ANTITRUST

The Eighth Circuit was faced with two cases in 1980 where the defense of implied immunity to the antitrust laws was asserted by defendants. Implied immunity can only arise where there exists a pervasive body of regulation inconsistent with enforcement of the antitrust laws. In this situation, activity taken pursuant to the regulations can be immune from antitrust challenge. The implied immunity defense differs from an express exemption from the antitrust laws, and should not be confused with the much litigated state action exemption.

In one of the cases decided in 1980, the implied immunity defense was successfully argued by Blue Cross of Kansas City, in an action brought under sections 1 and 2 of the Sherman Act by a recently constructed hospital which sought membership status from Blue Cross. In the second decision, the implied immunity defense was inadequate to stop an antitrust challenge brought against the American Telephone and Telegraph Company (ATT) by the manufacturer of competing telephone terminal equipment under sections 1, 2, and 3 of the Sherman Antitrust Act. These decisions will be discussed separately below, and the conclusion of this segment of the survey will discuss the inconsistency of these decisions, and attempt to glean the current status of the implied immunity defense to antitrust actions.

IMPLIED IMMUNITY IN THE HEALTH CARE INSURANCE INDUSTRY

The health care industry has recently been criticized as the cost of health care has increased more rapidly than the general inflation rate. This situation is brought about partly because competition in the health care field is generally on the basis of quality rather than on the basis of price.[1] Congress has responded with legislation intended to reduce undesirable competition by coordinating the activities of health care institutions with the hope of slowing the rate of increase in the cost of the services provided.[2] The National Health Planning and Resources Development Act of

1. M. THOMPSON, ANTITRUST AND THE HEALTH CARE PROVIDER 27 (1979). *See generally* S. REP. NO. 93-1285, 93d Cong., 2nd Sess. *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7842-8001.

2. National Gerimedical Hosp. and Gerontology Center v. Blue Cross, 628 F.2d 1050, 1055 (8th Cir. 1980); S. REP. NO. 93-1285, *supra* note 1, at 7845-46. The district court opinion of National Gerimedical Hosp. and Gerontology Ctr. by Judge Clark is found at 479 F. Supp. 1012 (W.D. Mo. 1979).

1974[3] initiated several programs including certificate of need procedures for certain capital expenditures such as construction or expansion of a health care facility.[4] The Act was intended to facilitate the development of a national health care planning policy designed to slow the rapidly increasing cost of care, by preventing the unnecessary duplication of health resources.[5]

The Act established regional Health Services Agencies (HSAs) charged with the responsibility for implementing health planning policy within their locales. The HSAs are federally funded nonprofit corporations with the powers of a semiregulatory body which operate within a limited geographic area.[6] Health planning policy is intended to achieve the social goals of quality health care at an affordable price, based on the assumption that reducing the oversupply and overconcentration of expensive equipment and highly trained personnel will reduce the overall cost of the services provided.[7] Critics have noted that the field of health care is in need of both public and private litigation to combat monopolistic and restrictive practices in the field,[8] and that consumer welfare demands that the antitrust laws be employed in

3. National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225, (codified at 42 U.S.C. § 300(k) to (v) (1979)) [hereinafter cited as Health Care Planning Act]. *See* M. THOMPSON, *supra* note 1, at 28.

4. M. THOMPSON, *supra* note 1, at 28.

5. 42 U.S.C. § 300-2(a) (1979).

6. M. THOMPSON, *supra* note 1, at 28.

7. *Id.* at 51-52.

8. Weller, *Medicaid Boycotts and Other Maladies From Medical Monopolists: An Introduction to Antitrust Litigation and the Health Care Industry*, 11 CLEARINGHOUSE REV. 99, 102 (1977). The Office of Policy Planning and Evaluation of the Federal Trade Commission reported that there exists "[t]remendous potential for consumer benefit" from continued FTC investigation into the Health Field. [1976] 758 ANTITRUST & TRADE REG. REP. (BNA) A-9.

