

1982

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Recommended Citation

Hamilton, Neil (1982) "Recent Developments in Minnesota Antitrust Law," *William Mitchell Law Review*: Vol. 8: Iss. 3, Article 3.
Available at: <http://open.mitchellhamline.edu/wmlr/vol8/iss3/3>

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RECENT DEVELOPMENTS

RECENT DEVELOPMENTS IN MINNESOTA ANTITRUST LAW

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State antitrust law in Minnesota has undergone a significant transformation in the last decade. Prior to the adoption of the Minnesota Antitrust Act of 1971¹ (1971 Act) the state law was virtually dormant, seldom enforced, and subject to conflicting and unclear interpretations.² Passage of the 1971 Act brought a new activism on the part of both the Attorney General's office and private parties. Consistent state funding and the influx of federal funds earmarked for state antitrust departments³ increased Minne-

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1. Act of June 7, 1971, ch. 865, 1971 Minn. Laws 1715 (current version at MINN. STAT. §§ 325D.49-.66 (1982)). The Attorney General's office, as early as 1963, began working on a state antitrust statute. The Uniform Antitrust Act (Tent. Draft No. 1, 1963) served as the dominant model. The final draft of the Uniform Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1973. 7A U.L.A. 733 (1978). The Illinois Antitrust Act of 1967, ILL. ANN. STAT. ch. 38, §§ 60-1 to -11 (Smith-Hurd 1977 & Supp. 1980), was also used as a model. See Note, *Minnesota Antitrust Law of 1971: Interpretation and Analysis*, 63 MINN. L. REV. 907, 914-15 (1979). Although the Minnesota Act is not identical to either the Uniform Act or the Illinois Act, it does retain basic features of both. *Id.*

2. A useful survey of the history of state antitrust law in Minnesota up to 1965 is found in French, *The Minnesota Antitrust Law*, 50 MINN. L. REV. 59 (1965). Professor French's attitude towards the then existing statutes is summarized by the opening quote of his article: "[A] tale [t]old by an idiot, full of sound and fury, [s]ignifying nothing." *Id.* at 59 (quoting W. SHAKESPEARE, *MACBETH* act V, scene v, lines 26-28). The state statutes carried very harsh penalties, including imprisonment for up to five years and forfeiture of the right to do business in the state. *Id.* at 59-60. These harsh penalties had very little effect on business activity however, there being practically no enforcement of the statutes in the 50 years prior to 1965. *Id.* at 60. Even if an inclination to enforce the laws had been present, the state of the case law left the outcome almost impossible to predict. *Id.* at 62-66. The confusion created by state court decisions dealing with the "rule of reason" lead Professor French to conclude that the state should rely on federal precedent and harmonize state law with the Sherman Act. *Id.* at 77. For a survey of the history and development of state antitrust law nationwide, see Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653 (1976).

3. See Crime Control Act of 1976, Pub. L. No. 94-503, § 116, 90 Stat. 2415 (codified at 42 U.S.C. § 3739 (1976)) (authorized \$30 million for fiscal years 1977-1979). See gener-

sota's enforcement of state antitrust laws thereby creating one of the most activist states in the nation.⁴

The increased activity generated a great deal of litigation.⁵ The majority of cases initiated have resulted in consent decrees or other forms of settlement.⁶ Although several district courts have considered the state antitrust laws,⁷ *Minnesota-Iowa Television Co. v.*

ally Empirical Research Project, *Revising State Antitrust Enforcement: The Problems with Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 591-94 (1979); Rubin, *supra* note 2, at 655.

4. See Empirical Research Project, *supra* note 3, at 570-71. Total expenditures by the Minnesota Attorney General's Office for enforcement of both state and federal statutes were \$375,000 in fiscal year 1980. The state legislature has appropriated funds every year since 1974. Federal grants totalling \$600,000 became available beginning in 1976. S. KILGRIFF, GOVERNMENT ENFORCEMENT, ANTITRUST LAW FOR THE BUSINESS AND CORPORATION ATTORNEY 135, 147 (Minn. Continuing Legal Educ. 1980).

5. As of January 1983, 16 cases begun by the Attorney General's office since 1978 were in active litigation. Telephone interview with Stephen Kilgriff, Special Assistant Attorney General, State of Minnesota (Jan. 13, 1982).

