ANTITRUST IMMUNITY OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS UNDER THE MALONEY ACT

INTRODUCTION

Plaintiffs in *Harwell v. Growth Programs, Inc.*[1] were investors who had held single investment contract plans[2] in Technology Fund, Inc. (the Fund), an open-end mutual fund. Plaintiffs originally brought a class action on behalf of all those who had purchased single investment contract plans in the Fund. Named as defendants in the case were the Fund, Supervised Investors Services, Inc. (Supervised), Growth Programs, Inc. (Growth) and the National Association of Securities Dealers, Inc. (NASD). Supervised was the management company operating the Fund. Growth, a subsidiary of Supervised, was a registered broker-dealer who sold the contract plans to the plaintiffs.[3]

The single investment contract plans purchased by plaintiffs contained withdrawal and reinvestment clauses.[4] Growth and Supervised had devised single investment plans in the Fund which permitted an investor to withdraw, for an unlimited number of times, up to ninety percent of his shares and subsequently to reinvest an equivalent amount of cash.[5] Withdrawal and reinvestment clauses had been included in investment contracts since the 1930's so that investors would have ready access to cash in the case of serious financial emergencies.[6] A typical withdrawal and reinvestment clause permitted an investor to reinvest in the fund the same amount which he had earlier withdrawn from it without paying the brokerage fee usually exacted for such investments. Thus the purchasers of the contract plans in question in *Harwell* could rely on the provision in order to withdraw up to ninety percent of their shares and then reinvest them without paying additional sales commissions.[7]

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1 451 F.2d 240 (5th Cir. 1971), aff'd on rehearing, 459 F.2d 461 (5th Cir. 1972), cert. denied, 41 U.S.L.W. 3187 (U.S. Oct. 10, 1972).

2 Mutual fund shares are usually sold wholesale by the fund's management company to broker-dealers. The broker-dealers in turn offer them retail to the public. An additional method of offering fund shares is through "contract plans," where a plan certificate evidencing a beneficial interest in a specified amount of fund shares is sold. The holder of such a plan certificate has the option of redeeming his certificate for the underlying shares themselves or their cash value. "Single investment" contract plans are plans for which the holder pays a single lump sum of money. 451 F.2d at 243.

3 Id. at 242-43. See Lobell, The Mutual Fund: A Structural Analysis, 47 Va. L. Rev. 181, 182-88 (1961). The relationships between the Fund, Supervised and Growth are not unusual. The mutual fund itself is considered to be a cluster of individual service arrangements with benefits similar to those accruing from private investment counseling. The large number of separate investors together create sufficient capital for significant market operations. Since withdrawals of investors' money from the fund decrease the total capital used for investment purposes and increase the necessity for liquid assets held by the fund, large-scale withdrawals are obviously financially undesirable.

4 451 F.2d at 243.

5 Harwell v. Growth Programs, Inc., 315 F. Supp. 1184, 1185-86 (W.D. Tex. 1970).

6 Id.

7 Id.

For some time after June, 1965, plaintiffs and other investors frequently used the "in-and-out" privilege allowed by the withdrawal and reinvestment clauses, and evidence later showed that some of the investors did so in order to play short swings of the stock market.[8] The net asset value of mutual fund shares was calculated twice a day, once at 1:00 P.M., becoming effective at 2:00 P.M., and again at 3:30 P.M., becoming effective at 4:30 P.M. Because of the reinvestment provisions in his contract plan, an investor could withdraw his interest and reinvest within the space of an hour.[9] The system of pricing the net asset value, together with the in-and-out privilege, guaranteed a profit for participating investors; in short, the combination of factors was ideal for speculation upon the stock market, especially in a short, downswing situation.[10] This type of downward-swing, guaranteed speculation became a matter of concern for both the NASD and the Securities and Exchange Commission (SEC).[11] The NASD issued an interpretation of Section 1 of Article III of its Rules of Fair Practice, effective August 1, 1966, which deemed "inconsistent with just and equitable principles of trade" the action of any NASD member in furthering withdrawal and reinstatement privileges as they had been practiced under the provisions of the contract plans in question.[12] The effect of the issuance of this interpretation by the NASD was to prevent broker-dealers such as Growth from honoring the in-and-out privilege in the contract plans.

In the United States District Court for the Western District of Texas, plaintiffs brought an action for breach of contract against Growth and its parent company, Supervised, and sought a declaratory judgment that their contracts were valid, specific performance of the contracts by the brokers and an injunction forbidding the NASD to use the interpretation to deny plaintiffs their in-and-out privileges.[13] Plaintiffs also alleged that the NASD had tortiously interfered with their contractual relations.[14] Finally, plaintiffs sought treble damages from all of the de-

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[8] Id.

[9] 451 F.2d at 245 n.2.

[10] A simple hypothetical is useful to illustrate the speculative nature of the arrangement in issue in *Harwell*. An investor would know that the current net asset value per share was $100 and that the new net asset value to go into effect in one hour was $90. He therefore could order up to ninety percent of his holdings sold at the old net asset value, $100, and buy back in at the new net asset value, $90, after the new price went into effect. This would increase his quantitative holdings and eventually his total investment if the net asset value later rose again to its former levels.

[11] National Association of Securities Dealers, Inc., Reprint of the Manual 5089-90 (August 1969). The NASD was concerned about the turnover taking place in individual investment companies that offered this type of plan as well as the fact that the management was forced to maintain higher than normal liquid positions in order to redeem shares. The NASD also expressed concern with the fact that the interests of other individuals in the fund would be hurt because their proportionate holdings would decrease, while the speculators' holdings would increase.

[12] Id. at 5090-92.

[13] 315 F. Supp. at 1187.

[14] Id.

fendants on the ground that their action constituted conspiracy in violation of the antitrust laws.[15] The NASD and the defendant broker-dealers admitted that plaintiffs' contracts had been breached but raised as a defense public policy considerations arising from the Maloney Act.[16] Growth and Supervised maintained that the NASD interpretation plaintiffs complained of was a valid exercise of NASD's quasi-governmental function under the Maloney Act, and that their compliance with the interpretation did not constitute a breach of contract.[17] The NASD argued that its interference with plaintiffs' contracts was not actionable because that interference constituted a proper exercise of delegated authority under the Maloney Act.[18] Growth and Supervised joined the NASD in contending that plaintiffs showed no antitrust violation, and that even if such a violation were demonstrated, the NASD and its members were immune from antitrust penalties while acting pursuant to the Maloney Act.[19]

The district court in *Harwell* conceded that the plaintiffs' contracts had been breached.[20] However, the court held that under the Maloney Act the NASD interpretation constituted a quasi-governmental regulation of the over-the-counter securities market.[21] Since the regulatory power is exercised by the NASD under the supervision of the SEC, the court reasoned, the NASD was immune from antitrust claims.[22] The district court interpreted the leading case dealing with the application of antitrust law in the securities area, *Silver v. New York Stock Exchange*,[23] as providing guidelines in quasi-governmental regulatory body rulemaking.[24] Interpreting *Silver* as granting antitrust immunity to the stock exchanges because of the close supervision of the SEC over exchange activities, the court ruled that by following the procedures established under the Maloney Act under the supervision of the SEC, the NASD had not violated plaintiffs' rights under the antitrust laws. The district court granted defendants' motion for summary judgment.[25]

The Fifth Circuit rejected the district court's contention that the

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[15] Id.

