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SOME ANTITRUST ISSUES RAISED BY LARGE ELECTRONIC FUNDS TRANSFER SYSTEMS

*Jules Bernard**

With the advent of electronic funds transfer (EFT) systems, a number of important antitrust questions have been raised, particularly when these systems are sponsored by the largest and most powerful institutions in a market. In examining the antitrust issues involved in any EFT system, one must consider the concentration of resources that such EFT projects represent and the possible effects of this concentration on other potential EFT system competitors, the restraints that the EFT projects might impose on competition among the participants within such a project, and, finally, the efforts of regulatory bodies, especially state legislatures, to deal with the adverse social and economic effects that EFT threatens to produce.

It is impossible to do more than sketch a few of these issues in a single article. Nevertheless, there are questions raised by large EFT projects that are particularly prominent and that require consideration while EFT is still developing and while its course can be shaped to conform to the antitrust laws without inflicting excessive hardship.

I. ANTITRUST PROBLEMS

A. Entry

The first major question raised by any large EFT joint venture is whether the size of the joint venture itself effectively removes the chance for competing EFT systems to develop.[1] The present doctrine in this area is expressed

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1. This question is especially important in the context of federally operated large EFT systems. *See* Comments of the United States Department of Justice, In the Matter of Proposed Policy on Access to Federal Reserve Clearing and Settlement Facilities, Nov. 20, 1975; Comments of the United States Department of Justice on the Federal Reserve Board's Proposed Amendment of Regulation J and Related Issues, filed May 14, 1974; letter from Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice, to Garth Marston, Chairman, Federal Home Loan Bank Board, Oct. 16, 1975 (on file at Antitrust Division, Department of Justice). *See also* Computer

in *United States v. Penn-Olin Chemical Co.*[2] The Penn-Olin Chemical Co. was a joint subsidiary formed by Pennsalt Chemical Co. and Olin-Mathieson Chemical Co. to produce sodium chlorate for the southeastern United States. Pennsalt already had entered the sodium chlorate industry, but its only plant was in Oregon. Olin-Mathieson was not engaged in the manufacture of sodium chlorate. Only two other companies produced sodium chlorate in the Southeast, but some, including Olin-Mathieson, produced a wide variety of related chemicals, and stood ready to enter the field.

The Department of Justice challenged the venture[3] under section 7 of the Clayton Act,[4] and argued that, but for the joint venture, both companies would have entered the attractive southeastern market and would have competed against each other. The companies maintained that neither one would have entered the market by itself and that the joint venture actually increased competition by adding a competitor to the market. Although the district court held for the defendants, its decision was based upon a different rationale. The court ruled that either company might have entered the market independently, but that after one company had done so, there would not be sufficient business to induce the other company to enter. The court observed that the joint venture supplied a new competitor in the southeastern market and did not preclude future entry any more than if either of the companies had independently entered the market. Therefore, there was no restraint on competition.[5]

The Supreme Court disagreed and remanded the case to the district court. The Court found that the district court had failed to consider what effect the second company might have exerted on the southeast market merely by threatening to enter it.[6] Comparing the actual effect of the Penn-Olin joint venture to a merger, the majority believed that competition had been elimi-

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Services Inquiry, 28 F.C.C.2d 291 (1970), *aff'd & rev'd in part*, GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

2. 378 U.S. 158 (1964). *See generally* Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969).

3. United States v. Penn-Olin Chemical Co., 217 F. Supp. 110 (D. Del. 1963).

4. 15 U.S.C. § 18 (1970).

5. 217 F. Supp. at 132-34.

6. 378 U.S. at 173-74. The court concluded that:

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.

Id.

nated between Pennsalt and Olin-Mathieson in the sodium chloride market.[7] The Court stressed the possible beneficial effect on competition of a strong potential competitor "waiting in the wings."[8]

Penn-Olin is especially significant in evaluating the acceptability of large EFT joint ventures because it focuses attention on the question of whether less comprehensive groups of institutions, or indeed single institutions, could provide EFT services in competition with one another. If so, competition at the systems level would generate faster, safer, cheaper and more flexible EFT services. Consumers and merchants could help to shape the growth of many systems, forcing them to adapt to the shifting and disparate needs of different users.

