SETON HALL LEGISLATIVE JOURNAL

VOL. 2 SUMMER 1977 NO. 2

NEW JERSEY ANTITRUST LAW: AN OVERVIEW

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The history of antitrust enforcement in New Jersey has been both innovative and sporadic. In 1970, the Legislature passed the New Jersey Antitrust Act,[1] which ended a fifty year absence of a comprehensive antitrust statute within the state. Private and public litigation under the new Act has created a growing body of case law to deal with antitrust violations. This article is designed to be a useful guide for the practitioner by providing a cursory review of the antitrust tradition in the state, and then an appraisal of the present Act and the judicial interpretations placed upon it.

Historical

The antitrust movement, which originated in the common law,[2] had its first legislative pronouncement in this country at the state level. Prior to the Sherman Act[3] of 1890, fourteen states constitutionally prohibited trusts and

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The authors wish to thank the Antitrust Section, Division of Criminal Justice, Department of Law and Public Safety and Deputy Attorney General Alfred Luciani, Section Chief. The authors especially wish to thank former Deputy Attorney General Joseph Kaestner and Deputy Attorneys General Robert Clark, John Enright, Martha Kwitny, and Laurel Price for their helpful suggestions.

The authors wish to stress, that the opinions and conclusions expressed herein are those of the authors and not of the Antitrust Section, Divison of Criminal Justice, Department of Law and Public Safety.

[1] N.J. Antitrust Act, ch. 73, 1970 N.J. Laws 265 (codified at N.J. STAT. ANN §§ 56:9-1 to 19 (West Supp. 1977-1978)).

[2] For an excellent review of antitrust development under the common law *see* H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955). *See generally* 16 J. VON KALINOWSKI, BUSINESS ORGANIZATIONS ANTITRUST LAWS AND TRADE REGULATION §§ 1.01-1.03 (1977); Letwin, *The English Common Law Concerning Monopolies*, 21 U. OF CHI. L. REV. 355 (1954); Holdsworth, *Industrial Combinations and the Law in the Eighteenth Century*, 18 MINN. L. REV. 369 (1934); SANDERSON, RESTRAINTS OF TRADE IN ENGLISH LAW (1926).

[3] 15 U.S.C. §§ 1 to 7 (1970 & Supp. V 1975).

monopolies and thirteen states provided statutory regulations.[4] Today, fewer than eight states are without major legislation proscribing restraints of trade and monopolies.[5]

Antitrust sentiment has deep historical roots in New Jersey. Early in our history, corporate charters were only available through legislative grants. Limited holders of the charters often enjoyed exclusive monopolies.[6] In fact, New Jersey had become notorious for its abusive practices in granting such charters.[7] Eventually this corruptive practice, along with the growing power of trusts nationwide, created a climate of public discontent. This public discontent was one of the major factors that prompted the state to enact general incorporation laws.[8]

Proponents of the general incorporation laws had hoped to stimulate free enterprise by allowing open competition.[9] Instead of being an incentive to freer competition, however, the liberal laws had the opposite effect by drawing all of the major corporations and trusts to New Jersey.[10] Once the state legislature allowed corporations to hold other corporate stock, massive amounts of capital accumulated in the great trusts.[11] By 1875, New Jersey had become the "mother of corporations."[12]

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[4] H. SEAGER & C. GULICK, TRUST AND CORPORATION PROBLEMS 341-343 (2d ed. 1973). Six states had both constitutional and statutory prohibitions. The constitutional prohibitions prior to 1887 appear to have been directed mainly against monopolies given by the government. Note, *A Collection and Survey of State Anti-Trust Laws,* 32 COLUM. L. REV. 347, 347 n.2 (1932).

[5] State v. Lawn King Inc., 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977). *See* [1976] 4 TRADE REG. REP. (CCH) 35,001-35,008; ABA, STATE ANTITRUST LAWS (1973-1974). "Only Pennsylvania, Rhode Island, and Vermont lack any treatment at all . . . in their statutes." Rhodes, *Some Thoughts on the Search for Private Rights of Action Under State Antitrust Statutes Lacking "Little Clayton 4" Provisions,* 25 EMORY L.J. 767, 769 (1976).

[6] J.W. CADMAN, JR., THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS 1791-1875, at 183-201 (1949).

[7] THORELLI, *supra* note 2, at 65 n.36.

> Perhaps the most notorious legislative charters were those granted by New Jersey in 1831 and 1832 by which the Camden and Amboy Railroad secured what amounted to an effective monopoly of rail transportation between New York and Philadelphia. The abuses of this monopoly including its corruptive activities in local politics, became so flagrant that for several decades New Jersey became widely known as the "Camden and Amboy State." *Id.*

See generally A HISTORY OF THE RAILROAD CONFLICT IN THE EIGHTY-FOURTH LEGISLATURE OF NEW JERSEY (1860).

[8] CADMAN, *supra* note 6, at 224-228. *See generally* THORELLI, *supra* note 2, at 65.

[9] CADMAN, *supra* note 6, at 224-228. *See generally* THORELLI, *supra* note 2, at 65.

[10] E.Q. KEASBEY, NEW JERSEY AND THE GREAT CORPORATIONS 5 (1899); *New Jersey and the Trusts,* 22 N.J.L.J. 357 (1899).

[11] *Id. See* A Supplement to an act entitled "An act concerning corporations," approved April seventh, one thousand eight hundred and seventy-five, ch. 265, 1889 N.J. Laws 214 (repealed 1896). *See generally* THORELLI, *supra* note 2, at 84.

[12] HENN, LAW OF CORPORATIONS 19 (2d ed. 1970).

Concerned over the state becoming a haven for trusts, Governor Robert Green, in his 1888 message to the Legislature,[13] called for legal sanctions against monopolies. The Legislature, however, was content with the situtation and failed to act. Consequently, it was not until the administration of Governor Woodrow Wilson in 1913 that New Jersey passed an antitrust act.[14] Called the "Seven Sisters Act," this law dealt with various anti-competitive problems.[15] This Act took on added significance since antitrust

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[13] THORELLI, *supra* note 2, at 155.

> The right of individuals and of corporations authorized . . . to combine for lawful purposes, is not to be questioned. When, however, the effect, if not the aim of such combinations is to control the market and regulate the price of articles . . . then their formation is against public policy, which . . . demands that competition shall not be restricted. The almost general formation of these combinations at the present day, should receive the attention of the Legislature, and be regulated within proper and harmless bounds, or prevented altogether.

Id.

[14] An Act to define trusts, and to provide for criminal penalties and punishment of corporations, firms, and persons, and to promote free competition in commerce and all classes of business, both intrastate business and interstate business, engaged in and carried on by or through any corporation, firm or person, ch. 13, 1913 N.J. Laws 25 (repealed 1920); A Further Supplement to the act entitled "An act for the punishment of Crimes (Revision of 1898)", ch. 14, 1913 N.J. Laws 27 (repealed 1920); A Further Supplement to an Act entitled "An act concerning corporations (Revision of 1896)," approved April twenty-first, one thousand eight hundred and ninety-six, for the purpose of amending section forty-nine thereof, ch. 15, 1913 N.J. Laws 28 (repealed 1920); An Act to amend an act entitled "A further supplement to the act entitled 'An act for the punishment of crimes,' approved June fourteenth, one thousand eight hundred and ninety-eight (Revision of 1898)," which supplement was approved June second, one thousand nine hundred and five, ch. 16, 1913 N.J. Laws 29, (repealed 1920); An Act to amend section one hundred and nine of an act entitled "An act concerning corporations (Revision of 1896)," approved April twenty-first, one thousand eight hundred and ninety-six, ch. 17, 1913 N.J. Laws 31 (repealed 1968); An Act to amend an act entitled "An act concerning corporations (Revisions of 1896)," approved April twenty-first, one thousand eighteen hundred and ninety-six, ch. 18, 1913 N.J. Laws 32 (repealed 1917); A Further Supplement to an act entitled "An act concerning corporations (Revision of 1896)," approved April twenty-first, one thousand eight hundred and ninety-six, ch. 19, 1913 N.J. Laws 33 (repealed 1920).

[15] The NEW JERSEY LAW JOURNAL described the bill prior to enactment:

> Seven measures known as "administration corporation measures which, it is understood, were prepared by Chancellor Walker and ex-Justice Van Syckel at the request of the Governor, were introduced in the Legislature January 20, and may be summarized as follows:
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> The first (ch. 13) makes any corporation, firm or individual guilty of a misdemeanor for forming a combination or agreement to restrict trade, limit production or increase prices. The second (ch. 15) provides that there shall be no fictitious stock issued by a corporation for the purchase of property, and no stock shall be issued based on prospective earning power. The third (ch. 16) makes it a misdemeanor to organize a corporation to restrain trade or create a monopoly. The fourth (ch. 17) prohibits the formation of new holding companies, but does not revoke the charters of those companies now in existence. The fifth (ch. 18) is a complement to the fourth bill eliminating the right of merged corporations to

concern was one of the national issues which promoted Governor Wilson into the presidency.[16] However, within seven years, the major sections of the Act were repealed.[17] Although the short-lived Act did not achieve major antitrust enforcement, it did destroy the state's premier position for corpo-

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acquire and hold the stock, bonds and evidence of indebtedness of other corporations. The sixth (ch. 19) provides that before the merger of any corporations approval must be secured from the Public Utility Commission.

The seventh (ch. 14) makes it a misdemeanor for any corporation, firm or person to discriminate between sections, communities, or cities of the State by selling any commodity in one community at a price lower than that at which the same commodity is sold in another section, when the intent is to secure a monopoly or drive a competitor out of business.

36 N.J.L.J. 33-34 (1913).

For a cursory discussion of the act see Reihing v. Brotherhood of Electrical Workers, 94 N.J.L. 240, 109 A. 367 (Ct. Err. & App. 1919) (ch. 13 creates only criminal action by state and not a private action for civil remedies; White, Jr. concurring, ch. 13 does not apply to human labor); State v. Black, 5 N.J. Misc. 639, 138 A. 513 (Essex County Ct. of Oyer and Terminer 1927) (a combination to monopolize is not per se indictable since the repeal of ch. 13); Buckelew v. Martens, 108 N.J.L. 339, 156 A. 436 (Ct. Err. & App. 1931) (ch. 13 merely made that which was prohibited by the common law an indictable offense and its enactment or its repeal did not change the common law); Bartley v. Lindabury, 89 N.J. Eq. 8, 104 A. 333 (Ch. 1918) (ch. 15); F.A. Cigol Rubber Co. v. Cigol, 93 N.J. Eq. 657, 117 A. 146 (Ct. Err. & App. 1922) (ch. 15); Bollschweiler v. Packer House Hotel Co., 83 N.J. Eq. 459, 91 A. 1027 (Ch. 1914) (ch. 15).

[16] As one commentator described Wilson's presidential campaign:

> Wilson started slowly, but soon found a central theme—restoration of free and competitive enterprise under federal regulation—with which he could oppose Roosevelt's plan to control monopoly. Building on the New Jersey experience, Wilson engaged his opponent in one of the most instructive and significant political debates in American history.

D.W. HIRST, WOODROW WILSON: REFORM GOVERNOR 235 (1965). Within six months, President Wilson initiated the Clayton Act. In discussing the Clayton Act, 15 U.S.C. § 12 (1970), some commentators suggested that: "The Clayton Act of 1914 contemplated on a federal basis some of the objectives that the Seven Sisters acts had sought in the state of New Jersey." G. GIBB & E. KNOWLTON, THE RESURGENT YEARS: 1911-1927, at 21 (1956).

[17] An Act to repeal an act entitled "An act to define trusts, and to provide for criminal penalties and punishment of corporations, firms and persons, and to promote free competition in commerce and all classes of business, both intrastate business and interstate business, engaged in and carried on by or through any corporation, firm or person, approved February nineteenth, one thousand nine hundred and thirteen, ch. 143, 1920 N.J. Laws 285; An Act to repeal an act entitled "A further supplement to the act entitled 'An act for the punishment of crimes (Revision of 1898),'" approved February nineteenth, one thousand nine hundred and thirteen, and the amendments thereto approved, ch. 144, 1920 N.J. Laws 286; An Act to repeal an act entitled "An act to amend an act entitled 'A further supplement to the act entitled "An act for the punishment of crimes", approved June fourteenth, one thousand eight hundred and ninety-eight (Revision of 1898),' which supplement was approved June second, one thousand nine hundred and five," approved February nineteenth, one thousand nine hundred and thirteen, ch. 145, 1920 N.J. Laws 287; An act to repeal an act entitled 'A further supplement to an act entitled 'An act concerning corporations (Revision of 1896),' approved April twenty-first, one thousand eight hundred and ninety-six," approved February nineteenth, one thousand nine hundred and thirteen, ch. 146, 1920 N.J. Laws 288.

rate settlement.[18] Since the Seven Sisters Act, limited statutory enactments have played an insubstantial part in bringing about effective antitrust enforcement.[19]

The courts of this state, even without legislation, have declared certain restraints of trade and monopolies violative of the common law, against public policy, and ultra vires. These cases were usually only concerned with the businesses that affected the public interest.[20] In other cases, where the public interest was void or de minimis, freedom of contract usually outweighed any possible antitrust concern.[21]

Two of the more important common law cases demonstrate judicial refusal to allow private parties to control prices in industries affected with a public interest and goods of public necessity. In *Stockton v. Central Railroad of New Jersey*,[22] coal dealers and railroads combined in an attempt to monopolize the anthracite coal market within the state. Coal being a necessary product of the times, the attorney general brought suit on behalf of the state's citizens. The court declared the action to be ultra vires and against public policy. In another case, *Messenger v. Pennsylvania Railroad*,[23] the defendant was giving special rebates to induce certain customers to ship their goods on defendant's railroad. Since the rebates allowed these customers to ship at cheaper rates than their competitors, the practice was held void as creating an illegal preference. Running a railroad was considered a "quasi-public trust."[24]

Prior to the 1970 enactment of the New Jersey Antitrust Act,[25] another important common law case was decided. In *Grillo v. Board of Realtors*,[26] the court held that a multiple listing service in real estate which excluded the

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[18] HENN, *supra* note 12, at 20.

[19] N.J. REV. STAT. § 14:3-10 (1937) (prohibits acquistion of stock of other corporations where effect is to substantially lessen competition); N.J. STAT. ANN. § 17:29A-3 (West Supp. 1977-1978) (prohibits price discrimination in insurance); N.J. STAT. ANN. § 33:1-93 (West 1940) (prohibits price discrimination in alcoholic beverages). The fair trade laws, N.J. STAT. ANN. § 56:4-1 (West 1964), were repealed in 1975 and supplanted by N.J. STAT. ANN. § 56:4-1.1 (West Supp. 1977-1978). Other recent statutory enactments that prohibit price discrimination are: N.J. STAT. ANN. § 56:6-2 (West 1964) (motor fuels); N.J. STAT. ANN. § 56:7-20 (West 1964) (cigarettes).

[20] Stockton v. Central R.R. Co., 50 N.J. Eq. 52, 24 A. 964 (Ch. 1892); Messenger et al. v. Pennsylvania R.R. Co., 36 N.J.L. 407 (Sup. Ct. 1873). For common law history generally, *see* note 2, *supra*.

[21] Attorney General v. American Tobacco Co., 55 N.J. Eq. 352, 36 A. 971 (Ch. 1897), *aff'd*, 56 N.J. Eq. 847, 42 A. 1117 (Ct. of Err. & App. 1898); Meredith v. Zinc & Iron Co., 55 N.J. Eq. 211, 37 A. 900 (Ch. 1897).

[22] 50 N.J. Eq. 52, 24 A. 964 (Ch. 1892).

[23] 36 N.J.L. 407 (Sup. Ct. 1873), *aff'd*, 37 N.J.L. 531 (1874).

[24] 36 N.J.L. 407, 413 (Sup. Ct. 1873).

[25] N.J. STAT. ANN. § 56:9-1 to 19 (West Supp. 1977-1978).