[16] Id. The provisions of the Maloney Act of 1938 are contained in 48 Stat. 881, 15 U.S.C. §§ 78o, o-3, q, cc, ff (1970). The Maloney Act, which regulates the over-the-counter market, is actually a 1938 amendment to the Securities Exchange Act of 1934. In this comment, citations to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq. (1970), refer to those provisions, exclusive of the Maloney Act, which apply to the regulation of stock exchanges.

[17] 451 F.2d at 244.

[18] Id.

[19] Id.

[20] 315 F. Supp. at 1192.

[21] Id. at 1191.

[22] Id.

[23] 373 U.S. 341 (1963).

[24] 315 F. Supp. at 1191.

[25] Id. at 1192.

case lent itself to disposal by summary judgment. The court noted that there were difficult issues in *Harwell* which could be resolved only after a trial on the merits.[26] It agreed with the district court in rejecting plaintiffs' contention that the case was essentially a simple breach of contract action.[27] It then determined, however, that plaintiffs' antitrust claim[28] presented significant problems which had to be dealt with, especially the NASD's allegation of antitrust immunity because of the Maloney Act.[29] The court pointed out that the Maloney Act does not protect *all* NASD activities from antitrust charges,[30] and suggested that the scope of the NASD's antitrust immunity should be gauged by the standards which the Supreme Court applied to stock exchanges under the Securities Exchange Act in *Silver*.[31] Because of the broad issues involved, the court of appeals remanded the case for trial on the merits.[32] Subsequently the court of appeals affirmed this disposition after having granted a rehearing; the Supreme Court denied certiorari.

The difficult issue raised in *Harwell* involved the scope of express or implied antitrust immunity which the Maloney Act grants to the NASD in its regulatory activities. This comment will examine this broad issue. Specifically, it will analyze the Fifth Circuit's suggested application to the NASD of the antitrust immunity standards pertaining to stock exchanges that are set forth in the landmark *Silver* decision. This analysis first seeks to determine which of the several interpretations of *Silver* set forth by courts and commentators should be applied. Second, it attempts to resolve the question whether the appropriate *Silver* standard is applicable to the NASD in light of the differences between the provisions regulating stock exchanges in the Securities Exchange Act of 1934 and the provisions of the Maloney Act. The resolution of this question necessitates a discussion of the impact of the repealer provision[33] contained in the Maloney Act, to which there is no analogous provision in the Securities Exchange Act of 1934. Finally, the comment will apply the conclusions of the foregoing analysis to the fact situation in *Harwell* and suggest how the central antitrust issue of the case should be decided.

I. *Silver v. New York Stock Exchange:* THE SCOPE OF ANTITRUST IMMUNITY OF THE STOCK EXCHANGES

A. *The* Silver *Decision*

Silver v. New York Stock Exchange, relied on in both the district court and the appellate decisions in *Harwell*, concerned the scope of

26 451 F.2d at 242.

27 Id. at 244.

28 Plaintiffs' argument was based on a theory of a concerted refusal to deal. 315 F. Supp. at 1191.

29 451 F.2d at 244-45.

30 Id. at 246.

31 15 U.S.C. §§ 78a et seq. (1970).

32 451 F.2d at 246-47.

33 15 U.S.C. § 78o-3(n) (1970).

antitrust immunity provided to stock exchanges as a result of the Securities Exchange Act of 1934. In *Silver*, plaintiff, a Texas over-the-counter securities dealer who was not a member of the New York Stock Exchange, had private wires installed between his offices and those of several member firms of the New York Stock Exchange. The Exchange gave temporary approval for these private wires as well as a ticker service. The Exchange subsequently disapproved of the private wires and other services without giving prior notice or explanation to the parties involved.[34] Plaintiff's brokerage business suffered as a result of his inability to follow New York Stock Exchange price movements with the same degree of ease as when he had direct wire connections. The aggrieved nonmember dealer brought an action against the Exchange, alleging violation of Sections 1 and 2 of the Sherman Act.[35] The New York Stock Exchange answered that the Securities Exchange Act of 1934 presented a regulatory scheme which precluded antitrust claims against the Exchange: the pervasiveness of the regulatory scheme of the Act exempted the Exchange from antitrust liability by implication.[36] The Exchange argued that if an action by it was within the general scope of the authority conferred upon exchanges by the Securities Exchange Act of 1934, then the delegation of authority by Congress which flowed through the SEC to the Exchange was a sufficient instance of pervasive regulation by the government to preclude the application of the antitrust laws.[37] *Silver*, then, presented the problems which occur when a regulatory scheme dealing with securities exchanges meets another regulatory scheme dealing with antitrust violations.

The Supreme Court did not accept the theory that the operation of the Securities Exchange Act of 1934 precluded application of the antitrust laws by *implication*. The Securities Exchange Act of 1934 was said to be "only the beginning, not the end, of inquiry,"[38] and the Court went on to suggest that an extended analysis of the regulatory scheme was part of the "test" which it envisioned for the application of antitrust principles to the securities industry.[39] It then articulated the essence of that test when it said that immunity will result in instances where the activities attacked on antitrust grounds are necessary to make the Securities Exchange Act of 1934 work.[40] The Court advocated a standard that reconciled the workings of both the regulatory scheme and the antitrust statutes without ousting either.[41]

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[34] 373 U.S. at 343-44.

[35] 15 U.S.C. §§ 1-7 (1970).

[36] 373 U.S. at 346-47.

[37] Id. at 347.

[38] Id. at 349.

[39] Id. at 357.

[40] "[E]xchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act . . . ." Id. at 361. Cf. United States v. Morgan, 118 F. Supp. 621, 687 (S.D.N.Y. 1953).

[41] 373 U.S. at 357.

However, the Court did not undertake the "extended analysis" of the regulatory scheme in question, nor did it resolve the issue of whether violations of the Sherman and Clayton Acts arose from the Exchange's refusal to allow plaintiff continued access to its wires.[42] Instead, it seized on the claim of deprivation of due process which was implicit in the Exchange's refusal to notify the nonmember securities dealer of the reasons for the deprivation of wire services and found the Exchange liable on that basis alone. Resting its decision on due process, and emphasizing "fair procedure," "procedural safeguards" and the "requirement of notice and hearing"[43] the Court never actually balanced the statutory policies of the Securities Exchange Act of 1934 and the Sherman and Clayton Acts. It never determined whether the Exchange's conduct was violative of antitrust principles or, if so, whether that conduct was immunized by its place in the regulatory scheme established under the Securities Exchange Act of 1934.[44] Hence the Court's discussion of the scope of antitrust immunity is dicta, and it is uncertain what outcome would have resulted had *Silver*'s standards of statutory reconciliation been applied to the fact situation of the case.

Immediate disagreement arose concerning the meaning of *Silver*.[45] There are two possible readings of the test which the Supreme Court articulated as the way in which to reconcile a legislative grant of self-regulatory power with the antitrust laws. According to one interpretation, described below as the "narrow" reading, the mere presence of a general statutory authorization of control by a *governmental* agency such as the SEC over particular forms of conduct potentially raises barriers, derived from primary jurisdiction and pervasive statutory regulation, to judicial review of antitrust matters. Antitrust principles may be considered only by the agency in this case, and judicial inquiry is limited to appellate review of the administrative determinations. The second

[42] Id. at 364-66.

[43] Id. at 364-65. Justice Stewart, in a dissenting opinion, noted: "Whether there has been a violation of the antitrust laws depends not at all upon whether the defendants' conduct was arbitrary." Id. at 370 (dissenting opinion).

