizations." Rather, all three subsections of section 56:9-5 are couched in terms of the limited activities that the Act does not forbid or penalize, so that even organizations mentioned in section 56:9-5 may be subject to liability based on conduct that violates the Act. The cases under the Act have long made this principle clear.[235]

Though section 56:9-5 is divided into three subsections, it protects two broad types of conduct. The first is the legitimate activity of organizations that are apparently deemed by the Act to be reasonable "combinations." These include trade and professional organizations,[236] labor organizations,[237] agricultural or horticultural cooperative organizations,[238] and nonprofit religious or charitable organizations.[239] The second set of exemptions relates to "activity directed, authorized or permitted by any law of this State that is in conflict or inconsistent with the provisions of this act," as well as certain activities in specific regulated industries.[240] This second category appears to represent a "state action doctrine" under the Act that somewhat parallels the federal doctrine of that same

---

235 *See, e.g.*, State v. Scioscia, 200 N.J. Super. 28, 35-41, 490 A.2d 327, 331-34 (App. Div.) (rejecting the contention that § 56:9-5(b)(3) exempted all activities of a public utility from the Act), *certif. denied*, 101 N.J. 277, 501 A.2d 942 (1985); Pomanowski v. Monmouth County Bd. of Realtors, 152 N.J. Super. 100, 107 n.2, 377 A.2d 791, 795 n.2 (Ch. Div. 1977), *aff'd on this point and rev'd and remanded on other grounds*, 166 N.J. Super. 269, 272, 399 A.2d 990, 991 (App. Div. 1979) (finding that the § 56:9-5(a) declaration that trade association activities are not per se illegal would not insulate the defendant board if activities violative of Act were shown), *certif. denied*, 81 N.J. 260, 405 A.2d 805 (1979); Oates v. Eastern Bergen County Multiple Listing Serv., 113 N.J. Super. 371, 394, 273 A.2d 795, 807 (Ch. Div. 1971) (same).

236 These organizations are protected in two different subsections. Section 56:9-5(a) provides that such associations are not forbidden by or per se illegal under the Act, and that the Act does not prohibit them "from lawfully carrying out the legitimate objects thereof not otherwise in violation of this act." For a brief discussion of the history of that provision, see Perrucci & Mussomeli, *supra* note 2, at 165. Section 56:9-5(b)(9), which is limited to not-for-profit professional associations that are "licensed and regulated by the courts or any other agency of this State," permits them to "recommend[ ] schedules of suggested fees, rates or commissions for use solely as guidelines in determining charges for professional and technical services."

237 N.J. STAT. ANN. § 56:9-5(b)(1) (West 1989).

238 N.J. STAT. ANN. § 56:9-5(b)(2) (West 1989).

239 N.J. STAT. ANN. § 56:9-5(b)(5) (West 1989).

240 These include public utilities, N.J. STAT. ANN. § 56:9-5(b)(3) (West 1989); insurance, N.J. STAT. ANN. § 56:9-5(b)(4) (West 1989); securities, N.J. STAT. ANN. § 56:9-5(b)(6) (West 1989); banks and savings and loans, N.J. STAT. ANN. §§ 56:9-5(b)(7), (8) (West 1989); and those subject to the statutes involving sales of cigarettes and motor fuels, N.J. STAT. ANN. § 56:9-5(b)(10) (West 1989).

name.[241] Its primary objective is to "prevent business entities from being subjected to conflicting sets of governmental regulations."[242]

The exemptions for organizational activities have been employed in only one published case to date.[243] In *Borland v. Bayonne Hospital*,[244] the charitable organization exemption was invoked in favor of a number of defendant hospitals who were allegedly involved in a conspiracy to charge higher prices to members of the union represented by the plaintiffs than to other patients.[245] The court stated that "[p]laintiffs' brief offers no reason or authority to support its bare statement that defendant hospitals should be denied the exemption for which the statute specifically provides."[246]

---

241 Under the federal antitrust laws, the state action doctrine exempts restraints that are "clearly articulated and affirmatively expressed as state policy" and "actively supervised by the State itself." *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). New Jersey cases have applied this state action doctrine in several cases where restraints created by the state were asserted to have violated the Sherman Act. *See, e.g.*, Fanelli v. City of Trenton, 135 N.J. 582, 594-97, 641 A.2d 541, 547-49 (1994) (applying doctrine to municipal ban on vending in Special Improvement District); Bally Mfg. Corp. v. N.J. Casino Control Comm'n, 85 N.J. 325, 336-37, 426 A.2d 1000, 1005-06 (applying doctrine to regulation prohibiting casino from acquiring more than 50% of its slot machines from one manufacturer), *appeal dismissed*, 454 U.S. 804 (1981); New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 565-66, 384 A.2d 795, 805-06 (1978) (applying doctrine to regulation establishing price guidelines for dispensers of hearing aids); *see also* Joseph H. Reinfeld, Inc. v. Schieffelin & Co., 94 N.J. 400, 416-18, 466 A.2d 563, 571-72 (1983) (discussing carefully and comprehensively the state action doctrine, though finding it unnecessary to rely on the doctrine). Section 56:9-5(c) appears more simple, because it applies to "any activity directed, authorized or permitted by any [State] law," without incorporating the notion of "active supervision." The specific provisions of certain portions of § 56:9-5(b), *see supra* note 239, in contrast, seem to rely entirely on the idea that conduct is protected to the extent that it is "actively supervised" by a regulatory agency, even though the phrase "active supervision" is not used in the statute.