[26] 91 N.J. Super. 202, 219 A.2d 635 (Ch. Div. 1966). *See* Note, *Arbitrary Exclusion From Multiple Listing: Common-Law and Statutory Remedies*, 52 CORNELL L.Q. 570 (1967).

plaintiff was an unreasonable restraint of trade. The *Grillo* decision reasoned that the restrictive membership arrangement had a tendency of preventing competition, raising prices and monopolizing; but more importantly, *Grillo* demonstrated that the common law of New Jersey had incorporated the Sherman Act within its broad equitable principles.

Legislative History

Past antitrust enforcement in the state, however, played an insubstantial role in establishing the present Act. Rather, the belief that antitrust action would be an effective weapon against organized crime activities was the major impetus behind the bill.[27] Enactment of a state antitrust act was recommended by Governor Richard J. Hughes in his 1968, 1969, and 1970 annual messages to the Legislature and was the subject matter of several legislative bills introduced in those years.[28] Describing a similar bill in 1968, Governor Hughes noted that a state antitrust act as intended "to protect honest businessmen against the intrusion of organized crime into legitimate business through extortion, intimidation, monopolization, and collusive bidding."[29]

Finally, on May 21, 1970, the New Jersey Antitrust Act,[30] along with a number of other statues,[31] was passed as an anti-crime package. In line with

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[27] *See* note 32 and text *infra*. *See generally* Hyland, *On Public Corruption*, 98 N.J.L.J. 977 (Nov. 20, 1975); F. Lacey, RECOMMENDATIONS TO THE 1970 SESSION OF THE NEW JERSEY LEGISLATURE CONCERNING LEGISLATION WHICH MIGHT BE ENACTED TO CURB THE POWER AND INFLUENCE OF ORGANIZED CRIME IN NEW JERSEY (1970); Lacey, *Organized Crime: The Problem and Some Suggested Approaches*, 2 SETON HALL L. REV. 11 (1970); Meth & O'Connor, *Antitrust for New Jersey*, 93 N.J.L.J. 354 (May 21, 1970).

For a more elaborate discussion of the state act, *see* O'Shaugnessy, *Role of Per Se Rule & Myth-Making By Whom? A Reply*, 97 N.J.L.J. 249 (April 11, 1974); Ableson, Calman, Kreizman, Price, *State Antitrust Enforcement: Myths and Realities*, 97 N.J.L.J. 185 (March 21, 1974); O'Shaugnessy, *Role of Per Se Rule Under the New Jersey Antitrust Act*, 96 N.J.L.J. 1325 (Nov. 15, 1973); Greene, *The New Jersey Antitrust Act*, 15 N.J. ST. B.J. 22 (No. 54 1971).

[28] *See* A.664, 192nd N.J. Legis., 1st Sess. (1968) (died in committee); A.829, 192d N.J. Legis., 1st Sess. (1968) (passed Assembly, died in Senate committee); A.172, 193d N.J. Legis., 2d Sess. (1969) (died in committee); A.230, 193d N.J. Legis., 2d Sess. (1969) (died in committee); A.256, 194th N.J. Legis., 1st Sess. (1970); A.562, 194th N.J. Legis., 1st Sess. (1970); A.971, 194th N.J. Legis., 1st Sess. (1970) (amended in Senate, enacted as ch. 73, 1970 N.J. Laws 265, codified at N.J. STAT. ANN. § 56:9-1 to 19 (West Supp. 1977-1978)).

[29] Governor Richard J. Hughes, Sixth Annual Message to the Legislature 10-11 (January 9, 1968).

[30] N.J. STAT. ANN. § 56:9-1 to 19 (West Supp. 1977-1978).

[31] Criminal Justice Act of 1970, N.J. STAT. ANN. § 52:17B-97 (West 1970); N.J. STAT. ANN. § 2A:81-17.2a (West 1970) (removal of certain public employees from office); N.J. STAT. ANN. §2A:170-102 (West Supp. 1977-1978) (disorderly persons in relation to usury); N.J. STAT. ANN. § 2A:119A-1 (West Supp. 1977-1978) (misdemeanor for excessive interest rates below 50% per annum).

the prior statement of Governor Hughes, the chief sponsor of the enacted bill stated: "We must promptly control attempts by the underworld to monopolize and restrain trade and commerce within the state. This (antitrust act) is another necessary tool for our law enforcement officials in their continuing fight against organized crime."[32]

The chief draftsman of the New Jersey Antitrust Act was Deputy Attorney General Elias Abelson. His recollection of the purpose of the Act was somewhat broader, as he recently stated:

> It was my expectation that this law would be useful in aspects of the fight against organized crime, but also that it would serve the broader antitrust needs of the State. It is for this reason that the law contains provisions dealing with private rights of action and tracking in great part (as did its predecessor bills not enacted) the Sherman and Clayton Acts which had been used for 80 years as corrective measures to secure a competitive marketplace in the United States.[33]

The initial controversy over the scope of the New Jersey Antitrust Act has never been seriously considered by any court.[34] Instead, every trial court that has interpreted the Act has read it as a "little Sherman Act" taking in the full "panoply of offenses" under the federal statute's "80 year history of judicial interpretations."[35] There are a number of reasons why such an interpretation is correct.

First, it is a general tenet of statutory construction that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."[36] A reading of the Act's enabling

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[32] *An Antitrust Bill to Fight the Mafia,* Newark Star-Ledger, Jan. 13, 1970, at 1, col. 7.

[33] Affidavit submitted by Elias Abelson to Judge Imbriani as part of the state's brief in State v. Lawn King, Inc., 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977). Assistant Attorney General Abelson's memos at the time of drafting the bill supports his present view. A drafter's notes may be of some value to courts in interpreting legislation. Neff v. Hindman, 77 F. Supp. 4 (W.D. Pa. 1948).

[34] The scope of the new act was discussed in a lively exchange of views between a private practitioner and the Antitrust Division of the New Jersey Attorney General's Office. *See* O'Shaugnessy, *Role of Per Se Rule Under the New Jersey Antitrust Act, supra* note 27; Abelson, Calman, Kreizman, Price, *supra* note 27; O'Shaugnessy, *Role of Per Se Rule: Myth-Making By Whom? A Reply, supra* note 27.

Although parties have raised the contention that the state act should be restricted to organized crime activities, no court has ever accepted this view seriously.

[35] Abelson, Calman, Kreizman, Price, *supra* note 27, at 194. *See* note 37 *infra.*

[36] Caminetti v. United States, 242 U.S. 470, 485 (1917).

clause suggests a broad interpretation in line with federal judicial interpretations.[37]

Second, it is a fundamental rule of statutory construction that when an act of another sovereign is reproduced and enacted the Legislature is presumed to have also adopted the prior judicial interpretations from the other sovereign.[38] Applying this rationale to the New Jersey Antitrust Act, it can be assumed that the Legislature accepted federal judicial interpretations existing prior to the state enactment.[39]

Another reason for employing a broad interpretation is found within the Act itself. Section 18[40] states that "[t]his act shall 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 it." In order to follow federal case law, courts have relied heavily on section 18.[41] Section 18, however, should not be interpreted as giving post-enactment federal case law a stare decisis effect on state courts. Since such reasoning would raise grave constitutional questions as to whether the state legislature had delegated its power to another sovereign,[42] the problem should be approached on a comity basis with the caveat that ignor-

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[37] The enabling clause describes the act as:

> An Act to promote the unhampered growth of commerce and industry throughout the State by prohibiting restraints of trade which are secured through monopolistic practices and which act or tend to act to decrease competition between and among persons engaged in commerce and trade, whether in manufacturing, distribution, financing, and service industries or in related for profit pursuits, and making an appropriation therefor.

[38] *See* 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 52.02 (4th ed. 1973).

[39] Proper statutory construction does not, however, demand that subsequent federal judicial interpretations be followed. Tripus v. Peterson, 11 N.J. Super. 282, 78 A.2d 149 (Law Div. 1950). On defendant's motion for a new trial in the Lawn King case, Judge Imbriani observed that he did not feel compelled to adhere to federal decisions which were decided subsequent to the 1970 state enactment. New trial motion, Aug. 10, 1977.

[40] N.J. STAT. ANN. § 56:9-18 (West Supp. 1977-1978).

[41] State v. Lawn King, Inc., 150 N.J. Super. 204, 211, 375 A.2d 295, 298 (Law Div. 1977) ([t]o provide uniformity with the Sherman Act and to supply our courts with a reservoir of experience, the Legislature wisely provided section 18); Finlay & Associates, Inc. v. Borg-Warner Corp., 146 N.J. Super. 210, 222, 369 A.2d 541, 547 (Law Div. 1976) (section 18 requires the statute to be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes); Clairol, Inc. v. Cosmetics Plus, 130 N.J. Super. 81, 94, 325 A.2d 505, 512 (Ch. Div. 1974) (the New Jersey Antitrust Act must be construed in harmony with ruling judicial interpretations of federal statutes); Kugler v. Koscot Interplanetary, Inc. 120 N.J. Super. 216, 237, 293 A.2d 682, 694 (Ch. Div. 1972) (section 18 provides a guide for construction); Oates v. E. Bergen Cty. Mult. List. Serv., 113 N.J. Super. 371, 383, 273 A.2d 795, 801 (Ch. Div. 1971) (after quoting section 18 the court reasoned that federal decisions which applied the per se rule were drawn into the stream of New Jersey's public policy).

[42] *See* O'Shaugnessy, *supra* note 27, at 271.

ing federal decisions altogether could damage the scope of the state act by restricting its jurisdiction on preemption grounds.

The state courts have demonstrated that the Act will be interpreted in line with the full force of its federal counterpart. Such judicial interpretations suggest that the original impetus of the bill—attacking organized crime—has actually given the state act a wider range of enforcement possibilities than its federal cousin. Under the state act, traditional antitrust actions, as well as actions against organized crime, are possible. The Sherman Act has never been applied to organized crime.

Preemption of Interstate Commerce

It is now generally accepted by both federal [43] and state [44] courts that the Sherman Act has not preempted state antitrust acts.[45] Yet there are certain areas which require federal preemption. Initially, a state antitrust act is prohibited from interfering in areas which are constitutionally dedicated to Congress.[46] Secondly, Congressional regulatory legislation which is consistent with the supremacy and commerce clauses may preempt certain defined

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[43] Ohio ex rel. Brown v. Klosterman French Baking Co., [1977] 5 TRADE REG. REP. (CCH) ¶61,361 (S.D. Ohio); Woods Exploration and Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943); Paramount Pictures v. Langer, 23 F. Supp. 890 (D.N.D. 1938), *rev'd,* 306 U.S. 619 (1939). Initial support against the preemption proposition came from dicta in Standard Oil Co. v. Tennessee, 217 U.S. 413, 422 (1910), where Justice Holmes tacitly stated:

> The mere fact that it (state statute) may happen to remove an interference with commerce among the States as well as with the rest does not invalidate it . . . [t]here is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power.

[44] State courts are somewhat more ambitious in asserting the state's right to deal with antitrust matters. *See* State v. Lawn King, Inc., 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977); R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974); State v. Sterling Theatres Co., 64 Wash. 2d 761, 394 P.2d 226 (1964); State v. Southeast Tex. Chap. of Nat. Elec. Con. Ass'n, 358 S.W.2d 711 (Tex. Ct. of Civ. App. 1962); State v. Allied Chemical and Dye Corp., 9 Wis. 2d 290, 101 N.W. 2d 133 (1960); Commonwealth v. McHugh, 326 Mass. 249, 93 N.E. 2d 721 (1950); Leader Theatre Corp. v. Randforce Etc., 186 Misc. 280, 58 N.Y.S. 2d 304 (Sup. Ct. 1945), *aff'd,* 273 App. Div. 844, 76 N.Y S. 2d 846 (1st Dep't 1948); State v. Golden Guernsey Dairy Cooperative, 257 Wis. 254, 43 N.W. 2d 31 (1950).

[45] For an extensive analysis, see J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 109-184 (1964). *See also* Rubin, *Rethinking State Antitrust Enforcement,* 26 U. FLA. L. REV. 653, 667-96 (1974); Note, *The Commerce Clause and State Antitrust Regulation,* 61 COLUM. L. REV. 1469 (1961).

[46] For instance,matters dealing with patents, bankruptcy, and admiralty are usually beyond state antitrust enforcement. *But see,* Comment, *Trade Secrets–Federal Patent Code Does Not Preempt State Trade Secret Statutes,* 28 RUT. L. REV. 191 (1974).

areas from state antitrust attack.[47] Along with this regulatory legislation, Congress ususally creates a regulatory agency with primary jurisdiction to oversee activity within the designated field.[48] Such legislation is usually the result of a desire to provide national uniformity to certain areas like labor law,[49] stock exchanges,[50] aviation,[51] shipping,[52] and communications.[53] Finally, a possible preemption area is one in which a unique activity requires federal preemption in order to fulfill its legitimate objectives. Absent Congressional legislation, the courts have turned to the broad sweep of the commerce clause itself. In particular, when dealing with professional sports,[54] courts have determined that national interest predominates over state antitrust concern.

State v. Lawn King, [55] the first criminal conviction under the New Jersey Antitrust Act, is the only case that has dealt with the issues of preemption and interstate commerce. The defendant corporation sold distributorship (wholesale) and dealership (retail) franchises in its lawn care business.[56] At the time of the indictment there were 158 dealerships, 58 of which were located in New Jersey. Lawn King was also incorporated in the state and had its offices here.

The defendant argued that the Sherman Act had preempted the field, or in the alternative, interstate commerce was "substantially" affected so as to

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[47] Professor Flynn has divided federal legislation into four possible preemption areas. He states:

> In the face of federal legislation, therefore, the doctrines of supremacy and preemption only exclude or limit state law (1) when the state legislation conflicts with supreme federal legislation or policy, (2) when state law is expressly preempted by valid federal law, (3) when the judiciary finds an "implied intent" of Congress to exclude or limit state law, and (4) when the judiciary finds that the state legislation intrudes upon an area peculiar to federal legislation.

FLYNN, *supra* note 45, at 112.

[48] For a discussion of primary jurisdiction, *see,* Shuman, *The Application of the Antitrust Laws to Regulated Industries,* 44 TENN. L. REV. 1 (1976); King Jr., *'Arguably Lawful' Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries,* 40 TENN. L. REV. 617 (1973); Note, *Primary Jurisdiction in Antitrust Cases: Three Recent Decisions,* 42 U. CIN. L. REV. 725 (1973).

[49] Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 635-37 (1975).

[50] *See* cases cited in note 201 *infra.*

[51] Federal Aviations Act, 49 U.S.C. § 1384 (1970).

[52] The Shipping Act of 1916, 46 U.S.C. § 814 (1970); Interstate Commerce Act, 49 U.S.C. §5 (2) (1970).

[53] Federal Communications Act, 47 U.S.C. §§ 221(a), 222(c) (1) (1970).

[54] Robertson v. National Basketball Ass'n., 389 F. Supp. 867, 880-81 (S.D.N.Y. 1975); Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), aff'd 443 F.2d 264 (2d Cir. 1971), aff'd 407 U.S. 258 (1972).

[55] 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977).