6. Consent decrees are the most common form of settlement used in antitrust cases brought under state statutes. Until very recently, all actions initiated by the Office of the Attorney General, not in active litigation, had been settled by the use of consent decrees. A. MACLIN, STATE ANTITRUST LAW ENFORCEMENT/INTERPRETATIONS AND PARENS PATRIAE, THE PRACTICAL SIDE OF ANTITRUST AND TRADE REGULATIONS 54, 67 (Hamline Advanced Legal Educ. 1979). The use of consent decrees has its advantages and disadvantages. On one hand it reduces the cost of lengthy litigation. *Id.* However, under the 1971 Act, consent decrees are not available as prima facie evidence in subsequent suits against the defendant brought by private parties. *Id.*; see MINN. STAT. § 325D.62 (1982).

7. In the most recent district court case, now on appeal to the Minnesota Supreme Court, the district court held that the Minnesota wholesale price posting system embodied in MINN. STAT. § 340.983 (1982) and its implementing rules constitute resale price maintenance and price fixing and are a per se violation of § 1 of the Sherman Act. The court also found that the state action doctrine does not afford the wholesale price posting system immunity from the application of the Sherman Act. *Intercontinental Packaging Co. v. Novak*, No. 454036 (Minn. 2d Dist. Ct. Aug. 4, 1982).

The district court's conclusions are incorrect. Clearly the posting of wholesale prices involves only information on prices at the wholesale level, and does not permit or require the filing of any resale prices. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 131, at 377-78 (1977). The district court's conclusion that the wholesale price posting scheme constitutes horizontal price fixing lacks support in the court's own findings of fact. A necessary element of horizontal price fixing under § 1 of the Sherman Act is the existence of an agreement. Section 1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States . . . is declared to be illegal . . ." Sherman Antitrust Act, 15 U.S.C. § 1 (1977). As this language makes evident, a violation of the Sherman Act cannot be based on unilateral action. See *United States v. Colgate & Co.*, 250 U.S. 300, 305-06 (1919); L. SULLIVAN, *supra* § 109, at 311-12.

Unlike the statute in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which required wine growers to file fair trade contracts that determined the prices at which wholesalers were to resell their products, *id.* at 99, the Minnesota statute does not mandate an agreement, and the district court cites no evidence

*Watowan T.V. Improvement Association*⁸ is the only Minnesota

from which an inference of agreement among competitors is to be drawn. *See* *Intercontinental Packaging Co. v. Novak*, No. 454036 (Minn. 2d Dist. Ct. Aug. 4, 1982) (order granting permanent injunction). Each wholesaler posted the price in compliance with the statute. There was no circumstantial evidence from which inferences of agreement could have been drawn. *See* *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223 (1939); *L. SULLIVAN, supra*, § 110, at 315-17. The fact that wholesalers amend their filings essentially to match the lowest filed prices is normal behavior in a competitive market. *But see* *Intercontinental Packaging Co. v. Novak*, No. 454036 (Minn. 2d Dist. Ct. Jan. 15, 1982) (order granting temporary injunction). The effect of loss of flexibility to lower prices during the month is to be expected from the requirements of the price posting statute itself, and creates no inferences of agreement. The district court made no findings concerning market structure. However, even if the market were concentrated and the prices were being set strategically with an awareness of the producers' interdependence, resulting in supra-normal profits, there would still be no violation. Conscious parallelism in pricing is not enough to establish an agreement. *See* *Theatre Enterprises, Inc., v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954). Considering antitrust challenges to similar wholesale price posting schemes, other courts have not found the necessary agreement to apply § 1 of the Sherman Act. *See* *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936, 939 (D. Conn.), *aff'd sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981); *United States Brewer's Ass'n, v. Healy*, 532 F. Supp. 1312, 1329 (D. Conn. 1982); *Enricos, Inc. v. Rice*, 551 F. Supp. 511, 513 (N.D. Cal. 1982).

Even if the statutory language of § 1 requiring agreement is to be ignored, the market structure elements of a § 1 analysis of the exchange or price information under the rationale of *United States v. Container Corp. of Am.*, 393 U.S. 333, 336-37 (1969), are not established. The district court makes no finding that the wholesale liquor industry is "dominated by a relatively few sellers." *Id.*; *see also* *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925) (fact that price information was made available to retailers considered to be mitigating factor). Finally, if the requirements of agreement and a market structure analysis are put aside, the state action doctrine seems to provide immunity for the posting of wholesale prices as provided for in the statute. The wholesale price posting scheme meets both prongs of the *Midcal Aluminum* test discussed more fully later in this Note. *See infra* notes 38-39 and accompanying text. There is no question that the Minnesota wholesale price posting system is a "clearly articulated and affirmatively expressed state policy." *See* *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 94, 105 (1980). Minnesota's Liquor Control Division also has "actively supervised" the program by implementing rules, enforcing the requirements of the statute and rules, and seeking legislative reexamination of the program. *See id.*