Those who build the large EFT ventures often argue to the contrary that their costs are so great and the value of individual transactions that can be diverted from traditional systems to their EFT system is so small, that universal participation in the project is essential for it to be economical. This argument deserves scrutiny on several issues. First, the market area that the ventures identify may not be the appropriate region to be considered. An unduly small market, such as a single city or even a single state, may indeed prove to have too few EFT-divertible transactions. It is possible, however, that larger regions composed of several states could support several discrete systems, each of which has part of the market in its component area.[9] Second, the projected costs upon which those in the joint venture rely may reflect expensive, obsolescent technology or an overly ambitious project. They also may reflect too narrow a focus on EFT transactions alone when the system could easily be adapted to perform other tasks such as inventory control and automated teller functions. Finally, the argument may ignore the extent to which innovation in communications and computer technology can reduce costs.

Large EFT ventures also deserve scrutiny because they constitute vertical integrations into a new industry, that of computerized financial communications systems, by nearly all the potential users of those systems. Although independent companies, such as those which already offer computerized communications for nonfinancial information, may stand ready to enter the field, those in the EFT system can cut them off from their market by dealing exclusively within the joint venture.[10] The independent companies, however,

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7. *Id.*

8. *Id.*

9. *See* Baxter, Cootner & Scott, The Law and Economies of Electronic Funds Transfer Systems—Executive Summary (1976) (on file at Department of Justice).

10. *See* Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968); *cf.*

might enjoy several advantages over the EFT system. It is conceivable that, given the opportunity, they might be able to produce EFT services more cheaply and more efficiently than the financial institutions, spread their fixed costs over a larger number of services, including nonfinancial data communications services, handle a greater volume of items at a lower cost per item, adapt more easily to advancing technology and develop new techniques for using existing technology more productively, and provide specialized services that would not be profitable for financial institutions to offer. Finally, the independent companies may be able to combine EFT services with nonfinancial communications services to generate entirely new capabilities, such as the transmission of the entire range of information required in connection with intermodal transportation. Indeed, hybrid (financial and nonfinancial) communications systems for intercorporate dealings may some day dwarf the purely retail EFT systems both in the number of items transmitted and in total dollar volume.

B. *Access*

Assuming that a single system composed of all the major institutions turns out to be necessary to provide EFT services in a market, it is the settled rule that other competing institutions must be able to use the system's facilities to serve their own customers, either by gaining membership in the venture or by paying a reasonable fee for access. The major alternative to open access is dissolution of the venture. In *United States v. Terminal Railroad Association*,[11] the Supreme Court specifically addressed the issue of access to services. The Court noted that the Terminal Railroad Association, an association attempting to monopolize all train access routes across the Missouri River to St. Louis, was not merely an association that facilitated commerce, but rather one that conferred tremendous competitive advantages on the member railroads. Realizing that the participants had not hesitated to use this advantage against their rivals, the Court ruled that the practices of the association clearly violated the basic tenets of freedom of competition.[12] While such a combination might be lawful in some instances, the Court maintained that because of the "physical and topographical condition peculiar to the [St. Louis] locality," the existing system was restricting interstate com-

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Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States Steel Corp. v. FTC, 426 F.2d 592 (6th Cir. 1970); United States v. Standard Oil Co. (New Jersey), 253 F. Supp. 196 (D.N.J. 1966).

11. 224 U.S. 383 (1912).

12. *Id.* at 401.

merce and that a unified system would be justified only if an impartial agent of all those railroads which used the system operated it.[13]

The Terminal Railroad Association and its members had not been content to rest on the superiority that geography gave them. They had executed a number of agreements to choke off competition before it began. Each member railroad enjoyed the power to veto the admission of any newcomer to the venture, and only those who belonged to the venture were allowed to use its facilities. Furthermore, the proprietary companies, who owned nearly one-third of the existing railroad mileage, had effectively eliminated any future possibility of competition by obligating themselves to the use of the Association's facilities forever. Under these circumstances, the Supreme Court had no trouble finding that this "exclusive ownership and control" of all of the bridges by less than all of the railroads required to use them was a violation of sections 1 and 2 of the Sherman Act "in that it constitutes a contract or combination in restraint of commerce among the States and an attempt to monopolize commerce among the States which must pass through the gateway at St. Louis."[14] Despite this finding, the Court declined to dissolve the combination between the Terminal Company, the Merchant's Bridge, and the Wiggens Ferry, believing that it was perfectly possible for an organization like the Association to provide a valuable service to the community. It perceived the evil deriving from the Terminal Company's operations as the "grip" that the proprietary companies had on commerce coming into St. Louis. If this dominance could be abolished, the Association would be beneficial to the commerce of the city as a "proper terminal association acting as an impartial agent of every line which [was] under compulsion to use its facilities."[15] The Court, therefore, directed the parties to admit competing railroads into full ownership and control of the terminal properties upon reasonable and nondiscriminatory terms, and to offer access to the properties at reasonable fees to railroads that preferred not to participate in ownership. It also required them to eliminate the provisions that required the participants to use the Terminal Company's facilities exclusively. In addition, the Court forbade the defendants from engaging in a number of particular discriminatory practices.[16]