[56] Lawn King was structured on a three-tiered system. At the apex was the defendant manufacturer. Immediately below the manufacturer were the wholesale distributors, and the retailers, which dealt with the public, comprised the lowest level of the chain.

preclude state antitrust action in contravention of the commerce clause. Judge Imbriani, after noting that "no state antitrust statute has ever been declared unconstitutional for being in conflict with [the] Sherman Act,"[57] gauged the preemption issue by employing a three prong test: to seek the purpose of the two statutes, to determine whether they are similar, and to determine whether Congress intended to make its jurisdiction exclusive.[58] The court reasoned that the first point was satisfied by the enabling clauses, and that the second point was established by the facts. It was the third point which the court stressed. By pointing out that in order to appease the criticism that the Sherman Act would supplant rather than supplement state antitrust law, Senator Sherman declared the object of the Sherman Act was to "cooperate with the State Courts in checking, curbing and controlling . . . combinations."[59] Since neither Congress nor the United States Supreme Court has preempted the antitrust field in its eighty year history, Judge Imbriani declared, "[i]t would be absurd for this court to do so."[60]

Turning to the defendant's alternative argument, the court laid down two possible tests in determining if interstate commerce was involved: whether the acts complained of occured within the flow of interstate commerce; or, whether the acts, although wholly intrastate, substantially affected interstate commerce.[61] The factual setting of the case ruled out the first test. In applying the second test, the court stated specific factual determinations by which it concluded that the defendant's activities did not substantially affect interstate commerce.[62] Reasoning that "every enterprise, however localized,

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[57] 150 N.J. Super. at 216, 375 A.2d at 301.

[58] *Id.* at 216-217, 375 A.2d at 301.

[59] *Id.* at 217, 375 A.2d at 301 (quoting from 21 CONG. RECORD 2457 (1890)). Professor Flynn, however, discounts reliance upon the words of Senator Sherman since the prevailing view of commerce at that time was that interstate and intrastate were mechanically divided. FLYNN, *supra* note 45, at 151.

[60] 150 N.J. Super. at 217, 375 A.2d at 301.

[61] *Id.* at 220, 375 A.2d at 303 (quoting from Gateway Associates, Inc. v. Essex Costello, Inc., 380 F. Supp. 1089 (E.D.Ill. 1974)).

[62] 150 N.J. Super. at 219, 375 A.2d at 302.

1. Lawn King was incorporated and maintained its offices in New Jersey.
2. All distributor and dealer franchise agreements were signed in New Jersey.
3. The equipment sold by Lawn King to its dealers was always picked up in New Jersey.
4. The seeds sold to distributors and/or dealers were purchased from manufacturers with plants in New Jersey.
5. The chemicals sold to distributors and/or dealers were purchased from manufacturers with plants in both New Jersey and Pennsylvania.
6. As of June 15, 1973 (date of the indictment) there were 58 dealers in New Jersey and 100 without.
7. Dealer net sales to the public in 1971 were $427,243 in New Jersey and $327,873 without, but reversed in the first six months of 1973 and were $845,571 in New Jersey and $1,531,040 without. *Id.*

has some affect, however remote, on interstate commerce . . .,"[63] the decision concludes that although "defendant's operation extends to interstate commerce . . . the Court is not satisfied that the restraints involved have sufficient impact . . . to be within the parameters of the Commerce Clause and Sherman."[64]

Viewing the vast expansion of interstate commerce authority,[65] the state had argued that regardless of the effect on interstate commerce, if there involved a local nexus, state antitrust regulation should be extended to include such conduct.[66] Along with this theoretical concept of jurisdiction the state pointed out the practical deficiency of federal antitrust enforcement because of the limited resources of the Justice Department.[67] By using the stricter test of jurisdiction, antitrust violators might necessarily go unpunished. In order to avoid this twilight zone effect, the state had urged that this middle ground was susceptible to concurrent jurisdiction. As one leading commentator pointed out, "[t]he current view is overwhelmingly supportive of the extension of state antitrust regulation to include conduct and practices that, while possessing a local nexus, nonetheless 'affect' or are 'in' interstate commerce."[68]

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[63] *Id.* at 218, 375 A.2d at 302 (citing Rasmussen v. American Dairy Association, 472 F.2d 517 (9th Cir. 1973)).

[64] *Id.* at 221, 375 A.2d at 303.

[65] Recent decisions of the United States Supreme Court recognize that the jurisdictional reach of the Sherman Act has expanded along with the broadening of the Court's view of Congressional power under the commerce clause. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (Stewart, J., dissenting); Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738 n.2 (1976); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201-02 (1974); United States v. Southern Motor Carriers Rate Conference, [1977] TRADE REG. REP. (CCH) 61, 551 n.3 (5th Cir.). *See generally* Note, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act - A Look at the Development and Future of the Currently Employed Jurisdictional Tests,* 21 VILL. L. REV. 721 (1976).

[66] Unless the court is dealing with one of the specific preemption areas mentioned above, the primary focus of jurisdiction should be on the activity's affect on the state. One commentator has suggested the jurisdictional problem with state antitrust acts could be analogized to the state's "in personam and adjudicatory authority" which meets minimum standards of procedural due process. Rubin, *supra* note 45, at 677. *See* Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (Ct. App. 1977), *appeal pending,* 46 U.S.L.W. 3058 (Aug. 16, 1977) for the full force of state regulations on businesses affecting interstate commerce.

[67] Because of its limited staff and resources the federal government is "anxious to see its efforts supported by active enforcement programs at the state level." Remarks by William E. Swope, Chief, Atlanta Field Office, U.S. Dept. of Justice, Antitrust Division, prepared for delivery at the Federal-State Conference on Antitrust April 11, 1973, cited in NATIONAL ASS'N OF ATTORNEYS GENERAL COMM. ON THE OFFICE OF THE ATTORNEYS GENERAL, ANTITRUST MANUAL (1975).

[68] Rubin, *supra* note 45, at 670. The most comprehensive study of the subject can be found in J. FLYNN, *supra* note 45, at 56-108.

Since the New Jersey Antitrust Act is modeled after the federal acts, and provides for uniformity with federal decisions, the state act should be allowed an expansive arena in order to aid the free enterprise policy in which the federal antitrust laws are rooted. By allowing wider freedom to the state acts, federalism is reaffirmed, and the federal government is gifted with fifty laboratories in which to observe antitrust policy.

Burden of Proof

Earlier cases under the Sherman Act took a staunch view of the broad language of section 1 and held anticompetitive activity illegal without regard to its reasonableness.[69] Moving away from the harshness of the earlier decisions, the Court, in *Standard Oil Co. v. United States,*[70] enunciated the rule of reason test. This test analyzes the suspected behavior by taking into consideration whether the benefits of the conduct outweigh any possible anticompetitive effect.

Later, in *Board of Trade v. United States,*[71] Justice Brandeis set out a number of factors to be considered under the rule of reason analysis.[72] In sum, "the classic rule of reason tests an arrangement by its impact on competition."[73] However, after consideration of the types of conduct involved

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[69] L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 165-71 (1977).

[70] 221 U.S. 1 (1911).

[71] 246 U.S. 231 (1918).

[72] [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business . . . .; its condition before and after the restraint was imposed; the nature of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. 231, 238 (1918).

[73] SULLIVAN, *supra* note 69, at 180. Some courts have described reasonableness as a question of relation and degree, Sugar Institute, Inc. v. United States, 297 U.S. 553, 600 (1936). Other courts have required a more elaborate test to determine impact on competition. DeFilippo v. Ford Motor Co., 378 F. Supp. 461-62 (E.D. Pa. 1974), *modified,* 516 F.2d 1313 (3d Cir. 1975), set the standard to require extensive statistical evidence dealing with the product and geographic markets in question, including the percentage of the market affected by the restriction, the strength of the remaining competition, the barriers that prohibit entering the market, the purpose behind the conduct, and the effect on price and availability of goods and services. *See,* Note, *Antitrust Law—In Applying the Rule of Reason to Restrictive Covenant in Franchise Agreement It Is Not Sufficient Merely to Determine That Less Restrictive Measures Would Protect Franchisor: Court Must Also Examine Impact on Competition in Relevant*

and their repetitiveness, and after all proferred justifications were heard and rejected, the Court finally opted for a per se approach. The per se rationale has been defined as follows:

> [t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[74]

A number of activities, that are usually considered naked restraints of trade, have fallen into the per se category, *e.g.*, horizontal price fixing,[75] vertical price restrictions,[76] horizontal market divisions,[77] commercial group boycotts,[78] tying arrangements,[79] reciprocity,[80] and, until recently, certain vertical territorial allocations.[81]

By applying the per se test, the Court's deterrent approach has put the business community on notice that most business justifications and excuses will not be accepted as a defense.[82] Another benefit derived is the judicial economy gained by relieving "the courts of the burden of extensive fact-finding analysis and the difficult economic examination inherent in the application of the rule of reason."[83]

Like other areas of the law, the factual setting in many antitrust cases is not easily categorized into extreme standards such as per se and rule of reason. Rather, experience suggests a sliding scale approach. When the conduct is obviously anti-competitive minimal proof is required, but as the behavior becomes more justifiable a fuller inquiry is in order. Hence, the

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Market - However, Restrictive Practices Whose Combined Effect Is to Prevent Franchisee from Competing with Its Franchisor Constitute a Horizontal Market Division, 44 GEO. WASH. L. REV. 436, 439 n.20 (1976).

[74] Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958).

[75] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[76] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[77] United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

[78] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

[79] International Salt Co. v. United States, 332 U.S. 392, *appeal dismissed*, 332 U.S. 747 (1947).

[80] United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966).

[81] United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), *overruled by*, Continental T.V., Inc., et al. v. GTE Sylvania, Inc., 97 S. Ct. 2549 (1977).

[82] There have been, however, narrow exceptions carved out of the conduct which is usually considered per se unlawful. *See, e.g.*, United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (new business entrant); Citizens Publishing Co. v. United States, 394 U.S. 131 (1969) (failing business doctrine).

[83] McCormick, *Group Boycotts—Per Se or Not Per Se, that is the Question*, 7 SETON HALL L. REV. 703, 765-66 (1976).

burden of proof becomes a question of degree, ranging from an irrebuttable presumption (per se) to a rebuttable one (rule of reason). One commentator has explained the process as:

> [t]he fewer the conditions precedent the less extensive the inquiry necessary to prove a violation; i.e., the burden of proof may be viewed as a continuum ranging from *per se* unreasonable, through proof of minimum conditions, to an extended economic inquiry—all being within the general principle of the Rule of Reason . . . Where the purpose or effect of a particular type of conduct is solely to restrain, an extended Rule of Reason inquiry is manifestly inappropriate. But where the restraint is ancillary to a lawful main purpose, it is necessary to balance the relative harm against the benefit, or "redeeming virtue", to determine the net effect, or "reasonableness" of the conduct.[84]

Utilizing the flexibility of the rule of reason, the judiciary has occasionally tailored the rule to fit the particular case and the result sought.[85] Through judicial ingenuity, procedural shortcuts have been devised to ease the burdens of a full market inquiry. This style would seem to suggest that cases falling between the two extreme poles might not necessarily require extensive analysis into their reasonableness.[86] The cases that do not lend themselves easily to either extreme may represent the middle ground of the continuum.

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[84] Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal,* 29 OHIO ST. L.J. 539, 569 (1968).

[85] For example, as the market becomes increasingly concentrated and the individual violator's market position becomes more dominant, the Court has less reason to undertake a full scale economic investigation. *See inferentially,* Continental T.V. v. GTE Sylvania, 97 S. Ct. 2549 (1977) (sanctity of contract deterring intrabrand competition justified when market share minimal); United States v. General Dynamics Corp., 415 U.S. 486 (1974) (structural analysis allowing concentration when overall market power is minimal); United States v. Container Corp., 393 U.S. 333 (1969) (per se ruling due to oligopolistic structure); Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (exclusive dealing not unreasonable when market share is 1%).

As Professor Sullivan has described: "[A] search for an alternative to the per se response which would consume less judicial energy than an elaborate analysis—a search for a method of truncated analysis. . . ." *Supra* note 69, at 471. Although Professor Sullivan was referring to exclusive dealings, the description appears to be applicable to other types of conduct with which the courts are confronted.

[86] There have been several opinions favoring a "less restrictive alternative" doctrine whereby the reasonableness of the restraint would be judged on the basis of whether or not it was the least restrictive measure available to meet the legitimate business justification. If not, it would be an unreasonable restraint of trade without a major inquiry into the market effect of the activity. *See generally* White Motor Co. v. United States, 372 U.S. 253 (1963) (Brennan, J., concurring); Siegel v. Chicken Delight, Inc., 48 F.2d 43 (9th Cir. 1972), *cert. denied,* 405 U.S. 955 (1972); Cooper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975); Robertson v. National Basketball Ass'n, 389 F. Supp. 897 (S.D.N.Y. 1975);

The cases under the New Jersey Antitrust Act have generally followed the per se approach.[87] In *Oates v. E. Bergen Multiple Listing Service,*[88] Judge Lynch was confronted with a group boycott similar to the one in *Grillo.*[89] After discussing the use of a reasonableness test[90] in *Grillo,* Judge Lynch noted that "[b]ecause of *Grillo* the issue presented here is no longer novel, and . . . application of [a] per se concept is now called for in New Jersey "[91] In another recent multiple listing case, *Pomanowski v. Monmouth County Board of Realtors,*[92] the absence of predatory practices prompted the court to distinguish the *Oates* line of cases and opt for a rule of reason analysis.[93]

Other cases under the New Jersey Antitrust Act have generally dealt with vertical restraints.[94] All of these cases relied heavily upon *United States v. Arnold Schwinn & Co.,*[95] which held the per se rule applicable to territorial restrictions when the manufacturer had parted with title, dominion, and risk over the product. Although the *Schwinn* doctrine was well received in New Jersey, it encountered substantial criticism from both scholarly opinion[96] and lower federal courts.[97]

Note, *Antitrust Law–Franchising–Restrictive Aspects of Motel Franchising System Individually and Cumulatively Held to Violate the Sherman Act,* 5 SETON HALL L. REV. 320 (1974). But see a rebuttal to this type of reasoning in American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3rd Cir. 1975); and in Note, *supra* note 73, at 445-48.

[87] State v. Lawn King, Inc., 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977) (per se); Clairol, Inc. v. Cosmetics Plus, 130 N.J. Super. 81, 325 A.2d 505 (Ch. Div. 1974) (per se); Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 68 (Ch. Div. 1972) (per se); Oates v. E. Bergen Cty. Mult. List. Serv., 113 N.J. Super. 371, 273 A.2d 795 (Ch. Div. 1971) (per se). *But see* Pomanowski v. Monmouth Cty. Bd. of Realtors, 152 N.J. Super. 100, 377 A.2d 791 (Ch. Div. 1977) (rule of reason).

[88] 113 N.J. Super. 371, 273 A. 2d 795 (Ch. Div. 1971).

[89] *See* text accompanying notes 153-160, *infra.*

[90] Although the court in Grillo utilized a rule of reason standard, it leaned heavily toward a per se condemnation. *See* Pomanowski v. Monmouth Cty. Bd. of Realtors, 152 N.J. Super. 100, 106, 377 A.2d 791, 794, (Ch. Div. 1977).

[91] 113 N.J. Super. 371, 383, 273 A.2d 795, 801.

[92] 152 N.J. Super. 100, 377 A.2d 791 (Ch. Div. 1977).

[93] *See* note 188 and accompanying text, *infra.*

[94] State v. Lawn King, Inc., 150 N.J. Super. 204, 379 A.2d 295 (Law Div. 1977); Clairol, Inc. v. Cosmetics Plus, 130 N.J. Super. 81, 325 A.2d 505 (Ch. Div. 1974); Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972). Vertical restraints involve a trader at one level of the market imposing restraints upon traders at a different level of the market.

[95] 388 U.S. 365 (1967). Schwinn's franchising plan entailed territorial restrictions upon distributors who were allowed to sell only to authorized dealers within their territory. Dealers were also restricted since they could sell only to the public and not to unfranchised dealers.

[96] For a list of the law review articles criticizing the Schwinn holding, *see* Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S. Ct. at 2560 n.13 (1977).

