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INTRODUCTION

The total number of antitrust actions filed in federal district courts during the fiscal year 1975 was 1,431—an increase over the 1,270 filings the previous year.[1] Of that number, only 56 were government suits,[2] illustrating the importance of the private antitrust action to enforcement of the antitrust laws. Approximately 20 percent of the private actions were filed in district courts of the Ninth Circuit,[3] which remained as the most active circuit in terms of antitrust litigation.

During the survey period, the Ninth Circuit heard appeals in 19 reported cases raising a variety of issues under the Sherman Act,[4] the Clayton Act[5] and the Robinson-Patman Act.[6] In Sherman Act cases, the court applied the "government action" exemption to immunize actions of a state and its political subdivisions alleged to have engaged in a price-fixing conspiracy;[7] ordered a district court to stay an action pending the outcome of a state agency proceeding under the doctrine of "primary jurisdiction;"[8] and found an insurance company exempt under the McCarran-Ferguson Act[9] in the face of the plaintiff's allegations of a tying arrangement whereby sales of the defendant's life insurance policies were tied to its furnishing of home owner loans and, further, that the protection of the "boycott exception"[10] of the Act did not extend to policy holders.[11] The court failed to adopt a

1. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT A-16 (1975).
2. *Id.*
3. *Id.*
4. 15 U.S.C. §§ 1-7 (1970).
5. *Id.* §§ 12-27.
6. *Id.* §§ 13, 13b-c, 21a.
7. *See* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. July, 1974) (per Wright, J.).
8. *See* Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co., 505 F.2d 152 (9th Cir. Oct., 1974) (per Carter, J.).
9. 15 U.S.C. §§ 1011-15 (1970).
10. *Id.* § 1013(b).
11. *See* Addrisi v. Equitable Life Assurance Soc'y of the United States, 503 F.2d 725 (9th Cir. Sept., 1974) (per East, D.J.).

coherent approach to the question of the attempt to monopolize offense, with separate panels taking diverging positions as to the requirements necessary to establish an attempt claim.[12]

In Clayton Act cases, the court reaffirmed its commitment to the "target area" test for determining standing under section four[13] of the Act.[14] In a class action suit alleging a price-fixing conspiracy among members of a real estate association, the court reversed a certification order on "fairness" and "manageability" grounds. The court also established substantive law barriers to class action suits in announcing that membership liability is essentially an individual question.[15] In a patent-infringement suit involving an antitrust counterclaim, the court held that the counterclaimant is entitled to treble attorney's fees expended to defend the infringement suit if there is a showing that such a suit was brought in furtherance of a plan to violate the antitrust laws.[16] The court also held that the remedy of divestiture is not available to a private litigant under section 16 of the Act.[17]

Finally, the court held that sales of drugs to hospitals which distribute them to patients other than in-patients or emergency patients are not covered by the nonprofit organization exemption[18] of the Robinson-Patman Act.[19]

I. THE SHERMAN ACT

A. Exemptions

The Sherman Act,[20] the first of the antitrust laws enacted by Congress, has been characterized by the Supreme Court as "a comprehensive charter of economic liberty aimed at preserving

12. *See* Westinghouse Elec. Corp. v. CX Processing Laboratories, Inc., 523 F.2d 668 (9th Cir. Aug., 1975) (per Burns, D.J.); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264 (9th Cir. Feb., 1975) (per Sneed, J.); ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52 (9th Cir. Jan., 1975) (per Beeks, D.J.); Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045 (9th Cir. Nov., 1974) (per Kilkenny, J.).

13. 15 U.S.C. § 15 (1970).

14. *See* Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. June, 1975) (per Trask, J.).

15. *See* Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. Dec., 1974) (per Trask, J.), *cert. denied*, 421 U.S. 963 (1975).

16. *See* Rex Chainbelt, Inc. v. Harco Prods., Inc. 512 F.2d 993 (9th Cir. Mar., 1975) (per Barnes, J.), *cert. denied*, 423 U.S. 831 (1975).

17. *See* International Tel. & Tel., Corp. v. General Tel. & Elect. Corp., 518 F.2d 913 (9th Cir. Apr., 1975) (per Goodwin, J.).

18. 15 U.S.C. § 13c (1970).

19. *See* Portland Retail Druggists Ass'n v. Abbott Laboratories, 510 F.2d 486 (9th Cir. Dec., 1974) (per Merrill, J.), *cert. granted*, 422 U.S. 1040 (1975).

20. 15 U.S.C. §§ 1-7 (1970).

free and unfettered competition as the rule of trade."[21] While the language of the substantive provisions of the Act is broad,[22] its reach is not all-inclusive. In addition to the statutory exemptions[23] to the antitrust laws, the courts have formulated judicial exemptions to immunize certain conduct from the strictures of the antitrust laws. One of these is the so-called "government action" exemption,[24] first announced by the Supreme Court in *Parker v. Brown*.[25]

In *Parker*, the Supreme Court sustained a state agricultural marketing program which was challenged by a California raisin grower who claimed that the program constituted a price-fixing scheme in violation of the Sherman Act.[26] Noting that the pro-

21. Northern Pacific Ry. v. United States, 356 U.S. 1 (1958).

22. 15 U.S.C. §§ 1, 2 (1970). Section 1 reads in part:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

23. Through a series of enactments, Congress has extended limited antitrust immunity to agricultural and fishing co-operatives. Capper-Volstead Act, 7 U.S.C. §§ 291-92 (1970); Cooperative Marketing Act § 5, 7 U.S.C. § 455 (1970); Agricultural Marketing Agreement Act § 8b, 7 U.S.C. § 608b (1970); Robinson-Patman Act § 4, 15 U.S.C. § 13b (1970); Clayton Act § 6, 15 U.S.C. § 17 (1970); Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-22 (1970). A partial exemption for the insurance industry was provided by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1970). The statutory sources of organized labor's exemption are the Clayton Act §§ 6, 20, 15 U.S.C. § 17 (1970), and 29 U.S.C. § 52 (1970) and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (1970). In certain federally regulated industries, practices which receive regulatory agency approval are exempt from the antitrust laws. For an overview of exemptions in the context of regulated industries see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 412-43 (1975).

24. A corollary to the "government action" exemption is the *Noerr-Pennington* exemption, whose name derives from two Supreme Court cases in which the doctrine was formulated, Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and UMW v. Pennington, 381 U.S. 657 (1965). These cases held that no violation of the Sherman Act can be predicated on attempts to influence the passage or enforcement of laws. The underlying rationale for the rule is the constitutional right to petition and the government's inherent authority to restrain competition through legislation, as attested by *Parker*. However, there is a limitation on the exemption—the "sham" exception announced in *Noerr*. When the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with business relationships of a competitor," the application of the Sherman Act would be justified. 365 U.S. at 144.

Recently, the Supreme Court extended the *Noerr-Pennington* exemption to cover efforts to influence the actions of administrative agencies. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). However, while recognizing the defendant's right of petition in this context, the Court found that the plaintiff's allegations brought the challenged conduct within the "sham" exception and affirmed the Ninth Circuit's reversal of dismissal.

25. 317 U.S. 341 (1943).

26. The marketing program was established pursuant to the California Agricultural

gram derived "its authority and efficacy from the legislative command of the state,"[27] the Court stated:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.[28]

The opinion concluded that the Sherman Act was intended as a "prohibition of individual and not state action."[29] Applying those principles, the Court found state action present since members of the committees approving the programs were selected by the governor, and the programs were enforced by the state through penal sanctions.

Although the opinion announced what purported to be a rather sweeping exemption for state action, it recognized certain situations where immunity might be unavailable. The Court warned that a "state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring their action is lawful . . . ."[30] In addition, the Court stated that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."[31] Diverging interpretations of the *Parker* doctrine were adopted by the lower courts,[32] whose deliberations proceeded in the absence of further doctrinal refinement by the

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Prorate Act, ch. 754, [1933] Cal. Stat. 1969. The declared purpose of the Act was to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of [California's] agricultural products." 317 U.S. at 346. To accomplish this end, the Act authorized the establishment of the Agricultural Prorate Advisory Commission, whose members were appointed by the Governor. Producers could petition the Commission for establishment of a marketing program. If the petition were granted, a program committee would then be selected by the Director of Agriculture. This committee, selected from nominees of producers within the affected market zone, would then formulate the program which the Commission could adopt. As a last step, the program required the approval of a specified number of producers by referendum. *Id.* at 346-47.

27. 315 U.S. at 350.

28. *Id.* at 350-51.

29. *Id.* at 352.

30. *Id.* at 351 (citation omitted).

31. *Id.* at 351-52 (citation omitted).

32. Some courts view *Parker* as establishing a broad exemption for governmental action. *See, e.g.*, Washington Gas & Light Co. v. Virginia Elec. Co., 438 F.2d 248 (4th Cir. 1971) (inaction of state utility commission was state action "immunizing" alleged anticompetitive practices of private utility company). Other courts, stressing language in the *Parker* opinion that the action found to be exempt was pursuant to legislative au-

Court, which for a long time declined to review cases raising questions as to the nature and scope of the government action exemption.[33] The Court's long inattention to this doctrine ended with its decision in *Goldfarb v. Virginia State Bar*.[34] However, prior to that decision, the Ninth Circuit was asked to rule upon a state's assertion of *Parker* immunity in *New Mexico v. American Petrofina*,[35] a case of first impression.

New Mexico brought an action against Shell Oil Co. and other suppliers of asphalt, alleging violations of the antitrust laws. Shell's counterclaim charged that the state and its political subdivisions had conspired as consumers to fix the prices at

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thority, have adopted a narrower position. Under this view, a finding that the challenged activity involved the state does not necessarily preclude liability under the antitrust laws. *See, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), wherein the court stated:

> Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.

Id. at 30. One commentator would carry the analysis one step further. Three categories of governmental action are distinguished: (1) actual state or local government *operation* of economic activity; (2) government *regulation* of private economic activity; and (3) government *approval* of private economic activity. Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221, 237 (1975). Once the challenged activity is properly classified, it must be analyzed as to its: (1) consistency with federal antitrust law; (2) inconsistency with antitrust law but consistency with some other federal policy; or (3) total antipathy to federal policies. *Id.*

These latter two categories are required, the author argues, because the program challenged in *Parker*, though conflicting with the Sherman Act, could be reconciled with national agricultural policy, announced in the Agricultural Marketing Agreement Act, by which the Secretary of Agriculture was authorized to establish new programs or adopt such state programs which he thought consistent with the purposes of the Act. *Id.* at 245-47.