[44] Id. at 365. The Court stated:

> Since it is perfectly clear that the Exchange can offer no justification under the Securities Exchange Act for its collective action in denying petitioners the private wire connections without notice and an opportunity for hearing, and that the Exchange has therefore violated § 1 of the Sherman Act, 15 U.S.C. § 1 and is thus liable to petitioners under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, there is no occasion for us to pass upon the sufficiency of the reasons which the Exchange later assigned for its action.

Id. The court went on to say that a failure by a private association such as the Exchange to provide procedural safeguards will result in damage liability without inquiry into the substantive basis of a petitioner's claim. Id. at 365 n.18.

[45] See, e.g., Kaplan v. Lehman Brothers, 371 F.2d 409 (7th Cir.), cert. denied, 389 U.S. 954 (1967), where the interpretation of *Silver* conflicts with that in Thill v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971). See also Note, Stock Exchange Anti-Rebate Rule Must Be Necessary to the Operation of the Securities Exchange Act in Order to be Immune from the Antitrust Laws, 71 Colum. L. Rev. 932, 934 (1971).

or "broad" interpretation of *Silver* stresses statutory reconciliation between the Securities Exchange Act of 1934 and the Sherman and Clayton Acts. It would utilize judicial inquiry into the antitrust effects of regulated activity and would insist that antitrust law be enforced except in those instances when it is irreconcilable with the policies of the Securities Exchange Act. The second interpretation essentially is the application of the traditional antitrust standard of the rule of reason in order to impart a degree of flexibility in carrying out the Securities Exchange Act of 1934.[46] Before discussing the applicability of *Silver* to the NASD, then, it is necessary to determine which of these two interpretations of *Silver* is correct.

B. *The Narrow Interpretation of* Silver

The narrow reading of *Silver* was fueled by a footnote in the opinion which suggested that courts would be estopped from determinations of antitrust claims if there were direct SEC jurisdiction and subsequent judicial review of the Exchange activity in question.[47] This narrow reading of *Silver* considers that the need for judicial reconciliation of the securities regulation statutes and the antitrust statutes occurs only in those limited situations where the SEC does not have direct control over the actions which originally bring the matter into court. If the SEC does have the statutorily assigned right to oversee a particular activity by a securities exchange, then, according to this restrictive reading of *Silver*, there is no need for direct inquiry by the courts. A court should not conduct a *de novo* adjudication of any problems which the SEC has decided; it should conduct only appellate reviews of agency determinations. Two alternative justifications are advanced for this conclusion: first, the SEC as an administrative agency is considered to have *primary jurisdiction* over the whole matter;[48] second, there is an implied immunity from the antitrust laws because the SEC's power to oversee the area is a sign of a *pervasive regulatory scheme* employed by Congress.[49]

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46 Id. at 360. Justice Brandeis' statement of the rule of reason is contained in Chicago Board of Trade v. United States, 246 U.S. 231 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business. . . . The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238.

47 373 U.S. at 358 n.12.

48 See Comment, An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered, 65 Nw. U.L. Rev. 260, 318-23 (1970).

49 See 71 Colum. L. Rev., supra note 45, at 934; 65 Nw. U.L. Rev., supra note 48, at 312-18. Essentially, the pervasive regulatory concept means that where the govern-

Primary jurisdiction is a mode of deferral by the courts to regulatory agencies which occurs when statutes give agencies and courts powers which are overlapping.[50] There are two situations in which courts will defer to an agency. One is when there are technical questions involved regarding which the agency's expertise is entitled to deference. The second is when Congress has delegated authority regarding the matter to an agency as part of a pervasive regulatory scheme.[51] Thus the concept of a pervasive regulatory scheme has been utilized both as a supportive underpinning for the primary jurisdiction rationale and as an independent rationale itself for the narrow interpretation of *Silver*. Used in the latter context, the concept is interpreted to mean that where a pervasive regulatory scheme exists, courts have no power to intervene in matters between an agency and the regulated entity. Rather, the regulating agency may have the discretion to weigh antitrust considerations, though such deliberations may not be specifically mandated by the statute concerned. These two rationales would in effect shield exchange practices from direct judicial inquiry into any antitrust implications of those practices.

The narrow interpretation of *Silver* was adopted by the Seventh Circuit in *Kaplan v. Lehman Brothers*,[52] where the plaintiffs attacked the minimum commission rates fixed by the stock exchange as an antitrust violation.[53] The Seventh Circuit ruled that the exchange activity involved was protected from the sweep of antitrust law because the SEC was supposed to oversee such activities, and hence a pervasive regulatory situation was present.[54] On the ground that the SEC had authority to oversee an area, then, the court determined that there could be no per se antitrust violations.

It is submitted, however, that administrative law decisions subsequent to *Silver* vitiate its narrow interpretation. These decisions attack the concepts of primary jurisdiction and pervasive regulation as blocking antitrust determinations by courts. Two post-*Silver* Supreme Court decisions regarding bank mergers which had been approved by the Comptroller of Currency suggest that the expertise of a particular agency may not justify judicial deference on grounds of primary jurisdiction if antitrust claims are involved. In *United States v. Philadelphia Nat'l Bank*,[55] the Court defined primary jurisdiction as the point at which

mental regulatory agency has power to review and direct the private parties involved, antitrust immunity may have been implied by Congress. Since the actual fact situation of *Silver* precludes any active SEC sanction against the New York Stock Exchange with regard to the enforcement of a stock exchange rule—section 19(b) limits SEC power over exchanges to change or supplement exchange rules rather than review of the enforcement or application of a rule—the question of a pervasive regulatory scheme arguably is never reached.

50 See Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1040-41 (1964).

51 65 Nw. U.L. Rev., supra note 48, at 319.

52 371 F.2d 409 (7th Cir.), cert. denied, 389 U.S. 954 (1967).

53 Id. at 410.

54 Id. Cf. 65 Nw. U.L. Rev., supra note 48, at 302, 308-09, 311.

55 374 U.S. 321 (1963).

judicial abstention occurred in order to protect the integrity of the regulatory scheme.[56] The *Philadelphia Nat'l Bank* case involved the Bank Merger Act of 1960[57] and the attempted merger of two Philadelphia banks which had previously been approved by the Comptroller of Currency. The Bank Merger Act of 1960 did not indicate whether the Comptroller was to give any particular weight to potential anticompetitive effects resulting from a merger but did indicate that he was to seek the opinion of the Department of Justice and the Federal Reserve Bank as to the desirability of any merger in terms of potential antitrust problems. The Court stated that the Comptroller of Currency was not bound by these opinions.[58] The Court rejected the argument that because the Comptroller was directed to consider anticompetitive factors before approving mergers, those mergers were immunized from antitrust challenges. The Court called such immunity "implied" and suggested that implied antitrust immunity was not favored;[59] in any case, it did not justify judicial abstention here on grounds of primary jurisdiction. Any narrowing of the courts' powers must therefore arise from a provision in an agency's enabling statute authorizing the agency to grant antitrust immunity rather than from an innate agency expertise.[60] In *United States v. First City Nat'l Bank*,[61] the Supreme Court disallowed two bank mergers which had been approved by the Comptroller of the Currency according to the standards of the Bank Merger Act of 1966;[62] the 1966 Act provided that the Comptroller should weigh the prospective benefits and the anticompetitive features in a proposed merger after receiving recommendations from the Federal Deposit Insurance Agency, the Federal Reserve Board and the Department of Justice.[63] The Court based its rejection on the grounds that the agency review conferred by the statute did not carry great weight with regard to the antitrust consequences of the merger. The antitrust area was one in which the *courts* had particular experience in determining the extent to which antitrust policy should apply: "traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure."[64] The Court went on to observe that the "momentum of judicial precedents" was moving in the direction of allowing the courts to handle antitrust problems which arose in the context of regulatory environments.[65]