[97] *See* Adolph Coors Co. v. FTC, 497 F.2d 1178, 1187 (10th Cir. 1974) (court urging greater flexibility from Schwinn); LaFortune v. Ebie, 26 Cal. App. 3d 72, 102 Cal. Rptr. 588 (Ct. App. 1972) (used Tripoli rationale to apply a reasonableness test to a territorial

Finding territorial and location restrictions indistinguishable, the Court in *Continental T.V., Inc. v.* GTE *Sylvania, Inc.*[98] recently overruled its prior decision in *Schwinn* and applied the rule of reason standard to location restrictions.[99] The Court in *Sylvania* rejected the *Schwinn* distinction whereby a manufacturer's restrictions were tested under a per se test if the product's title passed to the dealer, and a rule of reason analysis if the manufacturer retained title on a consignment basis. Reviewing the economic effects, the Court reasoned that most nonprice vertical restraints should be judged by a rule of reason standard because of their "redeeming virtues."[100] Basically, the Court determined that although intrabrand competition might be restrained, vertical restrictions are justifiable because they "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."[101] In overruling *Schwinn,* the Court stated:

> We do not foreclose the possiblity that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R. Co.* But we do make clear that departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing.[102]

The sudden shift from *Schwinn* to *Sylvania* has left the state courts in a precarious position. Future decisions must juxtapose state case law which has followed the *Schwinn* doctrine with the dictates of section 18 of the Act

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restriction); Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1379-80 (Ct. Cl. 1971) (per se inapplicable when purchaser can avoid the restraint by buying the product at higher price); Tripoli Co. v. Wella Corp., 425 F.2d 932, 936-38 (3d Cir. 1970) (used the "without more" language of Schwinn to carve out an exception to the per se rule against vertical territorial restraints); Janel Sales Corp. v. Lanvin Parfums Inc., 396 F.2d 398, 406 (2d Cir. 1968) (failure to strictly enforce restraints may give rise to rule of reason).

[98] 97 S. Ct. 2549 (1977). Sylvania manufactures and sells televisions. In 1962, after reassessing their dwindling market share, Sylvania adopted a plan whereby wholesale distributors were phased out and sales were made directly to franchised dealers. In the hope of attracting quality retailers, "Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised." *Id.* at 2552.

Continental, one of the most successful franchisees, protested a decision by Sylvania to grant another franchise in close proximity to Continental's San Francisco store. Their relationship was further eroded when, among other things, Sylvania denied a Continental request to open a franchise in the Sacramento area. Continental ignored the manufacturer's refusal and its franchise was shortly afterwards terminated.

[99] *Id.* at 2556.

[100] *Id.* at 2560.

[101] *Id.*

[102] *Id.* at 2562.

which seek uniformity with federal precedent.[103] A closer look at the state court cases, however, suggests that the differences between state and federal precedent may be reconciled without a major change in state law.

On motion for a new trial, Judge Imbriani, in *State v. Lawn King,* was faced with interpreting the recent *Sylvania* decision and the effect of that decision upon his recent conviction ruling.[104] Although the state presented several options,[105] the court rested its affirmance of its decison by distinguishing *Lawn King* from *Sylvania.* In particular, Judge Imbriani found *Lawn King*'s customer restrictions, customer allocations, threats of termination, and overall territorial restrictions to be the types of activity still condemned under *Northern Pacific.*[106] Another distinguishing point, not relied upon by the court, is the "aggregation of trade restraints" doctrine.[107] Under this theory, if territorial restrictions are part of a scheme that includes resale price maintenance and other restraints, the entire conduct will be judged by a per se standard.

Kugler v. Koscot Interplantetary, Inc.[108] involved a manufactuer who sold cosmetics and dealerships in cosmetics through a deceptive pyramid sales

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[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. Although not bound by federal precedent, state antitrust acts which set off in different directions could create confusion which in turn could cause federal courts to narrow the jurisdictional scope of the state acts on the ground that the conflict caused an undue burden on interstate commerce.

A more appropriate approach would be to distinguish the state court precedent from Sylvania in an attempt to create harmony for future decisions. It is also important to note that all of the state cases are trial decisions.

[104] Judge Imbriani had decided the Lawn King case prior to the Sylvania decision, but was aware that Sylvania was pending and so cited it as a caveat in his opinion 150 N.J. Super. at 230, 375 A.2d at 308.

[105] The state asked the court to affirm the opinion either by distinguishing Sylvania on the facts or by utilizing the "aggregation of trade restraints theory" to hold the entire conduct per se illegal, *infra* note 105. If the court had determined that Sylvania was to be followed, then the state would have requested the case be reopened in order to present evidence to meet the rule of reason standard.

[106] 97 S. Ct. at 2562.

[107] The term "aggregation of trade restraints" appears in Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). The basic proposition of the doctrine is that where vertical territorial restrictions are part of an aggregation of restraints which include price-fixing the per se test is available, United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944).

The per se illegality of an aggregation of restraints has been affirmed in numerous cases. *See* Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 948 (5th Cir. 1975); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 720 (S.D.N.Y.), *aff'd on other grounds,* 417 F.2d 621 (2d Cir. 1969); Ansul Co. v. Uniroyal, Inc., 306 F. Supp. 541, 559 (S.D.N.Y. 1969), *aff'd in part and rev'd and remanded in part,* 448 F.2d 872 (2d Cir. 1971), *cert. denied,* 404 U.S. 1018 (1972); Chapiewsky v. G. Heilman Brewing Co., 297 F. Supp. 33, 36 (E.D. Wis. 1968).

[108] 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972).

concept. In *Koscot,* mention was made that "[a]ll retail sales [were] to be made at the suggested retail prices."[109] The court, however, did not rest its decision upon price restriction, but rather upon the intrabrand restraint which was derived from market division and customer allocation. Because of the deception and fraud involved in *Koscot,* it would appear to be the type of case that "might justify per se prohibition under *Northern Pacific R. Co.*"[110] Again an "aggregation of trade restraints" theory could be employed to justify this per se ruling.[111]

Another case, *Clairol, Inc. v. Cosmetics Plus,*[112] dealt with a vertical restraint whereby the producer attempted to limit the customers to whom the wholesaler could sell to on the ground that the bottles sold to the professional customers lacked sufficient labels to warn the public of potential dangers. The court held the customer restrictions were unreasonable in light of *Schwinn.*[113] *Clairol* adamantly refused to follow the Third Circuit case of *Tripoli Co. v. Wella Corp.*[114] The *Tripoli* decison, which was recently embraced by *Sylvania,* leaves *Clairol* vulnerable to attack.[115]

Substantive Law

There are three basic types of state antitrust laws,[116] those: that are modeled after the broad language of the Sherman Act;[117] that specifically prohibit trusts or combinations to fix prices or to limit the quantity of arti-

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[109] 120 N.J. Super. at 240, 293 A.2d at 695.

[110] 97 S. Ct. at 2562.

[111] The "aggregation of trade restraints" doctrine is not limited to conduct which also involves price-fixing as stated in the cases at n. 107, *supra.* Rather, the doctrine has also been utilized in non-price restraints. In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962), the Court noted that "[t]he character and effect of a conspiracy are not judged by dismembering it and viewing its separate parts but only by looking at it as whole." For an elaborate discussion of applying the "aggregation of trade restraints" doctrine to non-price restrictions *see* Note, 44 GEO. WASH. L. REV. 451-53 (1976) and cases cited therein.

[112] 130 N.J. Super. 81, 325 A.2d 505 (Ch. Div. 1974).

[113] 130 N.J. Super. at 101, 325 A.2d at 515.

[114] 425 F.2d 932 (3d Cir.), *cert. denied* 400 U.S. 831 (1970).

[115] 97 S. Ct. at 2557 n.14. Although Clairol refused to follow Tripoli it did come to the same basic result as Tripoli since it refused to allow the wholesaler to distribute the products without proper labeling as required by law. The major distinction between the two cases being that Tripoli allowed the manufacturer to protect itself from liability by refusing to deal with the wholesaler; whereas, the Clairol rationale would only allow the courts to enforce a labeling law violation. *See* note 146 and accompanying text, *infra.*

[116] Rubin, *Rethinking State Antitrust Enforcement,* 26 UNIV. OF FLA. L. REV. 653, 658 (1974).

[117] *Id.* States within this group include: New Jersey, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Louisiana, Maine, Missouri, New Mexico, New York, North Carolina, Oklahoma, Virginia, Wisconsin, and Washington.

cles;[118] and that explicitly outlaw defined trust practices.[119] New Jersey codified the first alternative by relying upon the broad, sweeping language of the Sherman Act.

Section 3 of the New Jersey Antitrust Act is substantively modeled after section 1 of Sherman; both acts hold illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . ."[120] Restraints fall into two general categories: horizontal restraints which involve agreements between competitors and vertical restraints which concern agreements between persons on different economic levels.[121] Within these categories particular types of conduct have been declared unlawful.

Price Fixing

Perhaps the most elementary type of restrain is price fixing. Early on, price fixing was considered a per se violation in that "every price fixing agreement, if effective, is the elimination of one form of competition."[122] In the classic opinion of *United States v. Socony Vacuum Co.*[123] the Court described price fixing as "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . ."[124]

Although there are a number of actions now pending,[125] there is no case dealing with price fixing among competitors under the New Jersey Antitrust

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[118] *Id.* at 658-59. States within this group include: Alabama, Arkansas, Iowa, Michigan, Montana, Utah, and Wyoming.

[119] *Id.* at 659. States within this group include: California, Florida, Kansas, Mississippi, Nebraska, New Hampshire, North Dakota, Ohio, and Texas.

[120] N.J. STAT. ANN. § 56:9-3 (West Supp. 1977-1978); 15 U.S.C. § 1 (1970 & Supp. V. 1975). The obvious difference between the two sections is the jurisdictional requirement. Where Sherman applies to such activity conducted ". . . among the several States, or with foreign nations . . . .," The state act concerns conduct ". . . in this State . . ."

[121] 130 N.J. Super. at 94, 325 A.2d at 512. Vertical restraints usually involve a manufacturer placing restrictions upon the wholesaler or retailer.

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

[123] 310 U.S. 150 (1940).

[124] 310 U.S. at 221-223.

[125] State v. Ralph Barone & Sons, Docket No. C-309-77 (Ch. Div. 1977) (alleged bid-rigging in public construction projects); State v. New Jersey Tank Truck Carriers, Inc., No. C-469-77 (Ch. Div. 1977) (alleged price-fixing by tank truck carriers' association and individual members); State v. Allan's Towing Service, Inc., No. C-3605-76 (Ch. Div. 1977) (alleged price-fixing of vehicle towing services); State v. Nurses Private Duty Registry, Docket No., C-1834-77 (Ch. Div. 1977) (alleged price-fixing in provision of private duty nurses' services); State v. Bossong, No. L-17093-76 (Law Div. 1977) (alleged bid-rigging by contractors doing pavement markings for N.J. Dept. of Transportation); State v. John Bardolf, Jr., No. C-1284-76 (Ch. Div. 1976) (alleged price-fixing in livery services); New Jersey v. National Broiler Marketing Association, No. C-75-362A (N.D. Ga. 1975) (multi-district case

Act. The state, in *New Jersey v. Abbott Laboratories,*[126] has charged over 230 defendants with participating in a scheme whereby vendors paid kickbacks to public officials in order to secure public contracts with Jersey City and Hudson County. The state's assertion that the paying of kickbacks constitutes an antitrust violation is both innovative and, from a precendential standpoint, tenuous.[127]

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alleging price-fixing of chickens); New Jersey v. General Motors, No. C-77-1518 (N.D. Ill. 1974) (multi-district case alleging price-fixing in elimination of automobile fleet discounts); New Jersey v. Abbott Laboratories, Civil No. 1769-73 (D.N.J. 1973) (alleged violation of antitrust laws in purchasing by governmental entities); New Jersey v. Emhart Corp., Civil No. 1897-72 (D. Conn. 1972) (multi-district case alleging price-fixing in sale of master key systems and replacements).

There has also been a successful settlement in another price-fixing case, New Jersey v. Bergen Asphalt Corp., Civil No. 75-861 (D.N.J. 1975).

[126] Civil No. 1769-73 (D.N.J. Dec. 10, 1973).

[127] Bribery alone has never been held to be a Sherman Act § 1 violation. *See* Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir. 1976), (commercial bribery standing alone does not constitute a Sherman Act violation, although it may if tied to other acts); United States v. Boston & Mass. R.R., 380 U.S. 157, 162 (1966) (although an alleged violation of § 10 of the Clayton Act, bribery is not an antitrust violation); Ranger, Inc. v. Sterling Nelson & Sons, Inc., 235 F. Supp. 393, 399-400 (D.Ida. 1964), *aff'd,* 351 F.2d 851 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966) (district court held that bribery of a state employee was not a Sherman violation, but it was not raised on appeal since violation of § 2(c) of the Robinson-Patman Act was affirmed); Norville v. Globe Oil & Refining Co., 303 F.2d 281 (7th Cir. 1962) (landlord charging extra rebates to lessee not an antitrust violation); Parmelee Transportation Company v. Keeshin, 292 F.2d 794 (7th Cir. 1961), *cert. denied,* 368 U.S. 944 (1961) (bribery of an ICC member to gain an exclusive contract to transfer passengers to railroad terminals not violative of antitrust laws).

These cases fail to take into consideration the economic, political, and social circumstances under which the Sherman Act was enacted. It seems that many of the great trusts of the 1800's had used bribery and political corruption to gain their monopolies. For an illuminating discussion of the historical phenomenon *see* Thorelli, *supra,* note 2 at 93 (for the Standard Oil rebates to railroads), 475 (for the Swift Meats rebates) and 68 (for the National Cash Register bribes). The Court avers to such conduct in Swift & Co. v. United States, 196 U.S. 375, 392 (1905); Standard Oil of New Jersey v. United States, 221 U.S. 1, 33, 42-43 (1911). For Congressional awareness of such activity *see* CULLOM, COMMITTEE REPORT, SENATE SELECT COMMITTEE ON INTERSTATE COMMERCE, S. Rep. No. 46, 49th Cong. 1st Sess., 181 (1886).

Another failure of the cases that dealt with bribery is their direction. Antitrust legislation is premised upon the theory that conduct which results in restricting competition should be prohibited. When dealing with bribery the affect of the bribery upon the market should be the deciding factor. For a hodgepodge discussion of this concept, *cf.,* Duke & Co., Inc. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (involved an allegation that municipal officers had conspired with private firms to boycott the use of plaintiff's malt beverages in public facilities, remanded); Harmon v. Valley National Bank of Arizona, 339 F.2d 564 (9th Cir. 1964) (the state's attorney general was alleged to have conspired with several banks to monopolize commercial banking within the state, remanded); Parmelee Transportation Company v. Keeshin, 144 F. Supp. 480 (N.D. Ill. 1956) (conspiracy to restrain and monopolize interstate commerce by eliminating competition is clearly set forth; that the methods (bribery) of accomplishing this objective are unusual is unimportant). *See generally* California Transport v. Trucking Unlimited, 404 U.S. 508 (1972) (Stewart, J., concurring); Parmelle Transporta-

Apart from the dearth of precedent, however, the reasonableness of the state's price-fixing theory has a solid foundation. The feasibility of the argument is based upon the following factors:

1. Government purchasing should be open to all on an equal basis. Kickbacks necessarily lead to the exclusion of all honest businessmen, which in turn stifles competition and affects price;[128]
2. Government purchases are governed by New Jersey's bidding statutes. Under these statutes, all prospective sellers must bid on governmental contracts. The avowed purpose of this bidding requirement is to ensure the lowest possible competitive price. By circumventing the bidding requirement, the sellers have, in effect, "tampered" with the price structure; and
3. The payment of kickbacks is a felonious activity, and this being so, such payments can never be justified. Kickbacks schemes must, therefore, be subjected to per se analysis.

Whether the state's theory of price-fixing will ultimately be vindicated by the courts is uncertain. Though premised upon sound reasoning, and despite the usual admonishment that the scope of antitrust law is subject to constant expansion,[129] the judicial system's inherent distrust of innovation could prove fatal to the state's theory. For the present, however, the possibility of a verdict in the state's favor has prompted a number of settlements in *Abbott Laboratories*.

Turning to vertical price restrictions, the court in *Lawn King* determined that the defendant-franchisor had compelled dealers to charge the public a standard minimum fee in providing their services. Relying on federal precedent, the court refused to accept any justification for such practices and held resale price maintenance per se illegal.