Besides *Intercontinental Packaging*, another Minnesota district court has specifically held that the 1971 Act is a codification of federal antitrust law. *State v. Robert L. Carr Co.*, 1978-1 Trade Cas. (CCH) ¶ 61,983, at 74,185 (Minn. 5th Dist. Ct. 1978). There have also been two unreported Minnesota district court cases. In *State v. Riteway Rigging & Moving, Inc.*, No. 441177 (Minn. 2d Dist. Ct. Apr. 15, 1980), the court dismissed separate cross claims for contribution against a settling defendant. Unfortunately, the order did not include a memorandum opinion. In *In re Investigative Demand Served upon Maroney's Service*, No. 51265 (Minn. 10th Dist. Ct. July 19, 1981), an Investigative Demand enforcement action, the court affirmed in a memorandum opinion that corporations have no fifth amendment privilege and ordered the company to produce the requested corporate information.

8. 294 N.W.2d 297 (Minn. 1980). The policy pursued by the Office of the Attorney General partially accounts for the paucity of judicial decisions. The limited, although increasing, resources available to the Antitrust Division of the Attorney General's office result in the prosecution of primarily per se violations, these usually being the most serious

Supreme Court case to apply the state antitrust laws. The large amount of litigation, the number of consent decrees and other types of settlement, and the paucity of appellate decisions have left several significant issues unresolved. This Note will explain the court's approach to interpretation of the 1971 Act and recommend the approach the court should take in the future when confronted with unresolved issues.

Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Association involved a contract between a translator station⁹ (Watonwan) and a television station (KAAL). The contract provided that the translator station would not broadcast any national programming that duplicated programming broadcast by KAAL.¹⁰ KAAL was an ABC television network affiliate.¹¹ When ABC-TV switched its Twin Cities affiliate to KSTP, Watonwan chose to continue transmitting the KSTP signal, thus duplicating some programming provided by KAAL in violation of its contract.¹² KAAL brought suit to enforce the contract.¹³ Watonwan raised the state antitrust laws as a defense.¹⁴ The trial court ordered Watonwan to comply with the contract.¹⁵

On appeal the supreme court interpreted and applied three provisions of the 1971 Act. First, relying on federal case law and the Missouri Supreme Court's interpretation of a similar statutory exemption, the court denied the television industry statutorily exempt status under the 1971 Act because the television industry is not "regulated" under a pervasive federal regulatory scheme nor is the nonduplication agreement specifically "permitted" by the Federal Communications Commission (FCC).¹⁶ Second, the court

offenses. The state's burden of proof is less stringent than in the "rule of reason" cases. Since borderline or difficult cases are seldom pursued past the preliminary investigation stage the likelihood of settlements is great. See S. KILGRIFF, *supra* note 4, at 184; A. MACLIN, *supra* note 6, at 67-68.

9. "A translator station is essentially an antenna which picks up and rebroadcasts stations which cannot be otherwise received by individuals in the locality." 294 N.W.2d at 301.

10. *Id.*

11. *Id.*

12. *Id.* at 302.

13. *Id.*

14. *Id.*

15. *Id.* at 301.

16. *Id.* at 305-06; see *infra* notes 24-44 and accompanying text.

The 1971 Act provides: "Nothing contained in sections 325D.49 to 325D.66, shall apply to actions or arrangements otherwise permitted, or regulated by a regulatory body or officer acting under statutory authority of this state or the United States." MINN. STAT. § 325D.55(2) (1982) (previously MINN. STAT. § 325.8017(2) (1978)). The 1971 Act,

held that the disputed contract did not violate the 1971 Act's per se rule against refusal to deal.¹⁷ Finally, the court determined that the contract did not constitute an unreasonable restraint of trade under the 1971 Act, treating the question as a fact determination and deferring to the lower court's finding which were not clearly in error.¹⁸ The following discussion considers these holdings seriatim.

After finding it unnecessary to await FCC determination of the validity of the contract,¹⁹ the Minnesota court considered KAAL's

cited as MINN. STAT. §§ 325.8011-.8028 (1978) in *Watowan*, was renumbered by the Revisor of Statutes in 1980. The renumbering did not affect the substance of the 1971 Act. This Note will cite to the present section numbers and indicate parenthetically the 1978 section numbers when helpful.

17. 294 N.W.2d at 306-07; *see infra* notes 45-60 and accompanying text. Section 325D.53 of the 1971 Act provides a list of actions that, if proven, are per se unreasonable restraints of trade and unlawful. The specific provision considered in *Watowan* states, "[T]he following shall be deemed to restrain trade or commerce unreasonably and are unlawful: . . . A contract, combination, or conspiracy between two or more persons refusing to deal with another person." MINN. STAT. § 325D.53, subd. 1(3) (1982) (previously MINN. STAT. § 325.8015, subd. 1(3) (1978)).