The Justice Department has also recently been consulted for its opinion as to potential antitrust exposure for an HSA in central Virginia anticipating certain health planning activities. In response, Sanford M. Lituack, Assistant Attorney General for the antitrust division stated:

> In essence, we do not believe that the health Planning Act creates a complete antitrust exemption for all efforts by HSA's, and private parties working with HSA's, to implement health plans. An antitrust exemption protecting all activities which arguably furthered the general statutory goals is not, in our view, justified. The legislative history of the Act reveals no congressional intent to restrict the operation of the antitrust laws to such an extent. Moreover, that interpretation would clearly conflict with the well-established principle that the implied repeal of the antitrust laws is disfavored and that antitrust exemption should be construed narrowly.

Antitrust Division's Business Review Procedure Letter from Sanford M. Lituack, Assistant Attorney General to William G. Kopit, Esquire page 4 (May 6, 1980) (A file containing the business review request and the Department's response is available to the public at the Legal Procedure Unit, Antitrust Division, Room 7416, Dept. of Justice, Washington, D.C. 20530).

the health care field.[9] The application of the antitrust laws to the learned professions has led to lower fees for services.[10] The simultaneous functioning of the antitrust laws, requiring robust uninhibited competition, and a health planning policy advocating the elimination of competition, presents a conflict which is immediately apparent.[11]

Upon this background comes *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*[12] decided by the Eighth Circuit in 1980. Throughout the period relevant in this case, an eight county area surrounding Kansas City, Missouri was within the area designated by the Department of Health, Education and Welfare (HEW) to be within the health planning jurisdiction of a local HSA. The National Gerimedical Hospital (National) began construction of a new facility in 1976, which was completed in 1978. During construction, National requested a member hospital contract from Blue Cross, a health insurer. Such a contract allows the hospital to be directly reimbursed by Blue Cross for the cost of services received by individuals covered by Blue Cross policies. Covered individuals who receive eligible services at nonmember hospitals are personally reimbursed, but only up to a maximum of eighty percent of the cost of such services.[13] Thus, a membership contract has two principal advantages for the hospital: direct payment for covered services, thus avoiding collection costs; and, payment in full (less the deductible if any) rather than depending on the patient to pay the remaining twenty percent of the cost of care.

Blue Cross advised National that before a membership contract would be favorably considered, the hospital must first receive the approval of the local HSA.[14] Notice of this policy was contained in the membership contract and a newsletter sent to all member hospitals prior to the time construction began at National.[15]

National argued that the approval requirement was a contract, combination or conspiracy in restraint of trade, and in violation of the Sherman Act,[16] as well as an abuse of Blue Cross' monopoly

9. Weller, *supra* note 8, at 101.
10. *Id. See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); *see generally* Survey, *Antitrust Aspects of Interseller Price Exchanges and Fee Splitting Arrangements in Residential Real Estate Sales*, 13 CREIGHTON L. REV. 1168, 1168 & n.9 (1980).
11. M. THOMPSON, *supra* note 1, at 51-52.
12. 628 F.2d 1050 (8th Cir. 1980).
13. *Id.* at 1052-53.
14. *Id.* at 1052.
15. *Id.* at 1053.
16. *Id.* at 1054. The Sherman Antitrust Act is found at 15 U.S.C. §§ 1-7 (1979).

power in the health care reimbursement plan market.[17] Blue Cross contended that its actions were impliedly immune from the antitrust laws because its actions were in compliance with the provisions of the Health Planning Act[18] calling for voluntary cooperation of private entities while attempting to reduce the cost of health care.[19]

National sought a membership contract from Blue Cross, without first seeking the approval of the local HSA, perhaps because the HSA had publicly stated that it would not favorably view the addition of acute care beds to the area. National intended to build acute care beds in its facility.[20] Arguably then, Blue Cross' denial of a membership contract to National reached the same result that would have occurred had National initially sought HSA approval. In any event, Blue Cross took unilateral action which placed National at a competitive disadvantage with other area hospitals.