Although the recent *Sylvania* opinion has cast some doubt upon the continuing viability of per se to all vertical arrangements, the Court footnoted the declaration that resale price maintenance would remain governed by a per se test. *Sylvania* emphasized that price restrictions involved significantly different questions of analysis and policy.[130] This argument was buttressed

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tion Company v. Keeshin, 292 F.2d 794 (7th Cir. 1961) (Duffy, J., dissenting); Messenger, et al. v. Pennsylvania R.R. Co., 36 N.J.L. 407 (Sup. Ct. 1873), *aff'd*, 37 N.J.L. 531 (E.& A. 1874).

[128] Many of the defendants are also charged with boycott.

[129] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933): "The Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions . . . its general phrases . . . set up the essential standard of reasonableness."

[130] 97 S.Ct. at 2559 n. 18. *See also* United States v. Topco Associates, Inc., 405 U.S. 616 (1972) (Burger, C.J., dissenting).

by the observation that Congress had recently expressed its approval of a per se standard to vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of individual states. In fact, the state legislature had taken the initiative by repealing New Jersey's fair trade laws prior to Congressional action.[131]

The grounds upon which *Sylvania* relies in distinguishing price restraints from nonprice restraints are open to dispute. A number of commentators have suggested that the economic effect of resale price maintenance is equivalent, if not identical, to non-price restraints.[132] Moreover, the fact that both the Congress and the state legislature have repealed fair trade statutes, is far from dispositive of this matter. If the Court was able to maintain a per se standard in the midst of fair trade, there is no reason to suppose the Court will feel obliged not to use a rule of reason analysis now that fair trade has been repealed.[133]

Market Divisions/Customer Allocation

Similar to price-fixing, market divisions are generally classified along horizontal and vertical lines. Unlike price-fixing, however, only horizontal market divisions receive per se analysis. If *Sylvania* is to be followed, a rule of reason standard may well be employed in the future.[134] The only arguable exceptions to *Sylvania*'s rule of reason analysis are competitors within highly concentrated markets, or where a particular manufacturer has successfully differentiated its product. In either of these situations interbrand competition would not serve as a sufficient check upon the exploitation of intrabrand market power.[135]

Market divisions can be carried out in such diverse forms as specific geographic areas, fixed locations, customer restrictions, or perhaps a general fixed percentage of the business.[136]

The classic case dealing with horizontal market divisions is *United States v. Topco Associates, Inc.*[137] In *Topco,* independent supermarkets formed a

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[131] N.J. STAT. ANN. §§ 56:4-3 to 6 (repealed 1975).

[132] *See, e.g.,* Posner, *Antitrust Policy & the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, & Potential Competition Decisions,* 75 COLUM. L. REV. 282 (1975). *See also,* White's concurrence in Sylvania: "The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established per se rule against price restraints." 97 S.Ct. at 2568.

[133] The legislative history of the repeal of the Federal fair trade laws is ambiguous. Congress does say that if it were not for fair trade, then such agreements "would violate the antitrust laws." 1975 U.S. CODE & AD. NEWS 1569, 1570. The difference between a "would" and a "could" is too speculative a Congressional intent for the authors to subscribe to it.

[134] *See* notes 99-105 and accompanying text, *supra.*

[135] 97 S.Ct. at 2559 n. 19.

[136] Handler, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS, S. MONOGRAPH No. 38, 76th Cong., 3d Sess. 10, at 17 (1941).

[137] 405 U.S. 596 (1972).

cooperative association whereby they obtained their own marketing label on merchandise. Attempting to rebut antitrust liability, the association argued that their combining was necessitated in order to compete effectively with the larger firms. The association was considered an alter-ego of the individual members and their exclusive territories were determined to be a horizontal restraint. In holding the arrangement per se unlawful, the Court stressed that "one of the classic examples of a per se violation of section 1 is an arrangement between competitors at the same level of the market structure to allocate territories in order to minimize competition."[138]

While the New Jersey courts have not yet had an opportunity to deal with horizontal market divisions, they have taken a clearly jaundiced view of vertical market allocations and other nonprice vertical restraints. The cases that have been decided have adhered to, and enforced, the *Schwinn* doctrine with a vengeance. Apart from *Lawn King* which has already been discussed, there are two other state court opinions interpreting the New Jersey Antitrust Act's applicability to nonprice vertical restraints.

Kugler v. Koscot Interplanetary, Inc.[139] involved an action for both monetary and injunctive relief against a manufacturer. The complaint alleged that the defendant, through the use of restrictive rules and regulations, had violated section 3 of the Act. Specifically, the rules promulgated by the defendant restricted the retail outlets through which a distributor could sell the defendant's products. Additionally, the distributor's advertising expenditures were curtailed and each distributor was obliged to buy products only from his sponsor.[140]

The court found the defendant guilty, assessed a $25,000 penalty against it, and granted the state's request for an injunction.[141] The court rigidly applied *Schwinn*'s dichotomy between sale and non-sale transactions, dismissing the defendant's one percent market share as irrelevant to the application of the per se standard.

In *Clairol, Inc. v. Cosmetics Plus,*[142] decided two years after *Koscot,* the court reemphasized its attitude toward all vertical restrictions. In *Clairol,* the manufacturer sought injunctive relief against a distributor who was selling products labelled "for professional use" to retail customers.

The products marked "for professional use" were manufactured from 'coal tar' as were those products to be purchased by the general public. The "pro-

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[138] *Id.* at 608. In New Jersey v. Madison Square Garden, Inc., Civil No. 77-1334 (D.N.J. 1977) the state filed suit under the market division theory to help get a professional basketball team (the Nets) into New Jersey. *But see* Sheldon Pontiac v. Pontiac Motor Div., Gen. Motors, 418 F. Supp. 1024 (D.N.J. 1976).

[139] 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972).

[140] *Id.* at 247, 293 A.2d at 699.

[141] *Id.* at 250, 293 A.2d at 700-701.

[142] 130 N.J. Super. 81, 325 A.2d 505 (Ch. Div. 1974).

fessional" product, however, differed in three respects. First, some of the professional products, while having identical names as the products for general consumption, were highly concentrated and could, therefore, be mistakenly applied as their non-professional counterparts. Second, all goods with a coal tar base must have affixed individual "caution" labels. The goods for professional use did not use individualized lables since the manufacturer sold them in quantity with a single warning enclosed.[143] Finally, the two lines of products differed in that those for professional use sold at substantially less than those earmarked for the ordinary consumer.[144]

The plaintiff argued that the misapplication of its products would have an adverse effect upon the good will of Clairol.[145] The plaintiff cited *Tripoli Co. v. Wella Corp.*,[146] a Third Circuit decision, in support of its position. In *Tripoli* the court had reasoned that the manufacturer had a legitimate interest in protecting itself from potential products liability suits and consumers from potential injuries. That court accordingly found for the manufacturer, distinguishing, if not emasculating,[147] the per se standard articulated in *Schwinn*.

The court in *Clairol* seriously questioned the reasoning of *Tripoli*. *Clairol* found the distinction drawn between professional and non-professional products largely illusory. Rather than granting the manufacturer's injunctive relief, the court ordered the distributor to attach to each bottle a suitable label and to inform the consumer that the manufacturer sought "professional use" only of its product. The court reasoned that its order would sufficiently protect the manufacturer's good will, while affording the public the fruits of as much competition as was practicable.

Boycotts/Concerted Refusals to Deal

A classic group boycott involves a method by which traders, through concerted action, attempt to foreclose their market level to potential or existing competitors.[148] Creating obstacles to entry may involve coercing or inducing suppliers[149] or customers[150] at different market levels not to deal with the target company. Another method to effect a boycott may be accomplished by the traders themselves refusing to deal with the target com-

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[143] *Id.* at 85, 325 A.2d at 507.

[144] *Id.* at 86, 325 A.2d at 507.

[145] *Id.* at 91, 325 A.2d at 510.

[146] 425 F.2d 932 (3d Cir. 1970).

[147] In Tripoli, the court distorted Schwinn's use of the phrase "without more" to designate in any case where there is "more" (*e.g.*, in Tripoli a manufacturer's potential liability and a consumer's potential injury), the per se standard was not applicable.

[148] SULLIVAN, *supra* note 69, at 230.

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

[150] Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

pany in some essential transaction.[151] The basic element of a boycott is the concerted action aimed at depriving the target company of some trade relationship which it needs to compete effectively at the market level.[152]

In *Oates v. E. Bergen County Multiple Listing Service*,[153] realtors attempted to avoid the impact of *Grillo* by incorporating their multiple listing service (MLS) and separating it from the local realty board.[154] The plaintiff, a real estate broker, was denied admission to the MLS because of its restrictive charter which had limited membership to persons who had belonged to the old listing service.[155] The court found this exclusionary practice to be a "classic refusal to deal."[156] The court rested its reasoning on the fact that access to a MLS was essential to a realtor in order to assure him the opportunity to compete in his trade. Without such access to his "stock in trade,"[157] a realtor would effectively be denied the opportunity to earn a living.

Although the defendant's "exclusive club"[158] was held per se illegal, the court went on to judge it under a rule of reason analysis. Arguably this unnecessary extension was an attempt by the court to quell any further attempt by realty boards to elude the state's broad policy determinations which were reflected in the new Antitrust Act.[159] The unnecessary rule of reason analysis may also account for the reason why a later court implied that *Oates* required a showing that the boycotted product or service was of economic necessity to the plaintiff, as well as demonstrating that the boycott "substantially" affected the relevant real estate market.[160] Although a boycott implies that the product or service withheld is essential to the plaintiff, it does not require that the particular market be substantially affected. A substantiality requirement is more akin to a rule of reason test and is not a necessary element to a per se holding.

Tying Arrangements

A tying arrangement is defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different

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[151] Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

[152] SULLIVAN, *supra* note 69, at 289.

[153] 113 N.J. Super. 371, 273 A.2d 795 (Ch. Div. 1971).

[154] *Id.* at 378-79, 273 A.2d at 798-99. After the Grillo decision the state realty board suggested that the defendant incorporate its MLS.

[155] *Id.* at 378-79, 273 A.2d at 798-99.

[156] *Id.* at 382, 273 A.2d at 801.

[157] *Id.* at 381, 273 A.2d at 800. A broker's knowledge and access to salable property is his stock in trade.

[158] *Id.* at 377, 273 A.2d at 793.

[159] *See also* Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 33, 274 A.2d 577, 581 (1971).

[160] The court in Pomanowski v. Monmouth Cty. Board of Realtors, 152 N.J. Super. 105, 377 A.2d 794 (Ch. Div. 1977), seemed to infer as much.

(or tied) product, or at least agrees that he will not purchase that product from any other supplier."[161] In order to prove such a per se[162] unlawful arrangement, the plaintiff must demonstrate that a tie-in exists in fact,[163] that the seller possesses sufficient market power in the tying product to impose an appreciable restraint on free competition in the tied product market,[164] and that the arrangement forecloses a not insubstantial amount of commerce in the market for the tied product.[165] The anti-competitive effect of the tying arrangement is two-fold. First, the arrangement forecloses to the vendee (buyer) all alternate sources of supply for the tied product even if it may be obtained at a lower price or higher quality. Secondly, the agreement forecloses the market to competitors of the supplier in the tied product.

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[161] Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6 (1958). Under federal law, the validity of tying arrangements is usually considered under § 1 of the Sherman Act (15 U.S.C. § 1) or § 3 of the Clayton Act (15 U.S.C. § 14). However, since the Lawn King case deals with the tying of goods and services to a trademark, it is remitted to a Sherman Act analysis. This may be significant since conceptually there is a difference between the legal tests under each statute. Times-Picayunne Publishing Co. v. United States, 345 U.S. 594 (1953); Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974). However, this significance is lessened in practice because most courts do not distinguish between the legal tests for a per se illegal tying arrangement under the Sherman and Clayton Acts. Handler, *Antitrust: 1969,* 55 CORNELL L. REV. 161 (1969).

[162] Despite the fact that tying arrangements are normally per se illegal under the antitrust laws, there are a very few economic justifications which will rebut the inference they are inherently anticompetitive. *See* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); Siegal v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

If the plaintiff is unable to prove the second and third elements of the test, he may still succeed under a rule of reason analysis in demonstrating an unlawful tying arrangement. Fortner Enterprises v. United States Steel, 394 U.S. 495, 499-500 (1969).

[163] *See* note 171 and accompanying text, *infra.*

[164] In Fortner Enterprises v. United States Steel, 394 U.S. 495, 502-06 (1969) the Court provided three circumstances where sufficient market power could be inferred thereby avoiding the difficulty of requiring extensive proof to establish market power. The three evidentiary shortcuts were (1) an unusually high price in the tied product; (2) the acceptance of a burdensome tie-in by an appreciable number of buyers; or (3) the uniqueness of the tying product. But in the recent opinion of United States Steel v. Fortner Enterprises, 97 S. Ct. 861 (1977) the Court considerably narrowed its prior decisions by tightening these evidentiary presumptions to comport more with actual market leverage to affect price.

[165] The law in this area is fairly clear. As the Court stated in Fortner I:

> The requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie. . . [N]ormally, the controlling situation is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis is foreclosed to competitors by the tie. 394 U.S. at 501. *See, e.g.,* United States v. Loews, 371 U.S. 38 (1962) (dollar-volume $60,800); Aamco Automatic Transmissions v. Taylor, [1975] 2 TRADE REG. REP. (CCH) ¶ 60,666 (E.D. Pa. 1976) (dollar-volume $50,000).

There is only one case under the New Jersey Antitrust Act which has dealt with a tying arrangement.[166] In *Lawn King*, the state charged that the defendant had unlawfully tied the purchases of various goods and services to the sale of its trademark and combine.[167] Prior to dealing with the specific claims as to each product the court found evidence to meet the second and third elements of the tying test. Relying upon *Siegal v. Chicken Delight, Inc.*,[168] the court held that, standing alone, the uniqueness of a trademark would imply "sufficient economic power."[169] The court also met another proof requirement by finding that defendant Lawn King, being one of the three largest lawn care companies, possessed a not insignificant share of the lawn care field.[170]

After making these initial determinations, the court, in turning to the specific allegations, had only to determine whether or not a tie-in existed in fact. In order to establish whether a tying arrangement existed in fact, there are ususlly three preconditions to be met: whether there are two separate and distinct objects being tied; whether purchase of the tied object was imposed as a condition to the sale of the tying products; and whether the parties agreed to this arrangement.[171] Presumably the first was answered when the court found the trademark a unique product.[172] The second condition was also established since Lawn King offered its franchise as a package deal and

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[166] One case in New Jersey relied solely upon the federal antitrust laws. The defendant in Shell Oil Company v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (Ch. Div. 1972), *modified*, 63 N.J. 402, 307 A.2d 598 (1973) raised a tying arrangement as an affirmative defense to plaintiff's termination of defendant's lease without cause. The defendant was successful in showing that Shell was tying the purchase of tires, batteries, and accessories (TBA) to the sale of gasoline. Relying upon Shell Oil Co. v. FTC, 360 F.2d 470 (5th Cir. 1966), the court in Marinello found that Shell had sufficient economic power over its franchisees and that "by reason of the economic life-and-death power Shell had over its dealers, the system is inherently coercive and innately anticompetitive in its effect." 120 N.J. Super. at 388, 294 A.2d at 269.

[167] Specifically included within the tied items were tractors, trailers, chemicals, seeds, and advertising methods and materials. The court, however, found only the chemical and seed to be tied. The tying items were alleged to be the trademark, tradename and combine (a machine designed to fertilize, air, and plant seed in one operation). Finding the trademark to be a sufficiently unique item the court did not rule on the uniqueness of the combine, which could have fortified its determination.

[168] 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *See also* Aamco Automatic Transmissions v. Taylor, [1975] 2 TRADE REG. REP. (CCH) ¶ 60.666 (E.D. Pa. 1976); In re Chock-Full O'Nuts Corp., Inc., 1973 FTC Orders, ¶ 20,441 (1973); Susser v. Carvel Corp., 332 F.2d 505, 519 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965).