242 State v. Scioscia, 200 N.J. Super. 28, 39, 490 A.2d 327, 333 (App. Div.), *certif. denied*, 101 N.J. 277, 501 A.2d 942 (1985). Other cases making this same point include Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 75, 401 A.2d 722, 725 (Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (App. Div. 1980) and Borland v. Bayonne Hosp., 122 N.J. Super. 387, 406, 300 A.2d 584, 594 (Ch. Div. 1973), *aff'd*, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975), *aff'd*, 72 N.J. 152, 369 A.2d 1, *cert. denied*, 434 U.S. 817 (1977).

243 In *New Jersey Guild*, the Supreme Court of New Jersey relied on § 56:9-5(b)(9), which insulates price guidelines promulgated by professional associations. *New Jersey Guild*, 75 N.J. at 564, 384 A.2d at 805. However, *New Jersey Guild* involved a price guideline issued by a state administrative agency, not a private professional organization. Thus, while the cited section provided a useful analogy, it cannot be considered to have disposed, by its terms, of the issue in *New Jersey Guild*.

244 122 N.J. Super. 387, 300 A.2d 584 (Ch. Div. 1973), *aff'd*, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975), *aff'd*, 72 N.J. 152, 369 A.2d 1, *cert. denied*, 434 U.S. 817 (1977).

245 *Id.* at 405, 300 A.2d at 593.

246 *Id.* Cases since *Borland*, all of which centered on claims of wrongful denial of hospital staff privileges, have declined to rely on that section, and have instead ad-

In contrast, there have been a number of decisions under the "state action doctrine" protections of sections 56:9-5(b) and (c) of the Act. For example, the general protection of section 56:9-5(c) has been applied in three cases by the Supreme Court of New Jersey.[247] In *New Jersey Guild of Hearing Aid Dispensers v. Long*,[248] the court faced a challenge to an administrative regulation that created price guidelines for hearing aid dispensers. The plaintiff, Guild, asserted that the guidelines in fact constituted a price ceiling. The court held that the regulation was indeed merely a guideline, and that such guides were specifically protected by section 56:9-5(b)(9).[249] However, the court went on to note that "even if the guideline constituted a price restriction in restraint of trade, the Guild's argument must fail, as the express terms of the Antitrust Act itself indicate its inapplicability to any anticompetitive action authorized by state law."[250]

Three years later, the court decided *Bally Manufacturing Corp. v. New Jersey Casino Control Commission*.[251] There, the Casino Control Commission had adopted a regulation precluding any casino from purchasing more than fifty percent of its slot machines from a single manufacturer. Bally, the dominant manufacturer of slot machines for use in New Jersey, asserted (among other things) that the regulation violated the Act. The court disagreed, holding that the regulation was authorized and permitted by the Casino Control Act.[252] Because the regulation was permitted by that statute, the court invoked section 56:9-5(c) and rejected Bally's Antitrust Act

---

dressed and rejected the antitrust claims on their merits. *See* Desai v. St. Barnabas Medical Ctr., 103 N.J. 79, 99 n.9, 510 A.2d 662, 679 n.9 (1986); Belmar v. Cipolla, 96 N.J. 199, 219, 475 A.2d 533, 544 (1984); Petrocco v. Dover Gen. Hosp. & Medical Ctr., 273 N.J. Super. 501, 524, 642 A.2d 1016, 1028 (App. Div.), *certif. denied*, 138 N.J. 264, 649 A.2d 1284 (1994). The *Petrocco* court found it "unclear" whether "charitable activities" encompasses decisions on staff privileges. *See Petrocco*, 273 N.J. Super. at 524, 642 A.2d at 1028.

247 In addition to those cases, which are discussed *infra* notes 247-255 and accompanying text, the court addressed the state action exemption in dictum in *Monmouth Chrysler-Plymouth, Inc. v. Chrysler Corp.* 102 N.J. 485, 509 A.2d 161 (1986). There, in discussing the Motor Vehicle Franchise Act, the court noted that although the statute might have the effect of limiting the number of automobile dealers in New Jersey, thus diminishing intrabrand competition, "[u]nquestionably, the state-action exemption would apply" to that statute even if it created an unreasonable restraint on competition. *Id.* at 494, 509 A.2d at 165.

248 75 N.J. 544, 384 A.2d 795 (1978).

249 *Id.* at 564, 384 A.2d at 805.

250 *Id.* (citing N.J.S.A. § 56:9-5(c)).

251 85 N.J. 325, 426 A.2d 1000 (1981).

