

So You Think You're Safe Under the Antitrust Laws? A Word of Advice to Those Who Would Ignore the States

Robert M. Langer, Suzanne E. Wachsstock & Erika L. Amarante

Antitrust practitioners generally consider themselves well-versed in key antitrust principles, cases, and developments. They freely allude to “Colgate” and “GTE Sylvania”— meaning something other than toothpaste and televisions— in their everyday conversation. To remain at the top of their trade, they make an effort to stay current on the evolution of antitrust doctrines emanating from the U.S. Supreme Court and the application and development of those doctrines by the lower federal courts. But, all too often, they analyze legal issues presented to them exclusively from this vantage point, believing they have done their homework and fully educated and advised their clients.

Such practitioners are in for an abrupt awakening if they have not looked at state antitrust law recently. While federal law continues to be the primary source of general antitrust principles and is likely to serve as persuasive authority to many courts deciding state law antitrust claims, there are a number of real, substantive differences between state and federal antitrust law that can have serious consequences for the practitioner and, more immediately, his or her clients. And, perhaps more importantly, the states have retained for themselves a vital role in the policing of allegedly anticompetitive activity affecting consumers within their borders.¹

ROBERT M. LANGER, a member of the Board of Editors of ANTITRUST REPORT, is a partner in the Hartford office of Wiggin & Dana LLP and head of the firm's Antitrust and Trade Regulation Practice Group. Mr. Langer served previously as the Assistant Attorney General in charge of both Antitrust and Consumer Protection for the State of Connecticut, and was Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General from 1990 to 1992. SUZANNE E. WACHSSTOCK, a senior associate in the firm's Stamford office, and ERIKA L. AMARANTE, an associate in the firm's New Haven office, are both members of the firm's Antitrust and Trade Regulation Practice Group. The authors would like to thank Rob Huelin, a 2002 summer associate at the firm, for his assistance with this article.

By 1890, the year the Sherman Act was passed, at least twenty-six states had already enacted some form of competition law. Today, virtually every state has its own “mini Sherman Act,” “mini FTC Act,” or unfair trade practices statute (or some combination of the three). A number of states also have local counterparts to Sections 3 and 7 of the Clayton Act, as well as the Robinson-Patman Act. Yet, while many of these laws closely parallel the federal statutes, and often expressly state an intent to harmonize state law with federal antitrust jurisprudence, states have not hesitated to deviate substantially from the federal practice when they see fit. Nor have the states, both independently and collectively, hesitated to openly challenge developments in the federal law. In so doing, they have used methods ranging from filing *amicus curiae* briefs opposing such judicial evolution before it occurs (i.e., in *Khan*²) to proposing model federal legislation that would overturn U.S. Supreme Court decisions after the fact (i.e., the National Association of Attorneys General’s (“NAAG”) recommendation to essentially overrule *Monsanto*³). The states, primarily through their attorneys general, have become ever more aggressive in their enforcement of state antitrust laws, particularly in cracking down on perceived abuses in vertical distribution arrangements,⁴ just as the federal authorities have de-emphasized their focus in this area. All this has occurred notwithstanding increased procedural convergence between state and federal antitrust practice and intensified coordination between state and federal antitrust authorities.⁵

This article does not intend to offer a comprehensive analysis of the material differences between state and federal antitrust law, or the procedural interrelationships between state and federal enforcement bodies.⁶ Instead, it aims to focus on a limited number of substantive issues in which differences between federal and state jurisprudence have been, or threaten to be, especially meaningful. These issues are the indirect purchaser doctrine, intracorporate conspiracies, maximum resale price maintenance, and tying. Specifically, in these four areas, states have declined– or suggest that they may decline– to adopt evolutionary changes in the federal law, even where their own statutory principles promote harmony with federal antitrust principles.⁷

But it should be emphasized again that these are only a selection of the relevant differences, and are intended merely to impress upon readers the importance of being as “up” on developments in state antitrust principles as those in the federal law. The lesson we hope to impart is that, even where the U.S. Supreme Court has spoken, the principles of sovereignty and federalism permit states to reject its conclusions and reach a different result, a result that

can have serious consequences for the unwary. Put most simply, the states can, and do, speak loudly with a voice of their own, which can be ignored only at one's peril.

EXPRESS REJECTIONS OF FEDERAL ANTITRUST LAW

In the first two areas discussed in this article— the indirect purchaser rule and the intraenterprise conspiracy doctrine— certain states have explicitly considered and rejected significant recent developments in federal antitrust jurisprudence. These states, either by statute or judicial decision, simply declined to adopt key holdings of the U.S. Supreme Court, choosing instead to follow their own prior precedent as the relevant backdrop for issues arising under state law. An examination of the states' approaches to these evolving federal principles reinforces the notion that state law simply cannot be disregarded.

The indirect purchaser doctrine: Express and implied *Illinois Brick* repealers

Perhaps the most important recent development in the state/federal antitrust law interface is the express willingness of so many states to reject outright the principles articulated by the U.S. Supreme Court in *Illinois Brick Co. v. Illinois*.⁸ In *Illinois Brick*, the Court created a prudential rule that, with limited exceptions, only direct purchasers of a product can state a claim for alleged violations of the federal antitrust law; indirect purchasers do not have standing to assert private antitrust causes of action in federal courts. Among other things, the Court reasoned that permitting indirect as well as direct purchasers to sue for the same illegal overcharge would expose defendants to a risk of multiple liability, and that the antitrust laws would be more effectively enforced by direct purchasers, who have the greatest incentive to bring suit.⁹

This decision has obvious and important implications for entities assessing the antitrust risks of their actions and defending antitrust claims, in that it substantially limits the pool of potential plaintiffs who may have viable claims against them. But parties who draw too much comfort from *Illinois Brick* do so at their own risk. Although federal courts routinely and vigorously apply the doctrine to dismiss indirect purchaser claims under the federal antitrust laws, a large number of states permit recovery by such remote purchasers under their own competition laws.