[169] 150 N.J. Super. at 232, 375 A.2d at 309.

[170] *Id.* at 233, 375 A.2d at 309.

[171] *See*, Note, *Antitrust-Tying Arrangements-Class Actions—Each Franchisee Must Prove Individual Coercion*, 55 TEX. L. REV. 343, 346 (1977); Comment, *Physical Tie-Ins as Antitrust Violations*, 1975 UNIV. OF ILL. L.F. 224, 229-30 (1975).

[172] 150 N.J. Super. at 232-33, 375 A.2d at 309.

severely restricted the purchase of subsequent goods.[173] Finally, the third condition was evidenced by the express contract between Lawn King and the franchisees, as well as the general course of dealing between the parties.[174]

The court, however, only convicted the defendant for tying chemicals and seeds and acquitted the defendant for the alleged tying of tractors, trailers, and advertising. This rationale is the result of adding a fourth criterion to the tying test, that is, a showing of actual coercion. Although not alone in his thinking,[175] Judge Imbriani's additional requirement of showing actual coercion is mistaken because it fails to stay within the policy considerations for holding tying arrangements per se illegal.[176]

Instead of showing actual coercion, a plaintiff should only be required to prove the three preconditions to establishing that a tie-in existed in fact, thereby demonstrating that an implied coercion existed in the arrangement. A showing of implied coercion within the first element of the tying test should be sufficient evidence that the buyer's voluntary purchasing power is restricted, and the market is foreclosed to the defendant's competitors.

Exclusive Dealing

In *Finlay & Associates v. Borg-Warner Corp.*,[177] the defendant manufacturer had terminated the plaintiff-distributor's franchise. The plaintiff alleged that the termination was the result of a conspiracy between the manufacturer and a competing distributor of plaintiff which was designed to drive plaintiff out of the market. Although the court rested its involuntary dismissal on lack of sufficient proofs of a conspiracy,[178] it did make broad generalizations on antitrust law which may not be fully accurate.

The court was correct to note that if a manufacturer terminates a distributorship in the exercise of his sole, independent discretion, he has not violated antitrust law. However, when a manufacturer acts in concert with one distributor to terminate another distributor there may be a violation.[179] Since this question has seldom been presented for adjudication, it has never been held per se unlawful. This does not eliminate the possibility

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[173] *Id.* at 233-38, 375 A.2d at 309-12.

[174] *Id.* at 233, 375 A.2d at 309. *See* Note, *supra* note 171, at 346-47 n.38.

[175] Ungar v. Dunkin Donuts of America, Inc., 531 F.2d 1211 (3d Cir. 1976); Redd v. Shell Oil, [1975] 2 Trade Cases ¶ 60,572 (10th Cir.); In re 7-Eleven Antitrust Litigation, [1974] 2 Trade Cases ¶ 75,429 (N.D. Cal.); Kugler v. Aamco Automatic Transmission, Inc., 460 F.2d 1214 (9th Cir. 1972).

[176] *See* Note, 55 TEX. L. REV. 343, 353 (1977).

[177] 146 N.J. Super. 210, 369 A.2d 541 (Law Div. 1977).

[178] *Id.* at 227, 369 A.2d at 550.

[179] *See generally,* SULLIVAN *supra* note 69, at 423-29. It is important to note that an expansive reading of Sylvania may diminish the import of the discussion in SULLIVAN.

of holding such conduct unreasonable, under the broader standard of the rule of reason, if there is a sufficient showing of anti-competitive effect.[180]

When a manufacturer acts in concert with, or at the instigation of, a distributor, the fact pattern begins to mirror cases such as *Klor's v. Broadway-Hale Stores.*[181] In *Klor's* a competitor of the plaintiff-distributor convinced a number of manufacturers not to deal with the plaintiff. Characterizing the arrangement as a boycott, the Supreme Court applied the per se standard since there was no possible justification for the conduct. Exclusive dealing contracts are usually distinguishable since they can often be justified on an economic basis, and are normally implemented by a manufacturer independently of distributor coercion.

A further generalization of the court in *Borg-Warner* is the requirement of showing public injury.[182] Case law has demonstrated that it makes little difference that the victim of the restraint "is only one merchant whose business is so small that his destruction makes little difference to the economy."[183] Provided there is no economic justification for a particular termination, an antitrust violation should be found.

Undifferentiated Restraints and Other Violations

It is not necessary that every restraint of trade fit neatly within one of the definitional pockets which the courts have declared to be per se violations of the antitrust law.[184] In *Pomanowski v. Monmouth County Board of Realtors,*[185] the court was faced with a unique MLS case. Here, the plaintiff had voluntarily resigned from the MLS in protest over their requirement that the realtor be a member of the realty boards.[186] Since there was no predatory practice[187] involved, the court distinguished the *Oates* line of cases. Nevertheless, the court did find the required membership to the realty boards to be an unreasonable restraint of trade since "the payment of [realty] dues is totally unrelated to the operation of the multiple listing ser-

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[180] One important factor to remember is that the Uniform Commercial Code enacted by New Jersey sanctions exclusive dealing contracts as a matter of contract law. N.J. STAT. ANN. § 12A:2-306 (West 1962).

[181] 359 U.S. 207 (1959).

[182] 146 N.J. Super. at 229, 369 A.2d at 551.

There may, however, be a need to show more injury as the restraint moves from per se to rule of reason analysis.

[183] 359 U.S. at 213.

[184] Any type of conduct, unless specifically exempted, may give rise to an antitrust violation if the effect of such conduct restrains trade. *See, e.g.,* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

[185] 152 N.J. Super 100, 377 A.2d 791 (Ch. Div. 1977).

[186] *Id.* at 104, 377 A.2d at 793.

[187] *Id.* at 107, 377 A.2d at 794.

vice."[187a] Had the court desired, there were a number of other plausible reasons for holding this arrangement to be an unreasonable restraint of trade.[188]

Another violation of section 3 of the Act may be a restraint upon alienation. Perhaps the most striking difference between *Lawn King* and *Sylvania* is over their respective interpretations of the ancient doctrine of restraints upon alienation. Whereas *Lawn King* reaffirmed the validity of the doctrine, *Sylvania* ostracized the ancient rule.[189]

Monopolization

Section 4 of the New Jersey Antitrust Act is modeled after section 2 of the Sherman Act. In substance, each section states that it shall be unlawful to "monopolize, or attempt to monopolize, or to combine or conspire with any person or persons, to monopolize trade or commerce."[190] Although a section 4 claim has been raised in several cases, there has been no serious monopoly charge under the Act to date.[191]

Statutory Exemptions

Most state antitrust acts have an exemption section which more or less follows federal precedent and bestows immunity upon comparable practices.

Under section 5[192] of the New Jersey Antitrust Act an extensive array of exemptions are carved out from antitrust liability. Within section 5, subsection (a) provides that the creation of trade and professional organizations for

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[187a] *Id.* at 108, 377 A.2d at 795.

[188] There is a line of cases that holds, "where private individuals have monopolistic control over access to essential resources, they are obligated to make them available to others on equal and nondiscriminatory terms." General Telephone Co. of Southwest v. United States, 449 F.2d 846, 861 (5th Cir. 1971).*See* A.D. WEALE, THE ANTITRUST LAWS OF THE U.S.A. at 67 (1960).

Although the court did not find any predatory practices since the plaintiff voluntarily resigned from the multiple listing service, excessive fees of the realty boards may have created a constructive boycott.

[189] *See* Lawn King, 150 N.J. Super. at 239-42, 375 A.2d at 312-14. *Contra* Sylvania, 97 S. Ct. at 2559 n. 21.

[190] N.J. STAT. ANN. § 56:9–4(a) (West Supp. 1977-1978). *See* 15 U.S.C. § (1970 & Supp. V 1975).

[191] *See* Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 248-50, 293 A.2d 682, 699-700 (Ch. Div. 1972); Finlay & Associates, Inc. v. Borg-Warner Corp., 146 N.J. Super. 210, 222-23, 369 A.2d 541, 547-48 (Law Div. 1977); Health Corp. of America v. New Jersey Dental Ass'n, 424 F. Supp. 931, 932 (D.N.J. 1977).

In Hyland v. John's Wholesale Distributors, Inc., No. C-515-76 (Ch. Div. 1977) the state alleges the defendant attempted to monopolize the vending machine services in the Atlantic City area.

[192] N.J. STAT. ANN. § 56:9-5 (West Supp. 1977-1978).

mutual help (and not having capital stock) are not per se illegal combinations in restraint of trade.[193]

In drafting the bill, Deputy Attorney General Abelson appeared very hesitant about exempting trade and professional organizations since they often "serve as the prime vehicles for the carrying out of antitrust violations."[194] Abelson suggested the words "per se" be inserted if the exemption was to be acceptable. What this reasoning suggests is that the activity of organizing trade and professional groups in and of itself will not be considered an antitrust violation, but that anything beyond legitimate organizational activity must meet antitrust scrutiny. As the court in *Pomanowski* explained:

> *A close reading of this section demonstrates that the organization as an entity must be viewed separately from its conduct.* Thus, the act exempts the organization itself while mandating that the activities of its members may not be undertaken in violation of law. Furthermore, a *per se* approach may not be applied to the organization, although the doctrine may be applied to the activities of the organization where appropriate . . . . To construe the statute otherwise would require detailed judicial analysis of conduct which clearly invokes the *per se* rule, such as price fixing, a result not envisioned by the Legislature.[195]

Subsection (b) sets out ten particular areas where immunity from antitrust attack will be allowed; they are:

(1) legitimate labor activities of labor organizations or its individual members;[196]

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[193] For the federal counterpart, see 15 U.S.C. § 17 (1970). It is important to note that the federal statute lacks the words "per se." By adding the words "per se" the state may have wanted to stress that the state exemption is not as broad as the federal exemption.

[194] INTER-OFFICE MEMO TO ATTORNEY GENERAL KUGLER ON FEBRUARY 27, 1970.

[195] 152 N.J. Super. at 107-08 n.2. *See also* Oates, 113 N.J. Super. at 394, 273 A.2d at 807.

[196] N.J. STAT. ANN. § 56:9-5(b)(1) (West Supp. 1977-1978). Its federal counterpart is 15 U.S.C. § 17 (1970). In Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 622-23 (1975), the Court held that section 20 of the Clayton Act was not applicable since the arrangement involved both labor and non-labor groups. In dealing with the antitrust aspect, the Court implied that an antitrust exemption would only apply to labor activity which is expressly allowed under the labor laws. *See* Note, *Congress and the Court at Cross Purposes: Labor's Antitrust Exemption,* 7 LOY. CHI. L.J. 782 (1976); Note, *Labor's Antitrust Immunity after Connell,* 25 AM. U. REV. 971 (1976); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law,* 62 VA. L. REV. 603 (1976); Note, *Diminution of Labor's Immunity Under Antitrust Law,* 21 LOY. L. REV. 980 (1975). *See generally* W. OBERER & K. HANSLOWE, LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY (1972); SULLIVAN, *supra* note 69 at 723-31.

(2) legitimate cooperative activities of agricultural or horticultural cooperatives or the individual members; [197]

(3) designated public utilities which are regulated by state and federal agencies; [198]

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[197] N.J. STAT. ANN. § 56:9-5(b)(2) (West Supp. 1977-1978). Under New Jersey law cooperatives may be organized pursuant to either the Agricultural Co-Operative Associations Act, N.J. STAT. ANN. §§ 4:13-1 to 50 (West Supp. 1977-78); the Co-Operative Societies of Workingmen Act, N.J. STAT. ANN. §§ 34:17-1 to 18 (West 1959); or, the general nonprofit corporation laws, N.J. STAT. ANN. §§ 15:1-1 to 16 (West Supp. 1977-78). The most favorable statute for antitrust exemption would be the Agricultural Co-Operative Associations Act, which is modeled after federal statutes like the Cooper-Volstead Act, 7 U.S.C. § 291 to 292 (1970); and the Fishermen's Act, 15 U.S.C. §§ 521 to 522 (1970). Under federal judicial interpretations there are only two general types of conduct that will deprive a cooperative of its antitrust exemption. The first is when the cooperative utilizes predatory practices, such as coercive conduct, aimed at bringing nonmember producers into the cooperative or achieving monopoly through threats, boycotts and interference with others. *See* Hufstedder, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will be Affirmed,* 22 AD. L. REV. 455, 461-63 (1970) for a specific detail of the major cases and the conduct condemned as predatory in nature.

The second way a cooperative may lose its antitrust exemption is by combining with a non-agricultural party. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967); Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960); United States v. Borden Co., 308 U.S. 188 (1939); Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives,* 61 VA. L. REV. 341 (1975). But competing co-ops. may combine. United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151 (D.D.C. 1956); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974), *cert. denied,* 419 U.S. 999 (1974). *See also* Sunkist Growers, Inc. v. Winkler & Smith Citrus Products Co., 370 U.S. 19 (1970).

The only major difference between federal and state law is that N.J. STAT. ANN. § 4:13-3 (West 1973) specifically allows the co-op to engage in limited activities with non-members, as set out in N.J. STAT. ANN. § 4:13-30 (West 1973). The authors assume that "non-members" refers to agricultural non-members and not to non-agricultural non-members. Reading the state act this way allows the state statute to be harmonious with federal judicial rulings.

[198] N.J. STAT. ANN. § 56:9-5(b)(3) (West. Supp. 1977-1978).
The state's regulatory power has been shielded from federal antitrust attack by the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943). *See* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine,* 75 COLUM. L. REV. 1 (1976). Since Parker concerns separate sovereigns, that is, federal antitrust policy versus state regulatory authority, perhaps a more apt analogy would be federal antitrust enforcement against federal regulatory authority. *See* Silver v. New York Stock Exchange, 373 U.S. 341 (1963). Yet, there appears to be no analytical difference between the two for antitrust purposes. SULLIVAN, *supra* note 69, at 736-37.

The courts have been slowly carving away at the antitrust exemption given to areas under regulatory control. In Cantor v. The Detroit Edison Co., 428 U.S. 579 (1976) the Court refused to exempt, under state action, the utility company's program of giving away free light bulbs even though the state's PUC had approved the plan. *See* Note, *Antitrust—Cantor v. Detroit Edison Co.: A Further Refinement of Parker's State Action Exemption,* 8 LOY. CHI. L.J. 619 (1977).

Other decisions also indicate the erosion of state action. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (bar association's minimum fee schedule illegal, *see* note 204 *infra*); City

(4) legitimate activities of the insurance business which are regulated by the state agency;[199]

(5) bona fide, nonprofit religious, and charitable organizations;[200]

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of Lafayette, La. v. La. Power & Light Co., 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 97 S. Ct. 1577 (1977) (city utility held not to be ipso facto immune from antitrust laws); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977) (city zoning ordinance not automatically insulated from antitrust attack); Mazzola v. Southern New England Telephone Co., 363 A.2d 170, 169 Conn. 344 (1975) (PUC approving tariff for a protective link apparatus did not constitute state action such as would exempt the telephone company from the state antitrust laws). *But see* Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2696-98 (1977) where the Court distinguished *Goldfarb* and *Cantor* and held restraint upon attorney advertising imposed by the Supreme Court of Arizona to be exempt from antitrust liability under Parker's state action doctrine. For a discussion about the fine line to be drawn in distinguishing these cases, see Professor Milton Handler, Lecture on United States Supreme Court Decisions, During 1977, Affecting Antitrust Enforcement, *quoted in* ANTITRUST & TRADE REG. REP. (BNA) No. 8, at 31, F-7 to 10 (Sept. 22, 1977).