Based on this analysis, the author concludes that *Parker* exempts only: "(1) actual governmental operation of a nonproprietary activity within the scope of legislative authority and . . . (2) private enterprises affirmatively and intentionally regulated by state law that is consistent with federal policy that prevails over antitrust policies." *Id.* at 249. For a relevant judicial discussion see Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

33. Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); Woods Exploration & Processing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966).

34. 421 U.S. 773 (1975).

35. 501 F.2d 363 (9th Cir. July, 1974) (per Wright, J.).

which they purchased asphalt from Shell and the other suppliers. The Ninth Circuit affirmed the district court's dismissal of the counterclaim, holding that sections one and two of the Sherman Act do not apply to the conduct of a state.[36] This conclusion was based, in part, on the lack of reference to state action either in the language of the Act or in its history.[37] A second rationale rested on the "dubious propriety" of the principal remedies of the Act if applied to the states. Because the eleventh amendment raises substantial constitutional problems for a suit brought under the treble damage provision,[38] the court found it unlikely that Congress intended to apply the Sherman Act to the states.[39]

The *Petrofina* court rejected the defendant's interpretation of *Parker*, which relied principally on cases from the First Circuit and the District of Columbia Circuit.[40] Those cases read *Parker* to exempt only state action which is pursuant to an anticompetitive scheme mandated by the legislature. Consequently, the defendant argued that since the state had acted as a consumer, the *Parker* exemption did not apply.

In response, the court stated that two issues involved in *Parker*'s "governmental action" analysis are: (1) whether state or individual action is involved; and (2) whether the antitrust laws are applicable to the action found. The court explained that *Parker*'s emphasis on the extent of government involvement in the marketing program was necessary because members of the committees which approved the programs were chosen from the industries involved. Consequently, the question was raised whether its actions were, in fact, those of the state. Such an inquiry, said the *Petrofina* court, was relevant only to consideration of the first issue. Once state action is found, the inquiry ends:

36. *Id.* at 372.

37. The inferences drawn by the court from its reading of the legislative history of the Act are questionable. It has been argued that, given the status of congressional power to regulate under the commerce clause at the time the Act was passed, it is doubtful that Congress had even considered the question of the Act's applicability to state activities. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. Rev. 71, 82-85 (1974).

38. 15 U.S.C. § 15 (1970).

39. It has been suggested that the court's discussion of the eleventh amendment in this context confuses two separate issues: (1) the question of a substantive violation of the Sherman Act; and (2) the question of sovereign immunity. 88 Harv. L. Rev. 1021 (1975).

40. Reliance was placed upon Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), and George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

> The basis (grounded in federalism) for our conclusion that Congress did not intend the Sherman Act to apply to the states does not vary in strength depending upon the specific activity in which the state engages.[41]

The court concluded that since the suit was directly against the state, state action was unquestionably present.[42]

The Ninth Circuit's expansive reading of *Parker* excludes the closer scrutiny of state activities as taken by those courts which adhere to a "legislative mandate" requirement.[43] However, this interpretation of *Parker* must be considered in light of the Supreme Court's decision in *Goldfarb*.

Goldfarb involved a class action suit seeking injunctive relief and damages and claiming that the operation of a minimum fee schedule, as applied to fees for legal services relating to residential real estate transactions, constituted price-fixing in violation of section one of the Sherman Act.[44] The defendants were a county bar association, which published the schedule, and the Virginia State Bar Association, which enforced the schedule by means of reports condoning such schedules and ethical opinions indicating that the schedules should not be ignored. Both defendants contended that their actions were exempt under the *Parker* doctrine. The county bar argued in addition that it was exempt since the practice of law was a "learned profession," and not "trade or commerce" within the meaning of the Sherman Act.[45]

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41. 501 F.2d at 371.
42. *Id.* at 369.
43. The court stated:

> Our conclusion that a state . . . is not covered by . . . the Sherman Act is inconsistent with the rationale of *Hecht*. We can do no more than say that . . . we disagree with the implication of *Hecht* that a state may sometimes be liable.

Id. at 371. However, in a footnote, the court indicated that the exemption might not apply where: (1) private parties conspire with a state in restraint of trade; and (2) injunctive relief is sought to prevent a state from forcing private parties to violate the antitrust laws, and the requirements of *Parker* are not met. The court also reserved the question of whether state agents and officers acting in their official capacities are subject to the Sherman Act. *Id.* at 372 n.19.

44. 15 U.S.C. § 1 (1970).
45. The district court found that the state bar was immune under *Parker*, but rejected both contentions of the county bar and found it liable under the antitrust laws. The Fourth Circuit reversed, finding the county bar immune on the ground that the practice of law is not "trade or commerce" within the meaning of the Act. It agreed with the district court that the state bar was covered by the *Parker* exemption.

The Supreme Court reversed the Fourth Circuit decision,[46] which held that both defendants were exempt. In rejecting the "government action" claims of both defendants, the Court stated that determination of whether anticompetitive action is state action involves "[t]he threshold inquiry . . . [of] whether the activity is required by the State acting as sovereign."[47] "State action" was lacking here because the Court could find no directive in the Virginia Supreme Court Rules nor in any Virginia statute that required the fee schedule. Nor did the status of the state bar as a state agency shield it, per se, from the Sherman Act. Through its opinions advising that deviation from the county bar fee schedule could lead to disciplinary action, the state bar "voluntarily joined in what is essentially a private competitive activity, and cannot claim it is beyond the reach of the Sherman Act."[48] This latter statement seems to indicate that the actions of the state bar were not exempt because they involved participation in a private agreement in restraint of trade—the type of activity which *Parker* strongly suggests is not within the exemption.[49] However, other language in the opinion reflects the Court's conclusion that there was no "state action" even as to the state bar:

> Here we need not inquire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of *either* [defendant].[50]

Thus, even though the state bar was a state agency, its actions were not "state action" for purposes of the *Parker* exemption. The Court's analysis here marks a significant refinement of the *Parker* doctrine. The *Petrofina* court assumed that the critical inquiry involved the distinction between state action and individual action, and that the "legislative mandate" analysis was pertinent only to this determination. Yet *Goldfarb* clearly demonstrates that even though a state is involved, further analysis is required. In contrast to *Petrofina, Goldfarb* authorizes scrutiny of the source and extent of the state authority underlying the actions for which the exemption is claimed. The Court also indicated the kind of showing necessary to establish "state action." The Court found that the

46. 497 F.2d 1 (4th Cir. 1974).
47. 421 U.S. at 790 (citation omitted).
48. *Id.* at 791-92.
49. *See* text accompanying note 31 *supra*.
50. *Id.* at 790 (emphasis added).

state law "simply does not refer to fees,"[51] and that "although the [state] Supreme Court's ethical codes mention advisory fee schedules they do not direct either [defendant] to supply them . . . ."[52] These statements seem to suggest that the activity for which *Parker* immunity is sought must be expressly designated and mandated by the legislature.

Goldfarb narrows the range of government activities entitled to *Parker* immunity, restricting such immunity to "anticompetitive activities . . . compelled by direction of the State acting as sovereign."[53] Thus the *Petrofina* decision—with its interpretation of *Parker* as precluding application of the antitrust laws to the activities of a state and its consequent rejection of any inquiry into the "legislative mandate" underlying the state activity challenged—has largely been nullified. In light of *Goldfarb*, the court's finding of state action lacked the proper foundation.

A corollary to the *Parker* doctrine as interpreted by the Ninth Circuit was formulated by the panel in *Industrial Communications System, Inc. v. Pacific Telephone & Telegraph Co.*[54] The plaintiff, Industrial, was engaged in the business of one-way signaling, a means of informing individuals who are not near a phone that someone is trying to contact them. An integral part of the system was a dial interconnection linking the radio transmitter to the telephone network. Industrial had obtained this interconnection through contracts with the defendants. The defendants then ob-

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51. *Id.*

52. *Id.*

53. *Id.* at 791. The implications of *Goldfarb* are perhaps most profound for the area of state-regulated industries, a hybrid of state and individual action which has been a bountiful source of antitrust litigation, particularly in the telecommunications industry. Significant in this regard is the Court's treatment of the county bar's assertion of a "learned profession" exemption based upon the existence of state regulation. The Court found the consequences of allowing such a claim to be unacceptable:

> Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity.

Id. at 787. Although the Court here was concerned with the defendant's assertion of a "learned profession" exemption, and not the *Parker* exemption, the principles can be adapted easily to the "government action" doctrine, especially in view of the Court's statement that to be exempt the challenged activity "must be *compelled* by *direction* of the State *acting as sovereign*." *Id.* at 791 (emphasis added). An answer should be forthcoming since the Supreme Court has agreed to review the Sixth Circuit's casual rejection, in Cantor v. Detroit Edison Co., 392 F. Supp. 1110 (E.D. Mich. 1974), *aff'd mem.*, 513 F.2d 630 (6th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975) (No. 122), of a challenge to a state regulatory agency's approval of a power company's distribution of free light bulbs to its customers.

54. 505 F.2d 152 (9th Cir. Oct., 1974) (per Carter, J.).

tained permits from the Federal Communications Commission (FCC) to build radio transmitters to establish their own one-way signaling business and submitted tariff proposals to the California Public Utilities Commission (PUC).

Industrial filed a complaint with the PUC, challenging the rates as unfair and anticompetitive. Before the PUC reached a decision in the case, Industrial filed an action in district court to enjoin the defendants from entering the market. The district court dismissed the case on justiciability grounds.[55]

The Ninth Circuit reversed the dismissal but ordered the district court to stay the proceedings pending the final outcome of the PUC proceeding.[56] Relying on the doctrine of primary jurisdiction, the court stated that the district court should stay proceedings properly within the jurisdiction of, and under consideration by, an agency with exclusive regulatory powers over the subject matter and the parties involved.[57]

The decision is significant in that the *Industrial Communications* court applies the federal primary jurisdiction doctrine to require prior resort to a *state* regulatory agency.[58] The court declared that the test for application of the doctrine is "the extent and amount of regulatory powers vested in the governmental agencies involved."[59] Where the companies or activities are fully regulated, the doctrine applies. The court found comprehensive regulation under the California Public Utility Code[60] and a state supreme court decision directing the agency to consider federal antitrust laws in reaching its decisions.[61]

55. The district court dismissed the action on the ground that the dispute was hypothetical and abstract since the PUC had not yet approved the defendants' tariffs and the FCC had not granted the requisite licenses.

56. The court found the case justiciable under § 16 of the Clayton Act, 15 U.S.C. § 26 (1970), which allows an aggrieved party to sue for injunctive relief against threatened loss or damage by reason of an antitrust violation. Citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), the court declared that a party seeking such relief need not prove injury in fact to succeed in its claim; a "significant threat" of injury from the impending violation is sufficient. 505 F.2d at 155.