The Eighth Circuit noted that the application of implied immunity is only to be used sparingly, but recognized the instant case as one well suited to application of the doctrine.[21] This conclusion was based on the test found in a recent New Jersey district court opinion, *Essential Communications Systems, Inc. v. ATT*,[22] which recognized that implied immunity is akin to limited implied statutory repeal.[23] The implied immunity test from *Essential Communication* is as follows: (1) if a clear repugnancy exists between the antitrust laws and the conduct at issue, and (2) the intent of Congress, in passing the statute in question, was to impliedly repeal the antitrust laws to the extent necessary to remove the conflict; repeal can be implied, and implied immunity can be found.[24] The Eighth Circuit held that the facts of National Gerimedical

17. 628 F.2d at 1054. *See* 15 U.S.C. § 2 (1976).

18. National Gerimedical Hospital and Gerontology Center v. Blue Cross, 479 F. Supp. 1012, 1019 (W.D. Mo. 1979).

19. 628 F.2d at 1054; 42 U.S.C. § 300 l-2(c)(1) (1979).

20. 628 F.2d at 1054.

21. *Id.* at 1054. The court seemed to rely on Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975) in reaching this conclusion. *Id.* Other important cases on the implied immunity question are: United States v. Nat'l Assoc. of Sec. Dealers, 422 U.S. 694 (1975); United States v. First City Nat'l Bank, 386 U.S. 361 (1967); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); United States Alkali Export Assoc. v. United States, 325 U.S. 196 (1945); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); and United States v. Bordon Co., 308 U.S. 188 (1939).

22. 446 F. Supp. 1090 (D.N.J. 1978). The decision in *Essential* was reversed in Essential Communication Systems, Inc. v. ATT, 610 F.2d 1114, 1115 (3d Cir. 1979).

23. 628 F.2d at 1054.

24. Essential Communication Systems, Inc. v. ATT, 446 F. Supp. 1090, 1094-95 (D.N.J. 1978).

presented just such a situation.[25] In reaching this conclusion the court relied upon comments made during debates over subsequent amendments to the Act. These comments made by Representatives Paul Rogers (D. Florida) indicated his belief that by enacting the Health Planning Act, Congress intended that HSAs, and health care providers working in voluntary cooperation with them, should not be subject to the antitrust laws. Rogers felt that subjecting health care providers to this type of liability would prevent the Act from being successfully implemented.[26] It must be noted, however, that these comments were made almost four years after the Health Planning Act was passed by Congress.[27] Statements made during debate of an amendment would not seem to be a sufficient expression of congressional intent to invoke implied immunity, according to a sizable body of law.

Through this case law, it has been clearly established by the United States Supreme court that statutory exceptions from the antitrust laws are to be strictly constructed.[28] Additionally, immunity from the antitrust laws is never lightly implied.[29] Further, and especially relevant to this case, repeal of the antitrust laws by implication, or implied antitrust immunity derived from other federal statutes is clearly never favored,[30] nor is it to be casually allowed.[31] Only a clear repugnancy between the antitrust laws and a new law results in the former laws giving way, and then, only to the mini-

25. 628 F.2d at 1054.

26. *Id.* at 1056. The comments of Rep. Paul Rogers relied on by the court are found at 124 CONG. REC. H11962-63 (daily ed. Oct. 10, 1978). At the end of Mr. Rogers' initial comments on H.R. 11488, he states: "Mr. Chairman, there is one issue that is not dealt with in H.R. 11488 that should be clarified. Concern has been expressed that HSA's and health care providers who voluntarily carry out the mandates of the health planning laws (titles XV and XVI of the Public Health Service Act) may be in violation of the antitrust laws." Mr. Rogers then went on to explain the relationship between the antitrust laws and the Health Planning Act, and stated that Congress intended that those who cooperated with HSA's should not be subject to the antitrust laws, although no specific exemption was provided, at which point Mr. Rogers stated: "Thus, it is my view that the concerns which have been expressed [about the antitrust laws] are unnecessary and should not deter the cooperative relationships which are developing." *Id.* It seems, therefore, that the court has placed significant reliance on the opinion of a single Congressman to grant implied immunity from the antitrust laws.