States' rejections of the indirect purchaser doctrine can take a number of different forms. The legislatures of at least seventeen states and the District of Columbia have passed "*Illinois Brick* repealers," which expressly permit indirect purchasers to state a private cause of action for damages based upon violations of the state's antitrust law.¹⁰ In *California v. ARC America Corp.*,¹¹ the Supreme Court held that nothing in the Sherman Act or in *Illinois Brick* preempts the enforcement of state statutes allowing indirect purchaser suits, even if this results in multiple recoveries (i.e., direct purchasers could recover treble damages under federal antitrust law while indirect purchasers could recover treble damages attributable to the same conduct under state antitrust law). *ARC America*, thus, confirmed the states' authority to adopt different rules than the federal authorities for antitrust enforcement, and to impose additional monetary penalties for violations of state laws.¹²

The legislatures of at least seventeen states and the District of Columbia have passed "Illinois Brick repealers," which expressly permit indirect purchasers to state a private cause of action for damages based upon violations of the state's antitrust law.

In addition to amending the state antitrust statutes to permit actions by and on behalf of indirect purchasers, many states permit indirect purchasers to recover under state consumer protection laws or unfair trade practices acts, instead of or in addition to recovery by indirect purchasers under the state's antitrust act.¹³ Relatedly, the District Court for the District of Columbia recently held that states whose antitrust statutes are interpreted in light of Section 5 of the Federal Trade Commission Act (i.e., "little FTC Acts") may maintain actions for disgorgement on behalf of indirect purchasers.¹⁴

Even among states that have not enacted *Illinois Brick* repealers in any form, some state courts have ruled that *Illinois Brick* simply does not apply under the state's competition statutes.¹⁵ Iowa is one very recent example of such judicial activism. In *Comes v. Microsoft Corp.*,¹⁶ the Iowa Supreme Court rejected Microsoft's claim that the Iowa Competition Law must be harmonized with the federal law under *Illinois Brick*. In considering this issue, the Court noted that the Iowa Competition Law, enacted only a year before the U.S. Supreme Court's decision in *Illinois Brick*, authorizes any person who is "injured" by anticompetitive conduct to maintain a suit in state court for damages.¹⁷ Citing this language, which is strikingly similar to the analogous clause in the Clayton

Act, the Court held: “given the clear, broad language of the state antitrust law ... the Iowa Competition Law creates a cause of action for *all* consumers, regardless of one’s technical status as a direct or indirect purchaser.”¹⁸

Notably, the Court rejected Microsoft’s argument that the harmonization language in Iowa’s Competition Law, Iowa Code § 553.2, which provides that the statute should be construed to complement and harmonize parallel federal laws so as to “achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices,” required the opposite finding.¹⁹ To the contrary, the Court concluded:

- (1) nothing in the statute’s harmonization language implied that federal antitrust law preempts state law;
- (2) *Illinois Brick* interpreted only federal, not state law; and
- (3) there is nothing inconsistent about allowing indirect purchasers to sue under state, but not federal, law.

In the Court’s view, only allowing the “real victims— those who purchase goods and pay the overcharge”— to recover damages satisfies the underlying purpose of the Iowa statute, which is to protect all injured purchasers.²⁰

Another lesson from the Iowa Supreme Court’s *Comes* decision may be gleaned from its conclusion that “[b]ecause Iowa took its clues from federal law in creating [its] state antitrust statute, the federal law in place before *Illinois Brick* is instructive.”²¹ In other words, the Court was comfortable concluding that even though the Iowa statute seeks harmony with the federal antitrust law, it is *only* the federal law that was in place as of the date the Iowa legislature enacted its antitrust statute, including its harmonization language, that is relevant in construing the legislature’s intent in applying the state’s law. By contrast, federal law as it has continued to evolve since the state statute’s adoption is irrelevant to the state’s construction of its own antitrust principles.²²

One of the two dissenting judges in *Comes* aptly criticized this outcome as inconsistent with the notion of a statutory harmonization clause:

There is ... nothing in section 553.2 [of the Iowa Competition Law] to even hint that our legislature only wanted our competition law to be uniform with the applied laws of the federal government as they existed at the time section 553.2 was enacted. In fact, such an approach would be contrary to the clear intent of our legislature to maintain uniformity between state and federal law. The rule of construction established by section 553.2 is unrelated to the doctrine of legislative acquiescence of existing legal principles. It is, plain and simple, a rule

of construction. We are obligated to use it, which leads only to one result. The majority has failed to reach this result, and, by doing so, has engaged in lawmaking in violation of the separation of powers doctrine.²³

The Iowa Supreme Court, however, was not alone in feeling free to pick and choose among the federal antitrust principles that would be applied under the state's Sherman Act analogue. Just two months prior to the Iowa Supreme Court's decision in *Comes*, the Court of Appeals of Arizona rejected *Illinois Brick* and concluded that indirect purchasers have standing to state a claim under the Arizona Antitrust Act.²⁴ The Court emphasized that the federal harmonization provision in the Arizona statute was "permissive," and, therefore, the Court was not bound to follow federal law:

We acknowledge that Arizona appellate courts have typically followed federal case law in antitrust matters. [citing cases] ... Notwithstanding, we find it significant that our legislature provided in § 44-1412 that Arizona courts "may" use federal court interpretations as a guide in construing our own antitrust laws. The legislature's use of the word "may" suggests that the statute is permissive, not mandatory. ... We also note that the legislature directed that federal cases may be used as a "guide" rather than adopting an imperative requiring that Arizona follow such interpretations.²⁵

With that justification, it then went on to hold that, despite the permissive federal guidance provision in the Arizona statute, the U.S. Supreme Court's decision in *Illinois Brick* simply was not the policy reflected in Arizona's antitrust statute.²⁶ Notably, the Court of Appeals of Arizona also took guidance from the pre-*Illinois Brick* federal precedents that existed at the time the Arizona legislature passed the state statute. The Court noted that, in *In re W. Liquid Asphalt Cases*,²⁷ the Ninth Circuit had permitted indirect purchasers to recover for overcharges that resulted from an alleged conspiracy to fix prices, and that, when the Arizona legislature adopted its antitrust statute in 1974, it presumably knew about the Ninth Circuit's holding.²⁸ Thus, the Court concluded that, because the legislature did not specifically limit standing to *direct* purchasers in its 1974 antitrust legislation in order to counteract the precedent existing at that time, it must have intended for indirect purchasers to have standing to sue under the state antitrust act.²⁹

Similarly, the Court of Appeals of North Carolina rejected the application of *Illinois Brick* to its state antitrust law in *Hyde v. Abbott Laboratories*.³⁰ The Court also found dispositive the fact that, during the years preceding *Illinois Brick*, a

number of federal courts permitted indirect purchaser cases to proceed, suggesting that *Illinois Brick* was enough of a shift in policy that the North Carolina legislature could not be assumed to have anticipated such a shift, or to have intended to adopt it.³¹ The Court reached this conclusion despite its recognition that “[f]ederal case law interpretations of the federal antitrust laws are persuasive authority in construing our own antitrust statutes,”³² because, like the courts of Iowa and Arizona, it determined that “the relevant federal precedent” was that which existed in 1969, when the North Carolina antitrust statute was last amended.