[199] N.J. STAT. ANN. § 56:9-5 (b) (4) (West Supp. 1977-1978). *See* Borland v. Bayonne Hospital, 122 N.J. Super. 387, 405-08, 300 A.2d 584, 593-94 (Ch. Div. 1973). The insurance exemption is different and sui generis from the other exemptions set out in section 5. The major difference being the Congressional desire to allow state's substantial rights in regulating the insurance business as expressed in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 to 1015 (1970). In section 1012 the states are given the right to regulate insurance as long as the conduct does not amount to acts of boycott, coercion, or intimidation as condemned in section 1013. *See generally* Note, *McCarran Act's Antitrust Exemption for the 'business of insurance': A Shrinking Umbrella*, 43 TENN. L. REV. 329 (1976); Note, *McCarran-Ferguson Act: A Time For Procompetitive Reform*, 29 VAND. L. REV. 1271 (1976); Note, *Limits of State Regulation Under the McCarran-Ferguson Act: Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 42 GEO. WASH. L. REV. 427 (1974).

New Jersey has recently revised its insurance statutes and has described unfair methods of competition and unfair or deceptive acts within N.J. STAT. ANN. § 17:29B-4 (West Supp. 1977-78). See especially section 4(4) which prohibits "[b]oycott, coercion and intimidation."

Courts have generally exempted insurance companies under the "business of insurance" provision, 15 U.S.C. § 1012(b) (1970) unless "boycott, coercion or intimidation" is shown. Frankford Hospital v. Blue Cross of Greater Philadelphia, 554 F.2d 1253 (3d Cir. 1977). A number of cases have also limited the injured party of the "boycott, coercion or intimidation" to insurance agents or other insurance companies. *But see* Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3 (1st Cir. 1977), *cert. granted*, 46 U.S.L.W. 3283 (Nov. 1, 1977) (refusal to follow such a narrow reading of the McCarran-Ferguson Act). In *Barry* consumers were allowed to bring an antitrust action since they had sufficiently alleged a boycott. The granting of certiorari, however, places the circuit court's holding in possible jeopardy.

The insurance exemption has also been held only to exempt federal antitrust action and not necessarily an action under the state unfair practices act, unless insurance is specifically exempted. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977). *See also* S. 1710, 95th Cong., 1st Sess. (1977) (proposed "Federal Insurance Act of 1977"). This proposal involves a dual federal-state system of insurance regulation as an alternative to state regulation for fostering price competition and restricting federal antitrust immunity. ANTITRUST & TRADE REG. REP. (BNA), No. 831, at A-22 (Sept. 22, 1977).

[200] N.J. STAT. ANN. § 56:9-5(b)(5) (West Supp. 1977-1978). *See* Borland v. Bayonne Hospital, 122 N.J. Super. 387, 405, 300 A.2d 584, 593 (Ch. Div. 1973).

(6) legitimate activities of security dealers, issuers, or agents; [201]
(7) legitimate activities of state and national banking institutions to the extent regulated by state and federal agencies; [202]
(8) legitimate activities of state and federal savings and loan associations to the extent regulated by the state and federal agencies; [203]
(9) activities of "suggesting fees by professional societies"; [204]
(10) activities permitted by the Fair Sales Act,[205] the Unfair Motor Fuels Practices Act,[206] and the Unfair Cigarette Sales Act.[207]

Subsection (c) adds strength to the expansiveness of the exemptions by restricting antitrust enforcement where it conflicts with any other statute.

There has been only one New Jersey case that has relied upon the exemption section of the Act. In *Borland v. Bayonne Hospital*,[208] the plaintiffs, trustees and members of a union welfare fund, alleged that the defendants had conspired to restrain and monopolize health care services by providing Blue Cross with more favorable rates. After pointing out that factual evidence for a conspiracy was lacking,[209] the court relied upon section 5 (b) (5)

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[201] N.J. STAT. ANN. § 56:9-5(b)(6) (West Supp. 1977-1978). Under federal law the courts have held that the security laws repeal the antitrust act only so far as necessary to make the security regulations work. For an understanding of the antitrust-securities interrelationship see the trilogy of cases: Silver v. New York Stock Exchange, 373 U.S. 341 (1963), Gordon v. New York Exchange, 422 U.S. 659 (1975); United States v. National Association of Securities Dealers, 422 U.S. 694 (1975). *See* Linden, *A Reconciliation of Antitrust Law With Securities Regulation: The Judicial Approach,* 45 GEO. WASH. L. REV. 179 (1977); Robinson, *Recent Antitrust Developments: 1975,* 76 COLUM. L. REV. 191, 215-26 (1976).

[202] N.J. STAT. ANN. § 56:9–5(b) (7) (West Supp. 1977-1978). For a general discussion of the bank exemption, see Annot. 83 A.L.R.2d 344 (1962). Often banks are involved in merger problems. See McHatton, *The Bank Holding Company and the Sherman Act: The Validity of Cooperation Among Commonly Held Banks,* 18 ARIZ. L. REV. 147 (1976); Note, *Antitrust and Correspondent Banking: Bankers Get a Green Light,* 13 HOUS. L. REV. 398 (1976); Note, *Antitrust-Banking,* 10 GA. L. REV. 641 (1976). A new potential antitrust problem in the banking field is the use of electronic fund transfer systems. *See* Bernard, *Some Antitrust Issues Raised By Large Electronic Funds Transfer Systems,* 25 CATH. U.L. REV. 687, 749-65 (1976).

[203] *Id.* N.J. STAT. ANN. § 56:9–5(b) (8) (West Supp. 1977-1978).

[204] N.J. STAT. ANN. § 56:9–5(b) (9) (West Supp. 1977-1978) This exemption may rest on the degree of state involvement in the professional code. In Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2696-97 (1977), the Court distinguished Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), because the rules in question were the "affirmative command of the Arizona Supreme Court," and hence "compelled by direction of the State acting as a sovereign." 97 S. Ct. at 2697. *See also* Handler, *supra* note 198.

[205] N.J. STAT. ANN. §§ 56:4–7 to 15 (1964) (repealed 1975).

[206] N.J. STAT. ANN. §§ 56:6–1 to 32 (1964).

[207] N.J. STAT. ANN. §§ 56:7–18 to 38 (1964).

[208] 122 N.J. Super. 386, 300 A.2d 584 (Ch. Div. 1973).

[209] *Id.* at 404, 300 A.2d at 593.

to exempt the hospitals as nonprofit charitable organizations, and section 5 (b) (4) to exempt Blue Cross as an insurer which was regulated by the State Commissioner of Insurance who approved the rates being questioned.[210] The court reasoned that the purpose of the exemption was "to avoid the situation whereby a state regulatory agency acting pursuant to one statute (the insurance laws) requires conduct which might be held to violate another statute (the New Jersey Antitrust Act)."[211] Pointing to a similar federal exemption, the court reported that not all activity of exempt entities could escape antitrust regulation. Conduct amounting to boycotts, coercion, and intimidation was still condemned as violative of the Sherman Act.[212]

As noted, many of the New Jersey exemptions when enacted followed federal precedent. Recent federal court decisions, however, appear to be traveling in the direction of limiting areas traditionally considered immune from antitrust liability.[213] If New Jersey hopes to follow federal precedent, then the courts of this state should carve away the expansive exemption section.[214] It would also seem that state regulatory agencies are ill equipped to detect antitrust complications that could be bypassed if proper planning were available. With the large antitrust division within the state's attorney general's office, it might be beneficial for some type of oversight to be initiated.

Investigative Powers

The investigative powers granted to the attorney general cannot be overemphasized. When dealing with as complicated and intricate an area of law as antitrust, it becomes of paramount importance to introduce as much order and efficiency as is constitutionally feasible.[215] No matter how enlightened and progressive the substantive provisions might be, and regardless of how stringent the punishment inflicted for violations of those provisions might be, if the investigative powers are unreasonably and severely circumscribed, then the enforcement of the New Jersey Antitrust Act would prove to be a quixotic endeavor.

Pursuant to section 9 of the Act, the attorney general is granted expansive, though not overly broad, powers to investigate possible antitrust viola-

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[210] *Id.* at 405-06, 300 A.2d at 593-94.

[211] *Id.* at 406, 300 A.2d at 594.

[212] *Id.* at 407, 300 A.2d at 594. The court was referring to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1970), see note 199, *supra*.

[213] *See generally* notes 197-204, *supra*. For lower federal decisions in this area see Handler, *Twenty-five Years of Antitrust*, 73 COLUM. L. REV. 415, 431 n.113 (1973).

[214] *Compare* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693 (1974); *with* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 75 COLUM. L. REV. 1 (1976).

[215] *See generally* ATTORNEY GENERAL'S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS (1955).

tions.[216] In order to conduct an investigation, the attorney general need not have probable cause to believe that a violation has or will occur.[217] It is sufficient if he believes that the public interest would be furthered by the initiation of an investigation.

The power granted the attorney general which has caused the greatest controversy is the one that implicitly allows the issuance of Civil Investigative Demands (CID's). CID's are not unique to New Jersey and are, indeed, modeled after the authority vested in the Federal Trade Commission, and granted to the attorneys general of several other states.[218]

The attacks launched upon the use of CID's have been as numerous as they have been ineffective. The arguments range from those of constitutional proportion to those merely concerned with the burdensome nature of CID's.[219] The primary constitutional issues raised by the CID's concern the fourth and fifth amendments to the United States Constitution, specifically, whether CID's constitute an "illegal search and seizure," or could possibly entail the violation of a person's right against self-incrimination.

The Supreme Court, in what could only be labeled a masterful use of sophistry, discarded the fourth amendment objection in cursory fashion, distinguishing between those cases involving "figurative" searches and those involving "actual" searches.[220]

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[216] According to the statutory pronouncements the attorney general is not limited to sending CID's to people under investigation. Furthermore, the right to conduct an investigation does not terminate with the instituting of a suit. Additionally, and unlike the Federal Antitrust Civil Process Act, 15 U.S.C. § 13 12(b)(1)(a) (1976), the New Jersey statute does not require the attorney general to state the nature of the conduct constituting the alleged antitrust violation.

[217] As stated in United States v. Morton Salt Co., 338 U.S. 632 (1950):

> Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that which is not derived from the judicial function.

Id. at 642. The *Morton* opinion questions the applicability of the maxim "no fishing expeditions" to the administrative investigation.

[218] *See, e.g.*, HAW. REV. STAT. 26:480–18(a) (1968); N.Y. GEN. BUS. LAW, § 340 (McKinney 1968). While the New Jersey statute does not expressly grant to the attorney general the power to "require statements through specific questions" it is implicit within the grant of authority to "require statements."

[219] For a discussion of the standard that a defendant must meet in convincing a court of the "burdensomeness" of a CID, see United States v. IBM Corp., 71 F.R.D. 88 (D.C.N.Y. 1976) wherein the expenditure of many months of effort, and costs amounting to tens of thousands of dollars, was held on balance to be non-burdensome.

[220] "The primary source of misconception concerning the fourth amendment's function lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure." Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 202 (1946).

The fifth amendment concern with self-incrimination has been given more careful consideration. It is beyond debate today, after a half-century of precedent, that a corporation has no protection against self-incrimination.[221] The Court has reasoned that claims of privacy and confidentiality can rarely be maintained with respect to the financial records of any collective entity.[222] The Court has made it clear that a corporate officer or stockholder cannot shield himself with the constitutional privilege against self-incrimination in attempting to avoid the production of corporate records, even if such records might incriminate him personally.[223]

For those who refuse to answer any questions on the ground that it may be incriminating, the New Jersey statute provides for a form of automatic immunity.[224] If a person continues to refuse to comply with the attorney general's order after a grant of immunity, he may be adjudged in contempt and imprisoned until he agrees to speak or produce the desired evidence.[225]

Remedies

The New Jersey Antitrust Act provides for a myriad of remedies.[226] The civil remedies consist of monetary penalties,[227] damages,[228] injunctive relief,[229] as well as the possible dissolution of corporate violators. The criminal

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[221] Wilson v. United States, 221 U.S. 361 (1911). *See also* United States v. White, 322 U.S. 694 (1944) (holding that corporations have no right to conduct affairs in secret).

[222] Bellis v. United States, 417 U.S. 85, 90 (1974).

[223] *Id.* at 90.

[224] N.J. STAT. ANN. § 56:9–9(b) (West Supp. 1977-1978). As the statute is worded, a person must answer questions if ordered to do so by the attorney general. Later, if prosecuted, such information could not be used against him.

[225] N.J. STAT. ANN. § 56:9–9(b) (West Supp. 1977-1978). Section 9(b) is unclear as to whether the Legislature intended the individual to be found guilty of civil or criminal contempt. It should be noted that if a person fails to obey the command of the subpoena in the first instance, without good cause, he shall be automatically found guilty of a misdemeanor.

[226] Pursuant to N.J. STAT. ANN. § 56:9–16 (West Supp. 1977-1978) all remedies are cumulative.

[227] N.J. STAT. ANN. § 56:9–10(c) (West Supp. 1977-1978) reads in part:

"[A]ny person who violates the provisions of this act shall be liable to a penalty of not more than the greater of $100,000.00 or $500.00 per day for each and every day of said violation."

Poorly drafted, this provision caused confusion in the cae of Kugle v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972), wherein the attorney general argued that the $100,000 penalty was the minimum penalty to be imposed. Refusing to allow the state to take advantage of the ambiguous language employed, the court held that, considering all the circumstances, it had discretion to impose a lesser penalty. 120 N.J. Super. at 250; 293 A.2d at 700-01.

[228] N.J. STAT. ANN. § 56:9–12 (West Supp. 1977-1978).

[229] N.J. STAT. ANN. § 56:9–10(a) & (b) (West Supp. 1977-1978).

remedies include imprisonment as a misdemeanant for up to three years for a single violation of the Act, as well as corporate fines of up to $100,000.[230] The criminal sanctions also include, as presently enacted, a provision termed a "mandatory interdict"[231] whereby, as a collateral consequence to a criminal conviction, the guilty party would be denied the right to manage or own any business within the state.[232]

The civil penalty provision serves a dual purpose. It enables the state to punish a violation of the Act without having to meet the heavier burden of proof required if a criminal proceeding were instituted. Additionally, it allows the recovery of a money judgment without the need to show actual damages.[233]

The treble damages allowed by the Act is modeled after the federal law.[234] However, unlike its federal counterpart, the state provision is innovative in that it extends coverage to the state and political subdivisions,[235] while the federal law permits only single recovery for the federal government.[236]

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[230] N.J. STAT. ANN. § 57:9–11(a) (West Supp. 1977-1978). In State v. Lawn King, Inc., the president of the corporation (one count) and the corporation (three counts) were fined in excess of $160,000. 152 N.J. Super. 333, 377 A.2d 1214 (Law Div. 1977) (Sentencing Order).

[231] N.J. STAT. ANN. § 56:9–11(b) (West Supp. 1977-1978).

[232] See discussion on Amendments *infra*.

[233] N.J. STAT. ANN. § 56:9–10(c) (West Supp. 1977-1978). See also recent federal enactment which allows state attorneys general to sue in a parens patriae capacity on behalf of its citizens, Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 301, 9 Stat. 1394. The Act, however, was damaged by the recent decision of Illinois Brick Co. v. Illinois, 97 S.Ct. 2061 (1977), where the Court ruled that indirect purchasers could not recover for injury to their "business or property" under the Clayton Act. There is a legislative attempt to overrule *Illinois Brick*. H.R. 8359, 95th Cong., 1st Sess. (1977) (introduced by Chairman Peter W. Rodino (D.-N.J.) of the House of Monopolies Subcommittee); S. 1874, 95th Cong., 1st Sess. (1977) (introduced by Chairman Edward M. Kennedy (D-Mass.) of the Senate Antitrust Subcommittee).

[234] N.J. STAT. ANN. § 56:9–12(a) (West Supp. 1977-1978).