27. The Health Planning and Resources Development Act was passed by the House on December 20, 1974 and Mr. Rogers' comments were made October 10, 1978.

28. Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 732 (1973).

29. United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963).

30. Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 683 (1975); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); United States v. Borden Co., 308 U.S. 188, 196-99 (1939).

31. Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 682 (1975).

mum extent needed to alleviate the repugnancy.[32]

With this type of precedent against implied immunity from the antitrust laws, the Eighth Circuit has taken a bold step in finding Blue Cross immune in this case. In January of 1981, the United States Supreme Court granted National's petition for certiorari, and will hear the case this term.[33] Therefore, it seems the Supreme Court will decide if the regulation over the health care field is sufficiently pervasive to add health care to the other industries which enjoy at least a limited exemption from the antitrust laws.

It seems that the trend in decisions dealing with the implied immunity issue has been to find private action to be immune only under the most stringent conditions. This analysis would indicate that the Eighth Circuit's decision in this case would well be reversed by the Supreme Court. Reversal seems more likely when, it is considered that much of the district court's opinion in *National* is based on the holding in *Essential Communication* and on comments made on the floor of the House nearly four years after the Health Planning Act was passed, yet which purported to convey the intent of Congress at the time the Act was originally enacted. The *Essential Communication* case was subsequently reversed by the Third Circuit, which felt that the level of regulation of the telephone industry was not sufficiently pervasive to require implied immunity.[34] It should be noted that the telephone business is nearly a complete monopoly which is extensively regulated by the states and by the FCC. To apply the same standard to the health care field, where competition is available and should be encouraged, seems unsound. The purpose of the Health Planning Act was to reduce the costs of services to consumers, not to protect the providers of health care from the antitrust laws.[35]

The Eighth Circuit failed to mention that section 300 l-1 of the Health Planning Act expressly provides that the HSAs themselves, their employees and their governing members shall not be liable for the payment of damages under any law of the United States or of any state.[36] The presence of this provision in the Act leads to the familiar argument that since some persons are expressly pro-

32. Georgia v. Pennsylvania R.R., 324 U.S. 439, 457 (1945); United States v. Bordon Co., 308 U.S. 188, 198-99 (1939).

33. 49 U.S.L.W. 3531 (January 27, 1981).

34. Essential Communication Systems, Inc. v. ATT, 610 F.2d 1114, 1124 (3d Cir. 1979).

35. 42 U.S.C. § 300 l 2(a) (1979).

36. 42 U.S.C. § 300 l 1(4) (1979). In similar narrow language, 42 U.S.C. § 300(m)-3 provides for insulation from liability for members and employees of state health coordinating committees.

tected from liability, Congress intended that all other persons should be subject to liability under the laws of the United States, which presumably includes the antitrust laws. Therefore, the argument goes, Congress clearly did not intend to provide blanket immunity for the unilateral private action taken by individuals.

Reliance on the remarks of Mr. Rogers also seems inadequate to justify finding implied immunity in this case. Mr. Rogers remarks were not the subject of true debate, but rather were made in an offhand manner following an argument in favor of an expenditure of nearly 800 million dollars.[37] The expenditure provisions were hotly debated, but Mr. Rogers' comment seems almost as if it was planted for future use in litigation.[38]

The facts of this case indicate that application of implied immunity to Blue Cross would allow unilateral private conduct, which amounts to little more than offering less than desirable terms to certain competitors, to be free from antitrust challenge. When the history of the growth of Blue Cross is considered, it becomes clear that Congress could not have intended the private actions of health care providers to be immune from scrutiny under the antitrust laws.[39] Blue Cross was originally organized and controlled by local hospitals in the 1930's and although not all of these plans are still controlled by hospitals, it is clear that most Blue Cross plans are still under the control of health care providers.[40] To allow Blue Cross, an organization typically controlled by health care providers, to set the terms on which nonmember hospitals will be reimbursed appears to present a clear conflict of interest, and one to which the antitrust laws should be allowed to address themselves.