The principle of nondiscriminatory access set forth in *Terminal Railroad Association* has proved to be durable. It has been adopted in such diverse

13. *Id.* at 405. Physical conditions made it impossible to reach St. Louis without using facilities entirely controlled by the three terminal systems in the Association. Originally, these systems operated independently and competed with each other, but ultimately, they were absorbed into the Association. *Id.* at 397-99.

14. *Id.* at 409.

15. *Id.* at 410.

16. *Id.* at 411-12.

areas as news-gathering services,[17] produce markets,[18] stock exchanges,[19] and electric power companies.[20]

Monopolistic EFT ventures can produce many undesirable side effects. For one thing, the member institutions can use their power over the EFT system to compel customers to use other services they offer (such as other EFT services)[21] or to compel their customers to refrain from dealing with nonparticipants.[22] In addition, EFT systems can lead to more extensive coordination among those within the system than is necessary to fulfill the purposes of the joint venture. Excessive coordination can show up in uniform pricing, either in the actual prices or in the methods of calculating them, in market allocation, in product division, or in standardization of services.

Uniform pricing, market allocation, and product division are relatively straightforward abuses of a joint venture.[23] Standardization, however, represents a more subtle attack on the consumer. Standardization not only defeats customers' power to exercise their preference, but also forces customers to contribute to the fixed costs of services that they do not use. Furthermore, it often means that the rate of change and especially the rate of adopting new technology, tends to proceed at the pace that the least adventurous institution sets. This danger is greatest where the highest degree of innovation is called for, that is, in research and development. The industry-wide venture eliminates the risk of inadequate innovation by guaranteeing that all will have to consent to the adoption of new technology, and that all will be certain to benefit from whatever technology is adopted.[24]

Large EFT ventures also raise the spectre of discrimination among the joint venturers. It is all too possible for the largest, most dominant members of the venture to try to compel the others to use their system exclusively, for example, by structuring fees in a certain way.[25] They may also influence

17. Associated Press v. United States, 326 U.S. 1 (1945). The district court relied on *Terminal Railroad Association* in prescribing the appropriate form of relief. The Supreme Court, while rejecting the lower court's argument, nevertheless accepted the court's choice of methods for dissipating the anticompetitive effects of the organization. *Id.* at 21-22. *See* pp. 756-58 *infra*.

18. *See, e.g.*, Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

19. Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

20. United States v. Otter Tail Power Co., 410 U.S. 366 (1973).

21. *Cf.* Advance Business Sys. & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

22. *Cf.* Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

23. *Cf.* United States v. Sealy, Inc., 398 U.S. 350 (1967) (market allocation); American Column & Lumber Co. v. United States, 257 U.S. 377 (1967) (uniform pricing).

24. *See* United States v. Automobile Mfrs. Ass'n, Inc., 1969 Trade Cas. 87,456 (C.D. Cal. 1969).

25. *Cf.* Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Advance Busi-

the standards that the association actually does adopt in a fashion that serves their own ends, and not necessarily those of their smaller partners by insisting on higher-cost technologies than smaller institutions would care to adopt, on different service areas than those which the smaller institutions would prefer, or on different service lines or packages from those that meet the special needs of the smaller institutions' customers. All of these distortions require the smaller institutions, and their customers, to help pay for something they may not need.

The question of access is particularly important in the field of EFT, because it is beginning to appear likely that an institution offering EFT services may enjoy a significant advantage over one that does not. There are several areas where the issue of access has already stirred debate. One area that has attracted a great deal of attention is whether thrift institutions deserve direct access to automated clearing facilities, rather than indirect access through a commercial bank, and under what conditions they can demand access. These questions depend on the specific circumstances that excluded thrift institutions confront, whether the denial injures them significantly, or whether they can mitigate or erase the injury in a reasonable fashion. If direct access to an automated clearing house does confer a significant competitive advantage and the excluded institutions have no reasonable way to create their own alternative facilities, then those excluded must be admitted to the automated clearing house on an equal basis with those who already belong. As a matter of federal policy, the same sort of examination should be undertaken whether the facilities are privately operated or operated by a government agency. The economic effects of access, not the form of ownership, should control the analysis. Similarly, if it should turn out that retail point-of-sale EFT systems confer a substantial advantage on those who have access to them, and they cannot be duplicated by excluded institutions, then the antitrust laws will compel access to them as well.