57. 505 F.2d at 156. *Accord*, Communication Brokers of America, Inc. v. Chesapeake & Potomac Tel. Co., 370 F. Supp. 967 (W.D. Va. 1974).

58. The court ordered referral of the issue to the PUC, and not the FCC, since the jurisdiction of the FCC is limited to "interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a) (1970). Regulation of intrastate communications, such as that in *Industrial Communications*, is reserved to the appropriate state commission. *Id.* § 153(e).

59. 505 F.2d at 156.

60. CAL. PUB. UTIL. CODE §§ 455, 489, 701, 728, 729, 761, 1001 (West 1975).

61. *See* Northern Cal. Power Agency v. Public Util. Comm'n, 5 Cal. 3d 370, 436 P.2d 1218, 96 Cal. Rptr. 18 (1971).

The *Industrial Communications* court reasoned that the rationale for the doctrine applies equally well whether a state or federal agency is involved. As in the federal context, the agency's expertise in illuminating technical aspects of the case not within the conventional knowledge of judges would assist the court in resolving the legal issues involved.[62] Another consideration stated was the policy of avoiding a judicial-administrative conflict when the same subject matter is before a court and a regulatory agency. The court offered a third justification for applying the doctrine in this context. Positing the threshold issue in cases involving regulatory agencies as whether the regulatory policy can be reconciled with the application of the antitrust laws, the court reasoned that such a determination could not be made unless the agency had been given a chance to formulate that policy.[63]

This application of the primary jurisdiction doctrine by which a court defers to a state agency has been criticized. Deferral is

62. The technical aspects in this case, according to the court, were: "the nature of the market, the quality of present radio telephone utility service, the competitive impact of the defendants' entry into the market . . . ." 505 F.2d at 157.

63. The authority for the court's pronouncements was a Fifth Circuit case, Carter v. American Tel. & Tel. Co., 365 F.2d 486 (5th Cir. 1966), in which the court affirmed a stay of a district court proceeding pending the outcome of the administrative proceeding. However, the agency to which the court deferred was the FCC, not the state agency.

A district court in the Fourth Circuit adopted the state primary jurisdiction doctrine in Communication Brokers of America, Inc. v. Chesapeake & Potomac Tel. Co., 370 F. Supp. 967 (W.D. Va. 1974). While that court approved the *Carter* rationale, its announcement of the doctrine came in the context of the Fourth Circuit's decisions involving the *Parker* exemption. The starting point was the decision in Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972), in which the Fourth Circuit held that anticompetitive practices of Virginia Electric were within the scope of the *Parker* exemption, despite the failure of the state agency to give affirmative approval of those practices since the utility's promotional practices were "under the control" of the agency. The court stated:

> The antitrust laws are a poor substitute, we think, for the plaintiff's failure to protest to the SCC and to seek the administrative remedy ultimately shown to have been available and effective.

438 F.2d at 252. In Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754 (4th Cir.), *cert. denied*, 414 U.S. 866 (1973), the court sustained the dismissal of an action against a private utility. The court found the challenged activities to be covered by *Parker* but stressed that the plaintiff had an adequate remedy in the agency's procedures for the handling of complaints. Finally, the opinion in Communication Brokers of America, Inc. v. Chesapeake & Potomac Tel. Co., 370 F. Supp. 967 (W.D. Va. 1974), reads *Business Aides* and *Virginia Electric* to require a plaintiff to seek relief under the state regulatory scheme before bringing an antitrust action. Although the court's reference to the "plaintiff's failure to pursue his administrative remedies" seems to indicate that the court is following an "exhaustion of remedies" doctrine, it explicitly adopts the

arguably more appropriate to federal agencies which, unlike state agencies, may be required to consider the antitrust laws in reaching their decisions.[64] Even where such consideration is required of a state agency, it is usually based on state law rather than federal law.[65] Moreover, the objections which have been directed against the doctrine in the federal context raise doubts as to the wisdom of its extension in *Industrial Communications*.[66]

The McCarran-Ferguson Act: "Business of Insurance" Exemption

An early Supreme Court case held that the business of insurance involved "local" commerce and therefore was not subject to federal regulation under the commerce clause.[67] The rule announced in that decision remained unquestioned until the Court reversed its position in *United States v. South-Eastern Underwriters Association*,[68] in which it found the defendant insurance companies guilty of Sherman Act violations. Congressional reaction to this decision was swift; within a year the McCarran-Ferguson Act[69] was passed with the stated purpose of reserving to the states the continued regulation and taxation of the business of insurance.[70]

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primary jurisdiction rationale, citing Carter v. American Tel. & Tel. Co., *supra*:

> The reasoning and authority exhaustively set forth in Carter are persuasive and lead this court to conclude that *primary jurisdiction of the case at bar is with the Virginia State Corporation Commission*.

Id. at 970 (emphasis added). The problem with this position is that it rests on a reading of *Parker* that would allow the state agency to grant immunity to actions already taken. Clearly, the *Parker* Court did not contemplate such a result. For a discussion of the cases and a criticism of the state primary jurisdiction doctrine see Jacobs, *supra* note 32, at 250-57. For a favorable comment on this doctrine see Verkuil, *State Action, Due Process, and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

64. The Interstate Commerce Commission, whose approval of certain agreements between carriers confers an antitrust exemption, is such an agency, 49 U.S.C. §§ 5b(2), 5b(9) (1970), as is the Civil Aeronautics Board, *id.* § 1378(b).

65. *See* Jacobs, *supra* note 32 at 255. *But see* Northern Cal. Power Agency v. Public Util. Comm'n, 5 Cal. 3d 370, 486 P.2d 1218, 96 Cal. Rptr. 18 (1971).

66. Among the concerns expressed are: (1) the possibility of industry orientation on the part of regulatory agencies; (2) the likelihood that challenged conduct is more likely to be approved when the issue is decided by a regulatory agency rather than by the more exacting standards of the antitrust laws; and (3) the hardship imposed on litigants due to the expense and delay in pursuing their claims in two separate proceedings. For a suggestion that the doctrine of primary jurisdiction often plays a decisive role in the outcome of antitrust litigation see King, *The "Arguably Lawful" Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries*, 40 TENN. L. REV. 617 (1973).

67. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).

68. 322 U.S. 533 (1944).

69. 15 U.S.C. §§ 1011-15 (1970).

70. *Id.* § 1012(a). Section 1012(a) provides:

> The business of insurance, and every person engaged

The Act established two exemptions. There is a general exemption from all federal laws which do not specifically refer to the business of insurance where the state has enacted laws regulating such business. In addition, there is an exemption for the business of insurance from the federal antitrust laws to the extent that such business is not regulated by state law.[71] Another section declares that the Sherman Act will still apply to agreements or acts of "boycott, coercion, or intimidation."[72] This is the so-called "boycott exception" to the exemption.

The determination of whether an activity of an insurance company alleged to be an antitrust violation is within the scope of the McCarran-Ferguson exemption involves two inquiries: (1) whether that activity is within the "business of insurance"; and (2) whether the "business of insurance" is regulated by the state. In *SEC v. National Securities, Inc.*,[73] the Supreme Court announced the following definition of "business of insurance":

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policy holder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."[74]

> therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

71. *Id.* § 1012(b). Section 1012(b) provides in part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such a business, unless such Act specifically relates to the business of insurance: Provided, that . . . [the antitrust laws] . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

72. *Id.* § 1013(c).
73. 393 U.S. 453 (1969).
74. *Id.* at 460.

Because of this restrictive definition, lower courts have read *National Securities* to require a factual analysis of a defendant insurer's activity to determine if it is a part of the insurer-policyholder relationship.[75] If it is not, then the exemption does not apply.[76] If the contrary is true, then the exemption will apply if the court determines that state regulation is present.[77] These issues were before the Ninth Circuit in *Addrisi v. Equitable Life Assurance Society of the United States*.[78]

In *Addrisi* the plaintiff brought a class action under section four of the Clayton Act[79] alleging violations of section three of the Clayton Act[80] and section two of the Sherman Act.[81] The asserted violation was a tie-in arrangement whereby the plaintiff, in order to procure a homeowner loan from the defendant, was required to purchase a high cost life insurance policy as additional security. Affirming dismissal of the action, the court found that the plaintiff's allegations showed that the defendant was engaged in the "business of insurance" within the meaning of *National Securities*. Although the defendant was "also engage[d] in the real estate

75. *See, e.g.*, Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); DeVoto v. Pacific Fidelity Life Ins. Co., 354 F. Supp. 874 (N.D. Cal. 1973), *rev'd on other grounds*, 516 F.2d 1 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3229 (U.S. Oct. 14, 1975) (No. 232); Hill v. National Auto Glass Co., 293 F. Supp. 295 (N.D. Cal. 1968); United States v. Meade, 179 F. Supp. 868 (S.D. Ind. 1960).

76. In *National Securities*, the Court stated:

> Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply.

393 U.S. at 459-60.

77. The cases generally reflect a reluctance on the part of the courts to find an absence of state regulation. Most courts appear willing to accept legislation as evidence of state regulation for purposes of the Act, rejecting any requirement that the regulation be adequate or effective. The leading case espousing this approach is Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972), in which the court held that the "state regulation" requirement is satisfied if the state has "generally authorized or permitted certain standards of conduct." *Id.* at 1182. *Accord*, Crawford v. American Title Ins. Co., 518 F.2d 217 (5th Cir. 1975) (per curiam); Addrisi v. Equitable Life Assurance Soc'y of the United States, 503 F.2d 725 (9th Cir. 1974). *But see* the dissent by Justice Douglas to the denial of certiorari in *Insurance Rating Board*, in which he states that under FTC v. National Casualty Co., 357 U.S. 560 (1958), the grant of exclusive regulatory power to the state authorized by the Act should be ineffective if the state's regulatory provisions are a "mere pretense" of regulation. 409 U.S. at 917. For a similar reading of *National Casualty* see the dissenting opinion in Crawford v. American Title Ins. Co., *supra* at 220.

78. 503 F.2d 725 (9th Cir. Sept., 1974) (per East, D.J.), *cert. denied*, 420 U.S. 929 (1975).

79. 15 U.S.C. § 15 (1970).

80. *Id.* § 14 (1970).