252 N.J. STAT. ANN. 5:12-1 *et seq.* (West 1994). *See Bally*, 85 N.J. at 330-31, 426 A.2d at 1003.

challenge.[253]

Most recently, in *Fanelli v. City of Trenton*,[254] the New Jersey Supreme Court rejected a state antitrust challenge to a municipal ordinance that restricted vending in Trenton's Special Improvement District ("SID"). After holding that New Jersey SID statutes authorized the ordinance,[255] the court again applied section 56:9-5(c) to defeat the plaintiff's argument under the Act.[256]

Timber Properties, Inc. v. Chester Township,[257] the only lower court case to invoke section 56:9-5(c), is also the case that contains the most analysis of that section. In *Timber*, plaintiff, a real estate developer, challenged municipal zoning ordinance amendments that compelled the denial of the developer's application to build on its property. Among other things, plaintiff alleged that the amendments violated the Act. The court held that there was "no meaningful distinction in the application of exemption from antitrust liability provided by section 56:9-5(c) between a zoning ordinance and a state administrative regulation."[258] Because the Municipal Land Use Law ("MLUL") authorizes municipalities to adopt zoning ordinances, the court found that the amendments in question were protected by the "authorized or permitted" activity provision of section 56:9-5(c).[259]

The developer argued, however, that the ordinance amendments were violative of the MLUL and the New Jersey Constitution, so that, according to plaintiff, if those contentions prevailed, the amendments would not be "authorized or permitted."[260] The court rejected that contention, explaining:

> There is a well recognized distinction between an act of a governmental agency which is beyond its jurisdiction and an act which is within the jurisdiction of the agency but is found to be invalid. This distinction is pertinent in the interpretation of N.J.S.A. 56:9-5(c). The "activity" of adopting a zoning ordinance is clearly within the jurisdiction of a planning board and a governing body and hence "authorized or permitted" by law. The mere fact that an ordinance or administrative regulation is subject to being set aside by a court does not mean that a public

253 *Bally*, 85 N.J. at 335, 426 A.2d at 1005.
254 135 N.J. 582, 641 A.2d 541 (1994).
255 *Id.* at 589-91, 641 A.2d at 544-45 .
256 *Id.* at 598, 641 A.2d at 549.
257 205 N.J. Super. 273, 500 A.2d 757 (Law Div. 1984).
258 *Id.* at 289, 500 A.2d at 766.
259 *Id.*
260 *Id.* at 290, 500 A.2d at 766.

official has exceeded his authority in its adoption.[261]

In addition to the general state action protection of section 56:9-5(c), two of the more specific provisions of section 56:9-5(b) have each been the subject of several reported cases. They are the protections for insurers[262] and public utilities.[263]

The insurer provision has been invoked to bar a price-fixing claim against Blue Cross,[264] to prevent auto body shops from asserting that insurers conspired to keep repair prices too low,[265] and to reject a challenge to an insurance regulation requiring a minimum policyholder surplus as a prerequisite to an insurance company's participation in a high-risk driver insurance program.[266] The first two of these cases used this provision to grant summary judgment, thus demonstrating the usefulness of the "exemption" sections in avoiding the need for unnecessary and often protracted antitrust trials.

The public utility exemption was employed in *Sudler v. Environment Disposal Corp.*[267] to defeat a claim that a sewage disposal plant franchised by the Board of Public Utility Commissioners had improperly denied the plaintiff access to the sewage disposal system that connected with the plant, because the Board "expressly permitted the activity that Sudler claims violates the Act."[268] In *State v. Scioscia*,[269] a criminal case, however, the court prevented waste disposal companies who had conspired to divide up territories from using section 56:9-5(b)(3) of the Act to immunize their conduct. While recognizing that the waste disposal industry was

---

261 *Id.*, 500 A.2d at 767 (citation omitted). The court went on to note that most land-use ordinances arguably have anticompetitive consequences, so that plaintiff's view would create liability under the Act for every such ordinance. The need to avoid the chilling effect of such exposure in connection with even desirable regulations was viewed by the court as another reason to bar liability for the adoption of an ordinance. *Id.* at 290-91, 500 A.2d at 767.

262 N.J. STAT. ANN. § 56:9-5(b)(4) (West 1989).

263 N.J. STAT. ANN. § 56:9-5(b)(3) (West 1989).

264 Borland v. Bayonne Hosp., 122 N.J. Super. 387, 405-06, 300 A.2d 584, 593-94 (Ch. Div. 1973), *aff'd*, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975), *aff'd*, 72 N.J. 152, 369 A.2d 1, *cert. denied*, 434 U.S. 817 (1977).

265 *See* Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 75-83, 401 A.2d 722, 725-29 (Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (App. Div. 1980).

266 *See* IFA Ins. Co. v. New Jersey Dep't of Ins., 195 N.J. Super. 200, 208-09, 478 A.2d 1203, 1207-08 (App. Div.), *certif. denied*, 99 N.J. 218, 491 A.2d 712 (1984).