[235] In the case of Gerard Engineering, Inc. v. Jersey City, No. L–13492–73 (N.J. Super. Ct., pre-trial hearing Sept. 17, 1976) the court in a pre-trial ruling held that the state, pursuant to N.J. STAT. ANN. § 56:9–12(b) (West Supp. 1977-1978) could institute an action against a contractor who had entered into an illegal kickback scheme with city officials. Transcript at 70-71. In New Jersey v. Emhart Corp., Civil No. 1897-72 (D. Conn. Apr. 24, 1975), the court permitted the state to proceed on behalf of its political subdivisions under section 12(b), rather than FED. R. CIV. P. 23. *But see* New Jersey v. General Motors, [1974] 2 TRADE REG. REP. (CCH) ¶75,339 (N.D. Ill.)(requiring authorization from the political subdivisions). *See generally* Florida ex rel. Shevin v. Exxon Corp., 526 F. 2d 266 (5th Cir. 1976), *cert. denied*, 425 U.S. 930 (1976); Note, *"Antitrust–Standing–In the Absence of Contrary State Limitations, An Attorney General's Common Law Powers Are Sufficient Authority For the Institution of An Action Under Federal Law to Recover Damages Substained by Agencies, Departments, and Political Subdivisions, Even Where They Have Not Affirmatively Authorized the Suit,"* 2 SO. ILL. UNIV. L.J. 527 (1976).

[236] 15 U.S.C. § 15a (1970). The Act, however, does allow for treble damages when states sue under it.

When the New Jersey Antitrust Act was passed in 1970, the criminal provisions of the Act were considered, at least from a law enforcement standpoint, one of its strongest and more attractive features. Seven years hence, it is becoming increasingly apparent that the criminal provisions may well be the Act's Achilles heel.

Until recently a federal criminal conviction was a misdemeanor offense and subjected the offender to no more than one year's imprisonment. With the passage of an amendment to the antitrust laws in 1974, criminal offenses were upgraded to felony status and provided for upwards of three years in prison.[237]

The increase in custodial sentencing has prompted at least one federal district court, in the case of *United States v. Nu-Phonics,* [238] to hold that the per se rule should henceforth be deemed inapplicable to criminal proceedings. The reasoning of this case is tenuous at best. In denying the defendant's motion for a new trial in *State v. Lawn King,* the court specifically refused to follow the *Nu-Phonics* decision.[239] This lower court ruling, however, is far from dispositive of the matter. Whether New Jersey's higher tribunals will adhere to the reasoning of the court in *Lawn King* is uncertain. There remains the unsettling thought that the judiciary will not allow more effective antitrust enforcement in one area (*i.e.,* sentencing) without a corresponding trade-off in another equally important area (*i.e.,* proof). The importance of custodial sentencing when dealing with white collar criminals has taken an inordinately long time to become apparent. It would indeed be tragic if the courts were to hamper this growing realization by curtailing the use of the per se rule in criminal cases.[240]

The second arguable flaw involving the criminal sanctions pertains to the mandatory interdict. Although ruled constitutional by the court in the case of *State v. Lawn King,* [241] doubts linger as to its continuing viability. The mandatory interdict provision reads in part:

> Any person convicted pursuant to the provisions of subsection (a) of this section is hereby denied the right and is hereby prohibited

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[237] The New Jersey statute does not term an antitrust violation a felony, due in part to the fact that there is no felony classification under New Jersey law.

[238] 433 F. Supp. 1006 (W.D. Mich. 1977).

[239] The court sentenced the president of Lawn King to six months imprisonment, a term which is nowhere near the statutory maximum. The court, however, did caution that "future sentences for antitrust violations should be even more severe . . ., so as to provide an even greater deterrence." State v. Lawn King, 152 N.J. Super. 333, 340, 377 A.2d 1214, 1218 (Law. Div. 1977) (Sentencing Order).

[240] For an enlightened discussion of the custodial sentencing of antitrust violators, see U.S. v. National Dairy Products Corp., [1964] TRADE REG. REP. (CCH) ¶79,602 (W.D.Mo). *See also* Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L. REV. 280 (1962).

[241] 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977).

> from managing or owning any business organization within 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.[242]

Reminiscent of the bygone days of papal truculence, this provision of the New Jersey Antitrust Act is an all-encompassing economic ostracism of any person who has unforgivably transgressed against the twin forces, supply and demand.[243]

In the *Lawn King* case, the court ruled that the mandatory interdict did not constitute cruel and unusual punishment, reasoning that:

> It is a matter that I find to be within the legislative prerogative. It would just seem anomalous that the State could punish some people for violations of crimes by taking their lives, whereas the State cannot punish this individual in the way permitted by the interdict clause.[244]

In somewhat analogous state statutes, however, support can be found for the constitutionality of the mandatory interdict. For example, the denial to a corporate manager of the privilege to manage a business is roughly equivalent to denying a physician the privilege to practice medicine.[245] Such

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[242] N.J. STAT. ANN. § 56:9–11(b) (West Supp. 1977-1978). On Oral Decision on Motions, State v. Lawn King, Inc., 152 N.J. Super. 333, 377 A.2d 1214 (Law Div. 1977), the court ruled that the mandatory interdict did not offend due process. The court went on to hold that section 11(b) applied solely to individuals. Oral Decision on Motions of 4-6.

[243] The only other state that has a comparable provision in their antitrust statute is Kansas: "Every person . . . violating any of the provisions of this act . . ., are hereby prohibited from doing any business within this State. . . ." KAN. STAT. § 50–104 (1897). In the case of State v. Jack, 69 Kan. 387, 76 P. 911 (1904), the Supreme Court of Kansas read the phrase "any business" to mean "any lawful business," thereby thoroughly emasculating that statutory provision. Apparently, that court was inclined to perceive economic exile as a rather severe penalty to be imposed indiscriminately.

The analogy to the papal interdict is actually more significant then one might first suppose. The papacy, at least ostensibly, employed the interdict in order to save the souls of the people. According to church dogma, however, it would have the opposite effect, since all those who died during the interdict would suffer damnation having been denied the sacraments. Similarly, the mandatory interdict, while purporting to enhance competitive market forces, invariably hinders competition by ousting a potential competitor.

[244] Oral Decision on Motions at 26, State v. Lawn King, Inc., 152 N.J. Super. 333, 377 A.2d 1214 (Law Div. 1977).

It is arguable that the court incorrectly framed the issue. It is not disputed that the state can punish some people by taking their lives; but, it cannot do so capriciously. It is a hallmark of our jurisprudence that punishment must fit the crime. To say that the state has the right to imprison a man for robbery, is not to say that the state can put that same man away for double parking.

[245] In Schireson v. State Bd. of Medical Examiners, 129 N.J.L. 203, 28 A.2d 879 (1942), the New Jersey supreme court upheld the constitutionality of a statute that permitted the

statutes are readily distinguishable, however, since invariably they are all of either a temporary or discretionary nature.[246]

In order to aid the litigant in obtaining adequate remedies, several procedural devices are available. Both the state and the private litigant are allowed to bring class action suits against alleged antitrust violations.[247] If the alleged violation is not discovered prior to the four year statute of limitations,[248] a claim may still arise under the theory of fraudulent concealment which tolls the limitation period.[249] Another aid is the Act's provision which allows prior convictions or judgments to be used as prima facie evidence in subsequent civil suits.[250]

Proposed Amendments

Regardless of how much foresight and expertise the original drafters might have possessed, few statutory enactments survive the need for eventual modification. In the case of the New Jersey Antitrust Act the general principle is even more applicable than in the usual instance. Serious concern regarding the constitutionality of at least one provision of the Act,[251] the

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revocation of a doctor's license, if convicted of a crime, without a hearing or notice being given.

[246] *See, e.g.*, N.J. STAT. ANN. § 45:9–16 (West Supp. 1977-1978) (allowing the relicensing of a physician at any time at the discretion of the Board of Medical Examiners). In Meehan v. Bd. of Excise Commissioners, 73 N.J.L. 382, 64 A. 689 (1906) the automatic revocation of liquor licenses was upheld. The court upheld the statute, however, on the limited premise that "there is no inherent right in a citizen to sell intoxicating liquors." *Id.* at 387, 64 A. at 690 (quoting Justice Field in Crowley v. Christensen, 137 U.S. 86 (1890)).

[247] For a discussion of the attorney general's ability to commence a class action, see note 235 *supra*. For cases concerning the right of a private litigant to bring a class action under the antitrust laws, see N.J. Optometric Ass'n v. Hillman-Kohan, 144 N.J. Super. 411, 365 A.2d 956 (Ch. Div. 1976) (optometric association did not have standing under section 12(a) because there was no showing of actual injury to business or property); Kronisch v. Howard Savings Institution, 133 N.J. Super. 124, 335 A.2d 587 (Ch. Div. 1975) (class action available, but limited to mortgagors who had given mortgages to the defendants, possibly because of the ramifications of the joint and several liability of the antitrust act).

[248] N.J. STAT. ANN. § 56:9–14 (West Supp. 1977-1978). An action by the state automatically extends the limitation period for similar private actions. N.J. STAT. ANN. § 56:9–15 (West Supp. 1977-1978).

[249] *Id.* To demonstrate fraudulent concealment a plaintiff must show his ignorance of the facts, despite diligent inquiry upon notice, caused by defendant's concealment. Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975). Or more simply, plaintiff must show that there has been successful concealment of the facts by fraudulent means, Crummer Co. v. Dupont, 255 F.2d 425 (5th Cir.), *cert denied*, 358 U.S. 884 (1958). This doctrine is part of the law of New Jersey. Zimmerman v. Chervitch, 5 N.J. Super. 590, 68 A.2d 580 (Law Div. 1969). *See generally* Note, *Intent to Conceal: Tolling the Antitrust Statute of Limitations, Under the Fraudulent Concealment Doctrine*, 64 GEO. L.J. 791 (1976); Dawson, *Fraudulent Concealment and Statute of Limitations*, 31 MICH. L. REV. 875 (1933).

[250] N.J. STAT. ANN. § 56:9–13 (West Supp. 1977-1978).

[251] See text accompanying notes 226-50 *supra*, regarding the mandatory interdict.

growing realization that an FTC-like provision would greatly facilitate antitrust enforcement,[252] and an apparent oversight in the drafting of the merger provision,[253] have all combined with a number of other considerations to prompt demands for an overhaul of much of the Act.

All of the proposed amendments, at least ostensibly, are meant to strengthen the Act and make it a more effective tool of law enforcement. The proposed amendment that will do the most to enhance the power of the state in dealing with violators, however, is the section creating a miniature FTC provision.[254] Although only a single sentence long, the ultimate impact of this provision should be to significantly improve competition within the state. As with the federal act, this provision will enable the state to enjoin restraints of trade while "still in their incipiency, regardless of whether such activities constitute full violations of the New Jersey Antitrust Act at the time of their detection."[255]

The passage of this "little FTC" Act will complete the trilogy begun with the original enactment in 1970 of dwarfed Sherman and Clayton Acts.

A provision to this miniature FTC act would disallow its ever being interpreted to include the Robinson-Patman Act.[256] The labyrinthian intricacies and dangers that inhere within the Robinson-Patman Act are readily discernible, and it is doubtful if this proviso will seriously curtail the amendment's effectiveness.[257]

The proposed amendments also entail the modification of section 4 of the 1970 Act.[258] Whereas the anti-merger provision presently deals only with

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[252] A. 1416, 197th N.J. Legis., 1st Sess. (1976).

[253] N.J. STAT. ANN. § 56:9–4(b) (West Supp. 1977-1978).

[254] A. 1416, 197th N.J. Legis., 1st Sess. (1976). One of the proposed amendments reads: "Unfair methods of competition in this State shall be unlawful." This provision is akin to that found in Section 5 (a)(1) of the FTC Act: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45 (Supp. IV 1974).

[255] Assemblyman Perkins, Statement on A. 1416, 197th N.J. Legis., 1st Sess., at 6 (1976).

[256] A. 1416, 197th N.J. Legis. 1st Sess. sec. 1(b) (1976).

[257] The reason or reasons why the Legislature does not want the Robinson-Patman Act to become applicable is open to speculation. It might well be that the Legislature, like a number of prominent commentators, are skeptical as to its fundamental usefulness. *See, e.g.*, Bowman, *Restraints of Trade By the Supreme Court: The Utah Pie Case*, 77 YALE L. J. 70 (1967); Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH. L. REV. 1 (1966).

In passing it should be noted that the methods of competition condemned by the Robinson-Patman Act are, and after the passage of the amendment will continue to constitute violations of sections 3 and 4 of the 1970 Act. *See also*, N.J. STAT. ANN. §§ 56:8–1 to 25 (West Supp. 1977-1978) (Consumer Fraud Act).

[258] N.J. STAT. ANN. §§ 56:9–4(b) (West Supp. 1977-1978), which states:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation en-

acquisitions by one corporation of another corporation's stock, the amendment would expand the scope of this prohibition to include the acquisitions of another corporation's assets. With the enactment of this amendment, the New Jersey Act will more closely conform to the federal act as amended in 1950,[259] and thus avoid the type of judicial decisions that served as a catalyst to the 1950 amendment.[260]

The amended section 4 would also innovate the concept of "section of country" as developed under section 2 of the Clayton Act. As amended, the New Jersey Act would include the state as a whole or any of its political subdivisions within which the anticompetitive effects of a merger could be measured, thereby precluding extensive proof to establish the geographic market.

A third significant proposal is to make the mandatory interdict a discretionary sentence, to be imposed after a careful consideration of all the circumstances surrounding the violation. This should serve to alleviate whatever constitutional difficulties might inhere within the mandatory interdict.[261]

In summation, these proposed amendments will be conducive to the preservation of free competition within the State of New Jersey. A careful and

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gaged also in commerce, where the effect of such acquisition may be to substantially lessen competition within this State between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community of this State, or tend to create a monopoly of any line of commerce within this State.

[259] The passage of the original anti-merger provision of the New Jersey Act, absent the 1950 federal amendment, caused some speculation as to the possible reasoning that underlied the Legislature's decision not to include it. *See, e.g.*, O'Shaughnessy, Role of Per Se Rule Under the New Jersey Antitrust Act, *supra* note 29. After serious reflection on this matter, however, and especially in light of the proposed amendment to include the 1950 federal amendment, it seems apparent that the 1950 federal amendment was not included due to an oversight by the draftsmen of the Act, rather than due to some subtle, unfathomable reasoning by the Legislature.

[260] *See, e.g.*, Arrow-Hart & Hegeman Elec. Co. v. Comm'n, 291 U.S. 587 (1934); United States v. Celanese Corp. of America, 91 F. Supp. 14 (S.D.N.Y. 1950). The amendments to Section 4 would also clarify the geographical market concept of "sections" developed under the Clayton Act. A. 1416, 197th N.J. Legis., 1st Sess., sec. 2(f) (1976) reads in part: "[W]here in any line of trade or commerce in this State, in any section within this State, or in any political subdivision of this State, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." *See e.g.*, HAW. REV. STAT. 480-7 (1961); MISS. CODE 75-21-13 (1972).

[261] For a more detailed discussion of the constitutional problems with the mandatory interdict, see text accompanying notes 226-50 *supra*. It is an interesting observation, however, that the sole, purported purpose for this amendment is to allow the courts greater "flexibility" in sentencing. No mention at all is made of the probable constitutional concerns, perhaps prompted by fear that a defendant would employ such statements as part of his defense prior to the passage of the amendment.

honest consideration of these amendments will inexorably lead to their passage in the near future.[262]

CONCLUSION

In establishing the present Antitrust Act, New Jersey has demonstrated its commitment to free and unfettered competition. For both private and public litigants alike, the Act provides the legal tools necessary to safeguard society from restraints which threaten the economic, political, and social order. There has not been a more favorable climate for the vindication of antitrust transgressions since the time of Governor Woodrow Wilson.

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[262] In addition to these three major amendments, there are a number of minor ones that have been proposed. For example, a slight modification of N.J. STAT. ANN. § 56:9–11 (a) (West Supp. 1977-1978), "stockholder owning 10% or more of the aggregate" stock, to any "stockholder owning or controlling 10% or more of the aggregate stock," should facilitate the piercing of a corporate veil in an otherwise doubtful fact situation.