81. *Id.* § 2.

loan business as an adjunct to its business of insurance,"[82] the plaintiff complained only of practices in connection with its business of insurance. The *Addrisi* court also found California's regulation of the business of insurance extensive,[83] noting in particular Article 6.5 of the Insurance Code, entitled "Unfair Practices."[84] Moreover, the court declared that it would not consider the scope or effectiveness of the regulations to determine if the "state regulation" requirement of the Act was met: "whether California laws proscribe or permit the alleged acts of economic coercion in the issuance of life insurance policies is of no concern to the full force and effect of section 1012(a) and (b)."[85]

The plaintiff further contended that despite the existence of state regulation, the federal antitrust laws should still apply since the tying arrangement constituted an act of coercion within the meaning of section 1013(c).[86] The court's response was that policyholders are not a class of persons or business relationships protected under that section; the boycott exception applies only to a narrow area of restraint of trade: "antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies or agents."[87]

The *Addrisi* court's facile conclusion that the defendant insurance company was engaged in the "business of insurance" does not reflect adequate consideration of the distinction between the insurance business and the "business of insurance" to which the Supreme Court addressed itself in *National Securities*:

> The statute does not purport to make the States supreme in regulating all the activities

82. 503 F.2d at 727.
83. *Id.* at 728.
84. CAL. INS. CODE §§ 790-790.10 (West 1972).
85. 503 F.2d at 728. The authority for this statement was Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972), discussed at note 77 *supra*, and California League of Indus. Ins. Prod. v. Aetna Cas. & Sur. Co., 175 F. Supp. 857 (N.D. Cal. 1959).
86. 15 U.S.C. § 1013(c) (1970).
87. 503 F.2d at 729. Two district court cases provided the authority for this proposition: Meicler v. Aetna Cas. & Sur. Co., 372 F. Supp. 509 (S.D. Tex. 1974), and Transnational Ins. Co. v. Rosenlund, 261 F. Supp. 12 (D. Ore. 1966). Both cases declared that the legislative history of the McCarran-Ferguson Act showed that the "boycott exception" was included to protect insurance agents and companies from "blacklisting," a practice whereby agents would be directed not to issue insurance in the name of certain blacklisted companies. The district court's ruling in *Meicler* was fully endorsed by the Fifth Circuit on appeal. Meicler v. Aetna Cas. & Surety Co., 506 F.2d 732, 734-35 (5th Cir. 1975).

> of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply.[88]

In contrast to *Addrisi*'s approach is that approved by the panel in *DeVoto v. Pacific Fidelity Life Insurance Co.*[89] The panel sustained the district court's refusal to grant a motion for summary judgment based on the defendant's claim that the challenged activities were within the "business of insurance." The suit grew out of the efforts by two insurance companies, both offering mortgage protection insurance, to obtain customer lists of a mortgage company. Prior to January, 1968, Pacific Fidelity had an exclusive contract with the mortgage company by which it was provided with the names of the lender's customers. That month the lender ceased its exclusive dealing with Pacific Fidelity and accepted a new solicitation plan submitted by the plaintiff. Shortly thereafter, the lender abrogated the new contract and resumed its arrangement with Pacific Fidelity. The plaintiff brought suit against Pacific Fidelity charging that it had induced the breach of contract and thus violated section one of the Sherman Act.

Rejecting the defendant's claim of exemption, the district court found the alleged conduct to be peripheral to the "business of insurance." Competition between the two companies for the customer list was not the type of activity exempted from application of the antitrust laws. On appeal, the panel approved the district court's disposition of the issue without discussion, briefly stating in a footnote that the issue was controlled by *National Securities*.[90]

88. 393 U.S. at 459-60. For an application of these principles see Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974) (defendant insurer not exempt since its practices exceeded business of insurance and encroached upon business of providing funeral services), *cert. denied*, 419 U.S. 1110 (1975).

89. 516 F.2d 1 (9th Cir. May, 1975) (per Beeks, D.J.).

90. 516 F.2d at 375. The decision was reversed on other grounds. The treatment of this issue by the panel in *DeVoto* suggests a possible conflict with the *Addrisi* panel. However, there is one feature in *Addrisi* which may account for that panel's failure to apply the factual analysis authorized by *National Securities*. A companion class action suit had been brought in state court and the opinion in *Addrisi* seemed to attach importance to the district court of appeal decision in that case which reversed dismissal of the

The provisions of the McCarran-Ferguson Act have marked out a partial exemption for the insurance industry. Some lower courts, following the lead of *National Securities*, have limited the availability of this exemption through a narrow interpretation of the "business of insurance."[91] This has proved to be a successful technique for providing for greater scrutiny of insurance practices under the federal antitrust laws.

B. SECTION 2

Monopolization

Section two of the Sherman Act[92] defines three offenses: (1) monopolization; (2) attempt to monopolize; and (3) combination or conspiracy to monopolize.[93] The leading case on monopolization is *United States v. Aluminum Co. of America*,[94] wherein Judge Learned Hand defined the offense of monopolization as: possession of monopoly power[95] in a relevant market and some purposeful or deliberate act to acquire or maintain that power. The Supreme Court expressly endorsed Judge Hand's opinion in *American Tobacco Co. v. United States*,[96] and later defined the act of

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action, finding that certain allegations suggested a cause of action for restraint of trade under state law. It could be that the availability of the state remedy for the plaintiff's grievance made the court more favorable to a summary disposition on the "business of insurance" issue.

91. Several courts have relaxed somewhat the restrictive definition of "business of insurance." In upholding McCarran-Ferguson exemptions, these courts have stressed the Supreme Court's statement in *National Securities* that some activities of insurance companies relate so closely to their status as reliable insurers as to come within the "business of insurance." *See, e.g.*, Traveler's Ins. Co. v. Blue Cross, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77 (10th Cir. 1973); Schwartz v. Commonwealth Land Title Ins. Co., 374 F. Supp. 564 (E.D. Pa. 1974).

92. Sherman Act § 2, 15 U.S.C. § 2 (1970).

93. *Id.* § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

94. 148 F.2d 416 (2d Cir. 1945).

95. The Supreme Court has defined monopoly power as the power to control prices or exclude competition from a relevant market. United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 393 (1956). The principle indicium of monopoly power is the share of the relevant market which the alleged monopolist commands. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (90% market share is sufficient to establish monopoly power, but 60% probably insufficient).

96. 328 U.S. 781 (1946).

monopolizing as the "wilful acquisition or maintenance of power in the relevant market, as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident."[97] As a preliminary matter, determination of whether a defendant possesses monopoly power requires identification of the relevant market. Analysis of the relevant market, in turn, involves two threshold inquiries—the first as to the relevant product market, the second as to the relevant geographic market. The Ninth Circuit was asked to review a district court's determination of the relevant product market in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*[98]

The dispute in this case arose from a 1950 contract in which the Athletics baseball club gave the plaintiff's predecessor an exclusive concession franchise. The contract was later amended to include a "follow the franchise" provision to allow the concessionaire to accompany the club should it move to another city. Finley acquired ownership of the club and, after its second move, terminated the franchise. The plaintiff, Sportservice, sued for breach of contract. Finley's counterclaim alleged that the contract was an unreasonable restraint of trade under section one of the Sherman Act. He also advanced claims of monopolization and attempts to monopolize. The district court[99] gave judgment to Finley on the counterclaim, finding the contract to be an unreasonable restraint of trade and an unlawful tie-in arrangement.

A Ninth Circuit panel reversed. Discussing the monopolization claim, the *Twin City* court said that the district court had erred in its designation of the product market. The district court had concluded that the transactions involved the sale of concession services to major league baseball clubs. Reasoning that the concession services were sold to the baseball spectators, rather than the baseball clubs, the court found that the relevant product was the franchise sold by the baseball club to the concessionaire. The extent of the market was therefore a question to be determined on

97. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

98. 512 F.2d 1264 (9th Cir. Feb., 1975) (per Sneed, J.).

99. Former Supreme Court Justice Tom C. Clark, sitting by designation.

100. 351 U.S. 377 (1956). The Court gave the following statement of the rule:

> In considering what is the relevant market for determining control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

Id. at 395.

remand. To assist this determination, the *Twin City* court offered guidelines for the district court to follow. Applying the rule of "reasonable interchangeability" announced by the Supreme Court in *United States v. E. I. duPont de Nemours & Co.*,[100] the court advised the district court that the market should not be limited to franchises offered for sale by major league baseball clubs. The court noted the high degree of "substitutability in production"[101] between concession services offered at major league baseball parks and those offered at various other sporting facilities, such as racetracks, stadiums, arenas and convention centers.[102] Consequently, the latter must be considered in defining the extent of the market. Reversal was likewise required on the restraint of trade claim because that too required the definition of the proper relevant market.[103]

Attempt to Monopolize

While the elements of a monopolization claim are well-established, the proof requirements for a claim of attempt to monopolize are less clear. The doctrinal confusion which exists in this area has been fostered in part by divergent Supreme Court

101. Paraphrasing the rule formulated in *duPont*, the court said:

> where there is a high degree of *substitutability in the use* of two commodities, it may be said that the cross-elasticity of demand between them is relatively high and therefore the two should be considered in the same market.

512 F.2d at 1271. The court continued:

> A like analysis applies when the market is viewed from the production rather than the consumption standpoint; the degree of substitutability in production is measured by the cross-elasticity of supply. Substitutability in production refers to the ability of firms in a given line of commerce to turn their productive facilities toward the production of commodities in another line because of similarity in technology between them. Where the degree of substitutability in production is high, cross-elasticities of supply will also be high, and again the two commodities in question should be treated as part of the same market.

Id.

102. The court found that the evidence was sufficient to support a finding that many aspects of concession operations at various facilities presenting leisure time activities other than major league baseball similar enough to those existing at major league baseball parks to be "substitutable." Consequently, the court concluded that franchises offered in connection with such activities, including football, basketball, soccer, rodeos, etc., should be considered by the district court in defining the market.

103. The court also reversed the finding of a tie-in arrangement. The court stated that Sportservice gave the loans and advances in exchange for the franchise; consequently, those items did not constitute a separate product, necessary to establish a tie-in arrangement.

opinions. The earliest formulation of the attempt offense came in *Swift & Co. v. United States*,[104] in which Justice Holmes interpreted the attempt clause in the following manner:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.[105]

It is not clear whether "intent" and "dangerous probability" were considered separate requirements of the attempt offense, or whether the "dangerous probability" followed as a result of the intent. One line of Supreme Court cases has been taken as authority for the proposition that "dangerous probability" of monopolization—requiring definition of the relevant market and the defendant's monopoly power in that market—is not an element of the attempt claim.[106] However, most lower courts follow the Supreme Court's reading of *Swift* in *American Tobacco Co. v. United States*,[107] and thus require plaintiffs to show that a defendant has such a dominant share of a particular market that there is a "dangerous probability" of successful monopolization.[108] In

104. 196 U.S. 375 (1905).

