Note

Retail Drug Advertising Bans Are Bad Medicine For Consumers—Is There A Sherman Act Prescription?

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Apothecaries profit is become a bye-word, denoting something uncommonly extravagant.

Adam Smith, 1776

The public has long been skeptical of the prices charged for prescription drugs.[1] To a large extent, this suspicion is the result of an inability to select the pharmacy offering the lowest prices. While this lack of consumer price awareness stems from several factors,[2] the primary cause is the prohibition of drug price advertising in most states.[3] Bans on price advertising and the resulting consumer ignorance are primarily responsible for the development of a retail drug market characterized by substantial price variance and overcharging for the same drug by different pharmacies within the same community.[4] A retailer can charge more than his competitor with little fear of losing sales.[5] So long as consumers remain uninformed about mar-

1. A. SMITH, WEALTH OF NATIONS 118 (Harv. Classics ed. 1909).

2. Other factors contributing to consumer ignorance of drug prices are: (1) the infrequent use of physician-prescribed medication by the average individual, (2) the large number of different drugs available, (3) the complexity of drug nomenclature and (4) the frequent nondisclosure of the name of the drug prescribed. M. SMITH, PRINCIPLES OF PHARMACEUTICAL MARKETING 319 (1968).

3. Prescription drug price advertising will be used here to refer to informational advertising only, which means the publication or broadcasting of the name of a prescription drug, its price for a specified quantity and the advertiser's explanation of his pricing policy. Informational advertising must be distinguished from promotional advertising, which extolls the virtues of a particular drug.

4. For surveys showing the wide disparity in prices charged by different retailers for the same drug, see *The Best-Selling Prescription Drugs,* CHAIN STORE AGE (Drug Store ed.), Feb., 1973, at 86; *Daylight on Prescription Prices,* MONEY, Oct., 1972, at 31; *Drug Pricing and the Rx Police State,* CONSUMER REPORTS, Mar., 1972, at 136.

5. Alleged improprieties by nursing homes in Arizona illustrate one of the possible abuses facilitated by the absence of price information. The Arizona Attorney General's Consumer Fraud Protection Division has alleged that rebates ranging from 10 to 40

ket prices, retailers have little incentive to compete on the basis of price.

The continuing absence of prescription drug advertising throughout most of the United States is primarily attributable to state statutes and state pharmacy board regulations which prohibit such advertising.[6] In addition, pharmacy trade association activity aimed at preventing advertising serves as a deterrent.[7] Retailers seeking to advertise drug names and prices have challenged the constitutionality of these prohibitions on the ground that they exceed the states' police powers.[8] These actions have been brought in only a few jurisdictions, however, and have met with varying success.[9]

Despite the obvious anticompetitive effect of these advertising bans which cost consumers large sums of money each year,[10] the possible applicability of the federal antitrust laws in this area is largely unexplored.[11] The following discussion will consider whether bans

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percent of the sales price were being paid by some pharamacists to nursing homes. The rebates were paid out of increased prices charged the patient. Since the patients had only a limited knowledge of the market price of the drugs they received, they were unable to detect elevated prices. Arizona Daily Star, Jan. 5, 1973, § A, at 8, col. 7. Senator Frank E. Moss of Utah has charged that similar practices are followed throughout the country. AMERICAN DRUGGIST, Oct. 16, 1972, at 4.

6. Prescription price advertising is prohibited by statute or regulation in most states. BNA ANTITRUST & TRADE REG. REP. (No. 536) at A-9 (Nov. 2, 1971). For a discussion of the nature of the prohibitions and how they have been promulgated in various jurisdictions, see text and notes 19 & 20 *infra*.

7. *See* F. FLETCHER, MARKET RESTRAINTS IN THE RETAIL DRUG INDUSTRY 49-50 (1967).

8. *See* Wall St. J., Sept. 7, 1972, at 14, col. 2.

9. Four reported decisions have struck down bans on prescription drug advertising: Florida Bd. of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969) (statute held invalid); Stadnik v. Shell's City, Inc., 140 So. 2d 871 (Fla. 1962) (board regulation held invalid because lacking reasonable relation to public safety, health, morals or general welfare); Oregon Newspaper Publishers Ass'n v. Peterson, 244 Ore. 116, 415 P.2d 21 (1966) (board regulation held invalid); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971) (statute held to be in violation of state constitution). *See also* OP. ATT'Y GEN. OF MISSOURI, Aug. 7, 1961.

Two other courts have upheld statutes prohibiting advertising: Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969) (statute held to be a proper exercise of state's police power under federal constitution); Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (Chan. 1966) (statute held valid under both state and federal constitutions).

For discussion of the constitutional aspects of advertising bans, see Comment, *Regulation of Prescription Drug Discount Advertising*, 24 WASH. & LEE L. REV. 299 (1967); 37 BROOKLYN L. REV. 617 (1971).

10. Representative Benjamin S. Rosenthal (D.-New York) has charged that American consumers are being overcharged $1 billion yearly because the market is not competitive. Arizona Daily Star, April 1, 1973, § E, at 4, col. 7. Consumers spent $4.5 billion on out-of-hospital prescription drugs in fiscal 1971. UNITED STATES DEP'T HEALTH, EDUCATION, AND WELFARE SOCIAL SECURITY ADMINISTRATION, PRESCRIPTION DRUG DATA SUMMARY 6 (1972). The number of prescriptions filled for outpatients in 1971 was 1,545,000,000. *Id.* at 27.

11. A complaint was filed in November 1972 in the United States District Court of Nevada by Skaggs Companies, Inc., a western drug store chain, charging that the members of the Nevada State Board of Pharmacy have violated the Sherman Act by conspiring to restrain and monopolize the retail sale of prescription drugs. The complaint alleges that the defendants have violated the Act by preventing Skaggs from offering price discounts to senior citizens, forbidding the advertising of drug prices and requiring

imposed by trade associations and state agencies against prescription drug advertising[12] are unreasonable restraints of trade under section 1 of the Sherman Anti-Trust Act.[13] The discussion will first examine the forms and nature of advertising proscriptions and their impact on the retail drug market. The anticompetitive nature of the bans will then be analyzed to determine if they constitute unreasonable restraints of trade within the meaning of section 1. In addition, the so-called "professional exemption" from the antitrust laws will be discussed[14] along with the "state action" exemption of *Parker v. Brown*.[15]

ADVERTISING BANS AND THE MARKETPLACE

Sources of Advertising Bans

Pharmacy trade associations form the core of resistance to prescription advertising. On the one hand, these associations assert independent force on individual pharmacists by defining advertising as unprofessional conduct subject to disciplinary action.[16] Few pharma-

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the pharmacy to be open when the merchandising areas of the store are open. Skaggs Companies, Inc. v. Broadbent, Civil No. LV-1940 (D. Nev., filed Nov. 18, 1972).

12. The Federal Trade Commission (FTC) has authority to prevent the dissemination of false advertising of drugs, therapeutic devices and cosmetics. 15 U.S.C. §§ 52-55 (1970). The general regulation of informational prescription price advertising, however, is not presently within the authority delegated to the FTC. A proposed amendment to the Federal Trade Commission Act, *id.* §§ 41-58, which would make state prohibition of prescription drug price advertising an unfair trade practice, was introduced in the House of Representatives during the ninety-second Congress. H.R. 5938, 92d Cong., 1st Sess. (1971). *See also* H.R. 5734-5737, 93d Cong., 1st Sess. (1973).

13. 15 U.S.C. § 1 (1970). The possibility that prescription drug advertising bans may violate state antitrust laws is outside the scope of this discussion. For examples of a state constitutional provision and statutes that may be used to challenge advertising bans, see ARIZ. CONST. art. 14, § 15; ARIZ. REV. STAT. ANN. § 44-1401 (1956); CALIF. BUS. & PROF. CODE § 16720 (West 1964); MASS. ANN. LAWS ch. 93, § 2 (1967).

14. Other professions are facing antitrust action. For example, fee schedules set by county bar associations have recently been found to be a form of price fixing in violation of section 1 of the Sherman Act. Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973). *See generally* Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 WISC. L. REV. 1237; Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities*, 82 YALE L.J. 313 (1972). Green, *Justice Department Begins Investigating Bar Groups' Fee Lists*, Wall St. J., April 11, 1973 at 1, col. 1.

15. 317 U.S. 341 (1943). The Antitrust Division of the United States Department of Justice has expressed its dissatisfaction with state prohibitions on drug price advertising and is reportedly considering action against pharmacy trade association for the restrictions they impose on advertising by their members. N.Y. Times, Nov. 28, 1971, § 1, at 70, col. 4. Solicitor General Robert Bork advocates that the Antitrust Division should intervene in industries such as drug retailing "where regulation often acts less to protect consumers than to preserve business fiefdoms from competitive challenges." Pierson, *New Solicitor General Called A Conservative in Radical's Clothing*, Wall St. J., Mar. 8, 1973, at 9, col. 1. *See also* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 ANTITRUST L.J. 950 (1970).