267 219 N.J. Super. 52, 529 A.2d 1022 (App. Div.), *certif. denied*, 109 N.J. 56, 532 A.2d 1119 (1987).

268 *Id.* at 64, 529 A.2d at 1027.

269 200 N.J. Super. 28, 490 A.2d 327 (App. Div.), *certif. denied*, 101 N.J. 277, 501 A.2d 942 (1985).

"pervasively regulated" by the Board of Public Utilities, the court held that it would "totally eviscerate and subvert the legislative plan were we to construe the exemption as precluding prosecution of criminal restraints of commerce neither mandated nor permitted by the BPU."[270]

Though not truly complete "exemptions," the protections of section 56:9-5 are a powerful tool to defeat claims under the Act in circumstances covered by that section.[271] Avoiding an unnecessary and expensive trial by using those protections to obtain summary judgment should be a first resort of anyone involved in cases falling within the ambit of that section.[272]

E. Remedies

The Attorney General of the State of New Jersey, the state and its political subdivisions and public agencies, and private parties all may seek relief under the Act.[273] Injunctive relief,[274] treble dam-

---

[270] *Id.* at 35-38, 490 A.2d at 331-33. The court thus implicitly construed the public utility provision as a parallel to the general state action subsection, since the court's reference to conduct "neither mandated nor permitted" was virtually identical to the "directed, authorized or permitted" language of § 56:9-5(c). *See supra* note 240 and accompanying text.

[271] Perrucci & Mussomeli, *supra* note 2, perceived a trend in the federal courts toward limiting the scope of comparable exemptions under federal law, and urged that "[i]f New Jersey hopes to follow federal precedent, then the courts of this state should carve away the expansive exemption section". It is unclear, however, how that suggestion accords with the authors' earlier statements that federal decisions, especially those postdating the Act's enactment, cannot be given stare decisis effect in state court. *Id.* at 141, 151 nn.1-3. The legislature's decision to adopt *statutory* exemptions developed in federal courts by case law should be honored by state courts regardless of the trend of federal cases.

[272] Presumably, certain other "exemptions" embodied in federal antitrust case law will also apply under the Act. For example, the *Noerr-Pennington* doctrine holds that attempts to influence governmental action are exempt from antitrust scrutiny unless they are "sham." *See generally* Professional Real Estate Inv., Inc. v. Columbia Pictures Indus., Inc., 113 S. Ct. 1920 (1993); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The *Noerr-Pennington* doctrine has already been applied in New Jersey in a common law tort case that did not assert antitrust claims. Village Supermarket, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224, 634 A.2d 1381 (Law Div. 1993). That ruling foreshadows application of *Noerr-Pennington* in an appropriate case under the Act as well.

[273] N.J. STAT. ANN. § 56:9-10(a) (West 1989) (Attorney General may seek injunctions); N.J. STAT. ANN. § 56:9-10(b) (West 1989) (any person may seek injunction against "threatened loss or damage to his property or business by a violation" of the Act); N.J. STAT. ANN. § 56:9-12(a) (West 1989) (any person "injured in his business or property by reason of a violation" of the Act may sue for damages and other monetary relief); N.J. STAT. ANN. § 56:9-12(b) (West 1989) (Attorney General, State and subdivisions and agencies considered "persons" who may seek damages). For a discussion of

ages,[275] reasonable attorneys' fees,[276] civil penalties,[277] revocation of a corporate offender's charter or right to do business in New Jersey,[278] and criminal fines and imprisonment[279] are among the listed remedies.

The most controversial aspect of the remedial area has been the "mandatory interdict" provision of section 56:9-11(b). That clause, which has no analog in the federal statute,[280] states that any person convicted under section 56:9-11(a):

> is hereby denied the right and is hereby prohibited from managing or owning any business organization within this State, and from serving as an officer, director, trustee, member of any executive board or similar governing body, principal, manager, stockholder owning 10% or more of the aggregate outstanding capital stock of all classes of any corporation doing business in this State, and all persons within this State, are hereby denied the right to handle the goods of or in any manner deal with, directly or indirectly, those persons, companies or corporations under the interdict specified herein.[281]

In *State v. Lawn King, Inc.*,[282] the court applied the mandatory interdict to an individual defendant, while stating that the interdict did not apply to the corporate defendant.[283] The convictions in

---

the standing requirements under the Act, see *infra* notes 305-24 and accompanying text.

274 §§ 56:9-10(a) & (b).

275 §§ 56:9-12.

276 § 56:9-10(b); § 56:9-12(a). In *Kimmelman v. Henkels & McCoy, Inc.*, the court held that the state could not recover attorneys' fees and costs for actions brought under § 56:9-10, because the state was not defined as a "person" for that purpose. Kimmelman v. Henkels & McCoy, Inc., 208 N.J. Super. 508, 515-18, 506 A.2d 381, 385-87 (App. Div. 1986), *rev'd on other grounds*, 108 N.J. 123, 527 A.2d 1368 (1987).

277 § 56:9-10(c). For a comprehensive discussion of civil penalties under the Act, see *Kimmelman*, 108 N.J. at 123, 527 A.2d at 1368, and Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972).