105. *Id.* at 396.

106. These cases are United States v. Columbia Steel Co., 334 U.S. 495 (1948), and United States v. Yellow Cab Co., 332 U.S. 218 (1947). However, reliance on the latter case (which involved a conspiracy to monopolize) for the proposition that proof of relevant market is unnecessary in attempt claims has been criticized: "conceptually, attempted monopolization and conspiracy to monopolize are different, and the elements of the claim are different . . . . The gravamen of conspiracy is an agreement to commit an illegal act; the gravamen of attempt is the specific intent to commit an illegal act, but falling short of completion." United States v. Charles Pfizer & Co., 245 F. Supp. 737, 738-39 (E.D.N.Y. 1965).

107. 328 U.S. 781 (1946). In *American Tobacco*, the Court stated that

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

Id. at 785; *accord*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

108. *See, e.g.*, Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3463 (U.S. Feb. 23, 1976) (No. 893); Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 422 F.2d 504 (8th Cir. 1970); Alles Corp. v. Senco Prods., Inc., 329 F.2d 567 (6th Cir. 1964); Mackey v. Sears Roebuck & Co., 237 F.2d 869 (7th Cir. 1956), *cert. denied per stipulation*, 355 U.S. 865 (1957).

addition, there is virtual unanimity among the courts that the plaintiff must also show the defendant's intent to bring about the unlawful monopolization, but there is disagreement as to what is required to make such a showing.[109]

The Ninth Circuit expressly rejected the "dangerous probability" requirement in *Lessig v. Tidewater Oil Co.*,[110] stating that probability of actual monopolization is not an essential element of proof of an attempt claim, although it may provide circumstantial evidence of intent.[111] However, subsequent decisions in the Ninth Circuit offer differing interpretations of the *Lessig* holding and reflect the confusion which this issue has generated in this circuit.[112] Two cases decided during the survey period have done little to clarify the issue.

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109. For a thorough discussion of the different approaches to this problem see Hawk, *Attempt to Monopolize–Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121 (1973). There is agreement, though, that specific intent requires more substantial proof than that involved to show deliberateness under a section 2 monopolization claim.

110. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

111. The court offered a dual rationale for this conclusion. First, it said that "specific intent itself is the only evidence of dangerous probability the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." *Id.* at 474. Second, since section 2 prohibits attempts to monopolize "any part" of commerce, a dominant position in the market in question is "not necessarily prerequisite to ability to attempt to monopolize . . . ." *Id.* at 474-75.

112. *Lessig* has undergone varying restatements in subsequent decisions. It was followed by the panel in Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970). However, the panel's statements in Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972), marked a major shift from the *Lessig* position. The case grew out of Cornwell's termination of C.T.S's sole distributorship and its adoption of a policy of direct sales to retailers. On the issue of attempt to monopolize by Cornwell, the court upheld a directed verdict in favor of Cornwell because the evidence and offer of proof were insufficient to establish specific intent to monopolize. Yet the panel clearly contemplated that more than specific intent alone was required to establish the claim: "CTS had to prove two . . . elements: (1) Cornwell had the specific intent to monopolize, and (2) it had sufficient market power to come dangerously close to success [citing *Swift*]." *Id.* at 832.

In Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972), the court announced what appeared to be a limitation on the *Lessig* holding. In rejecting the plaintiff's contention that specific intent is the sole element of an attempt claim, the panel distinguished *Lessig* and *Industrial Building Materials* on the ground that the claims involved in those cases were predicated on a substantial restraint of trade under section one from which the requisite intent could be shown. In contrast, the plaintiff in *Bushie* had failed to establish such a claim, and this failure necessitated the introduction of evidence as to the relevant market and the defendant's share thereof.

In Moore v. James H. Matthews & Co., 473 F.2d 328 (9th Cir. 1973), the panel reversed summary judgment in favor of the defendant, finding that material issues of fact as to plaintiff's claims which included attempt to monopolize. With respect to this

In *Trixler Brokerage Co. v. Ralston Purina Co.*,[113] the plaintiff's action was predicated on the theory that the defendant's termination of its brokerage contract for the sale of defendant's tuna products constituted an unreasonable restraint of trade and an attempt to monopolize. The *Trixler* court stated that the district court had not committed error in requiring direct evidence of the defendant's intent to monopolize since the plaintiff had failed to establish a substantial restraint of trade from which such an intent could be inferred. The court then proceeded to rule that it was

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latter claim, the opinion, written by the author of *Cornwell*, said:

> Finally, this court has ruled that an attempt to monopolize under section 2 does not require proof of monopoly power. Proof that there is a "dangerous probability of success" is certainly enough . . . . Evidence of market power is relevant, but not indispensable to a *Lessig* claim.

Id. at 332 (citation omitted). This statement appears to indicate a reversal of the *Cornwell* court's position, yet its reference to "dangerous probability," unwarranted in view of the reliance on *Lessig*, qualifies this conclusion. However, in Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8 (9th Cir. 1973), another panel, undaunted by the ambiguity of that statement, declared that *Moore* "reiterated the *Lessig* rule that proof of monopoly power is not required." *Id.* at 12 (citation omitted). Canvassing the Ninth Circuit's attempt decisions, the *Hallmark* court concluded that together they establish that market power need not be shown in an attempt claim. Conceding that "market power may establish dangerous probability," *id.* at 12, the court said:

> However, *Lessig*, *Industrial Building Materials*, and *Moore* held that dangerous probability may also be shown through proof of specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. This specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose. Ordinarily specific intent is difficult to prove and will be inferred from such anticompetitive conduct. Therefore, evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made.

Id. at 12. In addition, the court rejected *Cornwell* as clearly out of line with other Ninth Circuit decisions. 489 F.2d at 12 n.3.

One conclusion which can be drawn with fair certainty is that specific intent is the only required element of a claim of attempt to monopolize. Other propositions are less certain. Apparently, the "dangerous probability" analysis is subsumed within the specific intent determination. The plaintiff does not have the burden of market proof to establish a prima facie claim, but market considerations may be relevant to a showing of specific intent. A criticism of the *Lessig* rule is that, by making "exclusionary intent and a single act alone a violation of section 2," it creates a danger that legitimate business efforts will be condemned as unlawful attempts. See Note, *Attempt to Monopolize under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451, 1465-69 (1973). This criticism may account for the court's emphasis on attempt claims based on "substantial claim of restraint of trade." Apparently, this formulation is an effort to furnish guidelines as to the quantum of proof necessary to establish the requisite intent. Clearly, by this standard a "single act" would be insufficient. Moreover, as *Bushie* indicates, where such a "substantial claim" is lacking the court may require plaintiff to submit proof of market definition and power.

113. 505 F.2d 1045 (9th Cir. Nov., 1974) (per Kilkenny, J.).

error for the district court to require a showing of sufficient market power to establish a probability of successful monopolization. However, the court found that the error was not prejudicial since the plaintiff could not establish intent. This ruling is difficult to reconcile with an earlier statement, in *Bushie v. Stenocord Corp.*,[114] that *Lessig* authorizes the "dangerous probability" analysis unless the attempt claim is based upon a substantial claim of restraint of trade.[115]

In *ALW, Inc. v. United Air Lines, Inc.*,[116] the plaintiff alleged that United had used its CAB-approved monopoly on air travel to the Lake Tahoe area for the improper purpose of gaining a concurrent monopoly on tourist display advertising. After rejecting the monopolization claim because the plaintiff could not support its allegations of United's monopoly power, the *ALW* court declared that the attempt claim also failed because the evidence: (1) did not support an inference of a dangerous probability that the monopoly would be achieved; and (2) was insufficient to establish monopolistic intent. The court's decision, which relied on *American Tobacco*, clearly contemplates specific intent and dangerous probability as separate and essential elements of an attempt claim,[117] and to that extent it conflicts with *Lessig, Trixler*, and other Ninth Circuit decisions.[118]

II. CLAYTON ACT

A. SECTION FOUR

One of the key provisions of the Clayton Act is section four,[119] which allows private individuals to sue for damages sustained due to a violation of the antitrust laws. To encourage such suits the section provides that a claimant can recover treble damages as well as costs, including reasonable attorney's fees.[120]

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114. 460 F.2d 116 (9th Cir. 1972).

115. *See* the discussion at note 112 *supra*.

116. 510 F.2d 52 (9th Cir. Jan., 1975) (per Beeks, D.J.).

117. *Id.* at 57; *accord*, Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

118. *See* the cases discussed at note 112 *supra*; Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1276 (9th Cir. 1975) (declaring "it is well-established in this circuit that 'probability of actual monopolization is not an essential element of proof of intent to monopolize' . . . .").

119. 15 U.S.C. §§ 12-27 (1970).

120. *Id.* § 15. This section reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by

Standing

To establish standing under section four, two criteria must be met. First, the plaintiff must show that he has suffered injury to his "business or property." Second, the plaintiff must have received the injury "by reason of" the defendant's unlawful activity. The "business or property" requirement has been defined by the Supreme Court as referring to "commercial interests or enterprises."[121] However, more serious limitations on standing stem from the courts' formulations of the second requirement. Generally, two approaches have been followed in determining whether a plaintiff has been injured "by reason of" an antitrust violation. The "direct injury" test, announced in *Loeb v. Eastman Kodak Co.*,[122] is based on privity notions and requires the plaintiff to suffer the immediate effect of the antitrust violation. The focus is on the relationship between the alleged antitrust violator and the claimant. Under this analysis, if there is some intermediary between the claimant and the violator, standing is usually denied. Another test for standing was set forth by the Ninth Circuit in *Conference of Studio Unions v. Loew's, Inc.*[123] Under this "target area" test for standing, plaintiffs must show that their business is "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[124] The courts appear to be evenly split as to which is the appropriate test.[125] Although the Supreme Court has approved the lower

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him sustained, and the cost of suit, including a reasonable attorney's fee.

121. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

122. 183 F. 704 (3rd Cir. 1910).

123. 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

124. *Id.* at 55.