16. Section 8 of the American Pharmaceutical Association's Code of Ethics provides that "[a] pharmacist should not solicit professional practice by means of advertising or by methods inconsistent with his opportunity to advance his professional reputation through service to patients and to society." The Association can expel a member for unprofessional conduct if he violates the Code.

cists are willing to advertise and thereby chance censure by their peers. On the other hand, association activity is usually responsible for providing the impetus for the passage of state statutes and board regulations forbidding advertising.[17] In fact, the National Association of Retail Druggists has been said to be, at one time at least, the most politically powerful retail trade association in the United States.[18] It is thus no wonder that the associations have been able to keep consumers in the dark in regard to prescription drug pricing.

Prescription drug price advertising has been effectively prevented in most states by statute[19] or by administrative regulation promulgated by state pharmacy boards.[20] The most frequently used statutory and regulatory device is an outright prohibition of advertising.[21] Enforcement of these bans is facilitated by the availability of substantive sanctions. For example, some states provide that a pharmacist's license or the pharmacy's operating permit will be revoked if prices are advertised.[22] In other instances state boards have incorporated into their regulations section eight of the American Pharmaceutical Association's Code of Ethics or a similar provision deeming advertising to be

17. In Arizona, for example, the President of the Arizona Pharmaceutical Association recently noted in the Association's monthly journal that the State Board of Pharmacy was drafting a new pharmacy act. The President urged the readers to examine the Board's proposed act and suggest changes. All members of the board are also members of the Association. THE ARIZONA PHARMACIST, Jan., 1973, at 4.

18. J. PALAMOUNTAIN, JR., THE POLITICS OF DISTRIBUTION 92-95 (1955).

19. *See* ALASKA STAT. § 08.80.420(b) (Supp. 1972); ARIZ. REV. STAT. ANN. § 32-932(B)(3) (Supp. 1972-73); CAL. BUS. & PROF. CODE § 651.3 (West Supp. 1972); FLA. STAT. ANN. § 465.23 (Supp. 1973); LA. REV. STAT. ANN. § 37:1225(11) (1964); MD. ANN. CODE art. 43, § 266A(c)(4)(iv) (Supp. 1972); MASS. ANN. LAWS ch. 94C, § 46 (Supp. 1972); MICH. STAT. ANN. § 14.757(15)(5) (1969); NEB. REV. STAT. § 71-148(11) (1971); NEV. REV. STAT. § 639.261 (1971); N.J. STAT. ANN. § 45:14-12 (c) (Supp. 1972-73); N.D. CENT. CODE § 43-15-10(1)(b) (1960); OHIO REV. CODE ANN. § 4729.36 (Page, Supp. 1972); OKLA. STAT. ANN. tit. 59, § 736.1 (1971); TEX. REV. CIV. STAT. ANN. art. 4542(a), § 17(d)(3) (1960); VA. CODE ANN. § 54-524.35 (3) (Supp. 1972).

20. *See* Alabama State Board of Pharmacy Rule No. 8 & No. 9(2) (1967); Arizona State Board of Pharmacy Rules & Regulations § 6.6120 (1970); Arkansas State Board of Pharmacy Rules & Regulations No. 18 (undated); Colorado State Board of Pharmacy Rules & Regulations § 48-1-2(d).1(5) (1972); Georgia State Board of Pharmacy Rules § 480-11-.01(f) (1970); Hawaii Board of Pharmacy Rules & Regulations § 1.5 (undated); Indiana Board of Pharmacy Regulations No. 20, § 1(b) (undated); Kansas State Board of Pharmacy Rules & Regulations § 68-2-17 (1968); Louisiana Board of Pharmacy Rules & Regulations § 22 (1970); Massachusetts Board of Registration in Pharmacy Rules & Regulations No. 49, Item 20 (1968); Nevada State Board of Pharmacy Regulations No. 5.01(h) (1972); North Carolina Board of Pharmacy Rules & Regulations Art. 7, § 8 (undated); Texas State Board of Pharmacy Rules & Regulations § V(i)(1) (1969); Washington State Board of Pharmacy Regulations §§ 360-24-020, -035, -045 (1972); West Virginia Board of Pharmacy Amended Rules & Regulations Art. 15, §§ 7-8 (1972). The following states also have statutes prohibiting advertising: Arizona, Louisiana, Massachusetts, Nevada and Texas. See statutes cited note 19 *supra*.

21. *See, e.g.*, CAL. BUS. & PROF. CODE § 651.3 (West Supp. 1972); NEV. REV. STAT. § 639.261 (1971); Kansas State Board of Pharmacy Rules and Regulations § 68-2-17 (1968); Louisiana Board of Pharmacy Rules & Regulations § 22 (1970).

22. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-1932(B)(3) (Supp. 1972-73); MICH. STAT. ANN. § 14.757(15)(5) (1969); TEX. REV. CIV. STAT. ANN. art. 4542(a), § 17 (d)(3) (1960).

unprofessional.[23] Unprofessional behavior by a pharmacist may lead to disciplinary action by the state board.

Other states, while not directly prohibiting price advertising, require advertisers who mention the name of a prescription drug to include specific information about the drug's characteristics, including possible adverse reactions to the drug.[24] Such requirements may also have a prohibitive effect since the space needed for the additional information will increase the advertiser's cost. The pharmacy may choose not to advertise rather than to pass the increased cost on to the consumer. In addition, when presented with a drug's possible harmful side effects, the consumer may be dissuaded from purchasing the drug. This would not only reduce sales but could endanger individual health.

Where the banning of prescription advertising is by pharmacy board regulation, the boards have necessarily acted pursuant to legislative enabling acts. These acts usually grant broad powers to the board to adopt whatever regulations are necessary to protect the public health and welfare and to supervise the practice of pharmacy.[25] In

23. *See, e.g.*, Georgia State Board of Pharmacy Rules § 480-11-.01(f) (1970); North Carolina Board of Pharmacy Rules & Regulations, art. 7, § 8; West Virginia Board of Pharmacy Rules & Regulations, art. 15, §§ 7-8 (1972).

24. *See, e.g.*, N.M. STAT. ANN. § 54-6-37(C) (Supp. 1971) (advertisement must contain: all warnings and cautions; the drug's formula; the name of the manufacturer; the branded and non-branded name; the dosage form and strength; and a summary of the drug's use, side effects and contraindications); Colorado State Board of Pharmacy Rules & Regulations § 48-1-2(d).1(5) (1972) (regulation requires that the advertisement contain all warnings and contraindications for each drug named).

Similar requirements presently exist under the Federal Food, Drug, and Cosmetic Act. A retailer advertising prescription drugs and their prices must include the non-branded name of the drug, the drug's quantitative formula, information relating to dosage form, the quantity of the drug being sold for the stated price and the name and address of the manufacturer or distributor. 21 U.S.C. § 352(n) (1970). If the advertiser makes any representations as to the safety, efficacy or use of the advertised drug, he must comply with additional requirements imposed by the Food and Drug Administration. See 21 C.F.R. § 1.105(e)(2)(i) (1972). *See generally* Chadduck, *'In Brief Summary': Prescription Drug Advertising, 1962-71*, FDA PAPERS, Feb. 1972, at 13; Comment, *The Crystallization of American Drug Law*, 14 ARIZ. L. REV. 380 (1972). A pharmacist who advertises a drug without complying with these regulations is subject to the sanctions of the Act and the advertised drug stocked on the pharmacist's shelves is subject to seizure as a misbranded pharmaceutical. 21 U.S.C. §§ 331-34, 352(n) (1970).

The National Association of Boards of Pharmacy has recommended that individual boards enforce the federal provisions under their respective state pharmacy acts, Address by Dr. S.H. Willig, National Association of Boards of Pharmacy Meeting, Oct. 19, 1972, which could be done through the statutory provision common to many acts making the violation of the Federal Food, Drug, and Cosmetic Act a violation of state law. *See* ARIZ. REV. STAT. ANN. § 32-1932(A) (Supp. 1972-73). The Food and Drug Administration, however, is currently drafting a change in these "reminder" advertising regulations to eliminate any unnecessary information presently required in prescription price advertising. This change is being made to conform with the Department of Health, Education, and Welfare's policy supporting such advertising. Letter from Peter B. Hutt, Assistant General Counsel, Food, Drugs, and Product Safety Division, Department of Health, Education, and Welfare to the *Arizona Law Review*, Feb. 5, 1973.