Thus, rather than requiring the state legislatures to affirmatively opt out of key evolutionary developments in U.S. Supreme Court jurisprudence (i.e., by adopting express legislative “repealers”), these holdings suggest that states are not so bound *unless* the state legislatures, by amending the state’s competition laws, affirmatively adopt those developments. Otherwise, the states are free to pick and choose among evolving federal antitrust principles, particularly where a state court views those developments as contrary to existing state decisions, or clearly wrong as a matter of principle or policy. The inherent unpredictability of this approach makes our jobs as advisors and practitioners all the more challenging.

Intraenterprise conspiracy: Louisiana, the anti-*Copperweld* state

A similar development has emerged in the area of intraenterprise conspiracies. As antitrust lawyers are well aware, in *Copperweld Corp. v. Independence Tube Corp.*,³³ the U.S. Supreme Court reversed its earlier decisions in *United States v. Yellow Cab*³⁴ and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*³⁵ to repudiate the “intra-enterprise conspiracy doctrine” – the notion that a “vertically integrated enterprise” could comprise the plurality of actors needed for a violation of Section 1 of the Sherman Act. The Court concluded that a parent company could not be deemed to collude with its 100 percent-owned subsidiaries. As the Court reasoned: “a parent and its wholly-owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.”³⁶ Coordinated activity between such related entities is not a “sudden joining of economic resources that had previously served separate interests, and [therefore], there is no justification for § 1 scrutiny.”³⁷ Moreover, the Court concluded that this was true even where the

parent allowed the subsidiary to act independently, given the parent's ability to exercise full control and rein in the subsidiary at any time.³⁸

This decision had obvious and far-reaching implications for corporations structuring their intracorporate relationships. Indeed, while the U.S. Supreme Court limited its holding to the parent/subsidiary scenario, lower federal courts have extended the ruling to limit the availability of antitrust causes of action in derivative situations— particularly, agreements among wholly-owned “sister companies,”³⁹ as well as, in some cases, partially-held subsidiaries,⁴⁰ franchise systems,⁴¹ and other collective entities.⁴²

But the relatively clear principles emerging from the federal courts should not encourage complacency among counselors and their clients attempting to assess the risks of interaction among related corporate entities. That is because at least one state has expressly rejected *Copperweld*, and a number of other states have yet to decide how, if at all, the decision would be applied within their borders.

In *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*,⁴³ Louisiana's highest court recognized that the Louisiana antitrust law includes provisions that are virtually identical to the analogous provisions of the federal antitrust statutes (primarily Sections 1 and 2 of the Sherman Act). The Court further acknowledged that “our state statutes have been fashioned on federal antitrust legislation,”⁴⁴ and that because the state statute was designed to be a “counterpart to § 1 of the Sherman Antitrust Act, the U.S. Supreme Court's interpretation of the Sherman Act should be a persuasive influence on the interpretation of our own state enactment.”⁴⁵

In Louisiana Power, Louisiana's highest court chose to reject outright the federal law with respect to intracorporate conspiracies as it had evolved, and instead to continue to apply preexisting federal principles as they had been adopted in prior state precedents.

Despite these acknowledged— and intended— parallels between the state and federal antitrust laws, the Supreme Court of Louisiana chose to reject outright the federal law with respect to intracorporate conspiracies as it had evolved, and instead to continue to apply preexisting federal principles as they had been adopted in prior state precedents.⁴⁶ It did so based upon its conclusion that “the federal analysis is not controlling ... in this case where the relevant ruling of the federal high court is a departure from their own well-established rule, and from

a prevailing decision of this Court.”⁴⁷ In other words, the Court was simply unconvinced by the reasoning of the U.S. Supreme Court. Therefore, instead of following *Copperweld*, it reaffirmed its own analysis in a decision issued in 1931, *Tooke & Reynolds v. Bastrop Ice Co., Inc.*⁴⁸— sixteen years before the U.S. Supreme Court first considered the intraenterprise conspiracy doctrine in *Yellow Cab* (and fifty-three years before *Copperweld* overruled that decision):

[W]e conclude that ... Louisiana’s prohibition against contracts, combinations and conspiracies in restraint of trade, does not except from its provisions unreasonable restraints of trade committed by a parent corporation and its partially or wholly owned subsidiary corporation. In so holding, we affirm this Court’s earlier decision in [*Tooke*], and so interpret [Louisiana’s antitrust statute] unpersuaded by the United States Supreme Court’s recent interpretation of its counterpart antitrust statute in *Copperweld*.⁴⁹

Apart from Louisiana, other states have considered or attempted limitations on the application of *Copperweld* under state antitrust law. In February 2002, for example, the California Senate passed a bill that would have amended that state’s antitrust act, a.k.a. the Cartwright Act, to provide that a conspiracy in restraint of trade in violation of the Cartwright Act can occur between two or more persons “ who are related to one another by common ownership.”⁵⁰ After some intensive lobbying by business and legal groups, the quoted language was removed from the bill, which is yet to be acted upon by the California Assembly. However, the fact that the bill progressed as far as it did, and actually passed in the state Senate, serves as an alert to those antitrust practitioners who would ignore state law.