278 N.J. STAT. ANN. § 56:9-7 (West 1989); N.J. STAT. ANN. § 56:9-8 (West 1989). These remedies may be sought only by the Attorney General.

279 N.J. STAT. ANN. § 56:9-11(a) (West 1989). The Supreme Court of New Jersey has indicated that the interests of the state and its citizens may often be better protected by a civil suit rather than a criminal prosecution against alleged violators of the Act. *See* State v. Lawn King, 84 N.J. 179, 215-16, 417 A.2d 1025, 1045 (1980).

280 State v. Lawn King, Inc., 152 N.J. Super. 333, 340, 377 A.2d 1214, 1218 (Law Div. 1977), *rev'd on other grounds*, 169 N.J. Super. 346, 404 A.2d 1215 (App. Div. 1979), *aff'd*, 84 N.J. 179, 417 A.2d 1025 (1980).

281 N.J. STAT. ANN. § 56:9-11(b) (West 1989).

282 152 N.J. Super. 333, 340, 377 A.2d 1214 (Law Div. 1977), *rev'd on other grounds*, 169 N.J. Super. 346, 404 A.2d 1215 (App. Div. 1979), *aff'd*, 84 N.J. 179, 417 A.2d 1025 (1980).

283 *Id.* at 338, 340-41, 377 A.2d at 1217, 1218. In an unpublished oral decision, the

Lawn King were overturned on appeal,[284] so that ruling was never addressed by a higher court.

However, in *State v. New Jersey Trade Waste Ass'n*,[285] a law division judge held the mandatory interdict unconstitutional as violative of the bans against cruel and unusual punishment contained in the United States and New Jersey constitutions.[286] The court considered the perpetual bar against participating in the management of any business to be severe and extreme, easily distinguishable from other statutes that preclude violators from certain dealings for a limited time, and disproportionate in the particular case before it, where the offenders had "led exemplary lives with the exception of the instant offense."[287] The court also rejected the view of *Lawn King* that the interdict did not apply to business entities.[288] Finally, the court severed the interdict from the remainder of the Act.[289] As in *Lawn King*, however, that decision was never reviewed on appeal.[290]

Arguments both in favor of and against the validity of the mandatory interdict can be made.[291] However, any unconstitutional effects of at least part of the interdict may be mitigated by performing "judicial surgery" on the offending provision.[292] Certainly, the first portion of the interdict, which precludes violators from holding a managerial position in any business, does not deprive them of all realistic means of making a living, as the court in

---

trial court found the mandatory interdict constitutional. *See* Perrucci & Mussomeli, *supra* note 2, at 174 & n.244.

284 *See* State v. Lawn King, 169 N.J. Super. 346, 404 A.2d 1215 (App. Div. 1979), *aff'd*, 84 N.J. 179, 417 A.2d 1025 (1980).

285 191 N.J. Super. 144, 465 A.2d 596 (Law Div. 1983), *rev'd and remanded*, 194 N.J. Super. 90, 476 A.2d 301 (App. Div. 1984).

286 *Id.* at 153, 465 A.2d at 598. *See* U.S. CONST., amend. VIII; N.J. CONST., Art. 1, ¶ 12.

287 *New Jersey Trade Waste, 191 N.J. Super. at 153-61, 465 A.2d at 601-05.*

288 *Id.* at 149, 465 A.2d at 598. Given the language of the statute, which bans any dealings with "persons, companies, or corporations under the interdict specified herein," that ruling appears clearly correct.

289 *Id.* at 161, 465 A.2d at 605.

290 *See New Jersey Trade Waste Ass'n*, 194 N.J. Super. at 92 n.2, 476 A.2d at 302 n.2 (App. Div. 1984); *see also* In re Scioscia, 216 N.J. Super. 644, 661 n.3, 524 A.2d 855, 863 n.3 (App. Div. 1987).

291 Perrucci & Mussomeli, *supra* note 2, at 174-75, discuss some of the arguments. Those authors ultimately endorse an amendment to make the interdict discretionary. *See id.* at 177.

292 *See, e.g.*, Town Tobacconist v. Kimmelman, 94 N.J. 85, 104, 462 A.2d 573, 582 (1983) (applying judicial surgery); *see generally* NYT Cable TV v. Homestead at Mansfield, Inc., 111 N.J. 21, 27-28, 543 A.2d 10, 14 (1988) (Handler, J., concurring) (discussing principles of engaging in "judicial surgery").

New Jersey Trade Waste contended.[293] The language of that portion of N.J.S.A. 56:9-11(b) can certainly be limited to control positions, so that an offender would not be barred from becoming a "middle manager," as long as he was not in control of the business.[294]

The second part of the interdict, which forbids anyone to "in any manner deal with, directly or indirectly, those persons, companies or corporations under the interdict specified herein," seems far less easy to salvage. Construed literally, that provision would mean that no one could even employ such offenders, as hiring them in any capacity would constitute "dealing with" them.

