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**Motives of Non-Profit Organizations and the Antitrust Laws**

*Frank J. Nawalanic*

At first glance, it would appear repugnant to equate or associate non-profit organizations with the antitrust laws. This reaction stems from a clash between the basic definition of a non-profit organization—one that is not intended to and does not produce monetary gain except as reasonable salaries paid employees for actual services rendered—with the basic purpose of the antitrust laws: to insure competitive business. On its face, a non-profit organization would hardly be guilty of conspiring to restrain trade because its purpose is not so oriented.

Yet non-profit organizations have recently demonstrated a rapid growth into big business because of tax advantages afforded such organizations. Along with such growth, abuses of the non-profit status also have occurred. Simply put, some men are using altruistic form to further their financial gain.

Non-profit status has traditionally been delegated and regulated by state law. It is becoming increasingly clear that state law is expanding the types of organization allowed non-profit status, thus inviting more abuses of the status to exist. This is exemplified by New York's "Not-For-Profit Corporation Law" and recent indications by Pennsylvania and California legislators of their contemplation of enacting similar statutes.

It is with this understanding that the applicability of the antitrust laws to non-profit corporations will be considered.

**Development and Purpose of the Antitrust Laws**

Any discussion of the antitrust laws is premised on the belief that it is socially acceptable for an individual to compete in trade and com-

[Editor's Note: This paper, written for a seminar course on Non-Profit Organization Law at C. S. U. College of Law early in 1971, will be the basic material to be contributed by the writer as a chapter in the Third Edition of H. Oleck, *Non-Profit Corporations*, etc. (Prentice-Hall, Inc.) which is now in preparation.]

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2 "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, Congress was dealing with competition, which it sought to prevent." FTC v. Sinclair Refining Co., 261 U. S. 463, 475-76 (1923). See also, United States v. South-Eastern Underwriters Ass'n., 322 U. S. 533, 559 (1944).


4 *Supra* note 1 at 209.


merce for profit. However, engagement in trade is principally due to selfishness and not selflessness. It naturally follows that the selfish desire to engage in trade for profit would injure the public if left unchecked. History shows that such basic considerations as these led the ancient empires of Sumeria, Babylonia, Athens, and Rome to initiate checks on competition to prevent destruction of competitors.

In England and America, regulation of trade practices began to develop under a common law doctrine. One author has divided the trade practices regulated under common law into four areas: (1) unfair trade practices; (2) unfair competition; (3) unreasonable restraint of trade and (4) combinations or agreements to monopolize.

However, the common law proved to be incapable to handle the competitive restraints of the 19th century, namely the trusts, pools, and holding companies resulting and continuing from the large-scale business ventures formed to feed and supply the armed forces during the Civil War. First, the common law did not develop as a uniform body; and second, contracts in restraint of trade at common law were unenforceable; they did not give rise to a civil cause of action and were not criminally unlawful.

Also, state legislation proved only partially successful because the interstate activities of the "trusts" were largely beyond the reach of intrastate activity. Further, some state legislation even facilitated the growth of holding companies. It was in this background that the Sherman Act came into existence.

Contrary to the views of at least one well-known authority, there is both legislative and judicial support for the proposition that the Sherman Act codified the common law, although in doing so it was given a far broader reach than the common law prohibitions against trade restraint.

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7 J. Van Cise, Understanding the Antitrust Laws 1 (1970 ed.).
8 W. & A. Durant, The Lesson of History 54 (1968); J. Van Cise, supra note 7 at 3: by legislative acts such as the Homestead Act and constitutional rewards in the form of limited monopolies to inventors and authors of original works, our government implicitly accepts such premise as true.
9 J. Van Cise, supra note 7 at 3.
10 V. Kalinowski, 16 Bus. Org. Antitrust & Trade Regulation 1-39, § 1.03.
11 J. Van Cise, supra note 7 at 14, 15. See also E. Kinter, An Antitrust Primer 1-15 (1964).
12 V. Kalinowski, supra note 10 at 1-35.
13 J. Van Cise, supra note 7 at 15.
14 E. Kinter, supra note 11 at 10.
16 See 21 Cong. Rec. 1765 (1890).
17 Standard Oil Co. v. United States, 221 U. S. 1 (1911); Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940).
18 Loewe v. Lawlor, 208 U. S. 274 (1908); Northern Sec. Co. v. United States, 193 U. S. 197 (1904); Cases cited note 17 supra.
An Approach to the Non-Profit Organization — Antitrust Analysis

At common law, the purpose of the defendant organization was a factor to be weighed in determining the legality of the trade restraint asserted. Hence, the approach taken here with respect to non-profit organizations will be to determine if the nature of such organizations will result in an antitrust immunity or exemption and if so, to ascertain to what extent the immunity or exemption exists. If no immunity exists, it is assumed that the antitrust laws are equally applicable to profit and non-profit organizations alike.