IMPLIED IMMUNITY FOR A REGULATED INDUSTRY

In another case decided by the Eighth Circuit in 1980, the defense of implied immunity to the antitrust laws was unsuccessfully asserted by the American Telephone and Telegraph Company (ATT) in an action brought by Sound, Inc. (Sound), the manufacturer of telephone terminal equipment sold in competition with

37. *See* 124 CONG. REC. H11961-63 (daily ed. Oct. 10, 1978) (remarks of Rep. Rogers).

38. See note 27 and accompanying text *supra*.

39. Weller, *supra* note 8, at 104.

40. *Id.* at 104-05. Precisely who controls Blue Cross of Kansas City does not appear on the record, but that fact may not be material, because if this case is not overruled, it will arguably grant implied immunity to all health insurers regardless of who controls them.

similar equipment made by ATT.[41] The complaint alleged *inter alia* that ATT was engaged in a concerted effort to destroy Sound's business by predatorily pricing its own equipment, making false and slanderous statements to Sound's customers, and threatening to withhold telephone service from customers purchasing Sound's equipment.[42] The complaint further alleged that ATT sought to damage Sound's business by requiring that Protective Connecting Arrangements (PCAs) be installed as an interface between the ATT communications system and any terminal equipment not owned by ATT. Sound alleged that ATT required the PCAs knowing they were anticompetitively expensive, unnecessary, improperly designed, and harmful to Sound's equipment.[43] ATT answered, claiming that its rate related conduct was exempted from antitrust scrutiny by the state action doctrine, and its PCA requirements were impliedly immune because the antitrust laws and the appropriate regulatory standards are inconsistent. ATT argued further that the area of telecommunications was pervasively regulated, which infers that the hand of regulation substitutes for the antitrust laws, and ATT is insulated from antitrust actions.[44]

ATT has increasingly asserted the implied immunity defense to antitrust lawsuits in recent years. The issue has been hotly litigated by private plaintiffs, with the help of the Justice Departments, and is an issue in the government's monopoly case against ATT.[45]

In *Sound* this defense was raised by ATT in a motion for judgment on the pleadings which was denied by the district court. After certification for interlocutory appellate review, the Eighth Circuit affirmed the district court's denial of ATT's motion.[46] Only the implied immunity aspect of ATT's defense will be dealt with here, its state action claim already being the subject of a great deal of legal analysis.[47] The heart of ATT's implied immunity defense

41. Sound, Inc. v. ATT Co., 631 F.2d 1324, 1326 (8th Cir. 1980). The district court opinion is found at [1979-2] TRADE CAS. (CCH) ¶ 62,974 (S.D. Iowa 1979).

42. 631 F.2d at 1326.

43. *Id.* at 1327.

44. *Id.* ATT is, of course, under the regulation of both the Federal Communications Commission, and the Iowa State Commerce Commission. *Id.* at 1326.

45. LEGAL TIMES OF WASHINGTON, Feb. 4, 1980 at 6, col. 1. *See, e.g.*, Phonetele, Inc. v. ATT, 435 F. Supp. 207 (C.D. Cal. 1977), *appeal pending*, No. 77-3877 (9th Cir. 1980); Essential Communication Systems, Inc. v. ATT, 610 F.2d 1114 (3d Cir. 1979).

46. 631 F.2d at 1326.