Similarly, a Massachusetts Superior Court recently held that, although the state’s antitrust act conforms to *Copperweld* with respect to the existence of a “conspiracy,” a parent-subsidiary relationship is not immune from liability for an unlawful “contract” in restraint of trade. In *West Boylston Cinema Corp. v. Paramount Pictures Corp.*,⁵¹ the Court was faced with the issue of whether, under Section 4 of Chapter 93 of the Massachusetts General Laws (Massachusetts’ antitrust act), a controlling shareholder (National) of a parent corporation (Viacom) could, as a matter of law, conspire with the parent’s wholly-owned subsidiary (Paramount). The Court found that *Copperweld* prohibited a finding of conspiracy under these circumstances, but held that the controlling shareholder (National) and the wholly-owned subsidiary (Paramount) could be liable under the state antitrust law for entering into a *contract* that unreasonably

restrains trade.⁵² The Court reached this conclusion with no analysis as to why *Copperweld's* reasoning applies only to a “conspiracy” between two related entities and not to a “contract” between the same two entities, given that, among other things, the Sherman Act expressly equates “contracts” and “conspiracies.”⁵³

As in the indirect purchaser context, the lesson to be drawn from this discussion should be clear: Where a state believes that a federal court decision, even from the U.S. Supreme Court, is a departure from its own prior precedent— or plainly incorrect— it has the power to reject outright the application of that decision to its own state law. The forewarning should be evident, too: Where Louisiana has already gone, other states, among those that have not yet considered the application of the *Copperweld* doctrine to their own laws, may yet follow.⁵⁴

CONCERNS FOR THE FUTURE?

So far we have concentrated on areas of antitrust law where states have in recent years explicitly declined to adopt central developments in the federal law. We now turn to two areas— resale price maintenance and tying— where this express rejection has not yet occurred, but where prudence dictates careful attention as state antitrust jurisprudence continues to mature and evolve.

Minimum resale price maintenance: *Khan*, or *Khan-not*

In 1997, the U.S. Supreme Court crossed a critical threshold in vertical restraints jurisprudence when it concluded, contrary to historic federal and state court practice, that maximum resale price maintenance is not per se illegal. Overruling its earlier holding in *Albrecht v. Herald Co.*,⁵⁵ the Court in *State Oil Co. v. Khan*⁵⁶ recognized that setting maximum prices was not one of the small subset of restraints on trade that have such “predictable and pernicious anticompetitive effect[s], and such limited potential for procompetitive benefit, that they are deemed unlawful per se.”⁵⁷ While the Court expressly declined to hold that vertical maximum price fixing was per se lawful, the decision provided strong ammunition for defendants seeking to eliminate such claims at the pretrial level. Adopting the analysis of Chief Judge Posner of the Seventh Circuit, the Court held that suppliers have legitimate, procompetitive reasons to bind their distributors to maximum price levels (among other things, to prevent them from exploiting a position of market power in an exclusive

territory), and that “condemnation of practices resulting in lower prices to consumers is ‘especially costly’ because ‘cutting prices in order to increase business often is the very essence of competition.’”⁵⁸

But this may not mean that our clients can freely set maximum prices, and assume either that they will prevail if challenged or even that a rule of reason analysis will apply.⁵⁹ While no state has as yet expressly rejected the application of *Khan* to the state’s competition laws, a number of factors suggest that the states may not apply the Supreme Court’s liberalization of resale price maintenance law enthusiastically and across the board.

First, the states have openly challenged earlier federal decisions liberalizing the vertical resale price maintenance doctrine. Shortly after the U.S. Supreme Court’s decision in *Monsanto Co. v. Spray-Rite Service Corp.*,⁶⁰ which held that, in the case of a dealer termination in alleged furtherance of a resale price maintenance arrangement, the plaintiff’s proof must tend to exclude the possibility that the supplier acted independently, even where other dealers had urged termination, the NAAG proposed model legislation that would essentially overturn the holding.⁶¹ The proposed NAAG legislation would have created a rebuttable presumption of an illegal agreement solely on the basis of proof that the plaintiff’s competitors complained to their mutual supplier about the plaintiff’s pricing practices, and that the supplier then either coerced plaintiff regarding prices or terminated it (i.e., even without evidence of some kind of agreement between the plaintiff and the complaining dealers). The states’ desire to overrule *Monsanto*, as evidenced in NAAG’s proposed legislation, suggests that a similar backlash may follow *Khan*, a decision that went one step further than *Monsanto* in liberalizing the resale price maintenance doctrine.

Second, thirty-three state antitrust enforcement agencies had joined in an *amicus curiae* brief urging the Court to reach the opposite result in *Khan*.⁶² Having taken a strong stand and lost, there is reason to believe that at least some of these states may be more than willing, should the opportunity arise, to perpetuate both their and the Supreme Court’s contradictory prior precedents, just as Iowa and Louisiana have done in the indirect purchaser and intracorporate conspiracy contexts.

Third, and more particularly, individual states have given us reason to suspect that, faced squarely with a maximum resale price maintenance claim, they may well decline to follow *Khan*. California, for example, has historically applied the per se rule to resale price maintenance, not differentiating between maximum and minimum price caps. In *Kolling v. Dow Jones & Co., Inc.*,⁶³ the

Court of Appeal of California considered the case of a newspaper distributor allegedly terminated because he consistently overpriced his papers. The Court viewed Dow Jones' strong "suggestions" that plaintiff roll back his prices as per se unlawful price fixing, presumed that it had an anticompetitive impact on the market, and affirmed an award of damages on this basis.⁶⁴ Likewise, in *R. E. Spriggs Co., Inc. v. Adolph Coors Co.*,⁶⁵ the Court of Appeal of California, rejecting the defendant's argument that the California code effectively permitted the maintenance of *minimum* prices for beer, held that this was no defense because the defendant limited maximum prices as well.⁶⁶ Again, the Court interpreted this to be per se unlawful price fixing under the state's Cartwright Act. Nothing in these cases suggests any hesitation about the applicability of per se analysis to maximum price setting, any more than minimum. Whether the California courts will maintain their conviction regarding the per se illegality of maximum resale price maintenance or choose to follow *Khan's* rule of reason approach remains to be seen.

More broadly, the California courts have sent inconsistent messages with respect to whether federal antitrust principles are binding on state courts interpreting the Cartwright Act. On the one hand, the state's highest court has in numerous cases— including *Spriggs*— “proceeded on the assumption that ‘federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.’”⁶⁷ Yet in other cases, the same court has cast doubt on the coterminacy of that Act and the Sherman Act, suggesting that the Cartwright Act is not intended to parallel the federal law.⁶⁸

Given this lack of clarity in state law and policy, the one apparent conclusion is that it would be prudent for practitioners opining on restraints affecting California commerce to assume that the earlier state precedents may well continue to be good law, regardless of the U.S. Supreme Court's contradictory decision in *Khan*. For that matter, the same is true for any number of other states that have historically applied per se analysis to maximum resale pricing— as did the Supreme Court prior to *Khan*— and that have expressed even an inclination to apply antitrust principles on the state level that do not directly parallel those of the federal courts.