25. *See* ARIZ. REV. STAT. ANN. §§ 32-1904(A)(1)-(B)(5) (Supp. 1972-73); CAL. BUS. & PROF. CODE § 4008 (West Supp. 1972); FLA. STAT. ANN. § 465.14 (Supp. 1973).

addition, the state pharmacy acts frequently provide for the appointment of state trade association members to the board.[26] Even where there is no such provision, the boards are composed almost entirely of proprietors of independently operated drug stores,[27] stores faced with competitive pressures from the larger and generally more efficient chain operations. Since the chain stores are able to sell drugs at lower prices than the single unit stores which cannot avail themselves of the chain store's superior management, buying power and economies of scale,[28] it is not surprising that boards dominated by single unit proprietors usually maintain a protectionist attitude toward small pharmacies.[29]

Economics of the Retail Drug Market

One important characteristic common to all retail industries is that the consumer has imperfect knowledge of the market.[30] The purchaser can rarely grasp all of the quality and price differentials for

26. *See, e.g.,* IOWA CODE ANN. § 147.20 (1972); KANSAS STAT. ANN. § 74-1605 (1972); MD. ANN. CODE art. 43, § 257 (1957). *See also* F. FLETCHER, *supra* note 7, at 45-49. Some governors are required by statute and others by political realities to choose board members from nominees provided by the independent-dominated state pharmacy associations. *Id.*

While the Arizona statute provides that the appointee need not be from nominees chosen by the Arizona Pharmaceutical Association, ARIZ. REV. STAT. ANN. § 32-1902 (Supp. 1972-73), the Governor has appointed only one pharamcist since the board was created who was not so nominated. Interview with Dr. Henry Winship, III, Professor of Pharmacy Administration, University of Arizona, April 9, 1973.

27. F. FLETCHER, *supra* note 7, at 45-49.

28. Interview with Dr. Henry Winship, III, Professor of Pharmacy Administration, University of Arizona, April 9, 1973; *cf.* N.Y. Times, July 5, 1970, § 3, at 1, col. 2. A single unit or independent store is a pharmacy with only one retail outlet while a chain store utilizes multiple retail outlets.

29. The prohibition of advertising appears to be only one of a number of state pharmacy board imposed restrictions aimed at protecting the small-volume retailers and restricting high volume discount stores and chains. Other restrictions include fair trade resale price maintenance statutes (which prevent the discounting of prices on retail items) and requirements that drug stores be managed by pharmacists (who are usually in short supply and command a higher wage than a non-pharmacist store manager). M. GREEN, B. MOORE, & B. WASERSTEIN, THE NADER STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT, THE CLOSED ENTERPRISE SYSTEM 541 (1971).

One study of the retail drug market has concluded that pharmacy boards have deliberately attempted to restrain the competition of chain drug stores by the use of restrictive regulations such as advertising bans. F. FLETCHER, *supra* note 7, at 301, 305-09.

30. In addition, retail marketing has the following attributes: (1) the inability of buyers and sellers in the market to influence independently the price of output; (2) customer-perceived differences among the sellers' reputations, the competence and congeniality of pharmacists, or the attractiveness of the stores' prescription vials; and (3) relatively low barriers to entry. See Mueller, *Antitrust and Economics: A Look at "Competition,"* 10 ST. LOUIS U.L.J. 482, 494 (1966).

The investment necessary to start a retail pharmacy is relatively small. The average investment in a retail pharmacy is approximately $30,000 in inventory, approximately $10,000 of which is required for prescription drugs. THE DRUG DISTRIBUTORS, *infra* note 33, at 69. Fletcher has concluded, however, that a significant barrier to entry or expansion in the market is the limitation imposed by some states that only registered pharmacists can own pharmacies. F. FLETCHER, *supra* note 7, at 137.

any group of like products. Any possibility of approaching perfect market knowledge disappears with the imposition of advertising bans. For example, when a consumer does not know the price of food items at all the retail grocery stores in his area, he can at least ascertain some prices through the retailers' advertisements. The same consumer may be unable to obtain any information regarding prescription drug prices if advertising bans are in effect in his locale, however, especially since many pharmacies refuse to quote prices over the telephone.[31] Therefore, even if a customer thinks the prices at one pharmacy are too high, it is practically impossible to determine, without going from store to store, whether other retailers offer lower prices. The inconvenience and expense involved in checking prices of different pharmacies combined with the immediacy of the customer's desire to get well militate against such comparison shopping.[32]

Although the retail prescription drug industry has many characteristics of other retail industries, its unique aspects make advertising a crucial factor in securing competitive prices.[33] The behavioral characteristics of the consumer needing medication distinguishes him from the person shopping for most other commodities. When a person is ill, his primary concern is in restoring his health, and he will usually have a prescription filled regardless of price. Irrespective of price reductions or increases for the drug his doctor prescribes, a patient will normally purchase the quantity ordered for him. Thus, demand is inelastic in relation to price.[34] The only alternatives to purchasing a prescribed drug are foregoing the medication completely or buying only a portion of the prescribed amount. Since administration of less than the prescribed quantity is probably medically ineffective, either alternative can be detrimental to the consumer's health. Demand is

31. WEEKLY PHARMACY REPORTS, Jan. 22, 1973, at 1.

32. Some patients taking maintenance drugs for extended periods, however, may shop until they find the best price. F. FLETCHER, *supra* note 7, at 282.

33. Following the discovery of antibiotics in the 1930's, revolutionary changes occurred in all aspects of the pharmaceutical industry. Perhaps the most significant change was in the retail distribution of drugs. Formerly, a druggist had to compound most of his drugs from bulk chemicals. Now, for the most part, the druggist merely dispenses dosage units precompounded by the manufacturer. H. WALKER, MARKET POWER AND PRICE LEVELS IN THE ETHICAL DRUG INDUSTRY 1 (1971). More than 95 percent of all prescription drugs dispensed in a pharmacy have been precompounded by the manufacturer and require only repackaging by pharmacists. UNITED STATES DEP'T OF HEALTH, EDUCATION, AND WELFARE TASK FORCE ON PRESCRIPTION DRUGS, THE DRUG MAKERS AND THE DRUG DISTRIBUTORS 54 (1968) [hereinafter cited as THE DRUG DISTRIBUTORS].

34. F. FLETCHER, *supra* note 7, at 282-83. Inelasticity of demand means that the demand for prescription drugs will not change significantly, even though the drug's price or the consumer's income increases or decreases. While there may be a ceiling above which a consumer would not or could not purchase a drug, in most cases the consumer's concern for his health comes before his concern for the price he must pay. Such inelasticity allows the retailer to charge higher prices to increase his profits and yet retain his customers.

also inelastic in relation to the consumer's income. A change in an ill or elderly person's income has a negligible impact upon his demand for drugs. Sick persons generally wish to restore good health, and they are often willing to spend whatever is required to purchase medication even if it means foregoing such necessities as food.[35]

The prescription drug market is further distinguished from other retail industries by the absence of substitute products. Since only a physician can prescribe a drug, a prescription drug purchaser is unable to substitute a less expensive product to satisfy his needs. Even if a less expensive, non-branded or generic drug is available,[36] the dispensing pharmacist may be prohibited by state law from substituting a non-branded drug for a branded drug prescribed by the doctor.[37]

The fact that many pharmacies are inadequately managed—leading to overcharging and large price disparities among individual sellers—also distinguishes the retail drug market.[38] Some retailers lack the managerial ability to determine costs accurately and hence the ability to determine price to the consumer without overcharging.[39] Drug prices are determined either by adding a fixed fee to the drug's acquisition cost or, more often, by adding a percentage markup to the acquisition cost.[40] If adequate accounting procedures are employed by the retailer, the fee or the markup should recover the costs of distribution, including a reasonable rate of return on investment in inventory and other facilities.[41] When managers calculate their costs inaccurately, however, their retail prices are determined incorrectly.

The cumulative effect of the distinctive characteristics of the consumer and the prescription drug market is to elevate drug prices.[42]

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35. *See Hearing on Administered Prices Before the Subcomm. On Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess., pt. 14, at 7992-95 (testimony of G.D. Barsome, Arthritis and Rheumatism Foundation) (1959).

36. Lower cost generic drugs are available as substitutes for only about 15 percent of the most frequently prescribed drugs. Substitution is also ruled out if the branded drug is the best choice medically. UNITED STATES DEP'T OF HEALTH, EDUCATION AND WELFARE TASK FORCE ON PRESCRIPTION DRUGS, THE DRUG USERS 36-37 (1968).

Doctors do not always prescribe the least expensive and most acceptable drug available for several reasons. Physicians generally prescribe only the few drugs whose therapeutic values and adverse reactions are known to them. Additionally, doctors are frequently unaware of the retail price of the drug they prescribe.

37. *See, e.g,* FLA. STAT. ANN. § 465.101(h) (1965); N.Y. EDUCATION LAW. § 6816 (McKinney 1972); PA. STAT. ANN. tit. 63, § 390-5(a)(8) (1968).

38. Interview with Dr. Henry Winship, III, Professor of Pharmacy Administration, University of Arizona, April 9, 1973. Address by T. Donald Rucker, Drug Studies Branch, Social Security Administration in FDC REPORTS, March 20, 1972, at 15-17. (hereinafter cited as RUCKER).

39. RUCKER, *supra* note 38, at 15-17; *Prescription Drug—The War Over Secret Prices*, THE CHANGING TIMES, Feb. 1973, at 14.