It is reasonable to assume that the Supreme Court's interpretation

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56 Id. at 353.
57 Bank Merger Act, 74 Stat. 129 (1960), as amended, 12 U.S.C. § 1828 (1970).
58 374 U.S. at 351.
59 Id. at 348, 350.
60 Id. at 354.
61 386 U.S. 361 (1967).
62 12 U.S.C. § 1828(c) (1970).
63 386 U.S. at 363.
64 Id. at 367.
65 Id. at 368.

of the primary jurisdiction problems in the bank merger and antitrust area suggests that absent an explicit antitrust repealer, the courts rather than administrative agencies are the proper medium for the resolution of antitrust questions even where the agencies have primary jurisdiction. Hence it would appear that a narrow reading of *Silver*, removing exchange activities from judicial scrutiny of their anticompetitive effect on the ground that the SEC has primary jurisdiction over those activities, should fail in light of the bank merger cases.

The pervasive regulatory scheme rationale which has been used to support a narrow reading of the *Silver* dicta[66] appears to be no sounder than the primary jurisdiction rationale. A pervasive regulatory scheme which is capable of shielding the regulated activities from antitrust laws is one wherein the agency participates in the decisions of the industry and directs the route of its basic philosphy and choices.[67] An example of participation by an agency in an industry is that of the relationship between the Interstate Commerce Commission and the various transportation groups.[68] Where monitoring and participation by the agency are so close, it is agreed, antitrust exemption may be implied, even if no express repealer of the antitrust laws is contained in the statute.

No Supreme Court cases in the securities area which would rebut or limit this argument have been decided. However, the Court has discussed the concept of a pervasive regulatory scheme with regard to other areas of administrative law and, in the decisions handed down after *Silver*, discussed above, has clarified the scope of this standard. An examination of the rationale of the following decisions will help to determine whether or not the pervasive regulatory scheme test used in the narrow interpretation of *Silver* is sound.

In *United States v. RCA*[69] the Supreme Court found immunity from antitrust charges on the ground of a generalized rate structure that constituted a pervasive regulatory scheme. The reason given was that sporadic action by federal courts could disturb this delicate rate structure and defeat its very purpose.[70] If there is no pervasive regulatory scheme, it does not matter whether or not the agency controlling the industry has ruled that there is an antitrust violation.[71] The holding in *California v. FPC*[72] clarified the implications of the *RCA* decision. The Supreme Court stated in *California v. FPC* that even if there is a perva-

[66] See generally 71 Colum. L. Rev., supra note 45.

[67] 65 Nw. U.L. Rev., supra note 48, at 339. See Hale & Hale, Competition or Control VI: Application of Antitrust Laws to Regulated Industries, 111 U. Pa. L. Rev. 46, 53-56 (1962). This article points out that industries with highly pervasive regulatory schemes tend to have originated as natural monopolies which could not function properly without a high degree of government intervention.

[68] 49 U.S.C. §§ 5(11), 5b (1970). See also Comment, NYSE Rules and the Antitrust Laws—Rule 394—Necessary Restriction or Illegal Refusal to Deal? 45 St. John's L. Rev. 812 (1971).

[69] 358 U.S. 334 (1959).

[70] Id. at 350.

[71] Id. at 351. See Note, 1970 U. Ill. L. F. 544, 550.

[72] 369 U.S. 482 (1962).

sive regulatory scheme, but no express power on the part of the agency to immunize, the courts still have the power to decide the antitrust aspects of the case, although they may have to defer to the agency regarding all other aspects in issue.[73] Courts should not defer to agencies which have pervasive regulatory powers in an area if these pervasive powers do not include the authority to consider antitrust matters, despite the fact that the agency may have used antitrust criteria in its decisions.[74] The Court said that it was not deciding how conflicting legislative policies should be accommodated, but said that "Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency."[75]

It is submitted, then, that neither of the rationales advanced in support of a narrow interpretation of *Silver* is tenable. The bank merger cases suggest that even if the SEC had control over the actions in question in the *Silver* case, such control would have provided neither primary jurisdiction nor a pervasive regulatory scheme. *Philadelphia Nat'l Bank* suggests that even when a statute gives to the agency supervising the industry standards by which to judge antitrust implications, courts can review the antitrust issues unless a specific repealer has been enacted.[76] Thus the fact that Congress has given power to a specific agency concerning particular regulatory areas does not eliminate consideration by federal courts of antitrust problems in those areas. Pervasiveness is seen to be a determinative factor only in limited circumstances such as those in *United States v. RCA,* where regulatory agencies are empowered to set up technical rate systems whose balance might be impaired by court decisions. The Supreme Court accepted neither theories of primary jurisdiction nor congressional authorization of agencies to oversee particular activities as sufficient reasons to block judicial intervention over antitrust matters.

C. *The Broad Interpretation of* Silver

The second or broad reading of *Silver* is that the decision sets forth what has been called a "repugnancy test,"[77] *i.e.*, that it *demands* recon-

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73 Id. at 487.

74 Id. at 488-90.

75 Id. at 490. But see Pan American World Airways v. United States, 371 U.S. 296 (1963). The *Pan American* situation is the one in which the courts hesitate to use their antitrust expertise. Under the Federal Aviation Act, 49 U.S.C. §§ 1301 et seq. (1970), the Civil Aeronautics Board uses a special standard of the "public interest" defined by Congress for use in its determinations regarding air travel. The Supreme Court felt that this special grant of power to the CAB created a pervasive regulatory situation in this case since "if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. at 310. The Court thus found that the CAB was the proper body to apply antitrust standards in the case.

76 374 U.S. at 321. The Bank Merger Amendment of 1966 causes problems because it provides for the standards called for in *Philadelphia Nat'l Bank* but also provides for federal court trial de novo on antitrust claims. 12 U.S.C. § 1828(c)(7)(A) (1970).

77 Johnson, Application of Antitrust Laws to the Securities Industry, 20 Sw. L.J. 536, 553 (1966).

ciliation between the antitrust laws and other legislation governing a given activity and prohibits application of the former only when such application would make the statutory goals of the latter unattainable. Therefore, in the absence of an express antitrust repealer, recovery on an antitrust claim will be granted if plaintiff can show that there is an antitrust violation by activities which are not necessary to make the regulatory scheme work. Two questions must be answered in applying the repugnancy test: is the practice in issue necessary to preserve the particular regulatory characteristics of the statute in question; and, if the practice is not necessary to preserve the regulatory character, what antitrust standard is to be used—a reasonableness standard or a per se violation—in determining liability and balancing the two statutory schemes.[78]

The problem with the repugnancy test, as was illustrated in *Thill v. New York Stock Exchange*,[79] a Seventh Circuit decision which in effect reversed *Kaplan v. Lehman Bros.*,[80] is that reconciliation of two statutory schemes with an eye toward the preeminence of the regulatory scheme has a practical effect much like primary jurisdiction or pervasiveness if the regulatory statute is deemed to control.[81] In *Kaplan* the Seventh Circuit had ruled that if arguably anticompetitive conduct was subject to review by the SEC, it could not be reviewed by the court. Apparently taking notice of a stinging dissent to the decision to deny certiorari in the *Kaplan* case,[82] the Seventh Circuit suggested in *Thill* that the correct reading of the *Silver* standard lay in the broad view or reconciliation of the statutes.[83] Distinguishing *Kaplan* by stating that the plaintiff in that case had made the mistake of arguing that the minimum commission rates violated a per se antitrust standard rather than urging that the court apply a rule of reason test,[84] the court in *Thill* ruled that SEC supervision itself could not cloak the stock exhanges in antitrust immunity unless this immunity had been specifically conferred by the language of the regulatory statute; in so ruling the court relied upon the Supreme Court's insistence that antitrust immunity usually is not implied.[85]

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78 The Court in *Silver* noted that this question had to be answered in applying the antitrust immunity standards it had set forth in dicta, but found it unnecessary to resolve the question since the decision was based on other grounds. The Court stated:

> Thus there is also no need for us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness or some other measure.