It is important that monopolistic EFT systems be confined to the area where their monopoly is justified and not be allowed to spill over into areas where competition can exist. Because point-of-sale EFT systems differ markedly from automated clearing houses in purpose, operation and competitive effect, and because the economic foundations for point-of-sale services depend on different elements from those that sustain automated clearing house services, point-of-sale systems may be governed by one set of antitrust principles while automated clearing houses are governed by another.

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ness Sys. & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

C. *Discriminatory Practices*

Even where a large EFT system does not enjoy a monopoly of the kind that brings into play the doctrine of *Terminal Railroad Association*, that is, where it does not control an essential facility, it may nevertheless inflict injury upon the public. On the surface, the issues raised by such a system may seem very similar to those raised by monopolies controlling essential facilities. They rest on a different philosophical ground, however, and they can produce very different results. This philosophical ground is laid out in *Associated Press v. United States.*[26] In *Associated Press* the Department of Justice challenged several by-laws of the Associated Press (AP) as restraining the dissemination of news. These by-laws gave a member of the association the power to impose a heavy burden upon an applicant for membership when that applicant competed against the member. Applicants who did not compete against members did not face the same difficulties. Certain other by-laws forbade members to provide their "spontaneous news," that is, news reports that they generated, to anyone other than AP or its members. At the same time, the by-laws commanded AP to furnish news only to members. The total effect of these by-laws was to prevent competitors of AP members from either joining AP or obtaining access to its news by any other method.

Judge Learned Hand, writing for the district court, enjoined AP from enforcing the discriminatory entry requirements and the ban on disseminating "spontaneous news" to nonmembers.[27] He refused to declare the ban on dissemination to be illegal in and of itself, but he found it to be part of an overall illegal plan. To eliminate the anticompetitive effects of the combination, he decreed that AP would have to open its membership to all applicants on a nondiscriminatory basis and eliminate the restrictions on dissemination of news. The Supreme Court sustained the decree of the lower court in all particulars.[28]

Judge Hand's opinion differs considerably from that of the Supreme Court. He approached the issues in a fairly traditional manner, declaring that the Associated Press enjoyed many of the attributes of a monopoly, and concluding that it was impressed with a public duty to treat all applicants for membership on a nondiscriminatory basis. He condemned the other restrictions on disseminating news only because they were imposed by a monopolist.[29]

26. 326 U.S. 1 (1945).
27. 52 F. Supp. 362 (S.D.N.Y. 1943).
28. Associated Press v. United States, 326 U.S. 1 (1945).
29. 52 F. Supp. at 374. Analogizing this situation to the situation in *Terminal Railroad Association*, Judge Hand felt obligated to dispose of the good with the bad stating:

> Nevertheless, in all such cases the power must not be incident to a combina-

Citing *Terminal Railroad Association* and *United States v. Great Lakes Towing Co.*,[30] Judge Hand explicitly rooted his opinion in the "essential facility" doctrine.[31]

The Supreme Court rejected this segmented approach and treated the entire group of by-laws as a seamless fabric whose overall effect constituted a restraint of trade. The Court believed that the restraint would come about, not because AP controlled an essential facility, but simply because it possessed enough market power to do so.

Relying on Judge Hand's assessment that AP was an organization of "great consequence,"[32] the Court ruled that there was a violation of the Sherman Act because AP's power derived from a collective agreement, not from "individual enterprise and sagacity," and the result was to reduce the ability of nonmembers to compete.[33] The Supreme Court accepted Judge Hand's proposed relief because it seemed reasonably calculated to erase the prohibition on news dissemination. The Court did not suggest that the proposed relief was the only relief that would be appropriate; indeed, the Court was willing to accept it only because Judge Hand would be able to monitor its effectiveness.[34]

The reasoning behind the decree is far broader than the decree itself. It can be applied to many different types of anticompetitive activity. It is not limited to those arbitrary exclusionary policies that EFT projects might adopt, for instance, the arbitrary refusal to allow participation by thrift institutions, but rather extends to all anticompetitive activity that derives its power to injure from the sharing of resources by competitors. *Associated Press* can

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> tion which, though bound to admit all on equal terms, does not do so. While the present by-laws as to admission are in force, these agreements are parts of an unlawful combination, and they must be enjoined until the primary wrong is remedied.

Id.

30. 208 F. 733 (N.D. Ohio 1913).

31. *See* pp. 752-55 *supra*.