Tying: Per se or not per se, that is the question

Finally, it may be suggested that a similar analysis is applicable in the context of the ever-evolving tying doctrine. Tying, or conditioning the sale of one desired product on the purchase of a separate, undesired product is

prohibited under the Sherman and Clayton Acts. While federal courts still refer to two different standards of analysis of tying claims, *per se* and rule of reason, the federal *per se* test has in fact evolved substantially over the past two decades into something more akin to a “quasi rule of reason” analysis. The current formulation of *per se* tying claims under the federal law requires that a plaintiff prove four elements:

- (1) tying and tied products are two separate products;
- (2) seller has economic power in the relevant market for the tying product sufficient to force the buyer to purchase the tied product;
- (3) seller coerces the buyer to purchase the tied product (which he either did not want or would have preferred to purchase elsewhere on different terms); and
- (4) tying arrangement forecloses a not-insubstantial amount of interstate commerce in the market for the tied product.⁶⁹

The U.S. Supreme Court made clear in *Jefferson Parish Hospital District No. 2 v. Hyde*⁷⁰ and *Eastman Kodak Co. v. Image Technical Services, Inc.*⁷¹ that a detailed economic analysis of market power and anticompetitive effects, usually either irrelevant or presumed under a *per se* analysis, are very important factors in the threshold analysis of whether to apply a *per se* rule. Indeed, while rejecting the concurring Justices’ view that the decision represented an end to the traditional *per se* tying claim, the *Jefferson Parish* Court noted that “as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation.”⁷² In the years since *Jefferson Parish*, a good number of federal courts have gone even further in their analysis of “*per se*” tying claims, expressly requiring proof of an anticompetitive effect in the tied product and considering the defendant’s procompetitive justifications for the arrangements— factors rarely at issue under the traditional *per se* rubric.⁷³

Some states have gone even further than *Jefferson Parish* and its federal progeny, explicitly applying a full rule of reason test to all tying claims.⁷⁴ But, once again, while no state has expressly rejected the U.S. Supreme Court’s recent jurisprudence relaxing the *per se* tying rule, at least some state courts, among them states with express “harmonization” statutes, have given cause to suspect that they might not adopt federal tying law in its current iteration.

The Connecticut Supreme Court, in its only substantive discussion of this issue, *State v. Hossan-Maxwell, Inc.*,⁷⁵ held that since Connecticut’s primary anti-tying statute, Conn. Gen. Stat. § 35-29, is patterned after Section 3 of the Clayton

Act, it was appropriate to adopt tying doctrine as it had developed under the Clayton Act, as opposed to that under the Sherman Act, to determine whether a violation of Section 35-29 had occurred.⁷⁶ The Court, therefore, held that a tying arrangement was illegal per se so long as *either* of the conditions articulated by the U.S. Supreme Court in *Northern Pacific Railway Co. v. United States*⁷⁷ was met: “that is, if (1) the party has sufficient economic power in the tying product, *or* (2) a not insubstantial amount of commerce is affected.”⁷⁸ If the tying arrangement met both of the *Northern Pacific* conditions, the *Hossan-Maxwell* Court held that it violated both Sections 35-29 and 35-26– the Connecticut analogue to the Sherman Act’s tying test.⁷⁹ The Court emphasized, citing then-precedential Supreme Court jurisprudence, that “[t]ying agreements serve hardly any purpose beyond the suppression of competition,”⁸⁰ therefore, justifying such a summary per se analysis.

The *Hossan-Maxwell* rule, adopting the disjunctive form of the per se tying test, renders a substantially greater universe of activity subject to per se illegality than does the current federal rule. While the Connecticut decision, which relied so heavily on *Northern Pacific* and on then-current Clayton Act jurisprudence, was decided before the U.S. Supreme Court’s most recent tying decisions, some more recent decisions have perpetuated its analysis. For example, in one post-*Jefferson Parish* ruling, the Connecticut Superior Court emphasized that, because tying arrangements are per se unlawful, there is no requirement that a plaintiff specifically allege that competition has been substantially diminished because “no specific showing of unreasonable competitive effect is required to demonstrate the illegality of a tying agreement.”⁸¹ This suggests a more stringent approach than that taken by many federal courts.

Because of Connecticut’s general reliance on federal antitrust law to resolve questions of interpretation,⁸² it is conceivable, though hardly certain, that the Connecticut Supreme Court would follow the principles outlined in *Jefferson Parish* and *Kodak* the next time it is presented with a tying claim, and adopt the more lenient current federal rule. At least until the state Supreme Court is presented with an appropriate case in which to decide this issue, however, it

The Hossan-Maxwell rule, adopting the disjunctive form of the per se tying test, renders a substantially greater universe of activity subject to per se illegality than does the current federal rule.

would be safe to assume that per se tying law in the state of Connecticut will continue to follow the more stringent pre-*Jefferson Parish* standard.⁸³

The same is true for any number of other states that have not yet considered a post-*Jefferson Parish* tying claim under their own laws. Of course, it is not possible to predict what the courts in these states will do, but this is yet another area where it would be advisable to take the risk of divergent state decisions into account when counseling clients considering new and innovative distribution structures.

CONCLUSION

Perhaps the most elementary lesson to learn from the states' willingness to reject federal antitrust analysis when it strikes them as inconsistent with their own prior precedent— or merely wrong— is that it is very difficult to counsel corporate clients on how to avoid antitrust claims. Since every commercial transaction in the United States affects commerce within some state, it is likely that some state's antitrust laws could apply to virtually every decision a company makes. Even if the state has historically been a loyal adherent to U.S. Supreme Court precedents, and has an express policy of seeking to harmonize its antitrust law with that of the federal authorities, this is no guarantee that it will continue to do so into the future.

So the best advice we can offer is to be attentive to:

- P changes in the federal law;
- P implementations of those changes in the federal courts; and
- P the judicial, legislative, and administrative reactions to those changes on the state level.