373 U.S. at 365-66.

79 433 F.2d 264 (7th Cir. 1970).

80 See discussion at notes 52-54 supra.

81 Cf. 433 F.2d at 269-71.

82 389 U.S. at 957 (Warren, C.J., dissenting): "In my view, this blunderbuss approach falls far short of the close analysis and delicate weighing process mandated by this Court's opinion in *Silver*."

83 433 F.2d at 269-71.

84 Id. at 270.

85 Id. at 269. See United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967);

It is submitted that *Thill's* interpretation of *Silver* is correct. The holdings of the administrative cases discussed above regarding federal courts' jurisdiction over antitrust matters suggest that the narrow reading of *Silver* is unacceptable. It is unacceptable because it employs a mechanical standard in finding antitrust immunity if an administrative agency has any jurisdiction whatsoever, whether specifically granted by Congress or implied through the extent of the actual power of the agency. The Seventh Circuit rejected that standard in *Thill* when it in effect reversed the original narrow reading of *Silver* that it had set forth in *Kaplan*. The court stated that "a reconciliation of the two statutory schemes [antitrust and the Securities Exchange Act] is not foreclosed simply because the Securities Act and the review jurisdiction of the SEC may touch upon the activity challenged under the antitrust laws."[86] It is concluded, then, that the broad interpretation is the proper analysis of the principles set forth in *Silver*. Moreover, the broad reading of *Silver* is consistent with the outcome of *Silver* itself.

D. Silver *Analyzed Under the Broad Interpretation*

The problem in analyzing the holding in *Silver* is that the Court laid down its standards in dicta and then decided the case on notions of due process, leaving courts in subsequent cases to grapple with the scope of the standards set forth. It will be helpful, for purposes of analysis and for later application of the proper interpretation of *Silver* to the NASD activities in *Harwell*, to backtrack and consider the facts of *Silver* in light of the broad reading of the case. The standard would demand an inquiry as to whether the activities challenged in *Silver* were reasonably related to the goals of the Securities Exchange Act of 1934. The inquiry should start with the reasons for the passage of the Securities Exchange Act of 1934, an examination that will also provide a useful framework for a later comparison of that Act with the Maloney Act in the context of *Harwell*. The question to be considered in examining the Securities Exchange Act of 1934 concerns the scope of supervisory authority over the stock exchanges' self-regulation given to the SEC by the Act. It has been suggested that the terms of the Securities Exchange Act of 1934 are vague as to the supervisory duties of the SEC.[87] It appears, then, that the SEC is relatively free to choose its special areas of regulatory concern under the Securities Exchange Act of 1934.

The Securities Exchange Act of 1934 contains many implementation provisions which give the SEC specific powers over securities exchanges.[88] However, it is clear from the fact of the Act, as the Court in

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 327, 348 (1963); California v. FPC, 369 U.S. 482, 485 (1962).

86 433 F.2d at 269.

87 See Baxter, NYSE Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan. L. Rev. 675, 689-90 (1970).

88 15 U.S.C. § 78f (1970) provides for the registration of national securities exchanges. The registration statement must contain information which includes an agree-

Silver observed,[89] that there is no specific power on the part of the SEC to review *applications* of stock exchange rules by the exchanges themselves. There is no mention of antitrust in the Securities Exchange Act of 1934. Moreover, there are no standards in the Act which could be used to guide SEC deliberations concerning antitrust problems except for an admonition that the Act is intended "to insure fair dealing in securities traded in upon such exchange . . . ."[90] Although the SEC is free to consider the anticompetitive impact of exchange rules, the language of the statute makes it clear that there is no statutory duty imposed on the SEC to evaluate the antitrust aspects of exchange rulings.[91] The Securities Exchange Act of 1934 contains no specific repealer of the antitrust laws as do some other regulatory statutes.[92] The legislative history of the Securities Exchange Act of 1934 suggests that Congress did not consider antitrust problems in its scheme.[93] Congress was concerned with enacting a measure to control speculation and manipulation on the stock exchanges in order to protect the investor.[94]

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ment to comply with and enforce the provisions of the Securities Exchange Act of 1934 and any rules which the SEC makes under the provisions of the Act. 15 U.S.C. §§ 78f(a)(1), (2) (1970). Each exchange which files a registration statement is further obliged to provide the SEC with copies of any amendments to its rules. 15 U.S.C. § 78f(a)(4) (1970).

The SEC can directly prescribe rules with regard to the securities exchanges concerning their regulation of floor trading by members for their own account or discretionary accounts. The SEC can also prescribe rules to prevent excessive trading on the exchange but off the floor. 15 U.S.C. § 78k(a) (1970).

Section 78s is the basic mechanism for supervision of exchange practices. The SEC is authorized by § 78s(a)(1) to withdraw the registration of a national securities exchange if the exchange has failed to enforce compliance by members with the provisions included in the Securities Exchange Act of 1934. The SEC is also authorized to suspend the trading in any registered security for ten days or, with the approval of the President, to suspend trading on a national securities exchange for not more than ninety days. 15 U.S.C. § 78s(a)(4) (1970). Section 78s(b) authorizes the SEC to alter or supplement the rules of an exchange in order to encourage the protection of investors in certain specifically delimited areas. Section 78s gives the SEC power to alter the rules of exchanges but does not give the SEC any particular review powers of exchange *actions*. Furthermore, Section 78s(a)(1) permits the SEC to discipline an exchange only when the exchange itself is violating rules enacted in the Securities Exchange Act of 1934. The same section permits the SEC to discipline an exchange when there is a failure to enforce compliance with rules by a member of the exchange.

[89] 373 U.S. at 357. See Jennings, Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission, 29 Law & Contemp. Prob. 663, 680 (1964).

[90] 15 U.S.C. § 78s(b) (1970).

[91] 65 Nw. U.L. Rev., supra note 48, at 285.

[92] Cf. 15 U.S.C. § 1012(b) (1970) (exemption for state regulation of insurance); 15 U.S.C. § 17 (1970) (exemption of labor unions from antitrust); 15 U.S.C. § 45(a)(3) (1970) (exemption of resale of commodities from antitrust); 15 U.S.C. § 62 (1970) (exemption of export trade associations).

[93] See Hearings on Stock Exchange Practices Before the Senate Comm. on Banking and Currency, 73d Cong., 1st and 2d Sess. (1934); S. Rep. No. 792, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934); S. Doc. No. 185, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1838, 73d Cong., 2d Sess. (1934).

[94] See, e.g., Tracy & MacChesney, The Securities Exchange Act of 1934, 32 Mich.