32. 326 U.S. at 18, *quoting* 52 F. Supp. at 373. AP gathered news from around the world and was the "chief single source of news for the American press." 326 U.S. at 18.

33. 326 U.S. at 15-16.

34. In adopting the existing decree, the Court stressed that:

> The fashioning of a decree in an antitrust case in such a way as to prevent future violations and eradicate existing evils is a matter which rests largely in the discretion of the court.

Id. at 22. Later, in United States v. E.I. duPont De Nemours & Co., 366 U.S. 316 (1961), the Court qualified this statement by saying that the relief was "initially" the province of the district court, but that the Supreme Court also had a duty "to be sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws." *Id.* at 323.

be used to attack projects that inhibit the competitive development of EFT services over a single system, to attack arrangements that preclude the system members from experimenting with alternative systems, and to attack ventures that prevent other systems from coming into being. *Associated Press* is concerned primarily with the source of power. Its discussion of how the power is used limits the form of the relief, but not the principle on which the relief is based.

Because so many EFT projects resemble the organization of AP, *Associated Press* has special significance in the area of EFT services. EFT projects are composed of competitors and potential competitors. The participants pool their power to acquire information (in AP, news; in EFT, funds) and exchange it with one another for the use of all. The competitive advantage that the joint venturers gain derives not from the power to exchange alone, but from the quantity and distribution of the commodity within their control. The information in question is of a kind whose free flow is essential to the nation's welfare.

The relief granted in *Associated Press* is significant, not so much for its breadth, but rather for its precision in addressing the anticompetitive effects that AP produced. In contrast to the relief given in *Terminal Railroad Association*, the relief in *Associated Press* does not direct AP to accept all applicants as members; it merely requires AP to ignore the competitor or noncompetitor status of an applicant. In other words, *Associated Press* focused on discrimination, not monopolization, and the decree is framed to eliminate the inequity.

The relief granted in *Associated Press* may well not go far enough to protect the public from the anticompetitive influences of large EFT systems. Unlike AP members, those who deploy EFT systems compete not only in the gathering and processing of information but also in the manner of distributing it, that is, in greater efficiencies and more rapid innovation at the systems level. This form of competition cannot be preserved by compulsory access. Indeed, compulsory access can result in the elimination of these aspects of competition by encouraging a monopolistic system to develop where none would otherwise have arisen. *Associated Press* makes it clear that if intersystem competition is a value to be protected, a remedy specifically designed to achieve that end will have to be found.

II. The *Parker* Doctrine and State Regulatory Control of EFTS

Many states have started to pass laws to control the growth of EFT. These statutes fall into three major categories: "wild-card" statutes, under which states commit themselves to follow the same policies as those the Comptroller prescribes for national banks; expanded branching statutes, under which states declare remote terminals to be branches, and regulate them accordingly; and other, entirely new, patterns of regulation.

A common feature of some of these schemes is the "compulsory sharing" provision. Using this provision states declare that financial institutions may deploy EFT systems, but only if the institutions agree to make the systems available to other institutions and their customers. The deploying institutions may charge reasonable fees for their efforts. They may not discriminate between their own organization and the other institutions, however, nor may they charge excessive fees. Some states say that all financial institutions which deploy EFT systems must make them available to all other financial institutions. Other states define categories of institutions (usually banks and savings and loan associations) and only require a system-deploying institution to share with other institutions in the same category. These states generally allow sharing across category lines but do not compel it. Some EFT projects in compulsory-sharing states include all or nearly all the available financial institutions. The participants in these projects seem to believe that the state laws shelter them from antitrust attack, at least with regard to questions of access. This belief is likely to prove untenable.

The area where state regulatory provisions can grant immunity from federal antitrust laws was delineated in *Parker v. Brown*[35] and in subsequent cases that narrowly limited the doctrine expressed in that case. *Parker* dealt with an elaborate regulatory plan adopted by the state of California to govern the production and distribution of raisins. The plan created an Agricultural Probate Advisory Commission to consider, review, and adopt agricultural marketing programs. These programs were to be applied to certain regions, called "zones," that the Commission was to define. The Supreme Court held that the Sherman Act did not apply to the California plan because the plan was that of a sovereign state, not that of the private producers. Congress' purpose in passing the Sherman Act was limited to restraining the actions of private parties and not state action.[36] The Court pointed out that the program was created by the state legislature, carried out by its agents, enforced by its authority, in furtherance of its own goals. Noting this extensive state involvement, the Court ruled that "[t]he state . . . as sovereign, im-

35. 317 U.S. 341 (1943). *See generally* First, *Private Interest and Public Control: Government Action, the First Amendment, and the Sherman Act*, 1975 UTAH L. REV. 9; Kintner & Kaufman, *The State Action Antitrust Immunity Defense*, 23 AM. U.L. REV. 527 (1974).