Antitrust Exemptions Relevant to Non-Profit Organizations.

According to this analysis, it is more logical to first set forth the nature and extent of exemptions granted to certain characteristically non-profit activities before applying antitrust "elements" by rote. Noticeably absent from considerations are trade associations which have been deleted for obvious reasons and publicly-regulated utility companies which have been deleted because of the complex state and federal laws governing such companies.

A. Statutory Exemptions

1.) Agricultural Cooperatives. Statutory antitrust exemptions for agricultural cooperatives are found in

a.) Section 6 of the Clayton Act declaring that non-profit agricultural organizations are not to be considered "illegal combinations or conspiracies in restraint of trade"; 20

b.) Section 1 of the Capper-Volstead Act (sometimes referred to as the "Magna Carta" of cooperatives) authorizing persons engaged in the production of agricultural products to act together in associations with or without capital stock and to collectively process, prepare for market, handle and market such products; 21

c.) Section 2 of the Capper-Volstead Act authorizing the Secretary of Agriculture to prohibit any agricultural association from monopolizing or restraining trade. 22

The policy underlying these exemptions is to permit the individual farmer to compete effectively in the concentrated markets in which he buys and sells by organizing into cooperative associations which may be non-profit or profit in nature. At the turn of the century, the

24 H. Oleck, NON-PROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS 560 (2nd ed. 1965).
small farmer may well have been deserving of such special status, but since the statutory exemption was passed, cooperatives have considerably grown in size and number.25

Whatever the justification for such policy, three Supreme Court decisions have interpreted the cooperative statutory exemption. The first decision was rendered in *United States v. Borden Co.*26 which set forth the "Other Person's Rule" holding that the exemption to agricultural cooperatives did not extend to combinations or conspiracies in restraint of trade between an agricultural cooperative and others who would not qualify as such. The second decision rendered in *Maryland and Virginia Milk Producers Association v. United States*27 held that cooperatives could not engage in predatory trade practices. The third Supreme Court decision, *Sunkist Growers, Inc. v Winckler & Smith Citrus Products Co.*28 held that intra-enterprise conspiracy as applied to three separate cooperatives having substantially the same members were exempt from an antitrust violation despite allegations of conspiracy.

Hence, it appears settled that the antitrust exemption given the agricultural cooperatives does not extend to predatory trade practices29 and that the power vested in the Secretary of Agriculture was not of exclusive or primary jurisdiction.30 On the other hand, several cases have held that because of the exemption, natural cooperative association growth may proceed without limitation even to the point of a total monopoly.31 The question of the statutory grant to employ common marketing agents has not yet been decided.32

Of possible interest is a criticized district court case33 permitting price fixing, normally a per se violation, between two non-profit dairy

27 362 U. S. 458 (1962). In the *Maryland* case a dairy cooperative attempted to purchase a dairy distributor. The dairy cooperative controlled 50 to 85% of the milk produced in the area. Held, that allegations of Sherman § 2 violation of illegal monopoly, that allegations of Sherman § 1 violation of illegal conspiracy and that allegations of Clayton § 7 violation of illegally acquiring dairy's business, all stated valid causes of action. 2370 U. S. 19 (1962).
31 Antitrust Developments, 1955-1968, supra note 23 at 210 notes that such practices have received FTC approval subject to express limitations against predatory acts, unlawful monopolization, acts in restraint of trade and undue enhancement of prices.
cooperatives. The court interpreted the statutes to arrive at this result, and it is not clear to what extent, if any, the decision rested on the fact that the alleged violators were non-profit associations.

2.) Labor Unions. In 1908, the Supreme Court in the Danbury Hatters case held that a boycott by labor organizations and their members to compel unionization of the boycotted manufacturer violated the Sherman Act. To counteract this decision, the Clayton Act, when passed in 1914, contained two sections exempting labor from certain antitrust prohibitions. The first section provided that labor was not a "commodity or article of commerce" and the organization of labor shall not be a violation of antitrust laws. The second antitrust exemption basically prevented any restraining order or injunction from issuing to prevent a labor dispute. In 1932, the Norris-LaGuardia Act broadened labor's exemption by expanding the definition of a labor dispute and forbidding injunctions from issuing in a wide variety of labor union activities.