18. 294 N.W.2d at 306-07; *see infra* notes 61-63 and accompanying text. The court construed the section of the 1971 Act which provides that "[a] contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful." MINN. STAT. § 325D.51 (1982) (previously MINN. STAT. § 325.8013 (1978)).

19. 294 N.W.2d at 302-03. In determining there was no requirement to await a FCC determination regarding the validity of the contract, the court rejected three arguments. The doctrine of "primary jurisdiction," considerations of comity, and matters of convenience were held insufficient to compel the court to defer to the federal agency. *Id.*

To promote the effectiveness of administrative agencies the United States Supreme Court developed the doctrine of "primary jurisdiction." Coordination between agencies and the judiciary was perceived to promote the ends to which both strive. *See* *United States v. Morgan*, 307 U.S. 183, 191 (1939). The doctrine compels courts to avoid "passing over" agencies when cases involve "issues of fact not within the conventional experience of judges or . . . requir[e] the exercises of administrative discretion." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). Minnesota has expressly adopted the federal interpretation of the doctrine. *See State ex rel. PCA v. United States Steel Corp.*, 307 Minn. 374, 380, 240 N.W.2d 316, 319 (1976).

The "primary jurisdiction" doctrine was not applicable in *Watowan* for two reasons. First, FCC approved actions are not insulated from the reach of antitrust statutes. 294 N.W.2d at 302; *see* *United States v. RCA*, 358 U.S. 334, 348-50 (1958). Second, the question on which the FCC would rule differed from the issue facing the court. The FCC would have ruled on the validity of the contract under regulations promulgated by the agency. The *Watowan* court faced the issue of whether the contract violated provisions of the state antitrust laws. *See* 294 N.W.2d at 302-03.

Practical considerations precluded the use of comity and convenience as grounds to await an FCC decision. *Watowan's* claims were on appeal before the FCC at the time of the court's consideration of the case. The FCC appeal sought a new agency policy prohibiting voluntary nonduplication protection agreements between translators and their primary stations. The probability of a long delay before a final decision by the FCC and the improbability that *Watowan* would prevail convinced the court that waiting for such a decision was not required. *See id.*

defense that the nonduplication agreement was beyond the reach of the antitrust statute.²⁰ The 1971 Act exempts "actions or arrangements otherwise *permitted*, or *regulated* by any regulatory body or officer acting under statutory authority of this state or the United States."²¹ No prior Minnesota Supreme Court decision addressed this provision,²² so the court turned to federal case law,²³ the Missouri Supreme Court's interpretation of a similar provision in that state's antitrust statute,²⁴ and the suggestion of a commentator²⁵ to interpret the Minnesota statute.

The court articulated the principle that exceptions to antitrust laws should be narrowly construed to effectuate the competitive purposes of the statute.²⁶ It then focused on the meanings of "regulated" and "permitted" in the Minnesota statute. To define "regulated," the court resorted to federal cases concerning conduct by federally regulated firms, and adopted the suggested principle that antitrust immunity cannot be inferred in the absence of pervasive agency regulation.²⁷ Since FCC regulation is not a "pervasive regulatory scheme," the actions of the stations were found nonexempt.²⁸

20. See 294 N.W.2d at 305.

21. MINN. STAT. § 325D.55(2) (1982) (emphasis added).

22. See 204 N.W.2d at 305.

23. *Id.* at 305-06. In *Watowan* the court relied on several United States Supreme Court decisions to interpret the Minnesota statutes. *Id.* at 305-06. The reliance on federal case law is significant. The 1971 Act does not expressly instruct courts to look to federal case law when interpreting the state statute. At least one state's antitrust statute so provides. See MO. ANN. STAT. § 416.141 (Vernon 1979).

There are advantages to relying on federal precedent. First, such reliance provides a large body of precedent on which state courts can draw, promoting consistency and predictability in the interpretation of antitrust laws. Second, fashioning new principles and applications of antitrust law could strain the resources and capabilities of state courts. Reliance on the well-developed principles and theories of federal antitrust law minimizes this possibility. However, there are two disadvantages to this approach. First, one purpose of state antitrust statute is to develop state policies addressing local problems and concerns. Federal law may ignore or cloud distinctively local concerns. Second, federal precedent may be confused, contradictory, or inapplicable, and therefore, not helpful. See *infra* notes 65-68 and accompanying text.