36. 317 U.S. at 351.

posed the restraint as an act of government which the Sherman Act did not undertake to prohibit."[37]

Lower courts have limited *Parker* in several ways. They have generally been reluctant to find "state action" present unless the web of regulation adopted by a state is specific enough to direct the activities of private parties. The mere existence of an extensive regulatory scheme has not been enough to invoke *Parker* where the state exercises only "general supervision rather than . . . specific direction."[38] The state must be inextricably involved in the conduct. As the Fifth Circuit noted in connection with rates filed by the Georgia Power Co., in *Gas Light Co. v. Georgia Power Co.*:[39]

> The Commission here gave lengthy consideration to each of the practices and rates under attack, and after full adversary hearings ordered them into effect, some with major modifications. Defendants' conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission. They are thus immune from the operation of the antitrust laws under the *Parker* exemption.[40]

Other lower courts have limited *Parker* in other ways as well. In *Woods Exploration & Producing Co. v. Aluminum Co. of America*,[41] the Fifth Cir-

37. *Id.* at 352, *citing* Olsen v. Smith, 195 U.S. 332, 334-35 (1904). In *Olsen*, a would-be harbor pilot had challenged the Galveston Pilot Association as being a monopoly. The *Olsen* Court rejected this challenge, saying: "It must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law." *Id.* at 345.

The *Parker* Court also cited Lowenstein v. Evans, 69 F. 908 (D.S.C. 1895), which held that a monopoly of liquor sales by South Carolina could not be challenged under the Sherman Act, because a state is not a "person" under the Sherman Act. *Id.* at 911. The Supreme Court echoed the observation of the district court that "[t]he state makes no contract, enters into no combination or conspiracy. She declares and asserts in herself the monopoly in the purchase and sale of liquors." *Id.*

38. Marnell v. United Parcel Serv., 260 F. Supp. 391, 409 (N.D. Cal. 1966). *See also* Macom Prod. Corp. v. ATT, 359 F. Supp. 973 (C.D. Cal. 1973) (no immunity for tariff merely because filed with state commission); United States v. Pacific Southwest Airlines, 358 F. Supp. 1224 (C.D. Cal. 1973) (merger approved by state commission not exempt).

39. 440 F.2d 1135 (5th Cir. 1971).

40. *Id.* at 1140. It is noteworthy that the Fifth Circuit echoed the *Parker* Court in pointing out that the regulatory body had the power to alter proposals that came before it. *Id.* at 1139. *See* Parker v. Brown, 317 U.S. 341, 352 (1943). *See also* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971).

41. 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

cuit Court of Appeals adopted the point of view that it was "incumbent upon this court to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive."[42] In *Woods* the defendants sought to thwart the production of natural gas by the plaintiffs through the use of a state regulatory commission that established quotas on gas production. Relying on *Northern Natural Gas Co. v. Federal Power Commission*,[43] the appeals court held that the goal of administrative regulation and the antitrust laws was the same—the most efficient allocation of resources—and that Texas' quota system for the production of natural gas did not bar an application of the antitrust laws to defendants' concerted attempts to prevent plaintiffs from extracting gas.[44]

One month after *Woods* was decided, it was cited by the Court of Appeals for the District of Columbia Circuit in *Hecht v. Pro-Football, Inc.*[45] The *Hecht* court concluded that *Parker* referred to a situation where the state law was in harmony with a federal statute, the Agricultural Adjusting Act, that itself was designed to contravene the application of antitrust laws in the area.[46] Therefore, the court in *Hecht* believed that the state regulatory scheme in *Parker* had complemented federal policy rather than conflicted with it. The court also quoted with approval *Whitten v. Paddock Pool Builders, Inc.*,[47] where the First Circuit ruled that there is antitrust immunity " 'only

42. *Id.* at 1302.

43. 399 F.2d 953 (D.C. Cir. 1968).

44. 438 F.2d at 1302, *quoting* Northern Natural Gas Co. v. Federal Power Comm'n, 399 F.2d 953, 959 (D.C. Cir. 1968). Both these cases established that "the two forms of economic regulation complement each other." 438 F.2d at 1303.