The Supreme Court in the Allen-Bradley case held that the congressional purpose of the Sherman Act in preserving and advancing competition in a free market may at times conflict with the congressional purpose of the Norris-LaGuardia Act preserving the rights of labor to organize and better their working conditions through collective bargaining. In United States v. Hutcheson, the Supreme Court declared that the Sherman, Clayton, and Norris-LaGuardia Acts would have to be construed together to actively determine the status of labor's exemption in the antitrust area. Hence, the "Allen-Bradley doctrine" was formulated which held that a valid union objective could violate the antitrust laws if the means used to accomplish the objectives were beyond the scope of labor's exemption. As a result of such basic considerations, union activity restraining competition might be found as violations of the antitrust laws where the union:

a.) engages in violence or fraud which is intended to accomplish a direct commercial restraint;

b.) engages in activity not considered a labor dispute;

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54 Loewe v. Lawler, 208 U. S. 274 (1908).
57 29 U. S. C. § 113 (c) (1965).
60 "We have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the right of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." Id. at 806.
61 312 U. S. 219 (1941).
c.) combines or conspires with a non-labor group to effect a direct commercial restraint. 43

The law still remains in a state of flux insofar as standards are established to guide labor's conduct. The split of opinion is demonstrated in the United Mine Workers of America v. Pennington, 44 and in Associated Food Retailers v. Jewel Tea Company 45 decisions. Both cases were concerned with the basic collective bargaining agreement effected between the union and the company. In both instances, the majority opinion of three justices held that a labor union contract could be a violation of the antitrust act; three other justices maintained that the negotiation and agreements reached in collective bargaining afforded no consideration for an antitrust violation; and the three concurring justices in the Pennington case held that an industry-wide collective bargaining agreement violating the antitrust laws was prima facie proof of such violation. Notwithstanding such differences of opinion, it is reasonably concluded that the courts will allow the introduction of the bargaining agreement and negotiations as circumstantial evidence of an antitrust violation. 46

A recent Supreme Court case of interest 47 concerned the standard of proof applied in an antitrust case against labor unions. The majority decision of five justices applied the usual "preponderance of the evidence" standard of proof to an antitrust charge asserted against a labor union. The four-justice dissent would apply the "clear proof" requirement of Section 6 of the Norris-LaGuardia Act 48 to all elements of the union's antitrust violation, whereas the majority interpreted the statute to apply only to the union's action in authorizing or ratifying the alleged unlawful contract.

3.) Non-Profit Institutions. In 1938, Congress specifically exempted certain non-profit institutions from the price discrimination provisions of the Robinson-Patman Act. 49 The legislation was prompted in good part by a letter from the president of the Hospital Bureau of Standards and Supplies calling attention to hospital supply bills increasing 20

43 Supra note 23 at 206.
45 Jewel Tea Co. v. Associated Food Retailers, 381 U. S. 761 (1965).
48 "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U. S. C. § 106 (1965).
percent as a result of the passage of the Robinson-Patman Act eliminating price discrimination. Both the Senate and the House reasoned that a price discrimination exemption should apply to eleemosynary institutions.

Only three cases to date have considered the non-profit exemption. In the General Shale Products case, the statute was construed as not repealing price discrimination exemptions but adding to existing exemptions because such exemptions were provided for after the passage of the Robinson-Patman Act. Hence, the court held that the exemptions are specifically limited to those set forth in the non-profit statute and the statute would not be construed otherwise. In Students Book Co. v. Washington Law Book Co. the court held that the non-profit statute was not applicable in a price discrimination suit to sales at a university campus bookstore because, "the books sold were not for the use of the universities, but for resale at profit." Finally, in Logan Lanes Inc. v. Brunswick Corp. the court came to grips with the statute. In that case, summary judgment was granted dismissing a suit brought by a private bowling alley against a manufacturer of bowling equipment for discriminatingly selling similar equipment at a lower price to a state university for use in the university's student union. The reduced price sales allegedly resulted in the private bowling concern having to charge higher prices for bowling than that charged by the university. The court held that the non-profit institution act prohibited maintenance of an antitrust action in this instance, stating that:

a.) the antitrust exemption was not limited to just the non-profit party (i.e., the purchaser) but also the seller, because every sale consummated has to have a seller and a buyer;

b.) interpreted the word "supplies" in the statute to include not only stock materials and provisions needed to carry on daily operations,

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but also "embraces anything required to meet the institution's needs, whether it is consumed or otherwise disposed of or, whether it constitutes or becomes part of, a material object utilized to enable the institution to carry on its activities".\(^{57}\)

c.) the purpose of the exemption "was undoubtedly to permit institutions which are not in business for a profit to operate as inexpensively as possible".\(^{58}\)

d.) even if the public were shown to have substantially used the university's bowling lanes, the exemption would still be applicable because the purchases of the bowling facilities were made by a non-profit institution for its own use and this was sufficient to comply with the statute;

e.) the facts showed a legitimate non-profit object of the university was accomplished by the purchase of the bowling facility.