Only by remaining sensitive to the states' ever-evolving, and often inconsistent, approaches to the federal law can we hope to evaluate more accurately the unique antitrust issues, choices, and risks facing our clients on a daily basis.

NOTES

1. See, e.g., R. Langer & P. Harbour, *State Attorneys General: The Third Prong in the Antitrust Triad*, *The Antitrust Review of the Amer-*

icas 2001: Global Competition Review Special Report (Oct. 2001).

2. See *infra* note 62 and surrounding text.

3. See *infra* note 61 and surrounding text.
4. See generally R. Langer, *A Cautionary Tale: State Enforcer's Perspective on Vertical Restraints*, Antitrust ABA 9 (Spring 1994). Notably, the Vertical Restraints Guidelines of the National Association of Attorneys General [hereinafter NAAG], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,400, are markedly different from the relatively lenient standards imposed by the federal courts on non-price vertical restraints. For example, while the majority of courts have held that, under federal law, actual market power is a prerequisite to a finding of liability in a non-price vertical restraint case (see, e.g., *Assam Drug Co., Inc. v. Miller Brewing Co., Inc.*, 798 F.2d 311 (8th Cir. 1986)), the state guidelines provide that market share less than 10% in the relevant product and geographic markets (particularly in concentrated markets) may render an exclusive vertical restraint actionable as an unlawful restraint of trade. NAAG Vertical Restraint Guidelines ¶ 4.7.
5. See, e.g., R. Langer, *Should the Antitrust Division, the FTC, and State Attorneys General Formally Allocate the Market for Antitrust Enforcement?*, Antitrust Rep., Oct. 1998, at 2; R. Langer, *Cutting Edge Issues in State Antitrust and Consumer Protection Enforcement*, Antitrust Rep., Dec. 1995, at 3; R. Langer, *The Maturation of Coordinated Multistate Activity by State Attorneys General*, Antitrust Rep., Sept. 1994, at 7; R. Langer, *A Cautionary Tale: State Enforcer's Perspective on Vertical Restraints*, Antitrust ABA 9 (Spring 1994); R. Langer, *The States Will Continue to Be Central Players in the Development of Antitrust Policy*, Antitrust Rep., May 1993, at 3; R. Blumenthal, R. Langer & W. Rubenstein, *Antitrust Review of Mergers by State Attorneys General: The New Cops on the Beat*, 67 Conn. B.J. 1 (1993).
6. A number of excellent resources exist which aim to do just this. See, e.g., ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (2d ed. 1999); W. Haynes, *Will the Answers Be Different Under State Antitrust Laws?* Practising Law Institute, Corporate Law and Practice Course Handbook Series (Jan. 1993).
7. Although this article focuses primarily on vertical restraints, the same scenario has played out over time in other areas of the antitrust law. For example (and there are many others), in 1981, the Supreme Court of Alaska expressly rejected the U.S. Supreme Court's 1905 decision in *Swift & Co. v. United States*, 196 U.S. 375 (1905), which required a plaintiff alleging attempted monopoly to demonstrate proof of a dangerous probability of success. See *West v. Whitney Fidalgo Seafoods, Inc.*, 628 P.2d 10, 15 (Alaska 1981). In *West*, the Alaskan court adopted the minority view then expressed by the Ninth Circuit, and concluded that "proof of the monopolization and a probability of its monopolization are not essential elements of the offense of attempt to monopolize." *Id.* at 16.
8. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
9. *Id.* at 734-35.
10. See generally ABA Section of Antitrust Law, *Antitrust Law Developments* 811 n.61 (5th ed. 2002); K. O'Connor, *Is the Illinois Brick Wall Crumbling?*, Antitrust ABA 34-35 (Summer 2001). See also Ala. Code § 6-5-60(a) (2002); Cal. Bus. & Prof. Code § 16750(a) (West 2002); D.C. Code Ann. § 28-4509(a) (2002); Haw. Rev. Stat. § 480-3 (Matthew Bender 2001); 740 Ill. Comp. Stat. Ann. 10/7(2) (West 2002); Kan. Stat. Ann. § 50-161(b) (2001); Me. Rev. Stat. Ann., tit. 10, § 1104(1) (West 2002); Md. Code. Ann. Com. Law II § 11-209(b)(2) (West 2002); Mich. Comp. Laws Ann. § 445.778(2) (West 2002); Minn. Stat. Ann. § 325D.57 (West 2002); Miss. Code Ann. § 75-21-9 (West 2002); Nev. Rev. Stat. § 598A.210(2) (West 2002); N.M. Stat. Ann. § 57-1-3(A) (2002); N.Y. Gen. Bus. Law § 340(6) (West 2002); N.D. Code § 51-08.1-08 (Matthew Bender 2001); S.D. Codified Laws Ann. § 37-1-33 (2002); Vt. Stat. Ann., tit. 9, § 2465 (2001); Wis. Stat. Ann. § 133.18(1)(a) (West 2002).
11. *California v. ARC America Corp.*, 490 U.S. 93, 101-02 (1989).
12. *ARC America* affirmed the states' authority, pursuant to 15 U.S.C. § 15c, to obtain

damages for their own resident consumers through statutory *parens patriae* actions, without the need to comply with the complex procedural rules required of private litigants in Rule 23 class actions. See 490 U.S. at 97-98. In that regard, many states that do not permit indirect purchasers to state a private cause of action for damages do permit the Attorney General to bring a *parens patriae* claim for money damages on behalf of those indirect purchasers. See, e.g., Colo. Rev. Stat. § 6-4-111(2) (West 2002); Idaho Code § 48-108 (Matthew Bender 2002); Neb. Rev. Stat. § 84-212 (2001); Nev. Rev. Stat. § 598A.160 (West 2002); R.I. Gen. Laws § 6-36-12 (2001).

13. For example, in *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002), the Supreme Judicial Court of Massachusetts held that indirect purchasers who could not maintain an action under the state's antitrust statute did have standing to state a claim for price fixing and other anticompetitive conduct under the state's consumer protection statutes.

14. *FTC v. Mylan Labs., Inc.*, 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999). The court held that, because the Federal Trade Commission [hereinafter FTC] can seek disgorgement under Section 13(b) of the FTC Act, states with consumer protection statutes modeled after the FTC Act also may maintain actions for equitable relief such as disgorgement. The court punted, however, on the issue of whether the FTC or states may maintain an action for restitution on behalf of indirect purchasers. *Id.* at 4-5 n.2.