24. See 294 N.W.2d at 306. The court discussed and relied upon the Missouri Supreme Court's decision in *Fischer, Spuhl, Herzwurm & Assocs. v. Forrest T. Jones & Co.*, 586 S.W.2d 310 (Mo. 1979) (construing MO. ANN. STAT. § 416.041.2 (Vernon 1979)).

25. See 294 N.W.2d at 305. The court relied on the interpretation of the 1971 Act discussed in Note, *supra* note 1, at 939-40.

26. 294 N.W.2d at 305; see *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11 (1976).

27. 294 N.W.2d at 305-06.

28. See *id.* at 306. In *United States v. RCA*, 358 U.S. 334 (1959), the Supreme Court resolved the issue of whether the "primary jurisdiction" doctrine barred judicial determi-

The second prong of the exemption asks whether the challenged action is "permitted" by a regulatory agency. To interpret the statute the court resorted to the state action doctrine, initially developed by the United States Supreme Court,²⁹ and recently adopted by the Missouri Supreme Court in a case which interpreted the Missouri antitrust statute that contains the words "expressly approved" in place of "permitted."³⁰ The *Watowan* court concluded that actions must be "required or specifically permitted by the government" in order to be exempt.³¹

After *Watowan* the interpretation of the exemption provision in the 1971 Act remains unclear. In defining the statutory terms "regulated" and "permitted," the Minnesota court borrowed from two distinct federal antitrust doctrines. The definition of "regulated" is taken from federal antitrust doctrine defining the extent of antitrust immunity granted to a *federally* regulated firm. To define "permitted," the court borrowed from federal antitrust law defining the antitrust immunity granted to a *state* regulated firm. The two doctrines are related in the sense that in both cases a government directs an action inconsistent with the antitrust laws thereby implicitly determining that the role of competition should to some extent be displaced. However, the precise issue presented and the analytical frameworks adopted are somewhat different. If the governmental action is federal, the analytical issue is whether

nation of antitrust violations when the allegedly illegal actions had been taken with FCC approval. *Id.* at 346-52. The Court held that the doctrine was inapplicable and that defendant's actions were within the purview of the antitrust laws. *Id.* at 350. Although the television and radio industries are heavily regulated there is "no pervasive regulatory scheme and no rate structure to throw out of balance, and sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." *Id.*; see also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

29. The "state action" doctrine as applied by the Supreme Court excludes actions taken pursuant to state authority from the purview of the federal antitrust laws. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Parker v. Brown*, 317 U.S. 341 (1943).

30. See *Fischer, Spuhl, Herzwurm & Assocs. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979); compare MO. ANN. STAT. § 416.041.2 (Vernon 1979) ("Nothing contained in the Missouri antitrust law shall be construed to apply to activities or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of this state or of the United States.") with MINN. STAT. § 325D.55(2) (1982) (previously MINN. STAT. § 325.8017(2) (1978)) ("Nothing contained in [the Minnesota antitrust laws] shall apply to actions or arrangements otherwise permitted, or regulated by a regulatory body or officer acting under authority of this state or the United States.")

31. 294 N.W.2d at 306.

the legislation authorizing the action is an "implied repeal" of the antitrust laws. When state action is involved, more complex questions of federalism arise.³² Intermingling the two federal antitrust doctrines in interpreting the same provision of the 1971 Act may lead to confusion.³³

The *Watonwan* court developed neither doctrine fully. In applying the federal antitrust doctrine defining antitrust immunity granted to a federally regulated firm, the Minnesota court focused totally on the "pervasiveness" of the regulation. Areeda probes this rationale:

To be sure, an agency continually and deeply involved in the comprehensive details of an industry is more likely to develop special insights into industry circumstances and into the economic implications of prohibiting challenged conduct. But the scope and intensity of a regulatory regime does not indicate the extent to which Congress intended to confer antitrust immunity or to vest the responsibility for competition in the regulators rather than the courts. The main issue is not the breadth of regulation within an industry, but the impact of regulation on the challenged conduct. Such determinations often demand a particularized inquiry into the history and purposes of the regulatory statute.³⁴

In other words the "pervasiveness" analysis is too conclusory to be sufficient; it should only be one relevant factor in determining the congressional intent to commit responsibility for an industry to an agency rather than to market forces.

The "state action" doctrine also was not fully developed in the *Watonwan* decision. After mentioning the Supreme Court cases of *Goldfarb v. Virginia State Bar*³⁵ and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,³⁶ the Minnesota court concluded that "the foregoing decisions indicate that the exemption from antitrust laws for government approved activities has generally been

32. L. SULLIVAN, *supra* note 7, § 235, at 719. *But see* L. SULLIVAN, *supra* note 7, § 238, at 737.

33. *See* *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60-61 (1982) (Rehnquist, J., dissenting).