45. 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

46. The appeals court's rationale effectively limited the *Parker* doctrine to the narrow fact pattern of that case. The court said:

> Since the *Parker* Court found the state regulation harmonious with the federal agricultural regulatory scheme, the Supreme Court could safely find that Congress had no intent to have the already existing antitrust laws forbid this type of state action, i.e., state agricultural regulation. The Congress had already enacted a federal Agricultural Adjustment Act which was inconsistent with the application of the previously existing federal antitrust laws in this area, the congressional agricultural statute was of equal dignity with the antitrust statute, and the state agricultural action was harmonious with the federal regulation; hence, the Supreme Court did not apply the prohibitions of the antitrust laws to this type of state regulatory action. . . . Thus, *Parker v. Brown* involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, i.e., the Agricultural Adjustment Act, enunciated by the National Congress, which is also the source of federal antitrust policy.

444 F.2d at 936-37.

47. 424 F.2d 25 (1st Cir. 1970).

when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternative form of public regulation.' "[48]

The Supreme Court has recently retreated from some of the more restrictive interpretations of *Parker*, but at the same time it has made the test of "state action" more stringent. In *Goldfarb v. Virginia State Bar*,[49] the Court confronted a scheme for setting minimum attorneys' fees. Under Virginia law, the state supreme court was given authority to promulgate rules to govern the conduct of attorneys. The statute said nothing about any specific practices, however, and in particular was silent on the issue of pricing of services. The state supreme court adopted ethical codes that allowed a lawyer to consider fee schedules published by bar associations, but that also commanded him not to be controlled by them. The state bar, to which all attorneys had to belong in order to practice in Virginia, issued two reports suggesting that to habitually ignore fee schedules would call for disciplinary action. Inasmuch as the state bar was charged with the duty of investigating and reporting violations of the supreme court's rules, those interpretations carried a great deal of weight. In the end, however, it was not the state bar that published the fee schedules, but the county bar association, a group with no official status at all.

The Supreme Court dispatched the two bar associations' bids for antitrust immunity very quickly, ruling that the state supreme court rules may have "prompted" the anticompetitive conduct, but did not compel it. Therefore, there was no state action and no antitrust immunity.[50] The Court did not attempt to reconcile state law with federal antitrust policy, nor did it rely on the absence of a federal regulatory policy in the area as ground for distinguishing *Parker*. Rather, it cut back the *Parker* exemption to cases where the state *commands* a course of action as an exercise of its sovereign authority.

The "state action" doctrine of *Parker* must not be confused with the power to contravene the antitrust laws. The *Parker* Court carefully noted that "a state does not give immunity to those who violate the Sherman Act by au-

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48. 444 F.2d at 941, *quoting* 424 F.2d at 30.

49. 421 U.S. 773 (1975).

50. *Id.* at 790-91. The Court further stated:

> Although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions.

Id.

thorizing them to violate it, or by declaring that their action is lawful."[51] This theme was elaborated in *Schwegmann Bros. v. Calvert Distillers Corp.*,[52] which dealt with the validity of a state antidiscounting statute. The statute authorized manufacturers or distributors of a product to agree with retailers to set minimum retail prices. It further compelled all other retailers of the product to charge no less than the price agreed to by the parties to the minimum-price contract, notwithstanding the fact that the other retailers had not entered into any such contract themselves. The Supreme Court observed that "the fact that a state authorized the price-fixing does not, of course, give immunity to the scheme, absent approval by Congress."[53] While noting that the Miller-Tydings Act[54] specifically exempted minimum price agreements from the antitrust laws in states that had authorized them, the Court pointed out that the Act did not cover state nonsigner statutes, and this was "fatal to the respondents' position . . . ."[55] The Court relied on the intent behind the Sherman Act and provisions in the Miller-Tydings Act that continued the Sherman Act's prohibitions against "horizontal" price fixing,[56] and the fact that if Congress intended to give nonsigner clauses antitrust immunity, it would do so by specific provision.[57] Because there was no specific provision in the Act granting such immunity, and because state and federal policies conflicted, the Court concluded that the state was impermissibly compelling conduct forbidden by the Sherman Act.[58] The Court's emphasis on

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51. 317 U.S. at 351.

52. 341 U.S. 384 (1951).

53. *Id.* at 386. Price fixing has been held to be a per se violation of the Sherman Act. *See, e.g.*, Kieffer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

54. Pub. L. No. 75-314, Title VIII, § 1, 50 Stat. 693, *amending* 15 U.S.C. § 1 (1937).

55. 341 U.S. at 388. The Court emphasized that the Act did not "turn over to the states the whole problem of resale price maintenance . . . ," but only those areas specifically included in the legislation. *Id.*

56. *Id.* at 389.