40. THE DRUG DISTRIBUTORS, *supra* note 33, at 63, 66-67.

41. *See* UNITED STATES DEP'T OF HEALTH, EDUCATION, AND WELFARE TASK FORCE ON PRESCRIPTION DRUGS, FINAL REPORT 18 (1969) [hereinafter cited as FINAL REPORT].

42. F. FLETCHER, *supra* note 7, at 285; *see* Comment, *Prescription Drug Pricing*

Since there is no advertising, price information is limited. The inability of a single pharmacy to compete in price with other pharmacies, because consumers cannot respond to price competition, enables each retailer to establish his prices upward with little fear of losing business.[43] In a competitive market, price disparities and high profits should be narrowed by competition among sellers. Optimally, the markup above acquisition cost would be limited only to that which would cover the retailer's distribution cost, including a competitively determined rate of return on investment.[44] In reality, however, the retail prescription drug market is characterized by overpricing which results in excessive profits[45] and the maintenance of pharmacies which are inefficiently managed.[46] Competition induced by advertising should lead to lower prices and increased managerial efficiency among pharmacies.

Although arguments supporting advertising bans are largely founded on protecting the public health and welfare,[47] the bans appear more effective in promoting the economic interests of certain groups of pharmaceutical retailers. Druggists support the bans principally because they fear that advertising will result in ruinous competition for small stores and will damage the image of the pharmacy profession.[48] Because so few firms engage in direct advertising of prescription prices, it is difficult to predict whether retail prices will be lowered by price advertising.[49] In spite of this unpredictability,[50] our national economic policy favors competition[51] and it is fair to assume

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in California: An Analysis of Statutory Causes and Effects, 49 CALIF. L. REV. 340 (1961).

43. The retail prescription drug industry is characterized by an absence of cross-elasticity of demand. When one retailer lowers his prices he will gain little additional business in the absence of advertising to communicate the lower prices. Thus, each retailer is usually unable to influence the demand for other retailer's prescription drugs. *Cf.* E. SINGER, ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS 56 (1968).

44. Steele, *An Economic Analysis of Recent Attempts to Alter the Laws Regulating the Prescription Drug Industry: The Canadian Investigation and Its Relevance for the United States,* 6 HOUSTON L. REV. 666, 724 (1969).

45. FDC REPORTS—"THE PINK SHEET", Mar. 20, 1972, at 15.

46. *Id.* at 17.

47. *See* text at note 100 *infra.*

48. THE DRUG DISTRIBUTORS, *supra* note 33, at 81.

49. *Id.* F. FLETCHER, *supra* note 7, at 287. There is evidence, however, that merely posting prices in all Boston pharmacies, a requirement imposed by city ordinance, has resulted in the lowering of prices by the stores which formerly had the city's highest prices. DRUG TOPICS, June 5, 1972, at 24.

50. In the retail prescription eyeglass industry, similar to the prescription drug industry, one commentator has concluded that eyeglass prices are substantially lower in states where advertising is permitted. Benham, *The Effect of Advertising on the Price of Eyeglasses,* 15 J. LAW & ECON. 337, 351 (1972).

51. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963). *See also* C. KAYSEN & D. TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 14-16 (1965).

that prescription drug advertising will promote realistic and competitive prices.

ADVERTISING BANS AND THE SHERMAN ACT

Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . ."[52] Thus, two threshold requirements must be met before a violation of the Act may be found: (1) the alleged illegal activity must affect "trade or commerce" among the states, and (2) there must be a "contract, combination . . . or conspiracy" to restrain trade. Beyond these statutory elements, courts have developed the doctrines of the per se violation and the rule of reason test. Whether a violation is found in a particular case may be determined by the doctrine applied.

Restraint of Interstate Commerce

The Supreme Court of the United States recognized at an early date that interstate commerce is difficult to define through the application of mechanical rules.[53] It is well established, however, that the mere fact that an activity is confined within the boundaries of a single state does not preclude the possibility that it "substantially *affects* interstate commerce"[54] and therefore is capable of sustaining a federal antitrust action.[55] The relevant inquiry is "whether effects forbidden by the antitrust laws reach from processes ocurring within to those occurring without the state."[56] Thus, even where restraints have been imposed upon goods which had previously come to rest within a state, the Court has sustained actions under section 1.[57]

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52. 15 U.S.C. § 1 (1970). For discussions of the goals of the Sherman act, see Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7 (1966); *Symposium, The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363-65, 383, 386 (1965).

53. "[C]ommerce among the States is not a technical legal conception but a practical one, drawn from the course of business." Swift & Co. v. United States, 196 U.S. 375, 398 (1905).

54. Burke v. Ford, 389 U.S. 320, 321 (1967) (per curiam).

55. *See* United States v. Employing Lathers Ass'n, 347 U.S. 198 (1954); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

56. Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236, 243. As stated by Justice Jackson in United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949):

> Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

57. Burke v. Ford, 389 U.S. 320, 322 (1967) (per curiam); United States v. Employing Plasters Ass'n, 347 U.S. 186, 189 (1954).

The potential interstate effects of an antitrust violation involving prescription drugs sold intrastate by a retail pharmacy are manifold. First, no pharmacy in the United States sells drugs traded solely intrastate. Nearly all prescription drugs are precompounded by manufacturers and shipped directly to retailers or distributed through wholesalers. In addition, the retailer's sale to the consumer often has interstate implications, such as the direct mailing of prescriptions to out-of-state patients.[58]

Most significantly, advertising bans directly affect the interstate flow of prescriptions drugs by determining who will market them. Retailers, especially chain stores, seeking to enter a market frequently rely upon price competition to gain entry.[59] When the bans suppress such competition, retailers are not only hindered, but often discouraged from attempting to establish pharmacies. The new entry in the market may have difficulty in attracting consumers trading with established pharmacies since it cannot make the consumer aware of the lower prices it offers. Price competitive retailers already doing business also will be prevented from increasing their sales.

All the federal courts that have considered the retail sale of prescription drugs have concluded that such sales are in the flow of interstate commerce. In *Northern California Pharmaceutical Association v. United States*[60] the Court of Appeals for the Ninth Circuit upheld the trial court's finding that a substantial portion of the drugs sold in retail pharmacies in California were manufactured out of state and shipped in interstate commerce before reaching the retailer. In *United States v. Utah Pharmaceutical Association*[61] the district court found that the pharmacist acted as a conduit by delivering drugs flowing to the consumer through interstate commerce. As these cases indicate, a prescription drug vended by a retailer is almost always a commodity in interstate commerce.[62] Hence, any alteration of the retail price of a prescription drug, or restraint on its sale, will affect commerce in drugs between the states by altering market forces.

Contract, Combination or Conspiracy to Restrain Trade

In addition to showing that interstate commerce is substantially affected, a "contract, combination or conspiracy" between two or more

58. *See* DRUG TOPICS, Feb. 19, 1973, at 25.
59. *Drug Pricing and the Rx Police State*, CONSUMER REPORTS, Mar. 1972, at 136.
60. 306 F.2d 379, 386 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).
61. 201 F. Supp. 29, 33 (D. Utah), *appeal dismissed for lack of jurisdiction*, 306 F.2d 493 (10th Cir.), *aff'd mem.*, 371 U.S. 24 (1962).
62. *See* United States v. Sullivan, 332 U.S. 689 (1948).

parties must be shown before a Sherman Act violation can be established. The conspiracy may be tacit or express,[63] and need not be manifested in a formal agreement.[64] Indeed, it is unlikely that such an agreement would be embodied in a single written document. At least partially for this practical reason, the agreement may be inferred from circumstantial evidence.[65] For example, although proof of parallel business behavior on the part of competitors is in itself insufficient to establish a prima facia case of conspiracy,[66] under some circumstances parallel behavior may raise a permissible inference of conspiracy.[67] The existence of a conspiracy is sufficient conduct to establish the violation; no proof of wrongful intent by the parties to an agreement need be offered.[68]

Essentially two forms of conspiracies are apparent in analyzing prescription drug advertising prohibitions. One form is limited to individuals acting in a wholly private capacity. The other form involves, at least in part, the action of a state through its legislature, agencies or officers. There are numerous possible combinations of conspirators within these classes: for example, conspiracy between (1) pharmacists, (2) members of a pharmacy trade association, (3) a trade association member and a member of a state pharmacy board, or (4) board members.

Agreements not to release price information by telephone may be used to infer a conspiracy between individual pharmacists. Similarly, a resolution, by-law provision or association code of ethics[69] may indi-

63. Theater Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954).

64. American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

65. Esco Corp. v. United States, 340 F.2d 1000, 1006-08 (9th Cir. 1965); *see* Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914).

66. Theater Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

67. *See* United States v. General Motors Corp., 384 U.S. 127 (1966).

68. Northern California Pharamaceutical Ass'n v. United States, 306 F.2d 379, 388 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962). Overt acts by the conspirators are not required. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); Nash v. United States, 229 U.S. 373, 378 (1913). Similarly, neither the good motives of the conspirators nor their intent to promote the public welfare will save them from liability for their Sherman Act transgressions. See United States v. United States Gypsum Co., 340 U.S. 76, 87 (1950); Thomsen v. Cayser, 243 U.S. 66 (1917).