The entire issue may be academic, however, because *New Jersey Trade Waste* has stood for twelve years as a clear declaration of the interdict's unconstitutionality. It is not clear whether that remedy is still being pursued in cases brought under the Act.[295] In light of that, it certainly should come as no surprise if a higher court ultimately buries the interdict.[296]

The Act includes at least two remedial mechanisms that appear to have been designed to encourage parties to settle rather

---

293 The court stated:

> This statute not only prevents an individual from participating in a licensed profession, since those convicted of a crime are generally excluded from such practice, but also extends to prohibiting involvement in any business at a management or ownership level, for the rest of the defendant's life. The alternatives left to those convicted under the statute are few. They may take jobs as laborers, at probably substantially reduced income; they may be eligible to work for a labor union; or they may, of course, leave the state and start over. A defendant who takes a job in the state is forever barred from promotion or advancement and is prevented from using his earnings to obtain a significant interest in a business enterprise. The statute deprives individuals of the right to apply their skills and abilities to better themselves and to provide for themselves and their families in the best way they are able.

New Jersey Trade Waste, 191 N.J. Super. at 150, 465 A.2d at 599.

294 Though the statutory bar includes serving as "manager," under the principle of *noscitur a sociis*, which holds that a word's meaning is indicated by the words with which it is associated, that word should be construed as meaning only a top manager, of the type covered by the other categories from which offenders are barred. *See* Germann v. Matriss, 55 N.J. 193, 220-21, 260 A.2d 839 (1970). That would obviate much of the concern expressed in *New Jersey Trade Waste* while preserving the essence of the interdict.

295 *See, e.g.*, State v. Scioscia, 200 N.J. Super. 28, 32, 490 A.2d 327, 329 (App. Div.) (finding defendants guilty of violating the Act, but making no mention of any imposition of the interdict), *certif. denied*, 101 N.J. 277, 501 A.2d 942 (1985).

296 *Cf.* Callen v. Sherman's, Inc., 92 N.J. 114, 133, 455 A.2d 1102, 1111-12 (1983) (voiding Distraint Act and noting that the Chancery Division had declared it unconstitutional eight years earlier, so that "for over eight years landlords and their attorneys have been on notice that distraint is a doubtful and risky procedure"). Several appellate cases have expressly declined to rule on this issue. *See supra* note 289.

than to risk adverse final decisions.[297] First, a party who obtains a permanent injunction or damages may obtain not only reasonable attorneys' fees, but "reasonable costs of suit," which are defined to include, but not be limited to, "the expenses of discovery and document reproduction."[298] This broad definition of "costs of suit" is one that does not appear in other major New Jersey statutes that shift costs and attorneys' fees.[299] Given the extensive nature of discovery in antitrust cases,[300] the "reasonable costs of suit" could be substantial.[301] A party who settles does not face that liability.

Second, section 56:9-13 provides that a final judgment in any civil or criminal action brought by the state for violation of the Act "shall be prima facie evidence against such defendant in any proceeding brought by any other party against such defendant pursuant to [section 56:9-12], as to all matters with respect to which said judgment or decree would be an estoppel as between the parties thereto."[302] That provision is expressly inapplicable "to consent judgments or decrees entered before any testimony has been taken."[303] Although section 56:9-13 of the Act may not give private parties the benefit of collateral estoppel in their own damage suits,[304] defendants have a powerful incentive to enter into consent

---

297 The mandatory interdict may have been intended for this purpose also. *See* State v. New Jersey Trade Waste Ass'n, 194 N.J. Super. 90, 92, 476 A.2d 301, 302 (App. Div. 1984) (noting that guilty plea was entered under statute other than Act "to avoid burdening defendants with the 'interdict' sanctions of N.J.S.A. 56:9-11(b)").

298 N.J. STAT. ANN. § 56:9-10(b) (West 1989); N.J. STAT. ANN. § 56:9-12(a) (West 1989).

299 For example, the Consumer Fraud Act, N.J. STAT. ANN. § 56:8-19 (West 1989), the Law Against Discrimination, N.J. STAT. ANN. § 10:5-27.1 (West 1994), the Environmental Rights Act, N.J. STAT. ANN. § 2A:35A-10(a) (West 1989 and 1995 Supp.), and the Oppressed Minority Shareholder Statute, N.J. STAT. ANN. § 14A:12-7(10) (West 1995), all contain provisions to shift attorneys' fees or certain costs, such as expert fees. None of these statutes expressly shifts all discovery costs to the losing party.

300 *See, e.g.*, Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167 (7th Cir. 1978) (stating that "antitrust trials often encompass a great deal of expensive and time consuming discovery").

301 No case has yet decided whether an award of discovery expenses is *required* as part of "reasonable costs of suit." The Act says only that such costs "may" include discovery expenses. Sections 56:9-10(b) and 56:9-12(a). Thus, while reasonable costs of suit must be awarded, because the same sections of the Act say they "shall" be, it is unclear whether discovery expenses must be included in all cases. *See* Bell v. Western Employers Ins. Co., 173 N.J. Super. 60, 65, 413 A.2d 363, 366 (App. Div. 1980) (finding that where the legislature used "shall" and "may" in the same sentence dealing with the same subject, the court must assume that the change was intentional).