34. 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* § 223b, at 137-38 (1978); *see id.* § 224a, at 144-45; *id.* § 224e, at 154; *National Gerimedical Hosp. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981). In *National Gerimedical* the Court commented, "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Id.* at 388, *citing* *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975).

35. 421 U.S. 773 (1975).

36. 445 U.S. 97 (1980).

limited to activities either requested or specifically permitted by the government."³⁷ This articulates only half the test for state action immunity. Under the federal cases, there can be no state action immunity without both (1) a clear state command to displace antitrust law and (2) active public supervision.³⁸ The requirement of active state supervision is a response to federalism concerns. The states, when the public interest so requires, should be able to define areas inappropriate for market control. On the other hand, Congress, through the Sherman Act, has dictated that the market should control private economic activity. The federal-state conflict is resolved through the active supervision that demonstrates both the state's commitment to regulatory oversight and prevents private activity unrestrained by competition or supervision.³⁹

A clearer understanding of the exemption provision of the 1971 Act will develop if the court chooses to interpret the provision in the light of either the state action immunity or the implied antitrust immunity for a federally regulated industry.⁴⁰ The Missouri Supreme Court adopted the former approach in *Fisher, Spuhl, Herzwurm & Associates v. Forrest T. Jones & Co.*⁴¹ The Missouri court interpreted a state antitrust statute that exempted "activities or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of this state or of the United States."⁴² The issue was whether certain insurance industry activities were regulated by the state and therefore exempt. The Missouri court avoided the confusion introduced by the Minnesota court and held that the entire statutory exemption "represents a codification of the 'state action' doctrine of the federal antitrust law."⁴³ Since all state regulation is subject to the federal state action doctrine in any event, it makes sense to follow Missouri's interpretation of the exemption provision and to view the exemption provision of the 1971 Act as a codification of the state action doctrine.⁴⁴

37. 294 N.W.2d at 306.

38. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); see 1 P. AREEDA & D. TURNER, *supra* note 34, § 213a, at 72; *id.* § 214a, at 83.

39. See 1 P. AREEDA & D. TURNER, *supra* note 34, § 213a, at 73.

40. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60-62 (1982) (Rehnquist, J., dissenting).

41. 586 S.W.2d 310, 313 (Mo. 1979).

42. *Id.* (enforcing MO. ANN. STAT. § 416.041.2 (Vernon 1979)).

43. *Id.* at 314.

44. But note that one commentator states that the legislative history indicates that a listing of statutes exempting industries from the state antitrust act was an alternative pro-

After determining there was no exemption, the *Watonwan* court considered the second major issue: the merits of the antitrust claims. Under the 1971 Act, refusal to deal constitutes a per se violation of the statute and can be criminally prosecuted if undertaken "willfully."⁴⁵ The Minnesota court applied this provision strictly, finding under the facts that the provision in the contract was "unlike the type of agreement classified as a refusal to deal."⁴⁶ The court stated a number of reasons for its finding:⁴⁷ First, the contract did not specifically refer to a particular station with whom *Watonwan* was forbidden to deal, but only to any station carrying ABC programming. Second, the contract did not prohibit the broadcasting of other stations' programming but only

vision of the model act on which the 1971 Act is based. This suggests the issue is one of legislative intent and the adoption of the federal case law on antitrust immunity for a federally regulated industry may be appropriate. See Note, *supra* note 1, at 939-40. On the other hand, the statute appears to reflect the prevailing thought at the time of enactment in 1971 that the state action exemption required only state involvement, the old *Parker v. Brown* holding. See *Parker v. Brown*, 317 U.S. 341 (1943). The holding of *Parker v. Brown* has been substantially narrowed by the Supreme Court since 1975 beginning with *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

45. MINN. STAT. § 325D.56(2) (1982) (previously MINN. STAT. § 325.8018 (1978)) provides:

Any person who is found to have willfully committed any of the acts enumerated in section 325D.53 [the per se violations section (previously § 325.8015)] shall be guilty of a felony and subject to a fine of not more than \$50,000 or imprisonment in the state penitentiary for not more than five years, or both.

The question that arises in connection with this provision is what is "willful." Minnesota Supreme Court decisions in non-antitrust cases indicate that the violator must intend to engage in the conduct and to commit the crime alleged. See *State v. Everson*, 286 Minn. 246, 248, 175 N.W.2d 503, 505 (1970) (to defraud by check defendant must be found to have intended to defraud person who cashed check). As defined by the Minnesota Criminal Code, intent means "the actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result." MINN. STAT. § 609.02, subd. 9(4) (1982).