69. The Federal Trade Commission has stated that a trade association code of ethics must meet the general test of

> whether concerted action by competitors unreasonably affects a businessman's ability to compete. Thus, if association membership is an important competitive factor, arbitrary or discriminatory refusal of membership to a qualified applicant because of alleged failure to abide by the code would raise serious questions under Commission-administered law, as would arbitrary or discriminatory expulsion of association members.

FTC ADVISORY OPINION DIGEST No. 119 (April 6, 1967). Although the FTC cannot act under the Sherman Act, this opinion clearly recognizes that a code of ethics can have anti-competitive effects. *See generally* American Pharmaceutical Ass'n v. United States, 467 F.2d 1290 (6th Cir. 1972), *aff'g* 344 F. Supp. 9 (E.D. Mich. 1971).

cate conspiracy among pharmacy trade association members to discourage advertising, especially when members who advertise are censured. State board regulations prohibiting advertising are passed only after the individual pharmacists who compose the board have agreed to them.[70] Such agreements can be shown by the official regulation printed by the board and the minutes of the meeting.

Per Se Violation Versus the Rule of Reason Test

Once it has been determined that an alleged violation affects interstate commerce and that there has been an agreement which restrains trade, the nature of the violation must be examined. This is highly significant for determining the type and quantity of evidence which must be presented to establish the violation. While advertising bans appear to be what the courts would label per se violations, the Supreme Court has not considered the issue. The possible application of the rule of reason cannot be overlooked, therefore.

Section 1 only prohibits agreements which unreasonably restrain trade. This basic notion of what constitutes a violation, commonly termed the rule of reason, is not found in the statue itself.[71] Rather, it evolved as courts construing the statute realized that strict application of the language of the Act would invalidate most commercial contracts.[72] When applying the rule of reason test, therefore, courts will not find agreements restricting competition illegal if the agreements exist ancillary to the accomplishment of some legitimate purpose sought by the parties.[73]

The normal factors considered under the rule of reason are not used when certain types of commercial agreements, unquestionably anticompetitive in effect, are scrutinized. A rule of per se unreasonableness has evolved as to these practices.[74] For example, it is thought to

70. The Supreme Court is currently considering whether the due process clause of the fourteenth amendment is violated when self-employed optometrists on a state board of optometry can revoke or suspend the license of optometrists employed by an optical company. The district court held that the self-employed optometrists had a personal interest in such proceedings because they would receive the business of the suspended optical company optometrists. This personal interest was held to be sufficient to constitute a denial of due process. Berryhill v. Gibson, 331 F. Supp. 122 (M.D. Ala. 1971), *argued*, 41 U.S.L.W. 3390 (Jan. 9-10, 1973).

71. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, pts. 1 & 2, 74 YALE L.J. 775 (1965); 75 YALE L.J. 373 (1966).

72. Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1911); *see* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

73. Bork, *supra* note 71, 74 YALE L.J. at 799-800.

74. It is generally believed that the per se doctrine was formulated in United States v. Trenton Potteries Co., 273 U.S. 392 (1927). The defendants in that case had entered into an agreement that fixed prices and limited distribution. The Court said that agreements "may well be held to be in themselves unreasonable or unlawful restraints. . . ." *Id.* at 397.

be so unlikely that agreements, combinations or conspiracies which fix prices,[75] divide markets[76] or allocate customers[77] will have any reasonable economic justification that it would be a waste of judicial resources to engage in the intricate and often protracted inquiry necessary to establish an antitrust violation under the rule of reason.[78]

Despite the numerous adverse effects of advertising bans, there is little authority for or against the proposition that they constitute per se violations of section 1 of the Sherman Act. The Court of Appeals for the Seventh Circuit considered the issue in *United States v. Gasoline Retailers Association*,[79] and held that an agreement by service station dealers to ban the posting of gasoline prices was illegal per se. The defendant gasoline dealers argued that the suppression of price advertising had little or no effect on gasoline prices and, therefore, the practice could not properly be called per se offense. The court disagreed, however, relying on *United States v. Socony-Vacuum Oil Co.*[80] for the proposition that any "concerted scheme to affect prices" could be termed price fixing.[81] The admitted purpose of the conspirators in *Gasoline Retailers* was to eliminate price competition by preventing price wars among the gas retailers in the area. Similarly, retail pharmacists who advocate advertising bans are generally seeking the same result—the elimination of price competition.[82] An attempt to restrict the market mechanism of informing consumers as to the price of commodities may be correctly viewed as a form of price fixing.

Support for the proposition that advertising bans are illegal per

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75. *See, e.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

76. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

77. *See* United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

78. This was expressed by the Court in Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958):

> This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

See C. KAYSEN & D. TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 142-43 (1965).

79. 285 F.2d 688, 691 (7th Cir. 1961).

80. 310 U.S. 150, 222 (1940). The Court defined price fixing in broad terms:

> [I]t [is not] important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price fixing . . . has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.

81. United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688, 691 (7th Cir. 1961).

82. By not advertising prices, competitors eliminate price competition. See *Developments in the law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1160 (1967).

se can be found in the Supreme Court's decision in *United States v. Container Corporation of America.*[83] The defendants in *Container Corporation* were corrugated container manufacturers who exchanged information concerning current prices involved in specific sales to identified customers. The Court apparently held that an agreement to exchange information in an oligopolistic market was a per se violation of section 1 because it had the anticompetitive effect of "chilling the vigor of price competition."[84] Thus, the Court seemingly further extended the concept of the per se rule as set forth in *Socony-Vacuum.*[85] Justice Douglas, writing for the majority in *Container Corporation* stated that "[t]he limitation or reduction of price competition brings [this] case within the ban [of section 1], for as we held in *United States v. Socony-Vacuum Oil Co.* . . . interference with the setting of price by free market forces is unlawful *per se.*"[86] Such an expansive formulation of the price fixing concept would seem to bring agreements between competitiors to prohibit advertising within the ambit of a per se violation. If a court determined, however, that the evidence presented as to the economic effects of advertising bans was insufficient to permit a finding that they constituted a form of price fixing, the legality of the bans would probably be decided using the rule of reason.

No precise standards for the rule of reason test have been established because of the difficulty of defining what constitutes reasonable business conduct in restraint of trade.[87] Perhaps the best known statement of the test of reasonableness under the Sherman Act was by Justice Brandeis:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as

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83. 393 U.S. 333 (1969).

84. *Id.* at 337. Justice Fortas, concurring, refused to read the majority opinion as holding that the exchange of price information was a per se violation of section 1. *Id.* at 338. Three lower courts have been faced with applying *Container Corporation*—all have read the decision as promulgating a per se rule. See United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1064 (S.D. Ohio 1971); United States v. FMC Corp., 306 F. Supp. 1106, 1142 (E.D. Pa. 1969); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 718 (S.D.N.Y. 1969). *Contra,* Kefauver, *The Legality of Dissemination of Market Data by Trade Associations: What Does Container Hold?,* 57 CORNELL L. REV. 777, 791 (1972).

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

86. United States v. Container Corp. of America, 393 U.S. 333, 337 (1969).

87. *See* United States v. Trenton Potteries, 273 U.S. 392, 397 (1927); Bork, *supra* note 71, at 781-828.

> may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[88]

Thus, the rule of reason requires a case by case inquiry into both the effect of a business agreement or arrangement on competition and, if any adverse effect is found, possible justifications for the restraint. If a restraint merely regulates without destroying competition, there is no violation of section 1. If competition is destroyed, however, then a court may find the restraint involved to be illegal.[89]

One court, citing Brandeis, has considered non-economic values in determining the reasonableness of a particular restraint. In *Tripoli Company v. Wella Corporation*[90] the Court of Appeals for the Third Circuit stated that a restraint imposed by a manufacturer on a wholesale distributor's resale of a product could be justified by the manufacturer's desire to protect public health. The plaintiff was a wholesaler who sold the defendant-manufacturer's cosmetic preparations to members of the professional beauty trade. When the manufacturer learned that certain potentially dangerous products were being sold directly to the public by the wholesaler, it discontinued sales to the plaintiff. The plaintiff then brought suit, alleging that the defendant had violated the antitrust laws by restricting resale of the defendant's professional beauty care products.[91] Ultimately, the court rejected the idea that a section 1 violation had occurred because the restriction had no meaningful anticompetitive effect.[92] The court noted, however, that protecting the public from harm could be properly considered in determining the reasonableness of a restraint.[93]

As *Tripoli* indicates, a court faced with determining the reasonableness of prescription advertising bans may examine both their eco-

88. Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918). The Court found that a rule limiting the hours of trade in a commodity was a reasonable regulation of trade because it in fact served to promote competition. Justice Brandeis' formulation of the rule of reason test has since been reaffirmed by the Court. White Motor Co. v. United States, 372 U.S. 253, 261-62 (1963).

89. *See* United States v. Arnold Schwinn & Co., 388 U.S. 365, 375 (1967).