125. The First, Third, and Tenth Circuits apparently follow the "direct injury" test. *See, e.g.*, Kauffman v. Dreyfus Fund Inc., 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Co., 382 F.2d 925 (10th Cir. 1967); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

Besides the Ninth Circuit, the Fourth and Eighth Circuits follow the "target area" test. *See, e.g.*, Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966) and South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

Although decisions in the Second Circuit use "target area" language, they appear to approach the more restrictive "direct injury" test. *Compare* Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292 (2d Cir. 1971) ("a person must be within the 'target area' of the alleged antitrust conspiracy, *i.e.* a person against whom the conspiracy was aimed, such as a competitor of the persons sued . . . ."), *with* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.) ("in using the courts' efforts to limit standing under section four,[126] it has not expressly adopted either test.[127]

In *Blankenship v. Hearst Corp.*,[128] the Ninth Circuit reaffirmed its adherence to the "target area" test and rendered a liberal reading of its requirements. The plaintiff was an independent contractor for the purchase, distribution, and sale of the *Los Angeles Herald-Examiner* newspaper. One claim in the complaint for treble damage recovery alleged a conspiracy on the part of the defendants to fix the retail prices at which their newspapers were sold to home subscribers. The district court dismissed this claim for lack of standing: since the plaintiff sold his products to retailers—boy and girl carriers—he had no standing to sue for price fixing activities directed at the retail price of newspapers.

In reversing, the *Blankenship* court concluded that the plaintiff

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words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages"), *cert. denied*, 379 U.S. 880 (1964).

Another hybrid approach has been adopted by the Fifth Circuit which, although apparently applying a "target area" test such as was set forth in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), requires in addition that the plaintiff be proximately injured by the breakdown of competitive conditions. *See* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967).

Courts have cited Volasco Prods. Co. v. Lloyd A. Fray Roofing Co., 308 F.2d 383 (6th Cir. 1962), as signifying the Sixth Circuit's adherence to the "direct injury" test. Recently, that circuit has rejected this characterization of *Volasco*. In Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), the court stated that *Volasco* was not authority on the standing issue since the plaintiff in that case was appealing from a dismissal of its claim following a directed verdict—not from a dismissal for lack of standing. The court then proceeded to announce a new test, finding that both the "direct injury" test and the "target area" test demand too much of a plaintiff at the pleading stage of the case. *Id.* at 1149-50.

The court reasoned that the doctrine of standing poses the question of who is a proper party to litigate an issue. Citing Association of Data Processing Serv. Organization, Inc. v. Camp, 397 U.S. 150 (1970), the court said that standing was established where: (1) the plaintiff could allege injury in fact and; (2) the interest sought to be protected is arguably within the zone of interest protected or regulated by the statute or constitutional guarantee in question. The basis for this new test was a doctrine developed in the area of administrative law in suits challenging government action, but the court found it equally well-suited to resolve questions of standing under section four.

126. In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Court stated:

> The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy for all injuries that might conceivably be traced to an antitrust violation.

Id. at 263 n.14.

127. *But see* Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

128. 519 F.2d 418 (9th Cir. June, 1975) (per Trask, J.).

did have standing to bring that claim.[129] The court began its analysis by stating that the "target area" test involves two inquiries. The first is identification of the affected area of the economy which is the target of the alleged anti-competitive conduct. The court defined this area as the area upon which it was reasonably foreseeable that the challenged activity would have anti-competitive effects. The second inquiry involves whether the alleged injury is within that area.

Applying these principles, the court found that the plaintiff's activity was within the "affected area" since the price the dealers would charge the carriers, and thus the dealers' profits, were directly affected by any change in retail price: a fixed retail price would prevent the dealers from charging the carriers a higher price. Based on this expansive definition of the "affected area," the *Blankenship* court necessarily rejected the defendant's contention that the plaintiff lacked standing since retail sales and not resale prices were the "affected area." The court's liberal application of the "target area" test cautions against too literal a reading of the "target" terminology which would limit standing to those against whom the anti-competitive practice is specifically aimed.

Class Actions

To recover for damages resulting from violations of the antitrust laws, a plaintiff may proceed by means of the class action suit authorized by Rule 23 of the Federal Rules of Civil Procedure.[130] An antitrust class action must satisfy the four prerequisites of Rule 23(a),[131] and, in addition, must come within one of the three categories enumerated in Rule 23(b).

In *Kline v. Coldwell, Banker & Co.*,[132] the plaintiffs sought to

129. *Id.* at 425-26.

130. FED. R. CIV. P. 23.

131. *Id.* Rule 23(a) reads:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are common questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

132. 508 F.2d 226 (9th Cir. Dec., 1974) (per Trask, J.), *cert. denied*, 421 U.S. 963 (1975).

bring a class action under Rule 23(b)(3)[133] against the Los Angeles Realty Board and thirty-two named real estate brokers as representatives of a defendant class of an estimated 2,000 brokers. The plaintiffs sought recovery on behalf of approximately 400,000 sellers of real estate who had sold property over the statutory four year period. The complaint alleged that the defendants had violated section one of the Sherman Act by conspiring to fix brokerage commissions through distribution of a recommended fee schedule and sought treble damages under section four of the Clayton Act. The plaintiffs attempted to establish the defendants' liability without individualized proof, relying instead on two general theories of liability—the "membership-ratification" theory[134] and the "adherence" theory.[135] The district court certified the class, finding the central issue to be one of conspiracy to fix the commissions which predominated over any questions of law or fact affecting only individual members of the classes.

On an interlocutory appeal, the Ninth Circuit reversed the certification order on three grounds: (1) there was no showing that common questions predominated over individual questions;

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133. FED. R. CIV. P. 23(b)(3) provides that a class action may be maintained where

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation covering the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

134. A statement of this theory is provided in Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393, (2d Cir. 1943), in which the court stated that although mere membership does not authorize the unlawful conduct of an association, "once [a member] is chargeable with knowledge that his fellows are acting unlawfully his failure to disassociate himself from them is a ratification of what they are doing." *Id.* at 396-97.

135. This theory apparently derived from the Supreme Court's statement in United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950), that

> [p]rice-fixing is per se an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve.

Id. at 489.

(2) because of problems relating to the requirements of proof of damages, the class action was not superior to other available methods for adjudication of the controversy; and (3) the suit was unmanageable as a class action. The concurring opinion[136] reflected some common criticisms directed at the class action device. Assuming the class action features of the case to be the "brain children of plaintiffs' attorneys,"[137] the concurring judge warned that barratry is a crime. He referred to the possible recovery by the plaintiffs as "loot" and characterized class action suits such as that brought in *Kline* as "overwhelmingly costly and potent engine[s] for the compulsion of settlements, whether just or unjust."[138]

In rejecting the contention that the "membership-ratification" theory dispensed with the need for individualized proofs, the *Kline* court held that a member of a trade association cannot be found liable unless that member "knowingly, intentionally and actively participated in an individual capacity in the scheme."[139] In deciding that the class action suit was not "superior" to other methods of adjudication, the court noted that the plaintiffs sought to recover against the defendants jointly and severally. Consequently, reasoned the court, an individual broker faced potential liability for the entire amount of damages, estimated at three-quarter of a billion dollars when trebled. The court found such a result manifestly unfair, for the antitrust laws were intended to punish a violator for "his own malefactions"[140] and not "to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude."[141] Finally, the court found the suit to be unmanageable as a class action due to the likelihood that each defendant would present proof to rebut the plaintiffs' evidence on the issues of liability and damages, resulting in "individualized law suits."[142]

Despite its disclaimer "that in making this determination that the action is unsuitable as a class action we intimate no judgment on the merits,"[143] the *Kline* court's disposition of the conspiracy

136. 508 F.2d at 236-39. (Duniway, J., concurring).

137. *Id.* at 236.

138. *Id.* at 238.

139. *Id.* at 232, *quoting* Northern Cal. Pharmaceutical Ass'n v. United States, 306 F.2d 379, 388-89 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).

140. 508 F.2d at 235.

141. *Id.*

142. *Id.* at 236.

143. *Id.*

issue would indicate otherwise.[144] The Supreme Court has disapproved such preliminary inquiries into the merits of a proposed class action.[145] Moreover, concerning problems raised by proof of damages, an alternative ignored by the court is that Rule 23 allows a court to certify as to a single issue,[146] so that difficulties as to proof of damages need not preclude certification as to the liability issue. In addition, there exists the possibility of a de-certification order in the event that difficulties envisioned by the court become insurmountable.[147] Finally, the fears expressed in the concurring opinion appear to be exaggerated in light of the study of the class action device authorized by the Senate Commerce Committee.[148]

The court's conclusion that "membership liability is inherently an individual question"[149] has seriously curtailed the availability of the class action suit to antitrust plaintiffs seeking recovery for injuries sustained by reason of conspiratorial activities of organizations such as real estate associations. The decision is a

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144. The court concludes that it is

> the law of this circuit that the printing of a price schedule and its distribution to members is not enough to establish civil or criminal liability. Proof here, therefore, even by admissions of the Realty Board that it prepared a suggested commission schedule and distributed it to its members does not establish illegal conduct necessary for a recovery.

Id. at 232. This statement apparently imposes more stringent proof requirements on a plaintiff than does the formulation in the *Phelps Dodge* case, which is discussed at note 134 *supra*.

145. Quoting language from a Fifth Circuit opinion, the Court said:

> In determining the propriety of a class action, the question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but whether the requirements of Rule 23 are met.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974), *quoting* Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971).

146. FED. R. CIV. P. 23(c)(4) provides that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues . . . ." For an application of this rule see Hermann v. Atlantic Richfield Co., 65 F.R.D. 585 (W.D. Pa. 1974).

147. The de-certification procedure is outlined in the Advisory Committee Notes which were prepared when Rule 23 was proposed. *See* 39 F.R.D. 69, 106 (1966). For an application of this procedure see Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D. Pa. 1974).

148. The full report is presented in Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974). Its findings raise serious questions as to the accuracy of Judge Duniway's assertion of the "coercive potential" of large class action suits. The data revealed a higher proportion of cases with early disposition by motion in favor of defendants, suggesting that the class action is not a very effective tool for forcing settlements.

149. 508 F.2d at 233.

reflection of a trend toward greater restrictions on class actions which has culminated in the Supreme Court decision in *Eisen v. Carlisle & Jacquelin*[150] requiring that individual notice be given to identifiable members of the class and that the plaintiff bear the cost of notice. However, several bills now pending in Congress are designed to provide the remedy which has been denied plaintiffs by the restrictive construction placed on Rule 23 by the courts.[151]

Attorney's Fees

The Supreme Court has recognized that litigation as an integral part of a scheme to monopolize may form the basis of a Sher-

150. 417 U.S. 156 (1974).

151. Legislation has been introduced in the House of Representatives designed to give greater protection to consumers. One such bill, H.R. 2078, 94th Cong., 1st Sess. (1975), is entitled "Consumer Class Action Act of 1975." The bill would establish a private cause of action for various "unfair consumer practices" designated in section three of the bill. In addition, civil liability is established for any other practice prohibited by an FTC rule, provided the rule is expressly designed by the Commission as one intended to constitute a basis for civil liability under this class action legislation. H.R. 2078, § 3(a)(4).