Hence an apparent lack of congressional consideration of the role of antitrust in the regulatory scheme would seem to invite the application of antitrust standards by the courts.

The Securities Exchange Act of 1934 is a regulatory scheme, and admitted and anticompetitive effects accompany every regulatory scheme.[95] However, the question which a court adopting either the broad or the narrow *Silver* standard should apply to the Securities Exchange Act of 1934 is how pervasive and all-encompassing is the regulatory scheme.

It seems apparent that, had the *Silver* case not been decided on the basis of the denial of due process, the Court would have held that the SEC was not sufficiently involved with statutory standards of antitrust to warrant finding an immunity from antitrust. Since the denial of the private wires to the nonmember broker-dealer in *Silver* was tantamount to a refusal to deal, and no conceivable statutorily protected objective was thereby protected, it is concluded that the activity of the New York Stock Exchange which had come under scrutiny was vulnerable to the antitrust claims.

II. The Applicability of Stock Exchange Antitrust Immunity Standards to the NASD

The issues raised in *Silver* concerning antitrust violations and legislative and administrative regulatory policy were raised in the context of the Maloney Act and the NASD's regulation of its member brokers and dealers by the principal case considered in this comment, *Harwell v. Growth Programs, Inc.* Both the district court and the appellate decisions alluded to *Silver*, applying to the NASD the antitrust standards that the Supreme Court had applied to the stock exchanges; each, however, appeared to adopt a different interpretation of *Silver*.

The district court in *Harwell* apparently viewed the *Silver* standard as a variation of the narrow reading discussed above. The court felt that if it interfered on antitrust grounds with the rulemaking powers of the NASD, especially in this situation where the SEC had concurred in the establishment of the challenged NASD interpretation, a serious disruption of the statutory scheme of self-regulation established by the Maloney Act would occur. The district court stated that when "the NASD is acting in the quasi-governmental rulemaking capacity given to it by the Maloney Act, and is acting under the close supervision of the SEC, it is immune from antitrust suits."[96] The court further pointed to Section 78o-3(n) of the Maloney Act as a possible repealer of the antitrust laws.[97] Essentially, then, the district court followed the *Kaplan*

L. Rev. 1025, 1025-33 (1934); Baxter, supra note 87, at 685; 45 St. John's L. Rev., supra note 68, at 842 n.129.

95 Nerenberg, Applicability of the Antitrust Laws to the Securities Field, 16 W. Res. L. Rev. 131, 134 (1964).

96 315 F. Supp. at 1191.

97 Id. See text at notes 117-125 infra for a discussion of section 78o-3(n).

interpretation of *Silver*—if the groups involved were functioning under the aegis of statutory authority, they were immune from antitrust liability.

The court of appeals in *Harwell*, on the other hand, used the broad interpretation of *Silver* in its analysis of the antitrust problems in the case. The court observed:

> Implicit in the judgment of the whole court in *Silver*, majority, concurring and dissenting, is the basic concept that the Securities Act prevails over the antitrust acts, when the provisions of the two are in conflict . . . . [T]he Maloney Act "prevails" over any other laws of the United States only to the extent that they conflict. To determine if they conflict, the Maloney Act should be construed to reach only those things necessary to carry out the purposes of the Act.[98]

The problem as the court saw it was whether the "repealer" section of the Maloney Act was indeed an antitrust repealer. However, the court was uncertain whether, if it actually were a repealer, it could justifiably be read to reach *all* activity which the NASD carried out under the Maloney Act.[99]

It has already been submitted that the broad interpretation of *Silver* is the correct interpretation. However, the question arises whether the *Silver* standard can properly be applied to the problem in *Harwell* at all—that is, to the Maloney Act and the NASD. It is submitted that it can. The history and terms of the Maloney Act show that it was intended by Congress to establish for the over-the-counter market the same kind of regulatory scheme earlier established by the Securities Exchange Act of 1934 for the securities exchanges. One provision in the Maloney Act could be interpreted as providing express immunity from antitrust law, but, as will herein be shown, convincing arguments militate against such a view.

The Maloney Act was passed in 1938 as a response to the inadequate provision for the over-the-counter market in the Securities Exchange Act of 1934, which gave to the SEC few powers regarding the over-the-counter market. The SEC had at best general powers over fraudulent dealing in this area,[100] arising from the registration provisions of the Act.[101] A private investment bankers' association had devised a code for the over-the-counter industry under the auspices of

98 451 F.2d at 247.

99 Id. at 246.

100 See Note, the NASD—An Unique Experiment in Cooperative Regulation, 46 Va. L. Rev. 1586 (1960); Westwood & Howard, Self-Government in the Securities Business, 17 Law & Contemp. Prob. 518, 526 (1952).

101 15 U.S.C. § 78f (1970). The registration provisions were applicable to the many over-the-counter dealers who were also members of the New York Stock Exchange. See, e.g., Frey, Federal Regulation of the Over-the-Counter Securities Market, 106 U. Pa. L. Rev. 1, 43 (1957).

the National Industrial Recovery Act.[102] However, this code was vitiated by the effects of the ruling that rendered the NIRA unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*,[103] and in any case it was not an effective instrument for enforcement since there remained areas where abuses in the over-the-counter market could occur. Most of these abuses, not prohibited by the code, would not be technical violations of any law, but would be considered instances of unfair dealing by the securities industry.[104] In 1938, then, the SEC and the private association collaborated and sponsored the Maloney Act, which provided for what Senator Maloney, its Senate sponsor, termed "cooperative regulation."[105]

The Maloney Act provides for the registration of any association of brokers or dealers with the SEC as a national securities association.[106] As in the Securities Exchange Act of 1934, copies of the constitution and all rules of the association are to be supplied to the SEC.[107] The rules of any such national securities association must provide that any broker who comes under the geographical qualifications for membership established by the rules of the association be admitted as a member of the association unless he fails to meet the standards provided in the Maloney Act.[108] The Act obviously envisioned the creation of several associations, each in a different geographical area, rather than the one large association, the NASD, which ultimately resulted.[109]

The Act requires that the rules of a brokers' and dealers' association registered with the SEC assure fair representation of members regarding the adoption of any rule or amendment; be designed to prevent fraudulent and manipulative acts and practices; provide that its members be appropriately disciplined for rule violations; and have a fair and orderly procedure with respect to the disciplining of members.[110] The SEC is authorized to review disciplinary actions against members or denials of admission to the association upon its own motions[111] and to overrule actions by the association.[112] The SEC may abrogate any rule of an association in order "to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this chapter."[113] Furthermore, the SEC may

[102] 46 Va. L. Rev., supra note 100, at 1586-89; Frey, supra note 101, at 43.

[103] 295 U.S. 495 (1935).

[104] 46 Va. L. Rev., supra note 100, at 1587; Comment, Over-the-Counter Trading and the Maloney Act, 48 Yale L.J. 633, 644-46 (1939).

[105] 46 Va. L. Rev., supra note 100, at 1587 n.9; 83 Cong. Rec. 4451 (1948) (remarks of Sen. Maloney).

[106] 15 U.S.C. § 78o-3(a) (1970).

[107] 15 U.S.C. § 78o-3(a)(2) (1970).

[108] 15 U.S.C. § 78o-3(b) (1970).

[109] See 48 Yale L.J., supra note 104, at 646-48.

[110] 15 U.S.C. §§ 78o-3(b)(6), (8)-(10) (1970).

[111] 15 U.S.C. § 78o-3(g) (1970).

[112] 15 U.S.C. §§ 78o-3(h)(1)-(3) (1970).