47. *See generally* 7 J. VON KALINOWSKY, ANTITRUST LAWS AND TRADE REGULATION chap. 46 (1979); *see also* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 201-230 (1978); L. SULLIVAN, HANDBOOK ON THE LAW OF ANTITRUST § 238 (1977); Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM.

is whether the tension between the antitrust laws and the scheme of FCC regulation over the telecommunications industry impliedly repeals the Sherman Antitrust Act.[48] It has been clearly established that the FCC has jurisdiction over ATT's activity in the interconnect industry;[49] but this is not dispositive of the issue because it has been established by a long line of cases that activities which come under the jurisdiction of a regulatory agency may nevertheless be subject to scrutiny under the antitrust laws.[50] There is also no longer any doubt that the antitrust laws apply to utilities.[51]

The distinction between the state action defense and the implied immunity defense must be kept clear. The state action defense is epitomized by the *Parker v. Brown*[52] case which held that the Sherman Act was not intended to apply to actions taken by the state itself.[53] Although the boundaries of the state action defense are not completely stabilized, it remains clear that for the defense to be successful, the challenged activity must somehow be linked to action guided by the state itself.[54] In contrast, the implied immunity defense protects conduct which falls in the area between purely private action and action sufficiently close to an area of state domination to be exempt from antitrust challenge under the state action exemption.[55] In a situation where the requirements for successful application of the state action exemption are not met, implied immunity will only be allowed to protect challenged activity where (1) the statute and the antitrust laws cannot be successfully reconciled and (2) failure to impliedly repeal the regulation would render the regulatory statute ineffective.[56] Even in this situation, the antitrust laws will only be impliedly repealed (or the

L. REV. 328 (1975); Teply, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272 (1974); Note, *Recent Developments*, Cantor v. Detroit Edison Co., 5 HOFSTRA L. REV. 673, (1977); Comment, *The State Action Exemption in Antitrust: From* Parker v. Brown *to* Cantor v. Detroit Edison Co., 1977 DUKE L.J. 871.

48. 631 F.2d at 1327.

49. North Carolina Util. Comm. v. FCC, 552 F.2d 1036, 1051 (4th Cir. 1977).

50. Ottertail Power Co. v. United States, 410 U.S. 366, 372-73 (1973); Cantor v. Detroit Edison, 428 U.S. 579, 596-98 (1976).

51. MCI Communications Corp. v. ATT, 462 F. Supp. 1072, 1084-85 (N.D. Ill. 1978); United States v. ATT, 461 F. Supp. 1314, 1325-26 (D.D.C. 1978); United States v. ATT, 427 F. Supp. 57, 62-63 (D.D.C. 1976).

52. 317 U.S. 341 (1943).

53. *See* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 211 (1978); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 238(a) (1975).

54. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 238 (1977); Note, Cantor v. Detroit Edison Co.: *A Further Refinement of Parker's State Action Exemption*, 8 LOY. CHI. L.J. 619, 625 (1977).

55. THOMPSON, *supra* note 1, at 52.

56. *Id.*

activity be impliedly immune) to the minimum extent necessary to allow the regulatory scheme to functions.[57] ATT has regularly asserted the implied immunity defense for some time and, at least initially, with some success.[58] With over forty private antitrust actions against ATT nationwide, plus action by the Justice Department, ATT has a lot riding on the success of this defense.[59] Unfortunately for ATT, the latest trend has been to reject the implied immunity defense, holding utilities subject to antitrust liability.[60]

One early success was in *Phonetele v. ATT*, in which a firm seeking to market terminal equipment charged ATT with monopoly abuse.[61] ATT's motion to dismiss the complaint in *Phonetele* was granted by the district court, which held that regulation by the Federal Communications Commission, and the procompetitive influences of the antitrust laws were sufficiently repugnant that Congress intended to repeal the antitrust laws otherwise applicable to this activity.[62] In another successful district court case, *Essential Communication System, Inc. v. ATT*,[63] ATT was again able to have its motion to dismiss granted on facts similar to those in *Phonetele*. Unfortunately for ATT, the *Essential* decision was reversed on appeal. When the Third Circuit reviewed *Essential*, Judge Gibbons analyzed the history of regulation over the telephone industry from the Mann-Elins Act of 1910[64] through the communications Act of 1934,[65] and concluded that regulation by the FCC was intended to protect telephone users from discrimination in price and service.[66] Judge Gibbons saw nothing in the Act to suggest that it was the intent of Congress to protect equipment sellers or the competitors of ATT. Further, FCC regulation over the industry was not seen as comprehensive enough to imply congressional intent to make the telephone industry exempt from the antitrust