57. *Id.* at 390. In making this assessment of the legislative intent, the Court cited previous minimum price legislation and congressional debate on the Miller-Tydings Act. *Id.* at 390-95.

58. *Id.* It is lawful for a distributor to negotiate "vertical" price agreements with each of his retailers and thereby lawfully eliminate price competition so long as no coercion whatsoever is used. *See* United States v. Colgate & Co., 250 U.S. 300 (1919); *cf.* Dart Drug Corp. v. Parke, Davis & Co., 221 F. Supp. 948 (D.D.C. 1963), *aff'd*, 344 F.2d 173 (D.C. Cir. 1965).

> However when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing. A real sanction can be given the prohibitions of the proviso only if the price maintenance power granted a distributor is limited to *voluntary* engagements.

341 U.S. at 389.

the state's coercion seems, at first glance, to stand *Parker* on its head. After all, it was only because the state compelled the nonsigners to adhere to the minimum price that "they [were] driven into a compact."[59] Furthermore, it is the enforcement of the state law that the Court declines to undertake.

One way out of this thicket would have been to adopt a theory similar to that chosen in *Woods*, by confining *Parker* to cases where federal and state regulatory policies (including antitrust policies) worked together. In *Schwegmann Bros.*, as the Court pointed out, the state nonsigner clause conflicted with federal policy, so the Court could have distinguished *Parker* on that basis. It chose not to do so, but instead distinguished *Parker* with the observation that the conduct at issue was not state action but private action which was forbidden by the Sherman Act.[60] The Court expanded upon this evaluation of the circumstances by implying that the state acted only as the instrument of the parties entering into the minimum price agreement. As such they could

> fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, . . . [t]hat is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion.[61]

In other words, the *Schwegmann* Court regarded the state's involvement as the enforcer of the statute to be insufficient to call into play the state action doctrine of *Parker*. The private parties were free to adopt or forego their remedy in court. The terms to be enforced by the court were those agreed to by the private parties in their price fixing agreements with one another. The state acted throughout as a purely passive entity whose sole task was to enforce private actions. It never undertook the task, mentioned in both *Parker* and *Georgia Power*, of reviewing the terms of the agreements with a view to accepting, rejecting or modifying them.

These three major limitations on *Parker* (the insistence on a high level of state involvement in the actual operations of a program; the still nascent trend to construe *Parker* as concerned with parallel federal and state actions, not conflicting ones; and the inability of states to authorize private parties to escape antitrust penalties) combine to make compulsory sharing laws rela-

59. 341 U.S. at 389.

60. By classifying the minimum retail price scheme as private action, the Court brought *Schwegmann Bros.* in line with *Parker*, which had held that if the program was operated by force of individual agreement, as it was in *Schwegmann Bros.*, it violated the Sherman Act. *See* Parker v. Brown, 317 U.S. at 350.

61. 341 U.S. at 388.

tively ineffective as protectors of large EFT projects. They do not entail extensive regulatory oversight at the time that the parties enter into a sharing arrangement. They do not compel anyone to accept any particular system's offer. They do not specify the number of systems to be offered, the services to be offered over them, or the terms on which they are to be offered. They do not match any well-established federal policy other than the antitrust laws,[62] and they can be made to match the antitrust laws only by sharply curtailing their scope. Where they conflict with the antitrust laws, they must give way.

III. CONCLUSION

It is obvious that acceptable, effective EFT legislation will be a problem because of existing antitrust restraints. The first line of order should be comprehensive federal legislation, similar to that in *Parker*, which specifically delineates EFT systems' immunity to antitrust regulations. Based on this federal policy, state legislation, consistent with *Parker* and subsequent cases, must be enacted to control the growth of EFTS. Whether the federal legislation should include provisions that compel institutions to use EFT services is a matter that must be decided. Without such provisions it could be argued that EFT systems will never become an effective and viable alternative to traditional systems, yet with them come the possible evils of product standardization and uniform pricing. Another issue for resolution is whether all financial institutions or only institutions in specific financial categories (*e.g.*, commercial banks and savings and loan associations) should have access to EFT services. One fact is certain: EFT legislation must be forthcoming before EFT policy becomes a disorganized mass of inconsistencies incapable of being fashioned into a unified policy.

62. Congress has created a National Commission on Electronic Fund Transfers and charged it with the duty of creating such a policy. *See* 12 U.S.C. § 2401 (Supp. V, 1975).