[113] 15 U.S.C. § 78o-3(k)(1) (1970).

request the association to adopt specified alterations or supplements to its rules with respect to denials of membership, methods of adoption of rules changes, method of choosing officers and directors and the affiliation between registered securities associations.[114] Essentially, then, much of the Maloney Act is similar to the Securities Exchange Act of 1934, although it is tailored to the functioning of a far less structured branch of the securities industry, the over-the-counter market.

However, there are certain provisions in the Maloney Act which reveal differences between it and the Securities Exchange Act of 1934 and which create doubts about the applicability to the over-the-counter market of the *Silver* standard which was developed with reference to the stock exchanges under the Securities Exchange Act of 1934. One significant distinction arises from Section 78o-3(i)(1) of the Maloney Act. It provides:

> The rules of a registered securities association may provide that no member thereof shall deal with any nonmember broker or dealer . . . except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the public.[115]

Subsection (3) further provides:

> Nothing in this subsection shall be so construed or applied as to prevent any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission or special terms.[116]

This provision, analogous to the limited membership provision pertinent to securities exchanges which makes it so important that a broker-dealer retain his membership in an exchange, is the one which puts teeth into all the other provisions of the Maloney Act. If a broker-dealer cannot obtain a discount when trading over-the-counter, he in effect takes a loss on the transaction unless he can bill the customer for it. He cannot do that, however, if he wishes to remain competitive with other broker-dealers who are not charging a higher fee. Hence a strong inducement arises to join the NASD in order to obtain the member's discount.

The Maloney Act ends with a provision which has been interpreted as a "repealer" against the antitrust laws and which can be read in conjunction with the discriminatory discount provision in section 78o-3(i). Section 78o-3(n) reads:

> If any provision of this section is in conflict with any law of the United States in force on June 25, 1938, the provision of this section shall prevail.

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114 15 U.S.C. §§ 78o-3(k)(2)(A)-(D) (1970).
115 15 U.S.C. § 78o-3(i)(1) (1970).
116 15 U.S.C. § 78o-3(i)(3) (1970).

This "repealer" is the major feature distinguishing the Maloney Act from the provisions of the Securities Exchange Act of 1934 regulating stock exchanges. The specific grant of authority to the SEC to review disciplinary actions taken by any over-the-counter securities association which registers is also a significant difference.[117]

Notwithstanding the differences between the Maloney Act and the Securities Exchange Act, the former was not intended to differ significantly from the regulatory scheme set up for the securities exchanges.[118] Senator Maloney, speaking before the Senate, stated that "the bill does not propose anything radical in the investment banking field. It does for that business about what was done for the exchanges through the Securities Exchange Act."[119]

One striking difference between the Securities Exchange Act of 1934 and the Maloney Act does, however, stand out: the "repealer" clause of the Maloney Act. If Section 78o-3(n) is a total repealer of all conflicting laws, including the antitrust laws, then the consideration and acquiescence of the SEC is sufficient to immunize the NASD in the *Harwell* case as well as in other antitrust situations arising under the Maloney Act. But if section 78o-3(n) is not a blanket repealer, then the question of antitrust exemption or applicability should be answered in terms of the standards established in *Silver*—and the proper standards to be employed, it has been submitted, are those discerned in the broad interpretation.

Section 78o-3(n) may indeed be interpreted as a grant of antitrust immunity to the over-the-counter securities dealers in the regulation of their industry. It has been interpreted by various commentators as providing an antitrust exemption for the Maloney Act and the NASD and the SEC.[120] Justice Frankfurter suggested in a dissent in *Interna-*

117 Other differences include the power of the SEC to alter rules, the emergence of only one organization to be regulated, and the technical jurisdiction of the SEC over most action and rules of the NASD, something which the SEC does not have with respect to the exchanges. See Jennings, supra note 89, at 676; Hed-Hofmann, The Maloney Act Experiment, 6 B.C. Ind. & Com. L. Rev. 187, 205 (1965). It could be argued that the latter provision creates a primary jurisdiction situation that, under the narrow interpretation of *Silver*, would justify a decision that antitrust problems arising within that area of primary jurisdiction must be dealt with by the SEC, not the courts. However, neither the Maloney Act nor the Securities Exchange Act of 1934 makes any mention of guidelines for *antitrust determination* to be used by the SEC in overseeing the respective organizations. This absence of guidelines creates a situation which is the opposite of that in the *Pan American Airways* case, note 75 supra, and similar to the situation in California v. FPC. Therefore, the situation is arguably one in which the courts would not have to defer to the agency even under the narrow interpretation of the *Silver* decision.

118 See generally, White, National Association of Securities Dealers, Inc., 28 Geo. Wash. L. Rev. 250 (1959); Frey, note 101 supra; 83 Cong. Rec. 4451 (1938).

119 83 Cong. Rec. 4451 (1938).

120 See, e.g., Nerenberg, supra note 95, at 140; Sterling, Stockbrokers Going Public: Antitrust Aspects of Exchange Rules, 13 U.C.L.A. L. Rev. 563, 571 (1966); Note, Stock Exchange Immunity from the Antitrust Laws, 51 B.U. L. Rev. 32, 34 n.14, 43 n.101 (1971); Comment, Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange, 80 Yale L.J. 811, 818 n.49 (1971).

tional Ass'n of Machinists v. Street that section 78o-3(n) created an antitrust exemption,[121] and Justice Douglas made the same suggestion in dicta in *United States v. Socony-Vacuum Oil Co.*[122] One federal district court came to a similar conclusion in *United States v. Morgan.*[123]

On the other hand, it has been pointed out that both the Maloney Act and the Securities Exchange Act of 1934 specifically authorize practices which could be interpreted as per se antitrust violations.[124] In the case of the Maloney Act, it is the authorization of discounts and concessions to be given only to fellow members of associations and denied to nonmembers. The discount provisions in the Maloney Act supply what private self-regulatory attempts had been unable to do: force members to join the regulatory association or to suffer economic discrimination in the placing of their orders.[125]

Previous decisions have shown that a private group's efforts to enforce regulatory sanctions by showing discriminatory behavior to those outside the group who would not join the private group are vulnerable to state and federal antitrust law.[126] These cases suggest that without direct congressional protection from antitrust law of the discount provisions which the NASD uses as an inducement for membership, that type of inducement would constitute an antitrust violation. They suggest that if Congress did not in some way immunize the actions of the brokers' and dealers' association under the regulatory statute, the enforced discount situation would have violated antitrust laws.[127]

In a 1945 SEC case, one of the commissioners commented on the meaning of section 78o-3(n). He maintained that the section was to be read in conjunction with section 78o-3(i)(1), authorizing discounts, on the grounds that it would preclude antitrust claims based on the anti-competitive tendencies of that one section of the Maloney Act.[128] A final

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121 367 U.S. 740, 809-10 n.16 (1961) (dissenting opinion).

122 310 U.S. 150, 227 n.60 (1940).

123 118 F. Supp. 621, 686-88 (S.D.N.Y. 1953). The court stated:

> If Congress engaged in the elimination of harmful practices . . . passed a series of statutes into the terms of which the established procedures of investment bankers . . . have been inextricably interwoven, thus indicating that the members of the Congress were implementing the operation of a system which they regarded as generally legal and proper, what weight should a court give to such attitude on the part of the Congress, in determining whether or not the practices thus implemented are violations of the Sherman Act, in view of the circumstance that no general exemption from the provisions of the Sherman Act is set forth in such legislation?