302 The final clause of § 56:9-13 makes clear, however, that no such effect is given to damage suits brought under § 56:9-12.

303 *Id.*

304 Collateral estoppel can allow not only a successful litigant, but other parties in later litigation, to treat as established in their own lawsuits against a particular party all

judgments or decrees before testimony is taken, rather than subjecting themselves to suits by private parties whose cases are substantially made by an adverse verdict in the state's action.[305]

F. Standing

Under federal antitrust law, not every claim that is literally encompassed by an antitrust statute confers standing to sue.[306] Rather, a plaintiff must demonstrate both that (1) he has sustained "antitrust injury," meaning "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful,"[307] and (2) he is otherwise a proper plaintiff.[308] In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,[309] the United States Supreme Court listed the nature and directness of the injury claimed, the availabil-

---

facts actually and necessarily decided against that same party in a prior case. *See generally* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979); McIntyre v. ILB Inv. Corp., 172 N.J. Super. 415, 412 A.2d 810 (Law Div. 1979). Because § 56:9-13 makes those facts only prima facie evidence, which could be successfully rebutted, the statute falls short of conferring collateral estoppel effect. It does, however, substantially lighten the burden of private plaintiffs in proving a case against a defendant after the state has obtained a judgment covered by that section.

305 Perhaps as a result of this provision, a number of consent judgments entered before any testimony was taken have been reported. *See, e.g.*, Kimmelman v. Risalvato, 1984-1 Trade Cases (CCH) ¶65,971 (N.J. Super. Ch. Div. June 2, 1983) (concerning gasoline retailers who agreed not to conspire to fix prices); Zazzali v. New Jersey Pharmaceutical Ass'n, 1981-2 Trade Cases (CCH) ¶64,376 (N.J. Super. Ch. Div. Nov. 16, 1981) (concerning pharmacies that agreed not to fix prescription drug prices, disseminate information relating to price-fixing, establish fee schedules, or induce adherence to specific fees); Zazzali v. B&B Beverage Co., Inc., 1981-1 Trade Cases (CCH) ¶64,130 (N.J. Super. Ch. Div. June 17, 1981) (concerning beer distributors who gave up rights under an agreement that illegally created exclusive territories); Degnan v. Stokes Dairy, Inc., 1980-1 Trade Cases (CCH) ¶63,198 (N.J. Super. Ch. Div. Feb. 21, 1980) (barring dairies from fixing prices, allocating markets, submitting collusive bids, and exchanging price information); New Jersey v. Allan's Towing Serv., Inc., 1978-1 Trade Cases (CCH) ¶62,004 (N.J. Super. Ch. Div. Apr. 20, 1978) (banning towing companies from agreeing on prices or exchanging price information); New Jersey v. Nurses Private Duty Registry, Inc., 1977-2 Trade Cases (CCH) ¶61,809 (N.J. Super. Ch. Div. Dec. 12, 1977) (barring nurses' registry from making agreements to fix prices or generating fee schedules or other mechanisms to allow members to fix prices).

306 *See, e.g.*, Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537 (1983).

307 Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109 (1986) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).

308 *Id.* at 110 n.5 ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 [of the Sherman Act], because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons.").

309 459 U.S. 519 (1983).

ity of less remotely affected plaintiffs, and the judicial manageability of an action filed by particular parties[310] as factors to consider in determining whether a plaintiff is a proper one.[311] Those factors are to be considered regardless of whether the alleged antitrust offense is a per se violation or another type of wrong.[312]

Standing cases under the Act seem to have largely paralleled the federal standards, though such congruence is not required.[313] The cases have stated that the Act protects competition rather than competitors,[314] thus seemingly incorporating the federal rationale for the requirement of antitrust injury, which "ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and . . . prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief."[315] There has not yet been an explicit adoption, however, of the term "antitrust injury," with all its federal baggage, as a criterion under the Act.

One published case appears to have decided that the *Associated General Contractors* factors for a proper plaintiff apply under the Act. In *Van Natta Mechanical Corp. v. DiStaulo*,[316] plaintiff, a mechanical subcontractor, had been told by a major contractor, DiStaulo, with whom plaintiff dealt extensively, that plaintiff must cease dealing with a competing contractor or lose any future opportunity to bid on DiStaulo's jobs. Plaintiff filed suit for tortious

---

310 This includes such things as the potential for duplicative recoveries or complex problems of damages apportionment. *Id.* at 545.

311 *Id.* at 538-45; *Cargill*, 479 U.S. at 111 n.6. *Associated General Contractors* involved a claim for treble damages. These factors also apply to a case where only injunctive relief is sought, but not necessarily in the same way as in a treble damages action. *Id.*

312 *See* Arco v. USA Petroleum, 495 U.S. 328, 341-45 (1990). For a discussion of the difference between per se violations and other violations, see *supra* notes 31-67 and accompanying text.