The Supreme Court resolved the issue of intent in criminal prosecutions under the Sherman Act in *United States v. United State Gypsum Co.*, 438 U.S. 422 (1978). In light of the Minnesota Supreme Court's willingness to look to federal precedent when interpreting the state statute, the federal standard of intent provides insight into the standard to be applied in Minnesota. In *Gypsum* the Court distinguished between two levels of intent. The stricter standard required that the action be taken with the "conscious object" of producing illegal effects. The lesser standard required only "[k]nowledge that the proscribed effects would most likely follow." 438 U.S. at 445. The Court concluded that the lower standard, that of knowledge of probable consequences, is enough to find criminal liability in the antitrust area. *Id.* The Court noted that the general criminal definition of intent is appropriate for Sherman Act violations. Requiring proof of a conscious desire on the part of the violator would be unduly cumulative and burdensome on the prosecution. *Id.* at 447; see also 1 P. AREEDA & D. TURNER, *supra* note 34, § 310a.

46. See 294 N.W.2d at 306-07.

47. *Id.*

ABC programming carried by them. Third, the contract did not actually prohibit ABC programming because it was still available using KAAL's signal. Finally, the contract did not preclude other stations from broadcasting in the county by using facilities other than Watonwan's.

Rather than seizing the opportunity to elucidate the new statute, the Minnesota court failed to offer any authority, let alone any analytical framework, legal or economic, to justify its conclusory characterization that the nonduplication provision was "unlike the type of agreement classified as a refusal to deal." From the laundry list of facts presented, a possible inference is that the court did not find all the elements of a refusal to deal in the sense of *Fashion Originators' Guild of America v. F.T.C.*⁴⁸ and *Silver v. New York Stock Exchange*.⁴⁹ In these cases there were concerted efforts by traders at one level to inhibit competition by other traders on the same level by making it difficult for competitors to obtain needed suppliers, customers, or access to critical facilities. The *Watonwan* court apparently saw no concerted action at one level to cut out specific competitors, no clear purpose to do so, and no significant anticompetitive effect.

Even if these inferences are correct and thereby provide some insight into the analytical framework to be used in refusal to deal claims, the court ultimately failed to analyze the exclusivity provision in the KAAL-Watonwan contract in two respects. First, the court's analysis ignored the general legislative purpose of promoting competition which underlies both state and federal antitrust law. Second, the court failed to consider the specific intent of the Minnesota legislature in condemning as a per se violation all contracts between two or more persons refusing to deal with others.

The contract between KAAL and Watonwan appears to be an exclusive dealing contract involving a commitment by a distributor like Watonwan to distribute only the ABC programming of KAAL.⁵⁰ The principal objectives of exclusive dealing contracts are to foreclose the market opportunities of the seller's competitors and to assure a stable market for the seller.⁵¹

It is clear that the nonduplication provision in the KAAL-Watonwan contract constituted a restraint on intrabrand competi-

48. 312 U.S. 457 (1941).

49. 373 U.S. 341 (1963).

50. See L. SULLIVAN, *supra* note 7, § 163, at 471.

51. P. AREEDA, *ANTITRUST ANALYSIS* § 559, at 810-11 (3d ed. 1981).

tion among ABC stations. The severity of the restraint depended to some degree on the alternatives available to KSTP. It is not certain from the facts whether alternative means of distribution existed.⁵² Watonwan may have been KSTP's only access to this market. In any event, there is no indication in the court's discussion of any benign competitive purpose for the nonduplication provision. Was the restraint necessary or beneficial to promote interbrand competition?⁵³ Did it provide "economic advantage" to buyers and sellers in the form of cost savings?⁵⁴

The absence of any showing of benign competitive purpose simplifies the analysis of the nonduplication provision. The restraint, in the absence of such a showing, seems to fall within the language of Minnesota Statutes section 325D.53, subdivision 1(3), making agreements to refuse to deal with another person illegal *per se*.⁵⁵ A commentator points out that the statute does not require that parties to a refusal to deal be in competition.⁵⁶ Thus, the provision appears to outlaw vertical boycotts such as exclusive dealing or requirements contracts. The legislative history supports such a construction.⁵⁷

Characterization of *per se* offenses becomes a problem only in cases where there may be plausible competitive benefits. As indicated by the Supreme Court in *Broadcast Music, Inc. v. CBS*:⁵⁸

[I]n characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed "to increase economic efficiency

52. 294 N.W.2d at 307.