Several provisions are intended to facilitate consumer class action pursuant to rights established under the bill. While the jurisdictional amount requirement is $25,000, claims may be aggregated. *Id.* § 6(c). However, perhaps the most significant provision is section 12 which adopts flexible notice requirements: reasonable notice is to be given class members in such a manner as the court directs. Unless the court orders otherwise, the plaintiff is to bear expense of notification. However, the court may order a defendant to bear the cost or may apportion the financial burden between the parties.

Thus, *Eisen*'s notice requirements are effectively overturned, at least to the extent they could be read to preclude the class action suit altogether in cases where the costs of notice were prohibitively high.

However, the bill also contains certain procedural restrictions. Section 7 requires that each member must have at least a $10 damage claim. Section 13 authorizes the court to impose a defendant's "reasonable settlement offer" on the class. Section 11 requires that the plaintiff afford the defendant an opportunity to settle prior to the filing of a formal class action complaint. Finally, the court is given discretion to dismiss the class action suit even if the requirements of Rule 23 are met. *Id.* § 6(b).

A more serious deficiency though is that the bill does not expressly authorize a damage award to the class as a whole, thus allowing courts to raise manageability objections due to problems of individualized proof of damages. However, one of the sponsors of the bill, Rep. Robert Eckhardt, has stated in an interview that one of the purposes of the bill is to impose liability on a defendant for proven class damage regardless of whether every individual claimant steps forward to assert his claim. *See* Note, *Federal Consumer Class Action Legislation*, 4 CLASS ACTION REPORTS 3, 5-11 (1975) (containing Rep. Eckhardt's remarks). This article also contains the text of H.R. 2078 and a critique of its provisions.

Other bills have been introduced to authorize a state attorney general to recover damages (caused by antitrust violations) to both the states' "general economy" and its consumers. S. 1284, 94th Cong., 1st Sess. (1975); H.R. 6786, 94th Cong., 1st Sess. (1975).

man Act claim.[152] Similarly, the Ninth Circuit has concluded "that litigation can be an integral part of a scheme prohibited by the Sherman Act."[153] A question which arises in this context is what may be recovered by a plaintiff who brings an antitrust action for such an anti-competitive scheme. A central question before the court in *Rex Chainbelt, Inc. v. Harco Products, Inc.*,[154] was whether legal expenses incurred in defending a patent infringement suit, brought in furtherance of a scheme to restrain trade, are properly assessable damages under section four of the Clayton Act. The plaintiff had obtained a patent for the substitution of an epoxy material for molten zinc as backing for certain parts of a crushing machine. The plaintiff did not issue licenses for use of its patented process but did sell its unpatented epoxy with a "can label" license. The plaintiff brought a patent infringement suit against Harco, which filed an antitrust counterclaim. The district court declared the patent void and found that the licensing arrangement was an unlawful tie-in arrangement in violation of section one of the Sherman Act. The district court also ruled that Harco was not entitled to treble attorney's fees expended in defense of the infringement suit.

On appeal, the Ninth Circuit sustained the district court's findings as to patent validity[155] and the plaintiff's tie-in arrangement, but remanded on the issue of attorney's fees. Harco argued that the bringing of the infringement suit was in itself an act in furtherance of the unlawful tie-in arrangement and that, consequently, it was entitled to treble attorney's fees under section four. Relying on cases from the Second and Tenth Circuits,[156] the

152. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). For a discussion of the impact that litigation can have on a business enterprise see Blecher & Bennett, *Litigation as an Integral Part of a Scheme to Create or Maintain an Illegal Monopoly*, 26 MERCER L. REV. 479, 480-81 (1975).

153. Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755, 760 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972). *See* Rodgers v. FTC, 492 F.2d 228 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); Plastic Contact Lens Co. v. Butterfield, 366 F.2d 338, 346 (9th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 830-31 (9th Cir. 1963); Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938).

154. 512 F.2d 993 (9th Cir. Feb., 1975) (per Barnes, J.), *cert. denied*, 423 U.S. 831 (1975).

155. 512 F.2d at 996-1000. For a discussion of the patent issues raised in this case see the Intellectual Property article *infra*.

156. The court relied principally on Ansul Co. v. Uniroyal, Inc., 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972), and Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952).

Rex Chainbelt court responded that the mere coincidence of an antitrust violation and an infringement action was not enough to entitle Harco to such recovery. There had to be some showing that the suit was brought in furtherance of, and as an integral part of, a plan to violate the antitrust laws.[157] Because there had been no findings on this issue, the case was remanded. The court provided some guidelines to aid the district court in its consideration of the question. The court of appeals stated that, where the patentee brings an action under a valid patent and believes in good faith that he is neither misusing the patent nor violating the antitrust laws, the suit is not one in furtherance of an antitrust violation.[158] However, where the plaintiff has a good faith belief in the validity of his patent, but intentionally uses its patent in furtherance of an unlawful scheme, then attorney's fees are a proper subject of treble damage recovery.[159]

In holding that costs of defending a patent infringement suit may be recovered as part of treble damages where the patentee has been found to violate the antitrust laws, the Ninth Circuit has adopted the rule recognized by an established line of cases.[160]

B. Section 16: Private Divestiture Suits

In addition to the treble damage recovery permitted under section four of the Clayton Act, a private plaintiff is entitled to seek injunctive relief under section 16.[161] An unresolved question has been whether divestiture is a form of injunctive relief authorized by this section. It is well established that the government

157. 512 F.2d at 1005-06.

158. *Id.* at 1006-07.

159. *Id.* at 1007.

160. Ansul Co. v. Uniroyal, Inc., 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25 (7th Cir. 1967), *aff'd in part*, 395 U.S. 100 (1969); Switzer Bros., Inc. v. Locklin, 297 F.2d 39 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962); Dairy Foods, Inc. v. Dairy Maid Prod. Coop., 297 F.2d 805 (7th Cir. 1961); Clapper v. Original Tractor Cab Co., 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952).

161. 15 U.S.C. § 26 (1970). This section provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

can seek an order requiring an acquiring company to divest itself of illegally-acquired stock under section 15,[162] despite the absence of a specific authorization for such a remedy.[163] Although some courts have suggested that a similar remedy is available to a private plaintiff under section 16,[164] only two courts have ordered divestiture in a private suit.[165] In reviewing the trial court's divestiture order in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*,[166] the Ninth Circuit held that the remedy of divestiture is not available to a private party seeking injunctive relief under section 16.

The suit arose as the result of the acquisition by General Telephone & Electronics (GTE), over a period of eighteen years, of numerous manufacturers of telecommunications equipment. International Telephone & Telegraph (ITT), an independent manufacturer, brought suit alleging that these acquisitions, and the trade practices which followed them, violated sections one and two of the Sherman Act and section seven[167] of the Clayton Act. ITT's theory was that the acquisitions enabled GTE, which owned and controlled 33 telephone operating companies, to restrain competition in the telecommunications equipment manufacturing

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162. *Id.* § 25.

163. *See* United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961).

164. *See, e.g.*, Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76 (N.D. Cal. 1972); Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120 (N.D. Cal. 1970); McKeon Construction v. McClatchy Newspapers, 1970 Trade Cas. 73,212 (N.D. Cal. 1969); Julius M. Ames Co. v. Bostitch, Inc. 240 F. Supp. 521 (S.D.N.Y. 1965); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), *aff'd per curiam*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

Cases concluding that private divestiture suits are not authorized under section 16 include Continental Securities Co. v. Michigan Cent. R.R., 16 F.2d 378 (6th Cir. 1926) (dictum), *cert. denied*, 274 U.S. 741 (1927); American Commercial Barge Line Co. v. Eastern Gas & Fuel Associates, 204 F. Supp. 451 (S.D. Ohio 1962); Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 107 F. Supp. 532 (S.D.N.Y. 1952), *rev'd on other grounds*, 202 F.2d 731 (2d Cir. 1953); Westor Theatres, Inc. v. Warner Bros. Pictures, Inc., 41 F. Supp. 757 (D.N.J. 1941); Graves v. Cambria Steel Co., 298 F. 761 (S.D.N.Y. 1924) (per Hand, J.); Venner v. Pennsylvania Steel Co., 250 F. 292 (D.N.J. 1918).

165. These cases were Calnetics Corp. v. Volkswagen, Inc., 353 F. Supp. 1219 (C.D. Cal. 1973) *rev'd*, No. 73-1954 (9th Cir., Feb. 24, 1976), and International Tel. & Tel., Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153 (D. Hawaii 1972), *rev'd*, 518 F.2d 913 (9th Cir. 1975).

166. 518 F.2d 913 (9th Cir. Apr., 1975) (per Goodwin, J.), *rev'g* 351 F. Supp. 1153 (D. Hawaii 1972). Another Ninth Circuit panel has relied upon *ITT-GTE* in reversing a similar divestiture order. *See* Calnetics Corp. v. Volkswagen, Inc., No. 73-1954 (9th Cir., Feb. 24, 1976), *rev'g* 353 F. Supp. 1219 (C.D. Cal. 1973).

167. 15 U.S.C. § 18 (1970).

industry. By satisfying the needs of its operating subsidiaries from sales by its manufacturing subsidiaries, GTE allegedly reduced the sales opportunities of independent manufacturers, such as ITT. The trial court found that GTE had violated both the Sherman Act and the Clayton Act and ordered GTE to divest itself of several of its operating and manufacturing subsidiaries.

On appeal, a Ninth Circuit panel began its analysis as to the propriety of private divestiture suits by stating that, since section 16's reference to "injunctive relief" is ambiguous, the court was permitted to examine the legislative history of the Act in order to effectuate congressional intent. After an extensive exploration of available history, in which the opinion focused on statements of members of the House Judiciary Committee during hearings on the proposed section 16, the court concluded that "injunctive relief" was not understood to permit private dissolution suits.[168] A further question to be answered was whether divestiture, too, was not considered a form of injunctive relief available to private plaintiffs. The trial court had stressed that the technical distinction between "dissolution" and "divestiture" meant that the latter was not necessarily precluded by a finding that the former was not a proper remedy under section 16. However, the *ITT-GTE* court found that, despite the distinction in current usage, circumstantial evidence indicated that Congress also intended to disallow divestiture suits.[169]

168. 518 F.2d at 922.

169. Again, the court referred to statements of committee members during the hearings in which "dissolution" was used to include "divestiture." *Id.* at 923-24. Also, the court maintained that by "dissolution" the committee members understood the remedy which the government had obtained in Standard Oil Co. v. United States, 221 U.S. 1 (1916). Since the remedy approved by the Supreme Court in that case was divestiture, it was clearly the latter remedy which the committee meant to withhold from private litigants.