313 *See infra* notes 313-24 and accompanying text.

314 *See* Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 88, 401 A.2d 722, 732 (Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (App. Div. 1980); *see also* Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515, 530, 602 A.2d 733, 741 (App. Div. 1991) (same, though no standing issue presented).

315 *Arco*, 495 U.S. at 338, 342 ("The antitrust laws were enacted for the protection of *competition*, not *competitors*.") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

316 277 N.J. Super. 175, 190, 649 A.2d 399, 407 (App. Div. 1994). Though the court did not cite *Associated General Contractors* or any other United States Supreme Court case, it relied on Eighth Circuit case law that in turn cited *Associated General Contractors*. *See id.*, 649 A.2d at 407 (citing Midwest Communications v. Minnesota Twins, 779 F.2d 444, 450 n.6 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986)).

interference and also asserted a monopoly claim under the Act. The appellate division, applying the *Associated General Contractors* factors, held that plaintiff lacked standing to raise the antitrust claim, because it was not a target of the allegedly monopolistic activity and its injury was not direct enough to afford standing.[317]

The *Associated General Contractors* factors appear to be prudential and discretionary ones, born of the concern that too many speculative lawsuits will burden the courts, expose parties to duplicative recoveries, and reduce the effectiveness of the treble damages remedy.[318] Although *Van Natta* had the right to apply those factors under the Act, to the extent that this aspect of antitrust standing is informed by general federal standing law,[319] which is based on the federal constitutional "case or controversy" requirement[320] and is more stringent than New Jersey's own standing rules,[321] other courts confronting these same issues under the Act could legitimately choose not to incorporate the "proper plaintiff" tests into New Jersey's antitrust standing rules.

To this point, the New Jersey cases have set up the requirement of section 56:9-12 that a person be "injured in his business or property"[322] as the primary determinant of standing. That language is identical to the phrasing of the comparable federal statute.[323] In reliance on that language, New Jersey courts have denied standing to associations of businesses (even though their members might have had standing on their own), because the associations were not conducting businesses.[324] In contrast, consumers who have shown injury to their "property" in the form of increased costs

---

317 *Id.*

318 *See* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111 n.6 (1983); Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519, 544-545 (1983).

319 *See Associated General Contractors*, 459 U.S. at 535 n.31 (noting that "[h]arm to the antitrust plaintiff is sufficient to satisfy the *constitutional* standing requirement of injury in fact").

320 *See* U.S. CONST., art. III, § 2.

321 *See* Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107-08, 274 A.2d 433, 437-38 (1971).

322 N.J. STAT. ANN. § 56:9-12 (West 1989); *see also* N.J. STAT. ANN. § 56:9-10(b) (West 1989) (requiring "threatened loss or damage to [the] property or business" of a plaintiff seeking injunctive relief under the Act).

323 15 U.S.C. § 15 (1994).

324 *See* Chick's Auto Body v. State Farm Mut. Auto. Ins. Co., 168 N.J. Super. 68, 73, 401 A.2d 722, 724 (Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (App. Div. 1980); New Jersey Chiropractic Soc'y v. Radiological Soc'y, 156 N.J. Super. 365, 369, 383 A.2d 1182, 1184 (Ch. Div. 1978); New Jersey Optometric Ass'n v. Hillman-Kohan Eyeglasses, Inc., 144 N.J. Super. 411, 426, 365 A.2d 956, 964 (Ch. Div. 1976), *aff'd*, 160 N.J. Super. 81, 388 A.2d 1299 (App. Div. 1978).

for X-rays have been afforded standing to assert claims that medical societies, hospitals, and radiologists had conspired to monopolize trade by refusing to provide X-rays to customers referred by chiropractors.[325]

The "injury to business or property" criterion parallels federal law, and is, by itself, sufficient to ensure that only persons with real injury may file antitrust lawsuits. If, however, other New Jersey courts follow *Van Natta* by incorporating the additional, prudential limitations of federal law as well, New Jersey antitrust standing law will substantially emulate federal law in most respects.

VI. CONCLUSION

For the most part, New Jersey courts have followed federal antitrust substantive law in construing the Act. However, New Jersey courts are not bound to adhere to federal procedural requirements. Instead, as they have in fact sometimes done, New Jersey courts may choose their own procedural path. Practitioners should be cognizant of New Jersey's treatment of antitrust issues, both substantive and procedural, especially if they have a choice between filing suit in state court under the Act or in federal court under the federal antitrust laws.

---

325 *See New Jersey Chiropractic*, 156 N.J. Super. at 370-71, 383 A.2d at 1185. Not every "injury" to a consumer, however, suffices to confer standing. In *Monmouth Real Estate*, the court found that a consumer who alleged that he was inconvenienced by the defendant's allegedly monopolistic actions lacked standing because he had not shown any injury other than "*de minimis* additional travel expenses by automobile." Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc., 196 N.J. Super. 262, 272, 482 A.2d 186, 191 (App. Div. 1984), *certif. denied*, 99 N.J. 234, 491 A.2d 722 (1985).