In summary, if the non-profit character of the organization is compatibly coupled with the purchase of equipment which has some direct relation or correlation with the organization's nonprofit purpose, then a broad exemption to such organization under the Non-Profit Institutions Act will be applied.\(^{59}\) However, the holding that the public trade could substantially use the organization's facilities in direct competition with and to the detriment of a similar profit-making organization may be suspect, and it is submitted that if such facts ever do occur, the courts will rule that the purchase of such equipment by the non-profit organization was not made for its own use.

B. Judicial Exemptions

1.) \textit{State and Federal Government Action}. It should be obvious that the Federal Government cannot be held to violate the antitrust laws.\(^{60}\) But the Supremacy Clause of the Constitution\(^{61}\) did not make such conclusion obvious for state governmental action until \textit{Parker v. Brown}\(^{62}\) was decided in 1939. The Supreme Court held in the \textit{Parker case} that state government activities were not within the Sherman Act prohibitions.\(^{63}\) This does not mean that states can authorize or immunize violations of the Sherman Act by declaring such violations

\(^{57}\) \textit{Id} at 216.

\(^{58}\) \textit{Id}.

\(^{59}\) \textit{See also} Annot., 3 A. L. R. Fed. 996 for discussion of non-profit price discrimination exemption.


\(^{61}\) \textit{U. S. Const.}, art. VI, § 2.


\(^{63}\) "The Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain state action or official action directed by a state." \textit{Id} at 351.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." \textit{Id} at 352.
lawful.\textsuperscript{64} The state must actively regulate the business seeking antitrust immunity.

State regulation of business may be analogized to a broad spectrum with its middle occupied by those state-regulated businesses whose policy is neutral or silent with respect to restraints of trade. In such cases, there is no state antitrust immunity conferred.\textsuperscript{65} Cases clearly falling within the exemption at the far end of the spectrum must be:

a.) either created by the legislature or given government character and,

b.) directed and authorized by the same statute "to utilize anti-competitive means to achieve a specific governmental purpose."\textsuperscript{66}

To be considered at all within that part of the spectrum granting immunity, the entity or transaction must be mandated by legislative enactment.\textsuperscript{67}

Currently, there are two unresolved issues under this exemption. The first relates to an antitrust claim alleging that the state regulatory board is nothing more than a "strawman" for other interests.\textsuperscript{68} The second relates to an antitrust claim alleging that public authorities are part of the conspiracy; a situation not present in \textit{Parker}.\textsuperscript{69}

2.) \textit{Group Solicitation of Favorable Governmental Action}. Related to the above section on governmental immunity is the effect given to conspiring businessmen procuring legislative or executive action favorable to business activity under the assertion of political activity

\textsuperscript{64} Northern Securities Co. v. United States, 193 U. S. 197, 332, 344-347 (1903).

\textsuperscript{65} "No State can, by merely creating a corporation, or in any other mode, project its authority into other States and across the continent, so as to prevent Congress from exercising the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce," at 345.

\textit{See also} Parker v. Brown, 317 U. S. 341 (1943); Asheville Tobacco Bd. of Trade v. FTC, 263 F. 2d 502, 509 (4th Cir. 1959).


"The middle of the spectrum is occupied by cases in which the state has chosen to regulate a field, but state policy is neutral or silent with respect to restraint of trade. Since there is no conflict in such cases between state regulatory action and the policy of unfettered competition the courts have found no difficulty in denying antitrust immunity" at 31.

\textsuperscript{67} Id. at 1112. \textit{See also} Gas Light Co. of Columbus v. Georgia Power Co., 313 F. Supp. 860 (M. D. Ga. 1970) and cases cited therein.

\textsuperscript{68} In Allstate Insurance Co. v. Lanier, 361 F. 2d 870 (4th Cir. 1966), \textit{cert. denied} 385 U. S. 930 (1966) the court found that North Carolina's insurance rating bureau was actively supervised by the state and not challenged on appeal. The court then noted that "absent congressional action departing from the rule of \textit{Parker v. Brown} the North Carolina statutory plan is clearly valid" at 872. Note that insurance regulation is specifically left to the states in § 1 of the McCarran-Ferguson Act, 15 U. S. C. §§ 1011-1014 (1963). \textit{See also} W. Bachelder, \textit{State-Approved Transactions}, 33 A. B. A. \textit{Antitrust L. J.} 99, 103 (1967).

\textsuperscript{69} Harmon v. Valley National Bank of Arizona, 339 F. 2d 564 (9th Cir. 1964) (complaint alleging that attorney general is co-conspirator not subject to dismissal); E. W. Wigg-
rights. The question was decided by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, holding that joint efforts by businessmen organized in a trade association to procure favorable anticompetitive legislation was not a Sherman Act violation. Rationale for the *Eastern Railroad* holding was that the Sherman Act did not invade the area of legitimate political activity and to do so would encroach on the right of group petition, a freedom appended to the Bill of Rights. This doctrine was reiterated and broadened in *United Mine Workers v. Pennington*, the court holding that a union's actions in concert with large coal companies to influence a public official to set minimum wages for government purchases of coal was not an antitrust violation.