90. 425 F.2d 932 (3rd Cir.), *cert. denied*, 400 U.S. 831 (1970). This decision affirmed a summary judgment, and the only examination of the need for the restraint rested on the facts set forth in the pleadings. As recognized by the dissenting opinion, a thorough examination of the facts at the trial would have seemed more appropriate to determine the reasonableness of the restraint.

91. *Id.* at 936. The plaintiff argued that the defendant unlawfully restricted the territories in which retailers could resell defendant's goods.

92. *Id.* at 939.

93. *Id.* at 938.

nomic and non-economic justifications. Indeed, since the underlying premise supporting the bans is that they are required to protect public health and welfare, this rationale should be considered if the rule of reason test is applied. Several courts, in the context of constitutional attacks on the advertising prohibitions, have considered whether they are in fact necessary to protect public health and have reached varying results.[94] An analysis of the reasons given in support of the bans, however, raises extreme doubt whether they serve a protective function.

Proponents of the bans have argued that without them small retailers would be unable to compete with drug store chains unless the retailers bought large quantities of drugs in order to reduce the acquisition costs. As a result, the low volume pharmacy would be forced to sell from its large stock for an extended period and, consequently, the consumer might receive deteriorated drugs.[95] The fallacy of this argument is that prohibiting price advertising is an inefficient method of protecting the public from adulterated drugs.[96] Both the federal[97] and some state[98] governments have taken a more direct approach by prohibiting the sale of deteriorated or adulterated drugs. The argument is also unconvincing because it proceeds on the questionable assumption that pharmacists cannot be trusted with the responsibility of dispensing potent medication.[99]

Another argument is that price advertising will result in consumers shopping at different pharmacies. Thus, since no single druggist would be able to monitor total drug intake, consumers taking more than one drug might be subject to drug interactions with potential adverse effects. There is little evidence, however, that pharmacists do monitor each customer's total drug intake with the goal of detecting possibly dangerous combinations.[100] While such a goal might be worthwhile, it would be difficult to achieve in today's society in which consumers may not confine their purchases to one store. More importantly, the physician who prescribes the drugs is responsible for monitoring the medication.[101]

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94. *See* cases cited note 9 *supra*.
95. Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 342, 225 A.2d 728, 737 (Chan. 1966).
96. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 197, 272 A.2d 487, 494 (1971).
97. *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 331-34 (1970).
98. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-1965 (Supp. 1972-73); CAL. HEALTH & SAFETY CODE §§ 26200 *et seq.* (West Supp. 1972); ILL. ANN. STAT. 56½ §§ 503.1 *et seq.* (Supp. 1972).
99. F. FLETCHER, *supra* note 7, at 239.
100. Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 341, 225 A.2d 728, 736-37 (Chan. 1966).
101. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 196, 272 A.2d 487, 493 (1971).

It is also argued that even informational advertising will cause patients to exert pressure on their doctors to prescribe unneeded medication, or that patients may request unnecessary dosages if they believe that they can save money by buying larger quantities. This proposition has been rejected by at least one court because it disregards the physician's integrity and assumes that doctors can be easily influenced by demanding patients.[102] Another court has concluded that informational advertising of drug prices cannot lead to increased drug use because the drugs are sold only upon a doctor's order.[103]

In addition to the public health arguments advanced in favor of advertising bans, their proponents have contended that competitive price advertising will force small, independent pharmacies out of business.[104] No doubt such a loss would deprive some persons of needed pharmaceutical services, particularly residents of some urban areas.[105] Implicit in this argument, however, is the idea that when advertising creates public awareness of the price differential, independent pharmacies will lose enough customers to make business unprofitable. This reasoning is invalid for several reasons. First, there is no evidence that advertising will cause independents to lose significant numbers of customers. To the contrary, in Boston, which requires every pharmacy to post prices, there has been only slight customer movement away from the high price stores.[106] Second, many consumers prefer the service advantages offered by independent pharmacies.[107] Finally, the most important factor in a consumer's choice of a pharmacy appears to be geographical convenience and not price or service.[108] In the final analysis, whatever competitive harm might be experienced by independent pharmacies must be weighed against the general harm suffered by consumers because of high prices.[109]

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102. *See* Stadnik v. Shell's City, Inc., 140 So. 2d 871, 875 (Fla. 1962).

103. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 194-96, 272 A.2d 487, 492-93 (1971). Since prescription drugs are only sold to consumers who have a doctor's order, promotional advertising also would be ineffective in increasing sales. More importantly, advertising which promotes a drug, as opposed to informational advertising, may result in consumer demands for unneeded medication. The relationship of drug advertising to drug abuse is not well understood at the present time. It is believed, however, that drug price advertising would have little, if any, effect on demand because only a drug's name and price is disseminated. Absent a description of a drug's effects, a consumer would have no basis on which to request a drug.

104. *See* DRUG TOPICS, June 5, 1972, at 25. New Jersey Governor William T. Cahill recently asked that state's legislature to strike down advertising bans. In order to protect small pharmacies from predatory pricing, he also proposed that the state impose minimum prices on all prescription drugs. DRUG TOPICS, Feb. 5, 1973, at 3.

105. *See* DRUG TOPICS, June 5, 1972, at 25.

106. *See* DRUG TOPICS, Feb. 5, 1973, at 23.

107. *Id.*

108. *See* Kabat, *Choice of Source Pharmaceutical Service*, J. AM. PHARMACEUTICAL ASS'N, Feb. 1969, at 73-74.

109. Another argument in favor of advertising bans rests on the idea that consumers will be unduly confused and possibly deceived by the advertising of complex and

The conclusion from this survey of the reasons given in support of advertising bans is that the bans neither provide economic benefits nor protect public health. The restraints that such bans impose upon competition, therefore, cannot be deemed reasonable under the rule of reason test. The prohibition of retail prescription drug advertising should be considered a violation of section 1 of the Sherman Act under a per se standard or, if a court concludes that advertising bans do not constitute price fixing, under a rule of reason test.

Pharmaceutical Retailing and the Learned Professions Exemption

Pharmacists charged with a violation of the Sherman Act may argue that because of their status as professionals[110] they are exempt from its coverage. Commentators have implied an exemption for professionals on two grounds.[111] First, professionals render services and the Act applies to the marketing of commodities. Second, the competitive rules which govern the world of trade are inappropriate where professions are involved.[112] Since no federal court has yet explicitly declared that the practice of a profession is itself trade or commerce within the meaning of the Act, the issue is unsettled. An analysis of the problem, however, indicates that pharmacists should not be entitled to an exemption.

The applicability of the Act to services was first considered in 1922 when the Supreme Court, drawing a negative inference from the phrase "trade or commerce," held that the jurisdiction of the Act did not extend to "personal effort."[113] This exemption has not

often similar drug names. AMERICAN DRUGGIST, July 10, 1972, at 34. This reasoning harkens back to the days when physicians wrote their prescription orders in Latin so that a patient would not know what medication he was receiving. Current medical opinion takes the contrary view and favors informing a patient of what medication he is taking. See L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 1702 (4th ed. 1970).

110. *See* Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379, 384 (9th Cir. 1962).

111. Coleman, *The Learned Professions*, 33 ANTITRUST L.J. 48 (1967). Justice Story was the first to note in American case law that learned professions are distinguishable from a business or commercial trade. The Nymph, 18 Fed. Cas. 506, 507 (1834) (No. 10,388).

112. *See* United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952) (dictum) (ethical, historical and practical considerations may distinguish professions from other occupational groups); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (dictum) (Sherman Act intended to apply to business world and not to liberal arts and learned professions). *See also* Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935). *But cf.* American Medical Ass'n v. United States, 317 U.S. 519, 528-29 (1943) (dictum) (calling or occupation immaterial if purpose or effect of conspiracy is to restrain trade).

113. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) (baseball held to be exempt from federal antitrust laws). The Court has since decided that professonal baseball occurs in the flow of interstate commerce, but still exempted the baseball reserve system. The decision was based upon stare decisis and congressional inaction. Flood v. Kuhn, 407 U.S. 258 (1972).

been extended to other enterprises dealing in services, however.[114] In fact, two decisions by the Supreme Court have held personal services to be trade or commerce under section 3 of the Sherman Act,[115] which prohibits restraints of trade within the District of Columbia and territories of the United States. One case held that restraints on services in the cleaning industry were proscribed by the Act,[116] and the other that fixing the fees charged by real estate salesmen was unlawful.[117] In *F.T.C. v. Raladam Co.*,[118] furthermore, the Court indicated that druggists might be subject to the antitrust laws when it stated, "[o]f course, medical practioners . . . are not in competition with respondent [a drug manufacturer]. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them."[119] Pharmacists are not in the business of prescribing remedies, they are in the business of vending them. On the basis of these cases, therefore, it appears unlikely that the service component involved in the practice of pharmacy would lead to an exemption.[120]

The second argument suggests that subjecting pharmacists to the competitive practices of the world of business would be detrimental to the profession. There is no evidence that this would be the case, however. Since the retail pharmacy industry is already extensively engaged in advertising over-the-counter drugs as well as the wide range of other goods sold in non-pharmacy areas of modern drug stores, there appears to be no support for the proposition that additional advertising will undermine the profession.