The Third Circuit, while endorsing this analysis of the legislative history, nonetheless reserved the question as to the availability of the private divestiture remedy. NBO Indus. Treadway Cos., Inc. v. Brunswick Corp., 523 F.2d 262 (3rd Cir. 1975). While conceding that the legislative committees did not assume that section 16 created the private divestiture remedy, the *NBO Industries* court questioned,

> whether legislative history from 1914, strong as it appears, should control the contemporary application of a statute laying down a fundamental national economic policy. This is especially true when the significance of the circumstances to which application is sought were perceived dimly, if at all, at the time of the passage. The antitrust laws are of necessity statements of general principle. They must be given meaning in specific applications on a case-by-case basis. It is impossible for a legislature to devise codes so all-encompassing as to

The *ITT-GTE* court also held that the equitable defense of laches was available in suits under section 16.[170] While the court found that this conclusion is justified by the statutory language,[171] it also offered policy considerations which it found persuasive. Responding to the argument that allowing such a defense would impair the deterrent function of the Clayton Act by lessening a plaintiff's chances of success, the court voiced its doubt that "parties considering a merger would disregard the Clayton Act in the hope that their competitors would wait too long to seek injunctive relief . . . ."[172] However, the court was more concerned with the "potential for economic disruption"[173]

> predict every case to which the general principle should apply. So, too, with antitrust remedies. There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes which are almost an economic constitution for our complex national economy.

Id. at 278-79.

One of the arguments which the trial court in *ITT-GTE* had made in support of the private divestiture suit was that since divestiture could be accomplished indirectly by phrasing a negative injunction, it could be accomplished through a direct order. 351 F. Supp. 1153, 1208 (D. Hawaii 1972). This position has received support among commentators. Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 Texas L. Rev. 54 (1969). However, under *ITT-GTE*, such "negative injunctions" will apparently no longer be available. 518 F.2d at 924.

170. The district court had granted ITT's motion to strike the laches defense, stating four reasons: (1) equitable defenses are unavailable to defeat statutory rights or rights which further strong regulatory policies; (2) equitable remedies created by section 16 are independent from the legal cause of action under section 4, and therefore the four year limitation period on actions under section 4 does not apply to section 16 actions; (3) ITT had alleged a continuing violation within the meaning of Hoopes v. Union Oil Co. of Cal., 374 F.2d 480 (9th Cir. 1967), and that such a violation could be challenged at any time within the span of the alleged violation—and at least four years thereafter; and (4) the suit is entertainable under United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), which permits the government to challenge an acquisition at any time that the acquisition may with reasonable probability, lead to a restraint of trade. 518 F.2d at 925.

171. The court found that the defense was available since the statute provides for injunctions

> where and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

15 U.S.C. § 26 (1970).

172. 518 F.2d at 926.

173. *Id.* at 927. The court explained:

> Without the equitable doctrine of laches, a plaintiff under § 16 could seriously interfere with a rival's business operations, at a time of the plaintiff's own choosing, yet the public would enjoy none of the safeguards of the public-interest standard

existing in private disvestiture suits. The court felt this potential justified a requirement that plaintiffs seeking injunctive relief act with reasonable promptness.

Because of the trial court's error in holding divestiture to be available to private plaintiffs and other errors,[174] the court reversed in part and remanded to the district court.

III. ROBINSON-PATMAN ACT: NONPROFIT ORGANIZATION EXEMPTION

The Robinson-Patman Act[175] includes a provision exempting certain sales from its prohibitions against price discrimination. The nonprofit organization exemption is established by 15 U.S.C. section 13c, which reads:

> Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.[176]

Determination of whether the exemption is to be applied centers on two inquiries: (1) whether the purchases in question are for the purchaser's "own use"; and (2) whether the institution is one "not operated for profit." This seldom litigated section of the Act was the subject of the court's opinion in *Portland Retail Druggists Association, Inc. v. Abbott Laboratories*.[177]

In *Portland Retail* the plaintiff, an assignee of the antitrust claim of various retail pharmacists in the Portland area, brought

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> and expertness which presumably guide the government when it is a plaintiff.

Id. at 926-27.

The court also held that the four-year limitation period in the Clayton Act § 4B, 15 U.S.C. § 15b (1970), furnishes the guidelines for computation of the laches period in section 16 suits on the theory that the two categories of relief served to enforce the same set of substantive rights.

174. The court found that the trial court erred in defining the product market by excluding (1) purchases of telephone equipment by the Bell System; (2) similar purchases by non-operating telephone companies; and (3) potential purchases of equipment by telephone subscribers. 518 F.2d 930-35.

175. 15 U.S.C. §§ 13, 13a-c, 21a (1970).

176. *Id.* § 13c.

177. 510 F.2d 486 (9th Cir. Dec., 1974) (per Merrill, J.), *cert. granted*, 422 U.S. 1040 (1975). The case has been argued before the Supreme Court, and a decision should be rendered shortly. It should be noted that as this went to press the Supreme Court vacated and remanded the Ninth Circuit decision at 96 S. Ct. 1305 (1976).

an action against twelve manufacturers of prescription drugs. The plaintiff alleged that the manufacturers had violated the Act by selling its drugs to the co-defendant hospitals at prices lower than those charged to the pharmacies.[178] However, the district court found the sales to be exempt under section 13c, and granted the defendants' motion for summary judgment. Although a Ninth Circuit panel found that the hospitals were nonprofit, it reversed the judgment because the manner in which the hospitals distributed the drugs did not meet the statutory requirement that the purchase be for the hospitals' "own use."

In upholding the hospitals' nonprofit status, the court eschewed a rigid application of section 13c's "not for profit" requirement. The court stated that the fact that a hospital operates with occasional surpluses and makes profits from the sale of drugs does not, in and of itself, remove the hospital from the exempted class. The court concluded that where assets are not distributed to any interested person and surpluses are expended in the overall cost of continuing operations, or in improvements, a hospital is "not operated for profit."[179]

However, the *Portland Retail* court held that hospital use, within the meaning of the statute, was limited to "use made by the hospital in dispensing drugs for hospital or clinic treatment of in-patients or emergency patients."[180] For purposes of the summary judgment motion, the defendants had conceded that they had distributed drugs in additional ways—to nonpatients, hospital employees and students, former in-patients, and hospital

178. The plaintiff alleged a violation of section 13(a), which provides in part:

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

179. 510 F.2d at 488. As to one of the hospitals, however, the court stated that it could not rule as a matter of law that a hospital is "not for profit" when it is part of an organization providing comprehensive health services at a predetermined fee, and where some of its doctors possibly receive distributions based on the net increase of such a health plan. Accordingly, it reversed summary judgment for the hospital on this issue. *Id.*

180. *Id.* at 489.

physicians for personal or family use. The court found that while such distributions were a "proper hospital function,"[181] the exemption applied only where the hospital is the consumer and not where resales by the hospital to private consumers are involved.[182]

In reaching this result, the court distinguished another Ninth Circuit case relied upon by the defendants. In *Logan Lanes, Inc. v. Brunswick Corp.*,[183] a 1967 price discrimination case, the court upheld summary judgment in the defendant's favor. The plaintiff there was the operator of a bowling establishment. His complaint alleged that the defendant, a manufacturer of bowling lanes and equipment, sold its products to the state university, for installation in the student union, at prices lower than those offered to the plaintiff for similar equipment. The campus bowling facility was primarily for the use of the faculty, students, and staff of the university, but it was also used by the public. However, the court declared that, given the "primary use," the amount of public use was immaterial. Even if public use had been substantial, it would not have established that the purchases were not made for the use of the university.[184]

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181. *Id.*

182. The court found support for this distinction in Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956). There a retail seller of law books challenged sales by publishing companies at reduced prices to campus bookstores of various law schools. The opinion dealt primarily with the issue whether the campus bookstores were purchasers of the defendant's books or agents receiving them on consignment. However, the defendant also argued that even if the transactions did in fact involve sales within the meaning of the Robinson-Patman Act, the sales were exempt under section 13c. In a footnote, the court rejected this contention, finding that the bookstores were "self-sustaining," and that the books were for resale at a profit rather than for use of the universities.

The *Portland Retail* court read *Students Book Co.* to distinguish between sales of books to universities for their own use and sales to university-connected bookstores for resale to students. However, this conclusion appears unwarranted, considering the *Students Book Co.* court's statement that "the transactions here in question were not actually with the universities, but with the *self-sustaining* campus bookstores . . . . " 232 F.2d at 50-51 n.5 (emphasis added). This statement indicates that the *Students Book Co.* court found the exemption inapplicable because the sales did not meet the "not for profit" requirement. Contrary to the assumption of the Ninth Circuit panel, that court was not distinguishing between uses of purchases made by a nonprofit organization.

183. 378 F.2d 212 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967).

184. The court stated:

> The primary purpose of the purchases established beyond dispute, was to fulfill the needs of the University in providing bowling facilities for its students, faculty and staff. This being the case, any additional use of the facilities by the general public for a fee, even if such use is substantial, would

It appears that the defendants in *Portland Retail* would have little difficulty in meeting the "primary purpose" test announced in *Logan Lanes*, especially in view of the *Portland Retail* court's concession that the greater part of the hospital's distribution of the drugs involved dispensation to in-patients and emergency patients—the categories by which the court had defined hospital "use." The court attempted to distinguish the two cases by emphasizing the different nature of the products involved: "plant equipment" in *Logan Lanes*, "stores of supplies" in *Portland Retail*.[185]

The distinction is not convincing. Public use of the bowling facility was not inevitable. It would be possible to prevent such use by requiring those seeking to use the facility to present some identification establishing the requisite affiliation with the university. Even if such methods were not fully effective, that fact would not dictate a different result in view of *Logan Lanes'* suggestion that the amount of public use is immaterial once it has been shown that the primary purpose of the purchase is for use by the nonprofit institution. The effort by the *Portland Retail* court to distinguish *Logan Lanes* is significant, though, in that it suggests that the court did not intend to abandon the "primary purpose" test. A probable explanation for the result is that unarticulated considerations persuaded the court that the permissive test of *Logan Lanes* was not the appropriate standard for judging the defendant's practices in *Portland Retail*.

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> not establish that the purchases were not made for the University.

Id. at 217.

185. 510 F.2d at 490. The court reasoned that such a distinction was important because the plant equipment acquired for the university's own use in *Logan Lanes* could not be segregated from that acquired for use by others "since the same equipment serves both uses." In contrast, stores of supplies to be resold can readily be segregated from those designated for the hospital's own use. *Id.*