The lower courts have interpreted this exemption to cover such situations as the bribing of a state official to use his position to impose a trade restraint harmful to the plaintiff; where the conduct complained of violates a valid state penal statute; or conduct giving rise to a valid state cause of action. More recently, the doctrine has been limited or eroded and exceptions to the rule have been found to apply to instances where false information was submitted to government officials carrying out official duties not subject to antitrust violation); Hecht v. Pro-Football, Inc., 312 F. Supp. 472 (D. C. Cir. 1970) (no conspiracy with Armory board because board is governmental agency and exempt).

In *United States v. Association of American Railroads*, 4 F. R. D. 510, 527 (D. Neb. 1945), this issue was considered with the court holding that group solicitation activities, lawful in themselves under the first amendment of the Constitution, may become unlawful if done in concert within a broad scheme of conspiracy.

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See also dissent in *United States v. Robel*, 389 U. S. 258 283 n. 1 (1967), saying that the right of association is an extension of protection afforded by the First Amendment and whether the right to associate is an independent First Amendment right is yet to be decided.


*Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act,*" at 670.


officials,\textsuperscript{78} to efforts influencing the sale of products to public officials acting under competitive bidding statutes,\textsuperscript{79} to efforts to utilize government powers conferred upon a private agency for illegal ends,\textsuperscript{80} and to attempts to use illegal means to influence governmental officials.\textsuperscript{81} Nor will the doctrine be extended to cover judicial and administrative adjudicative proceedings.\textsuperscript{82}

3.) The Professions.

a.) Professional Sports. In 1922, the Supreme Court in \textit{Federal Baseball Club v. National League}\textsuperscript{83} held that baseball was exempt from the antitrust laws. The exemption was affirmed in \textit{Toolson v. New York Yankees, Inc.}\textsuperscript{84} in 1953, and more recently (1971) in \textit{Salerno v. American League of Professional Baseball Clubs.}\textsuperscript{85} While granting an exemption to baseball, the Supreme Court denied such exemptions to boxing\textsuperscript{86} and football.\textsuperscript{87} Lower courts have refused to recognize exemptions for professional basketball,\textsuperscript{88} hockey,\textsuperscript{89} bowling,\textsuperscript{90} and golf.\textsuperscript{91}

As a result of such decisions, a limited statutory exemption was enacted in 1961\textsuperscript{92} permitting the professional teams to pool their television rights. Recently, the FCC has indicated that it will initiate an investigation of practices conducted under this exemption.\textsuperscript{93}

Of interest only is the rationale underlying the baseball exemption. At least two theories are plausible. The one most commonly subscribed to is that the court held baseball to be \textit{intrastate} commerce and therefore immune.\textsuperscript{94} However, in the \textit{Toolson} and \textit{Radovich} cases, the

\textsuperscript{78} Woods Exploration & Prod. Co. v. Aluminum Co. of America, 497 Antitrust & Trade Regulation Reporter, A-1, D-1 (9th Cir. 1971).
\textsuperscript{81} Sacramento Coca-Cola Bottling Co., Inc. v. Chauffeurs, Teamsters, and Helpers Local No. 150, 505 Antitrust & Trade Regulation Reporter A-1, (9th Cir. 1971).
\textsuperscript{82} Trucking Unlimited v. California Motor Transport Co., 432 F. 2d 755 (9th Cir. 1970).
\textsuperscript{91} Deesen v. Professional Golfers' Ass'n. of America, 358 F. 2d 165 (9th Cir. 1966), \textit{cert. denied}, 385 U. S. 846 (1966).
\textsuperscript{92} 15 U. S. C. §§ 1921-94.
\textsuperscript{93} \textit{See} 501 \textit{ANTITRUST & TRADE REGULATION REPORT} A-10 (Feb. 23, 1971).
\textsuperscript{94} "The business is giving exhibitions of baseball, which are purely state affairs." Federal Baseball Club of Baltimore Inc. v. National League of Professional Baseball Clubs, 259 U. S. 200, 208 (1922).

(Continued on next page)
court referred to congressional legislation as the means to subject baseball to the Federal antitrust laws.\textsuperscript{95} Because such legislation would have to rest on congressional powers conferred by the commerce clause, baseball would then have to be involved in interstate commerce and there would be no logical basis for an exemption. Since baseball is exempt from the antitrust laws, the reason may be found in a reluctance to upset the internal mechanisms of an organization allowed to develop with an immunity toward the antitrust laws.\textsuperscript{96} Another reason for such exemption may simply be termed stare decisis.\textsuperscript{97} The problem of baseball's exemption may become moot by recent introduction of bills in both the Senate and the House doing away with baseball's special status.\textsuperscript{98}

b.) The Learned Professions. Another judicial exemption, if it can be so classified, exists for the learned professions. The basis for such exemption springs from a negative or reluctant application of the "trade or commerce" element of the Sherman Act to the learned professions.