53. See P. AREEDA, *supra* note 51, § 559, at 811-12.

54. See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 333-35 (1961).

55. MINN. STAT. § 325D.53, subd. 1(3) (1982) (previously MINN. STAT. § 325.8015, subd. 1(3) (1978)) provides:

Subdivision 1: Without limiting § 325D.51, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

(3) A contract, combination, or conspiracy between two or more persons refusing to deal with another person, except a refusal to deal by associations, trading boards, or exchanges when predicated upon a failure to comply with rules of membership.

56. Note, *supra* note 1, at 932.

57. *Id.*

58. 441 U.S. 1 (1979).

and render markets more, rather than less, competitive.”⁵⁹

The Supreme Court indicated an abbreviated rule of reason analysis should satisfy this inquiry.⁶⁰

In the *Watowan* decision, no such analysis was evident nor was any benign competitive purpose for the restraint readily apparent. The refusal to deal should have been characterized as a per se offense pursuant to the statute.

The third claim raised by *Watowan* was based on the provisions of the 1971 Act statute which forbid actions constituting an “unreasonable restraint of trade.”⁶¹ This provision codifies the “rule of reason” doctrine developed by the United States Supreme Court prior to the passage of the 1971 Act.⁶² The *Watowan* court’s treatment of this issue gives almost no insight into the standards applicable under Minnesota law. The court held that under the facts of the case, the lower court’s determination was not in clear error as a matter of law, thus, its findings must be accepted.⁶³ No evidence indicating the contract’s impact on the advertising market was presented at trial.⁶⁴ The lack of evidence precluded a well-reasoned decision.

In relying on federal and another state’s case law in *Watowan*, the Minnesota Supreme Court adopts one commentator’s view of the desirable method of interpreting the state antitrust statute.⁶⁵ Where there is no conflicting Minnesota case law, no clear conflict between state and federal law, and no purely procedural question, the Minnesota Supreme Court should turn to precedent in foreign jurisdictions to maintain consistency and predictability among the antitrust laws of the various jurisdictions.⁶⁶ This view would prevent conflicts and provide businesses with a more reasonable opportunity to comply with federal and state law, thus advancing the purpose of antitrust statutes.⁶⁷ The Minnesota Antitrust Act of 1971 codifies much pre-1971 federal case law and follows the pro-

59. *Id.* at 19-20 (footnote, citations omitted).

60. *Id.* at 19 n.33.

61. MINN. STAT. § 325D.51 (1982) (previously MINN. STAT. § 325.8013 (1978)). The statute states: “A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful.” *Id.*

62. *See* *Standard Oil Co. v. United States*, 221 U.S. 1 (1910).

63. 294 N.W.2d at 307.

64. *Id.*

65. *See* Note, *supra* note 1, at 939-40.

66. *Id.*

67. *Id.*

visions of the Sherman Act to a significant degree.⁶⁸ In light of the similarity of the statutes, in the absence of a clear conflict with federal law, states should look to federal precedent and avoid unnecessary divergence from common practice.⁶⁹

68. MINN. STAT. § 325D.51 (1982) ("A contract, combination, or conspiracy between two or more persons *in unreasonable restraint* of trade or commerce is unlawful") (emphasis added). This provision in a codification of the federal "rule of reason" doctrine. MINN. STAT. § 325D.53 (1982), which lists *per se* violations, incorporates § 3 of the Sherman Act, 15 U.S.C. §§ 1-7 (1977). The Minnesota provisions are, however, much more detailed, listing numerous specific actions which are deemed *per se* illegal. One Minnesota district court has specifically held that the 1971 Act is a codification of federal antitrust law. *State v. Robert L. Carr Co.*, 1978-1 Trade Cas. (CCH) ¶ 61,983, at 74,185 (Minn. 5th Dist. Ct. 1978).

69. See 1 P. AREEDA & D. TURNER, *supra* note 34, § 208, at 58. When enacting the 1971 Act, the legislature left out a clause providing that federal judicial decisions are to control interpretation of the state statute. The Uniform State Antitrust Act of 1973 contains no express language making federal precedent controlling in the interpretation of the state statute. However, the Commissioner's Prefatory Note states, "Since the Act parallels the federal antitrust structure in its basic prohibitions, the following of federal antitrust precedent should be encouraged." UNIF. STATE ANTITRUST ACT Commissioner's Prefatory Note, 7A U.L.A. 733 (1973). In addition, the Commissioner's Comments after sections 2, 3, 4, 6, 8, 9 and 10 contain references to federal statutory or case law. Section 2, dealing with unreasonable restraints of trade, expressly states in the Commissioner's Comments that the section makes available to the states "the relevant body of federal precedent." *Id.* at 736.