57. Gordon v. New York Stock Exch., 422 U.S. 659, 683 (1975).
58. *See* LEGAL TIMES OF WASHINGTON, Feb. 4, 1980 at 6, col. 3.
59. *Id.* at col. 2.
60. *See id.* at col. 3. *See, e.g.*, Essential Communication Systems Inc. v. ATT, 610 F.2d 1114, 1123 (3d Cir. 1979).
61. Phonetele, Inc. v. ATT, 435 F. Supp. 207, 214 (D. Cal. 1977) (appeal pending).
62. *Id.* at 212.
63. 446 F. Supp. 1090, 1105 (D.N.J. 1978).
64. Essential Communication Systems, Inc. v. ATT, 610 F.2d 1114, 1117-21 (3d Cir. 1979). The Mann-Elkins Act of 1910 is currently found at 49 U.S.C. §§ 10301-11914 (1979).
65. The Communications Act of 1934 is currently found at 47 U.S.C. §§ 151-609 (1979).
66. Essential Communication Systems, Inc. v. ATT, 610 F.2d 1114, 1120 (3d Cir. 1979).

laws.[67] Other factors also helped defeat ATT's claim in *Essential*. One such factor was section 221(a) of the Communications Act of 1934 which provides only a limited exemption from the Clayton Act of consolidations of local service groups by telephone companies.[68] Another is section 414 of the same Act, which states that the Act shall not abridge or limit any then existing common law or statutory remedies, but that the provisions of the Act will be in addition thereto. A final factor mentioned in *Essential Communication* is that the Act does not direct the FCC to consider antitrust questions when exercising its authority.[69] *Essential Communication*, like *Sound* was not a decision on the merits, but was an appeal of a motion to dismiss made by ATT early in the proceedings. These two decisions agree that there is no blanket immunity from the antitrust laws implied by the current regulation over the telephone industry. The *Sound* decision by the Eighth Circuit, is in harmony with the other circuits which have heard the question, and is in agreement with at least fifteen other federal courts which have rejected similar claims by ATT and other telephone companies.[70] The decision in *Sound* is also in agreement with the black letter law on the subject, which states that implied immunity is not favored in the law.[71]

CONCLUSION

A comparison of the *National Gerimedical* and *Sound* decisions presents what appears to be an irreconcilable difference between the two. In the *National Gerimedical* case private anticompetitive conduct was found to be immune from the antitrust laws while in the *Sound* decision similarly anticompetitive conduct was found not to be immune from the same antitrust laws.

The very nature of the health care reimbursement market is such that some avenue to seek redress of perceived wrongs is required, as historically neither the ultimate consumer nor the insurance company itself has been in the position from which to effectively seek change. This situation has been the subject of substantial legal analysis,[72] which will not be repeated here, but a

67. *Id.*
68. *Id.* (citing 47 U.S.C. § 221(a) (1979)).
69. Essential Communication Systems, Inc. v. ATT, 610 F.2d 1114, 1120 (3d Cir. 1979).
70. This figure comes from a Justice Department brief as *amicus* in *Essential*. LEGAL TIMES OF WASHINGTON, Feb. 4, 1980, at 6, col. 3.
71. See note 21 *supra*.
72. A handy collection of this analysis is contained in Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802, 804 n.22-25 (1981).

strong argument is clearly available for reversal of the *National* decision in the interest of allowing those injured by the anticompetitive behavior of others to defend themselves.

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