It can be logically asserted that "trade or commerce" in the Sherman Act is defined in accordance with the meaning given the term at common law.\textsuperscript{99} In an early common-law decision, The Nymph, rendered by Justice Story, "trade" excluded professions and the liberal arts,\textsuperscript{100} and Supreme Court cases have cited this language with ap-

(Continued from preceding page)

"The controlling consideration in Federal Baseball and Hart was, instead a very practical one—the degree of interstate activity involved in the particular business under review."


\textit{See also} 1 CALMANN, UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES, 326-330, \S 15.2 (h).

\textsuperscript{95} "We think that if there are evils in this field [baseball] which now warrant application to it of the antitrust laws it should be by legislation."


"But Federal Baseball held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We therefore conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision."


\textsuperscript{97} R. Pogue, \textit{The Rationale of Exemptions from Antitrust}, 19 A. B. A. ANTITRUST SECTION 313 at 327.

\textsuperscript{98} \textit{See} 458 ANTITRUST & TRADE REGULATION REPORT A-16 (April 21, 1970) for latest legislative attempts to solve the problem.

\textsuperscript{99} Standard Oil Co. v. United States, 221 U. S. 1 (1910).

"It is certain that those terms at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question," at 51.

\textsuperscript{100} "... the word 'trade' is often and, indeed, generally used in a broader sense, as equivalent to occupation, employment or business, whether manual or mercantile, wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."

The Nymph, 18 F. Cas. (No. 10,388) 506, 507 (C. C. Me. 1834).
proval. Thus, at least in dicta, the learned professions were immune from antitrust violations.

In 1940, the appellate court for the District of Columbia in the first American Medical Association case held that the field of medicine was trade and can be subjected to a "restraint of trade". In the second A.M.A. case the Supreme Court reserved decision on the definition of trade to include medicine, saying that if the purpose and effect of the alleged conspiracy was a restraint of business (i.e., a non-profit organization rendering group health services) this was sufficient for an antitrust violation. The present posture of the lower court decisions on this point are at variance. Further, the effect of state statutes declaring that professions are not trades confuses the issue.

The rationale afforded the professions for their special consideration is vague. The Supreme Court noted that ethical considerations of the relationships between patient and physician are quite different from usual considerations involving ordinary commercial matters, and that such forms of business competition may be demoralizing to the ethical standards of a profession which would directly affect the community.

The extent of the immunity given to the learned professions is likewise vague. The Supreme Court has indicated that external activities of a professional group as opposed to internal activities receive different antitrust considerations. Internal activities, such as revoking membership, will be treated differently if membership

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102 "Of course medical practitioners . . . follow a profession and not a trade, are not engaged in the business of making or vending remedies but in prescribing them." Federal Trade Commission v. Raladam Co., 283 U. S. 643, 653 (1930).
103 United States v. American Medical Ass'n., 110 F. 2d 703 (D. C. Cir. 1940), cert. denied, 310 U. S. 644 (1940).
104 American Medical Ass'n. v. United States, 130 F. 2d 233 (D. C. Cir. 1942), aff'd 317 U. S. 519 (1943).
105 "Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. In the light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question." Id. at 528.
is mandatory by state regulation, than if membership is voluntary.111 The courts have always been reluctant to delve into internal operations of private associations,112 and their reluctance will not be significantly changed because of antitrust allegations.113 External activities are different. Hence, an agreement among "learned professionals" to fix commodity prices is an antitrust violation;114 likewise, imposition of a boycott against fellow professionals is an antitrust violation.115

Finally, another reason for the exemption may be found in the non-economic purpose of the learned professions. Briefly, there are common-law decisions holding that such persons as clergymen and educators, because of their status and non-commercial purpose, could commit an unactionable restraint of trade.116 Recently, this doctrine is apparently finding its way into the antitrust cases. Probably, the most noted case is Marjorie Webster Jr. Col. v. Middle States Ass'n. of C.&S.S.117 where plaintiff, a profit-making educational institution alleged a conspiracy violation by defendant, a non-profit educational corporation, for refusing plaintiff membership because plaintiff was not a non-profit organization. On appeal, the court recognizing that "lack of predatory intent is not conclusive . . . on antitrust liability," nevertheless held that the nature of defendant's activities "require a finer analysis" and "absent an intent or purpose" to restrain trade, the alleged conspiracy was at most an "incidental restraint of trade"

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111 See Annot., at 316 (1952), 89 A. L. R. 2d 976; See Annot., 6 L. Ed. 2d 1328; See also recent Supreme Court cases, Baird v. State Bar of Arizona, 401 U. S. 1 (1971); In re Stolar, 401 U. S. 23 (1971); Law Students Research Council v. Wadmond, 401 U. S. 154 (1971) all turning on constitutional guarantees and due process considerations. Note Justice Black's dissent in Law Students Research Council v. Wadmond at 771 "I must repeat once again that consistently with due process of law, no profession can be turned over to the whim of their present or prospective competitors to determine their right to practice."