Although the foregoing factors may be important to other professions, they are not determinative in the case of pharmacy. The crucial factor in considering pharmacy is that a commodity is being traded, and simply because a professional handles the commodity will not exempt restraints imposed on its sale from the proscriptions of the Sherman Act.

Hence, in both *United States v. Utah Pharmaceutical Associa-*

114. Radovich v. National Football League, 352 U.S. 445 (1957); United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955); United States v. Shubert, 348 U.S. 222 (1955).

115. 15 U.S.C. § 3 (1970). This section contains the same prohibitions found in section 1.

116. Atlantic Cleaners and Dyers, Inc. v. United States, 286 U.S. 427 (1932).

117. United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950).

118. 283 U.S. 643 (1931).

119. *Id.* at 653 (dictum).

120. In the view of one commentator, the Court no longer finds it necessary to ask if the alleged violation involves a personal service in order to find that a particular restraint is within the jurisdiction of the Sherman Act. Comment, *Personal Services and the Antitrust Laws*, 1 WAYNE L. REV. 124, 131 (1955).

tion,[121] which was affirmed per curiam by the Supreme Court,[122] and the factually similar case of *Northern California Pharmaceutical Association v. United States*,[123] it was held that no professional exemption was available to the defendant-pharmacists who had agreed to fix the prices of prescription drugs as articles of trade or commerce. Professional status was reasoned to be irrelevant because no question of the price fixing of professional services was present. The court declined to generalize on the application of the federal antitrust laws to the professions, but made it clear that section 1 is applicable to the retail sale of "precompounded prescription drugs" by pharmacists. These price fixing cases were relied upon in *American Pharmaceutical Association v. United States*[124] when the Association brought an unsuccessful action to prohibit the Justice Department from obtaining information about its anti-advertising activities. The court again held that pharmacists are not entitled to a professional exemption from the antitrust laws.[125] These cases indicate that courts will give little weight to the argument that pharmacists, in dealing with the commodities of their trade, fall within the protection of a professional exemption from section 1 of the Sherman Act.

State Action Immunity—The Implications of Parker v. Brown

Assuming that agreements forbidding prescription drug price advertising manifest all the indicia of a Sherman Act violation and that there is no professional exemption for pharmacists, then an antitrust action against individuals and associations should be successful. The question remains, however, whether the actions of state legislatures, pharmacy boards and their members who promulgate the prohibitions are immune from antitrust attack because of the nexus of these individuals and bodies to the state. The Supreme Court, in *Parker v. Brown*,[126] enunciated a doctrine of state action immunity applicable to the antitrust laws. The *Parker* Court reviewed the legislative history of the Sherman Act and concluded that Congress intended the Act to apply to the anticompetitive activities of private individuals and groups but not to "restrain a state or its officers or agents from activities directed by its legislature."[127] The *Parker* decision must be examined to understand the limits of state action immunity and to evaluate its

121. 201 F. Supp. 29, 34 (D. Utah), *aff'd mem.*, 371 U.S. 24 (1962).
122. Per curiam decisions theoretically are accorded full precedential value. *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279, 284 n.23 (1959).
123. 306 F.2d 379, 384 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).
124. 344 F. Supp. 9 (E.D. Mich. 1971), *aff'd*, 467 F.2d 1290 (6th Cir. 1972).
125. 344 F. Supp. at 12.
126. 317 U.S. 341 (1943).
127. *Id.* at 350-51.

possible application to state promulgated pharmacy advertising bans.

In *Parker* the Court was faced with deciding whether a raisin marketing program instituted pursuant to the California Agricultural Prorate Act[128] was invalid under the Sherman Act. The express purpose of the Prorate Act was to maintain farm prices and regulate competition by imposing quota restrictions and minimum prices on the sale of raisins.[129] Upon the petition of ten producers in the raisin industry who favored a prorate marketing plan, the commission created by the Act would hold a public hearing to determine whether the program could prevent agricultural waste without permitting unreasonable profits to the producers. If the commission made an affirmative finding, it was authorized to grant a petition directing the selection of a committee to design a program. If the program received the consent of a majority of the producers, it would be instituted.

A private raisin grower and packer brought suit to enjoin enforcement of the proration program as a violation of the Sherman Act.[130] In upholding the validity of the challenged marketing program, the Supreme Court said:

> [I]t is plain the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. 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. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[131]

Some lower federal courts have interpreted the Court's statement

128. Act of June 5, 1933, ch. 754, p. 1969, Statutes of Cal. of 1933, *as amended*, CAL. AGRIC. CODE §§ 59501 *et seq.* (West 1968).

129. Parker v. Brown, 317 U.S. 341, 346 (1943).

130. *Id.* at 348-49. The United States filed an *amicus curiae* brief asserting that the program was invalid under the Sherman Act and the commerce clause.

131. *Id.* at 350-51. The Supreme Court has cited *Parker* in dictum indicating continuing acceptance of the state action immunity doctrine. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961):

> [I]t has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question of whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislature or executive branch of government so long as the law itself does not violate some provision of the Constitution.

See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 516 n.3 (1972) (Stewart, J., concurring).

as establishing a general rule giving all state action immunity from the antitrust laws.[132] These courts have tended to disregard some of the plain language of *Parker*. The Court said that the state *had not* entered into a conspiracy,[133] not that a state *could not* conspire to violate the Sherman Act. The Court was also careful to point out that a state may not declare actions lawful which would otherwise be unlawful under the Act.[134] The exemption for state action was clearly limited to those situations where the state acted in its capacity as a governmental sovereign.[135] Given these statements, two fundamental questions remain after *Parker*. First, can "the state or its municipality [become] a participant in a private agreement or combination by others for restraint of trade,"[136] and second, what acts cannot be declared lawful by the states?

In analyzing advertising bans, the first problem has three components since state action may be found in acts by the state legislature, state pharmacy boards or state pharmacy board members. Of these three possibilities, conspiracy of the state legislature is the easiest to resolve, for it would be difficult to contend that a state legislature could violate section 1 by enacting advertising bans or for directing its pharmacy boards to devise such proscriptions. These are clearly the types of restraints which are adopted "as an act of government."[137] The same result obtains when a state pharmacy board or its members act pursuant to a specific legislative command. That was the exact question at issue in *Parker*.[138]

The gray areas left by the *Parker* decision arise when a state pharmacy board, composed primarily of independent drug store owners,[139] issues a regulation prohibiting advertising without a specific command from the legislature. It has already been decided that a public official who participates in a private antitrust conspiracy does not enjoy immunity from the Sherman Act.[140] It has also been recognized that private action masquerading as state action is not immune

132. Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); 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). *See generally* Comment, *Participant Governmental Action Immunity From the Antitrust Laws: Fact Or Fiction?*, 50 TEX. L. REV. 474 (1972); Note, *Of Raisins and Mushrooms: Applying the Parker Antitrust Exemption*, 58 VA. L. REV. 1511 (1972).
133. 317 U.S. 341, 352 (1942).
134. *Id.* at 351.
135. *Id.* at 352.
136. *Id.* at 351-52.
137. *Id.* at 352.
138. *See* text accompanying note 131 *supra*.
139. *See* text accompanying note 26 *supra*.
140. Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964); *cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962).

from the federal antitrust laws.[141] Thus, if board members ban advertising for private reasons and not in the public interest, their actions may be found to be illegal.

In the case of board regulations prohibiting advertising, it is apparent that the rationale of *Parker* would not extend immunity to drug price advertising bans. *Parker* was the implementation of a *specific* legislative command to restrict competition and to regulate prices. No pharmacy board has yet been expressly authorized by a legislature to control prices directly or indirectly. At the most, the action of a pharmacy board in banning advertising has a remote connection to a legislature's expression of the state's sovereign will to promote public health. Because public health justifications for the bans are illusory,[142] however, even that nexus disappears. On the other side of the issue, the personal interests of the board members are in direct opposition to advertising because of the harm that might be inflicted on each member's business by advertising. Given these facts, a reasonable inference can be drawn that the board members have prohibited advertising for personal economic reasons. Further factual examinations of individual boards would be necessary before a conspiracy to prohibit advertising could be established, but the law seems clear.

The second issue left unresolved by *Parker* is what the Court meant when it said "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[143] It is suggested that a state could not enact a statute authorizing a pharmacy trade association to fix the price of drugs at whatever level it deemed reasonable. Indeed, the Court has held subsequent to *Parker* that state compulsion of private price fixing was not exempt from the prohibitions of the Sherman Act.[144] The reasoning is as follows. As stated by the Court, "under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority . . . ."[145] By relying upon the commerce clause to enact the Sherman Act, Congress has constitutionally deprived the states of some of their power. Those state laws which conflict with the Act are invalid because of the supremacy clause.[146] If these are the general rules, then the question becomes just how much power the states have lost. Support exists

141. Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959).
142. *See* text accompanying notes 94-109 *supra*.
143. Parker v. Brown, 317 U.S. 341, 351 (1942).
144. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951) (enforcement of minimum price resale contracts against non-signors violated the Sherman Act).
145. 317 U.S. at 351 (1942).
146. U.S. CONST. art. VI, cl. 2.

for the proposition that the Sherman Act has deprived the states of the power to prohibit informational price advertising, regardless of whether it is banned by the legislature or the pharmacy boards.