15. See, e.g., *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002); *Hyde v. Abbott Labs.*, 473 S.E.2d 680 (N.C. Ct. App.), *review denied*, 478 S.E.2d 5 (N.C. 1996); *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. 1st DCA 1996), *review dismissed*, 689 So. 2d 1068 (Fla. 1997); *Blake v. Abbott Labs., Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,369 (Ct. App. Tenn. 1996). Other state courts have found the fact that the legislature proposed, but did not adopt, a repealer statute to be evidence of a state policy to follow *Illinois Brick*. See, e.g., *Vacco v. Microsoft Corp.*, 793 A.2d 1048,

1060-62 (Conn. 2002) (Wiggin & Dana LLP served as counsel to *amici curiae* the Connecticut Business and Industry Association, et al. in the *Vacco* case); *Kieffer v. Mylan Labs., Inc.*, 1999-2 Trade Cas. (CCH) ¶ 72,673 (N.J. Super. L. Sept. 9, 1999).

16. 646 N.W.2d 440 (Iowa 2002).

17. *Id.* at 445.

18. *Id.*

19. *Id.* at 446.

20. *Id.* at 447.

21. *Id.*

22. Other states have easily rejected this "freeze frame" view of state statutes that explicitly provide for harmonization with federal antitrust principles. See, e.g., *Minute-man, LLC v. Microsoft Corp.*, 795 A.2d 833, 839 (N.H. 2002) ("By enacting the permissive federal harmonization provision of RSA 356:14, we interpret the legislature's intent as encouraging courts to consider future interpretations of federal antitrust laws as well as those existing at the time of the enactment of the statute. We, therefore, reject the position that because a federal case had not been decided at the time of the enactment of RSA chapter 356, the legislature did not intend for the State to follow it."); *Vacco*, 793 A.2d at 1058-59 n.21 ("We ... reject the plaintiff's contention that the [Connecticut] Antitrust Act should be interpreted in accordance with the state of federal antitrust law existing at the time that the Antitrust Act was enacted.")

23. See *supra* note 16, at 454 (Cady, J., dissenting).

24. See *Bunker's Glass Co. v. Pilkington plc*, 47 P.3d 1119 (Ariz. 2002).

25. *Id.* at 1126-27.

26. *Id.* at 1128-30.

27. *In re W. Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973).

28. 47 P.3d at 1127.

29. *Id.*

30. 473 S.E.2d 680 (N.C. Ct. App.), *review denied*, 478 S.E.2d 5 (N.C. 1996).
31. *Id.* at 685.
32. *Id.* at 684 (*citing* N. Carolina Steel, Inc. v. Nat'l Council on Comp. Ins., 472 S.E.2d 578 (1996); Madison Cablevision v. City of Morganton, 386 S.E.2d 200, 213 (1989); Johnson v. Phoenix Mut. Life Ins. Co., 266 S.E.2d 610, 620 (1980)).
33. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
34. United States v. Yellow Cab, 332 U.S. 218 (1947).
35. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).
36. 467 U.S. at 771.
37. *Id.*
38. *Id.* at 771-72.
39. *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 139 (3d Cir.), *cert. denied*, 122 S. Ct. 506 (2001); Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 146-47 (4th Cir. 1990); Odishelidze v. Aetna Life & Cas. Co., 853 F.2d 21, 23 (6th Cir. 1988); Garshman v. Universal Res. Holding, Inc., 824 F.2d 223, 230 (3d Cir. 1987); Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 611 (6th Cir. 1987); Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1496-97 (5th Cir. 1985).
40. *See, e.g.*, Novatel Communications v. Cellular Tel. Supply, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986) (holding that a parent can assert immediate control over, and therefore, cannot conspire with, a 51%-owned subsidiary); *but see, e.g.*, Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486 (D. Or. 1987) (holding that only corporations held 100% in common, or a *de minimis* amount less than 100%, are covered under *Copperweld*).
41. *See, e.g.*, Williams v. Nevada, 794 F. Supp. 1026, 1032 (D. Nev. 1992) (extending *Copperweld* to franchises because “the franchisor does everything in its power to minimize competition and promote uniformity between the franchises. This is for the benefit of both the franchisees and the franchisor [T]heir economic unity of interest continues beyond the payment by the franchisee of the license fee. ... ”), *aff'd*, 999 F.2d 445, 447 (9th Cir. 1993) (“evidence ... clearly demonstrates that [franchisor] and [franchisee] comprise a ‘common enterprise’”).
42. *See, e.g.*, City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 277 (8th Cir. 1988) (rural electrical cooperative consisting of three tiers of cooperatives with interlocking ownership, which shared a common goal and did not pursue diverse interests, held to be a single entity under *Copperweld*).
43. Louisiana Power and Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149 (La. 1986).
44. *Id.* at 1154 (citing the state’s Reporter Notes that precede the statutory provisions).
45. *Id.* at 1158.
46. *Id.* at 1159-60.
47. *See supra* note 45 (citations omitted).
48. Tooke & Reynolds v. Bastrop Ice Co., Inc., 135 So. 239 (La. 1931).
49. *See supra* note 43, at 1160. Notwithstanding Louisiana’s departure from federal precedent with respect to *Copperweld*, the Fifth Circuit Court of Appeals held, in *Free v. Abbott Labs.*, 176 F.3d 298 (5th Cir. 1999), *aff'd*, 529 U.S. 333 (2000), that Louisiana’s antitrust act does follow the *Illinois Brick* rule, discussed *supra*. Although the Fifth Circuit recognized that Louisiana courts are not compelled to follow federal recent (*citing Louisiana Power*), it distinguished *Louisiana Power* from the circumstances at hand and determined that the state courts would follow *Illinois Brick* as consistent with the antitrust policy of the state. *Id.* at 299-300.
50. *See* California Senate Bill No. 1814, text available at <http://info.sen.ca.gov>. The Senate passed the bill by a vote of 21-15 on May 24, 2002.

51. *West Boylston Cinema Corp. v. Paramount Pictures Corp.*, 2000 Mass. Super. LEXIS 628 (Mass. Super. 2000).