112 H. Oleck, supra note 24 at 371-382. See also Deesen v. Professional Golfer's Ass'n. of America, 358 F. 2d 165 (9th Cir. 1966) wherein membership rules were looked into for reasonableness where golfer's livelihood depended on professional status.

113 First, for a Sherman Act violation, the interstate commerce requirement has to be overcome which is difficult for an individual seeking membership in an association to prove. See Riggal v. Washington County Medical Society, 249 F. 2d 266 (8th Cir. 1957) cert. denied, 355 U. S. 954 (1958); Spears Free Clinic and Hospital for Poor Children v. Cleere, 197 F. 2d 125 (10th Cir. 1952); Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959). Second, if a state antitrust action is asserted then the court relies on a "hands off" policy. See Hubbard v. Medical Services Corp. of Spokane County, 367 F. 2d 1003 (Wash. 1962); Washington Osteopathic Medical Ass'n. v. King County Medical Service Corp., 493 ANTITRUST & TRADE REGULATION REPORTER A-17 (Wash. Sup. Ct. 1971).

114 See United States v. Utah Pharmaceutical Ass'n., 201 F. Supp. 29 (D. Utah 1962) and the reference made by the court to the proposition that if commodities were sold as part and parcel of professional services the case would take a different complexion. See also, Northern California Pharmaceutical Ass'n. v. United States, 306 F. 2d 379 (9th Cir. 1962) for almost identical fact situation with the same holding.

115 Hubbard v. Medical Services Corp. of Spokane County, 367 P. 2d 1003 (Wash. 1962).


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not actionable under the Sherman Act. On the state plane, a recent Georgia decision held that a school board's action in excluding all but one musical instrument store from participation in its band program was, under the facts, not an abuse of discretion or violation of any law.

Antitrust Violation "Elements" Applied to Non-Profit Organizations

Because the antitrust laws are complex bodies of various statutory laws, it is perhaps a misnomer to refer to "elements" of an antitrust violation. Insofar as a Sherman § 1 violation is concerned, the activity complained of must be (1) in interstate commerce; (2) a restraint of trade (per se or rule of reason); and, (3) a contract, combination, or conspiracy. A similar breakdown exists for Sherman § 2 violations dealing with monopoly.

A. Interstate Commerce

Two tests are applied in determining if particular activity is within interstate commerce. The first test defines interstate commerce to embrace any activity, including local activity, within the flow of interstate commerce. The second test defines interstate commerce to cover activity, including local activity, which has a substantial effect on the flow of interstate commerce. The two theories are supposedly reconcilable by noting that they are additive in nature.

Of course interstate commerce is not applicable to state antitrust violations. However, there currently does not appear to be any state antitrust statutes mentioning or disclosing any application of antitrust violations to non-profit corporations.

B. Restraint of Trade

Unlike the learned professions exemption set forth above, it is commonly agreed that non-profit organizations are engaged in trade

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118 Note that the court arrived at this result by comparing the fact situation present to that of labor unions apparently overlooking the fact that labor's exemption is granted by federal statute.


120 J. VAN CISE, supra note 7 at 29-34.

121 Id. at 34.


124 ANTITRUST DEVELOPMENTS, supra note 23 at 39.

125 Research revealed only one antitrust state statute, Rev. Code WASH. ANN. § 24.04.110 revoking a non-profit corporation's license if such corporation engaged in restraint of trade. This statute was repealed by Laws ch. 235 § 100 p. 1202, eff. 7/1/69.
or commerce within the meaning of the Sherman Act.\textsuperscript{126} Hence, non-profit institutions can engage in restraints of trade.

Again for simplicity, restraints of trade may be classified into two categories, those that constitute per se violations (inherently unlawful) and those that amount to violations by application of the rule of reason.\textsuperscript{127} Theoretically, the per se doctrine evolved from application of the rule of reason to numerous, similar fact situations involving the same restraints of trade amounting to antitrust violations.\textsuperscript{128} What activities are currently deemed per se violations are beyond the scope of this paper. Suffice it to say that when clear per se violations are found, the non-economic purposes of true non-profit corporations will not serve as a defense.\textsuperscript{129}