One factor supporting this reasoning is that state prohibitions on the advertising of prescription drugs have already clashed directly with another federal statute, the Economic Stabilization Act of 1970.[147] Under the Act, the Federal Price Commission[148] required retail stores to post the base prices of their merchandise. The Commission ruled in the case of pharmacies that state statutes and regulations, which forbade posting as a form of advertising and which were in direct conflict with federal price posting requirements, were subordinate to the Commission regulations.[149] The Commission reasoned that the supremacy clause required the federal ruling to prevail.[150] Similarly, advertising bans imposed by state law frustrate what federal law encourages through the Sherman Act—competition in the marketplace.[151]

Although the Supreme Court has not directly faced the issue, some of its recent decisions support the proposition that the policy favoring competition expressed in the Sherman Act must prevail over anticompetitive state legislation.[152] In *Lear, Inc. v. Adkins*[153] the California contract doctrine of estoppel of patent licensees to challenge patent validity was subordinated to the federal policy in favor of competition. This policy was also expressed by the Court in earlier decisions in which it held that state unfair competition laws could not be used to grant exclusive rights to products unpatentable under federal law.[154] State prohibitions of prescription advertising should similarly give way to the overriding policy of competition found in the Sherman Act.

Hecht v. Pro-Football, Inc.,[155] a well-reasoned opinion of the Court of Appeals for the District of Columbia Circuit, used this approach when considering whether an act by Congress authorizing governmental action overrode the Sherman Act. The court concluded that the mere presence of "valid governmental action" is insufficient in itself to confer immunity from the federal antitrust laws. At issue

147. 12 U.S.C. § 1904 (1970).
148. Established pursuant to Exec. Order No. 11627, 3 C.F.R. 587 (1972).
149. ECONOMIC CONTROLS, STABILIZATION PROGRAM GUIDELINE, CCH ¶ 537.25 (1973).
150. The Commission cited Florida v. Mellon, 273 U.S. 12 (1927). In *Mellon* the Supreme Court held that a federal revenue act prevailed over a Florida constitutional provision which prohibited the imposition of inheritance taxes.
151. *Cf.* Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959); Hill v. Florida, 325 U.S. 538 (1935).
152. *See* Donnem, *Federal Antitrust Law versus Anticompetitive State Regulation*, 39 ANTITRUST L.J. 950, 957 (1970).
153. 395 U.S. 653 (1969).
154. Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964).
155. 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

was a restrictive covenant in a lease between the District of Columbia Armory Board and the owners of the Washington Redskins professional football team. The covenant prohibited the Board from leasing Robert F. Kennedy Stadium to any football team other than the Redskins. The plaintiff, seeking to use the stadium for its own team, sued the Board, alleging that the covenant was a restraint of trade in violation of the Sherman Act.

Since the Board was created by an Act of Congress, it was argued that the presence of governmental action exempted the lease from attack on antitrust grounds. The court disagreed.[156] Judge Wilkey, in carefully analyzing the development of state action immunity, concluded that courts had been routinely finding immunity without proper analysis:

> [T]he proper inquiry would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws, or, *where state action is concerned* (since states are not named in the Sherman Act and antitrust laws are directed at suppression of anticompetitive business action), *the inquiry should be to what extent is the state action permissible as not contravening the federal antitrust laws*, which in our federal system constitute overriding legislation under the federal commerce power.[157]

The Court also listed the factors which should be weighed in determining whether there is state action immunity. The factors are: the language of the statute involved and its legislative history, "the relative importance of the governmental action which is asserted to override antitrust policy," whether the governmental body considers the anticompetitive impact of its activity, "whether the agency is required to adhere to a clearly defined and restricted statutory directive," and to what extent the agency's actions are subject to judicial review.[158]

The *Hecht* court emphasized that in those cases in which the Supreme Court has spoken on the effect of state action,[159] the opinions have used overly broad language.[160] The court's language, in turn, has encouraged "the proposition that where state action can be found the application of the antitrust laws cannot."[161] *Hecht* analyzed the cases in which the antitrust laws were held inapplicable, however, and

156. *Id.* at 947.
157. *Id.* at 935 (emphasis added).
158. *Id.*
159. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Parker v. Brown, 317 U.S. 341 (1943).
160. Hecht v. Pro Football, Inc., 444 F.2d 931, 942 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).
161. *Id.* at 940.

found that in each one the crucial issue was whether an important national or state policy was deemed superior to the antitrust laws involved. *Parker*, for example, granted immunity to a state program because it was consistent with federal statutes regulating agriculture.[162] *Hecht* discussed two other decisions dealing with judicially created immunity from the federal antitrust laws. In each case, the Supreme Court refused to apply the federal antitrust laws where their application would have infringed on the first amendment rights of the parties.[163]

Applying the factors considered by the *Hecht* court in determining whether there is state action immunity leads to the conclusion that the Sherman Act should control over state statutory and regulatory advertising bans. First, there has been no showing of legislative intent to regulate prescription drug prices and none is expressed in the statutes which ban advertising. Nonetheless, the bans do have a substantial impact on retail prices. Second, advertising bans do not serve to protect the public health, although this premise has served as the basis for their promulgation. Since these proscriptions lack a valid governmental purpose, there is no countervailing reason for overcoming the national policy favoring competition. Third, no consideration has been given to the anticompetitive efects of the bans by most legislatures. Finally, the state statutes which enable state boards to prohibit advertising generally give broad powers to the boards, a specific legislative direction to regulate competition is not present. Therefore, these bans should be illegal under the Sherman Act.[164]

162. *Id.* at 937.

163. The two cases, Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965), stand for the principle that the Sherman Act does not forbid a conspiracy to influence either the legislature or the executive to take a course of action that would restrain trade. *See* Hecht v. Pro-Football, Inc., 444 F.2d 931, 940 (D.C. Cir. 1971).

Subsequent to *Hecht*, the holdings of the *Noerr* and *Pennington* cases were narrowed in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), where a concerted effort by the defendant trucking company to prevent the plaintiff from obtaining free access to administrative agencies and courts was held subject to the proscriptions of the federal antitrust laws. The case may indicate the Court's unwillingness to extend immunity from the antitrust laws beyond their present narrowly defined limits. In *Trucking Unlimited*, the defendants' anticompetitive behavior was interfering with the plaintiff's right to petition governmental bodies. Hence, no national policy militated against application of the Sherman Act. Rather, the contrary policy of maintaining the plaintiff's channels to government favored enforcement of the antitrust laws.

164. In Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956), *aff'd mem.*, 353 U.S. 919 (1957), a state board of medical examiners was held immune from the Sherman Act when it excluded naturopaths from state practice unless they were licensed pursuant to examination by the board. The Court rendered a per curiam decision so there was no illumination of state action immunity. Strong policy considerations in the case made application of the Sherman Act inappropriate. The state was exercising its police power by enforcing a licensing statute. A strong policy exists in favor of allowing a state to establish standards for practitioners of the healing arts in order to insure protection of the public from unqualified practitioners. The importance of the state interest involved outweighs the anticompetitive effect of the licensing statute.

CONCLUSION

The legality of prescription drug advertising bans under the Sherman Act is an issue the courts and the Justice Department are just beginning to tackle. Consumers recognize that they are being overcharged. Competitive retailers recognize that their business is injured by the bans. Measured either by the rule of reason or per se standard, the banning of informational, retail prescription drug price advertising is an unreasonable restraint of trade. Where pharmacists agree to prohibit advertising they are violating section 1 of the Sherman Act. Pharmacy trade association activities and other efforts by private individuals engaged in a conspiracy aimed at preventing price advertising are illegal restraints of trade. Pharmacists are not exempt from the Act's proscriptions by reason of their professional status since they are retailing a commodity. The action of state boards of pharmacy cannot be considered immune from the Sherman Act by virtue of the doctrine of *Parker v. Brown*. While the *Parker* doctrine probably confers immunity when a state legislature enacts a statute banning advertising, recent developments in the application of this doctrine may indicate that state legislation will not be immune from the antitrust laws in the future.

Due to the continuing harm inflicted on the ill, the elderly and the poor, bans on informational price advertising should be removed. The Department of Justice should implement actions enjoining pharmacy associations and state boards of pharmacy from forbidding advertising by druggists. Those states which have placed a statutory ban on advertising should reevaluate the utility of the bans. The essential premise underlying prohibitions on advertising is clearly invalid, for the public health and welfare is not being protected. Rather, the bans are very costly in terms of economic harm to consumers.