Id. at 686.

124 Cf. Westwood & Howard, supra note 100, at 528 n.67.

125 48 Yale L.J., supra note 104, at 646-47.

126 See, e.g., Chamber of Commerce v. FTC, 13 F.2d 673, 687 (8th Cir. 1926). The rules of a grain exchange calling for its members to deal with nonmembers on a discriminatory basis were deemed unfair competition since they tended toward monopoly. See also 48 Yale L.J., supra note 104, at 645-46.

127 Lowenfels, Private Enforcement in the Over-the-Counter Securities Markets: Implied Liabilities Based on NASD Rules, 51 Cornell L.Q. 633, 637 (1966); Westwood & Howard, supra note 100, at 528 n.67.

128 Nat'l Ass'n of Securities Dealers, Inc., 19 S.E.C. 424, 478 n.9 (1945). The Com-

argument that section 78o-3(n) is not a sweeping repealer arises from its imprecise language when compared with the explicit language of other sweeping antitrust repealers that the Congress has enacted into law.[129] It is concluded, then, that section 78o-3(i) is vulnerable to antitrust attack and that section 78o-3(n) was enacted in order to confer immunity upon that section only.

Assuming the "repealer" in the Maloney Act only applies to section 78o-3(i), then the differences between the Maloney Act and the exchange regulatory provisions of the Securities Exchange Act of 1934 are minimal. Accordingly it is submitted that this similarity between the two securities regulatory schemes justifies applying the standard developed by *Silver* to cases arising under the Maloney Act as well as to those involving the Securities Exchange Act of 1934. It has been submitted that the broad interpretation of *Silver* is the correct one. Accordingly the standards of the "repugnancy" test to which that interpretation gives rise should be applied to the facts of *Harwell*.

III. Application of the Broad Interpretation of *Silver* to *Harwell*

The broad or "repugnancy" standard of *Silver* is a test which first inquires whether an alleged antitrust activity is essential to the purposes of the regulatory act in question. Only if an activity is not essential will the court go on to determine whether there is an antitrust violation. Therefore, in the context of *Harwell*, the first determination which must be made is whether the NASD activity which was attacked by plaintiffs is *essential and necessary* to the workings and purpose of the Maloney Act.

The in-and-out short swing activity which the single investment plan holders were indulging in under the terms of their contract plans presents a question of fact as to whether this sort of trading situation is speculative or manipulative within the terms of the Maloney Act. If the in-and-out activity is within the speculative activity which the Maloney Act attempted to control, then the NASD interpretation of the rules of fair practice to eliminate this new device of speculation is necessary to accomplish the purposes of the Act. It would appear that the in-and-out trading on the basis of the contract plans constituted a classic speculative situation where the traders had an advantage over others in the same market. Because of their knowledge of the future net asset value, the position of the single investment plan owners was comparable to that of persons possessing inside information who trade on a securities exchange. Their ability to move in and out of the fund without

missioner noted that he "never knew of any other [meaning] and never heard of any other while the Maloney Act was pending before Congress and was the subject of daily reports and discussions inside the Commission."

[129] See, e.g., Federal Aviation Act, 49 U.S.C. § 1384 (1970); Interstate Commerce Act, 49 U.S.C. §§ 5(11), 5b(9) (1970); Shipping Act, 46 U.S.C. § 814 (1970); Webb-Pomerene Act, 15 U.S.C. § 62 (1970); Clayton Act, 15 U.S.C. § 18 (1970).

paying commissions also gave them an unfair advantage over traders who were not single investment plan owners.

If the actions of a regulatory body are necessary to uphold the policies of a regulatory statute, the repugnancy test advocated by the broad interpretation of *Silver* provides an absolute antitrust defense. It is submitted that the investors' speculative activities in *Harwell* are activities that the regulatory scheme established by the Maloney Act is *directly* intended to regulate. Accordingly, it would appear that, under the broad view of *Silver*, the NASD interpretation challenged in *Harwell* should be immune from antitrust liability: the application of antitrust law would create a result repugnant to the purposes of the Maloney Act. Therefore, the absolute defense of the "repugnancy test" should provide immunity against the antitrust claims of plaintiffs in *Harwell*.

If the facts of *Harwell* were different, and the activities of the plaintiffs were not so clearly speculative and directly violative of Maloney Act policies, then the second tier of tests mandated by the broad interpretation of *Silver* must be applied. The question becomes whether the action taken by the NASD here is "essential and necessary" under the terms of the Maloney Act. Here, again, if the rule or interpretation is expressly mandated by the Maloney Act, no problem arises, since it is necessary to the objectives of the Act. However, if there is no express authorization of the rule or interpretation, or if the rule or interpretation is for the purposes of administrative efficiency, the necessity of the NASD action must be examined as well as the alternative actions open to the NASD. That is to say, if the NASD has open to it several options for correcting behavior that it considers undesirable, it is obligated to choose the option which least curtails investors' rights.

Applying this reasoning to the *Harwell* situation, and assuming for the sake of the argument that the in-and-out activity of the contract plan holders had not been clearly speculative, it appears that the NASD could have responded to the activity with alternative actions in addition to the action that it did in fact take—the issuance of the interpretation. One option would have been to change the method by which the net asset value was calculated, a solution which would have left the contract plans intact, but which would have effectively removed the basis upon which any type of guaranteed speculation could operate. If, in such a situation, the NASD did not choose the most reasonable method of controlling an alleged abuse and thus the least violative of others' rights, it would be vulnerable to antitrust claims.

CONCLUSION

The antitrust immunity conferred by the Maloney Act should be judged by the standards applicable to the stock exchanges enunciated in *Silver*. Although the decision in *Silver* was actually based upon the New York Stock Exchange's denial of procedural due process, the Supreme Court's broad interpretation of the scope of antitrust immunity of the

stock exchanges, set forth in dicta, is applicable to the NASD. The conclusion that the broad interpretation of the unsettled meaning of *Silver* is the correct reading of the case is supported by the fact that the rationales for a narrow interpretation—*i.e.*, concepts of primary jurisdiction or pervasive regulatory power in a government agency—have been vitiated by administrative law decisions made by the Supreme Court subsequent to *Silver*. This broad interpretation of *Silver* requires courts to attempt to reconcile the policies of the regulatory statute in question with the antitrust laws; only where there is a direct conflict should the policy of the regulatory statute be controlling and immunity from antitrust law be accorded to the action of the regulatory agency.

The express repealer provision in the Maloney Act, Section 78o-3(n), is the key distinguishing feature between that Act and the exchange regulatory provisions of the Securities Exchange Act of 1934. However, this repealer does not grant blanket antitrust immunity to all NASD activities, but is limited in application to the discriminatory discount provisions in 78o-3(i). Thus, the NASD has no automatic defense provided by 78o-3(n) against antitrust claims such as those brought by the plaintiffs in *Harwell*. Instead, under the broad interpretation of *Silver*, the NASD must prove that its activities were necessary and essential to the anti-speculative policies of the Maloney Act in order that those activities be protected from antitrust liability. It is submitted that the NASD interpretation challenged in *Harwell* is necessary to accomplish the objectives of the Maloney Act. Therefore the NASD was justified in adopting the interpretation and is not subject to antitrust liability on the facts of the case. The Supreme Court should uphold the Fifth Circuit's decision to remand the case to the district court for a hearing on the merits. Ultimately, the district court should dismiss plaintiffs' antitrust claims on the basis of the antitrust immunity provided to defendants by the Maloney Act.

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