The rule-of-reason application may be likened to a gradient. At the top of the gradient are activities falling short of per se violations, and at the bottom are activities clearly not amounting to restraints of trade. Somewhere on this scale, the non-profit purpose will result in some “reasonable” restraint of trade. Recent cases indicate that the courts are taking a case-by-case approach to non-profit restraints of trade, either harmonizing the restraint to the non-profit purpose or disavowing the restraint from the non-profit purpose, and thereby holding the restraint a violation.\textsuperscript{130}

\textsuperscript{126} Hazen v. National Rifle Ass’n of Amer., 101 F. 2d 432 (D. C. Cir. 1938); Friends of Animals, Inc. v. American Veterinary Med. Ass’n., 310 F. Supp. 1016 (S. D. N. Y. 1970); both holding non-profit concerns are engaged in trade. See also State of Maryland v. Wiltz, 269 F. Supp. 826, 833 (D. Md. 1967), aff’d 392 U. S. 183 (1968) and cases cited therein holding that commerce includes non-profit organizations.


\textsuperscript{128} J. Van Cise, supra note 7 at 122.

\textsuperscript{129} See Phi Delta Theta Fraternity v. J. A. Buchroeder & Co., 251 F. Supp. 968 (W. D. Mo. 1966) holding that fraternities being non-commercial organizations had no bearing on trademark misuse antitrust charge; United States v. Utah Pharmaceutical Ass’n., 201 F. Supp. 29 (D. Utah 1962) non-economic purpose not applicable to price fixing; Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1929) non-commercial purpose no defense to boycott; McBeath v. Inter-American Citizens for Decency Com., 374 F. 2d 359 (5th Cir. 1967) boycott for apparent non-commercial purposes deemed violation.

\textsuperscript{130} See Application of American Society for Testing & Materials, 231 F. Supp. 686 (E. D. Pa. 1968) holding that non-profit charitable organization did not violate antitrust laws but that such organization could conceivably violate antitrust laws under different fact situations; Travelers Ins. Co. v. Blue Cross of Western Penn., 298 F. Supp. 1109 (W. D. Pa. 1969) holding that state’s non-profit laws are silent on trade and therefore alleged activities would have to be investigated; Marjorie Webster Jr. Col. v. Middle States Ass’n. of C. & S. S., cert. denied, 400 U. S. 965 (1970) holding non-commercial purpose justified incidental trade restraint; Deesen v. Professional Golfer’s Ass’n of Amer., 358 F. 2d 165 (9th Cir. 1966), cert. denied, 385 U. S. 846 (1966) holding that membership denial in professional sports association was reasonable; STP Corp. v. United States Auto Club, Inc., 236 F. Supp. 146 (S. D. Ind. 1968) no arbitrary abuse of power found by non-profit rules making body.
C. Contract, Combination, Etc.

Again, the scope of non-profit organizations and the antitrust laws must necessarily limit the analysis to a general treatment of the "step" which has resulted in a restraint of trade.

It should seem clear that non-profit status will not immunize non-profit organizations from associations with profit business concerns leading to violations of the antitrust laws. This necessarily follows from the analysis of the agricultural cooperative and labor union immunities which do not cover such situations.

Another area of speculation lies in a monopolization charge against a non-profit corporation. Because non-profit organizations generally do not expand by merger or acquisition, such charge, if made, would be based on a "natural" monopoly. This area is not completely settled with respect to profit-going concerns;\(^{131}\) it is currently unresolved with respect to the statutory exemption relating to agricultural cooperatives,\(^ {132}\) and it is suggested that non-profit status would be placed somewhere in the middle with substantial weight being given to the use of such monopoly power.\(^ {133}\)

VI. Trends

The subject of this paper is based on not one but two trends. The first trend is the expansion of non-profit organizations into areas traditionally thought of as profit-making businesses. The second trend concerns the applicability of the antitrust laws to non-profit organizations.

The exemption given non-profit organizations, if it can be called such, applies to the traditional non-commercial purposes of such organizations as a defense to antitrust charges based on the "rule of reason".

Obviously, the weight given to such non-commercial purpose will change when the nature of the organization changes from truly "charitable" to simply "non-profit". The weight given to the non-profit status should decrease when non-profit corporations become involved with profit-making business entities, especially if such profit-going concerns are subject to antitrust charges. Finally, no effect at all should be given to alleged non-profit status of those "non-profit" concerns that merely "utilize" liberal non-profit laws to incorporate in the form of non-profit concerns but for the real purpose of financial gain.

Evaluation of the weight given to such considerations must await case law development.

\(^{131}\) Antitrust Developments, supra note 23 at 35-36.

\(^{132}\) Authorities cited note 31 supra.

\(^{133}\) See weight given to such use of power in American Football League v. National Football League, 323 F. 2d 124 (4th Cir. 1963); Deesen v. Professional Golfer's Ass'n of America, 358 F. 2d 165 (9th Cir. 1966), cert. denied, 385 U. S. 846 (1966).