52. *Id.*

53. *Id.* See 15 U.S.C. § 1. Although the *Copperweld* rule developed in the “conspiracy” context, no federal court has ever held that it does not apply equally to “contracts” in restraint of trade. The policy reasons for the *Copperweld* rule apply with equal force to any collusive action— whether termed a contract or a conspiracy— and, we would argue, the distinction made by the *West Boylston* Court does not withstand scrutiny.

54. In addition to these examples, practitioners should keep in mind that many states (and some federal courts) have refused to extend the *Copperweld* doctrine beyond the antitrust context. Thus, even in the states that follow *Copperweld*, a parent and its wholly-owned subsidiary, or two wholly-owned sister companies, may be liable for civil conspiracy or tort actions under state or federal law. See, e.g., *Seeco, Inc. v. Hales*, 22 S.W.2d 157, 173 (Ark. 2000) (refusing to extend *Copperweld* to civil conspiracy action); *Valores Corp. v. McLane Co., Inc.*, 945 S.W.2d 160, 169 (Ct. App. Tex. 1997) (parent corporation is legally capable of tortiously interfering with its wholly-owned subsidiary’s contractual relations).

55. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

56. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

57. *Id.* at 10 (citing *N. Pac. R. Co. v. United States*, 356 U.S. 1 (1958)).

58. *Id.* at 14 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

59. Indeed, some commentators have challenged *Khan* as lacking in essential guidance for both suppliers and distributors. See, e.g., W. Grimes, *Making Sense of State Oil v. Khan: Vertical Maximum Price Fixing Under a Rule of Reason*, 66 *Antitrust L.J.* 567, 568 (1998) (noting that “although the Court has provided

suppliers encouraging words about potentially beneficial effects of ... price ceilings, the Court has offered no concrete guidance about the manner in which a rule of reason analysis should proceed. A supplier who imposes a resale price ceiling in this vacuum may face an uncertain, but significant, risk of treble damage liability.”).

60. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

61. Title 6 of the Proposed Model Federal Antitrust Legislation of the National Association of Attorneys General, 7 *Trade Reg. Rep.* (CCH) ¶ 50,008, at 48,536 (Aug. 8, 1989).

62. Brief of Thirty-Three States and the Territory of Guam in Support of Respondents, *State Oil v. Khan*, No. 96-871 (May 2, 1997) (available on LEXIS at 1996 U.S. Briefs 871). The thirty-three states involved in this brief were: Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

63. *Kolling v. Dow Jones & Co., Inc.*, 137 Cal. App. 3d 709 (Cal. Ct. App. 1st Dist. 1982).

64. *Id.* at 722-24.

65. *R.E. Spriggs Co., Inc. v. Adolph Coors Co.*, 94 Cal. App. 3d 419 (Cal. Ct. App. 2d Dist. 1979), *cert. denied*, 444 U.S. 1076 (1980).

66. *Id.* at 426.

67. *Id.* at 426 n.4 (citing *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976)).

68. See, e.g., *State of California ex rel. Van de Kamp v. Texaco*, 762 P.2d 385, 395 (Cal. 1988) (“[H]istorical and textual analysis reveals that the [Cartwright] Act was patterned after the 1889 Texas act and the 1899 Michigan act, and not the Sherman Act. ... Hence judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cart-

wright drafters' intent, given the different genesis of the provision under review.”).

69. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

70. 466 U.S. 2 (1984).

71. 504 U.S. 451 (1992).

72. See *supra* note 70, at 16.

73. See, e.g., *Hack v. President and Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000), *cert. denied*, 122 S. Ct. 201 (2001); *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 89 F.3d 233, 235-36 n.2 (5th Cir. 1996); *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1518-19 (2d Cir. 1989); *Commodore Plaza v. Saul J. Morgan Enters.*, 746 F.2d 671, 672 (11th Cir.), *cert. denied*, 467 U.S. 1241 (1984).

74. See, e.g., *Regal Motors, Inc. v. Flat Motors of North Am., Inc.*, 479 N.E.2d 1, 5 (Ill. Ct. App. 1st Dist. 1985) (tying arrangement may be prohibited “if, when tested by the ‘rule of reason,’ they are found to be injurious to competition”); *State v. Lawn King, Inc.*, 417 A.2d 1025, 1033 (N.J. 1980) (rule of reason, not per se rule, applies to vertical non-price restraints on trade).

75. *State v. Hossan-Maxwell, Inc.*, 436 A.2d 284 (Conn. 1980).

76. *Id.* at 288. The Court emphasized that Connecticut law differs from federal law in that under federal law, a complaint concerning a tying arrangement involving services can only be brought under the Sherman Act (with its conjunctive, rather than disjunctive, two-part tying test), because the federal Clayton Act test was applicable only to commodities, not services. By contrast, the applicable

Connecticut statutes apply to both services and commodities. *Id.* at 288 & n.6.

77. 356 U.S. 1 (1958). This case involved a violation under the Sherman Act; the Supreme Court there determined that both conditions (economic power in tying product and substantial amount of commerce affected) must be met for a Sherman Act violation to occur. *Id.* at 6. In *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 608-09 (1953), the Supreme Court had applied the disjunctive test (a plaintiff could prevail on a showing of either monopoly power or a restraint affecting a substantial amount of commerce) to tying claims under the Clayton Act. Today, this distinction appears to have disappeared under the federal law. The *Jefferson Parish* Court considered the standards under Section 1 of the Sherman Act and Section 3 of the Clayton Act as being the same. 466 U.S. at 11-18.

78. 436 A.2d at 288 (emphasis added).

79. *Id.*

80. *Id.* at 287.

81. *Central Delivery Serv. of Washington v. People's Bank*, 1992 Conn. Super. LEXIS 961 (Conn. Super. Ct. Mar. 20, 1992), at *3, *citing Hossan-Maxwell, supra* note 75, at 288.

82. See Conn. Gen. Stat. § 35-44b (providing that “in construing [the state antitrust act], the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes”). See also *Vacco*, 793 A.2d at 1056-57 (following *Illinois Brick* rule, discussed *supra*, because of this harmonization provision and the fact that Connecticut's antitrust act “was intentionally patterned after the antitrust law of the federal government”).

83. See, e.g., *supra* note 81, at *3.

?