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Proper Scope of the Non-Profit Institutions Exemption: Abott Laboratories v. Portland Retail Druggists Association, The

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cumstances to determine the existence of conflicting interests.[47] While the rule may receive criticism as being potentially harsh and mechanistic, its utility is undoubted where the court is convinced, as in the class action context, that an inherent conflict exists. The court's utilization of canon 9 as the sole basis for its opinion signals a willingness to respond to public criticism of the legal profession by putting significant pressure on attorneys to consider not only legal and ethical considerations of their conduct, but the public impression as well. By its adoption of this general rule of prohibition, the court has eliminated a potential conflict harmful to interests of class members, as well as having provided a remedy for criticism of attorney motivation in the pursuit of class actions generally.

IV. CONCLUSION

When faced with class actions in which an attorney appears as both named plaintiff and as class counsel courts have applied differing remedies to cure a conflict of interests if, indeed, a conflict is found to exist. The Third Circuit in *Kramer* concluded that all such situations, at a minimum, appear to pose a financial conflict of interest and should be cured by disqualification of the attorney serving as class counsel. The court based its conclusion and the scope of its ruling on canon 9 and, thus, avoided case-by-case determinations of factual issues of impropriety.

Noel Hensley

The Proper Scope of the Non-Profit Institutions Exemption: Abbott Laboratories v. Portland Retail Druggists Association

Abbott Laboratories and eleven other pharmaceutical manufacturers sold drugs at prices lower than those charged commercial pharmacies to certain hospitals for resale in their pharmacies. Portland Retail Druggists Association, as assignee of more than sixty commercial pharmacies, brought this antitrust action against the defendants for an alleged violation of the Robinson-Patman Act.[1] Defendants claimed the challenged sales were exempt under the Non-Profit Institutions Act,[2] which excludes from the application

47. *See* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) (plaintiff's attorney who previously represented defendant in litigation involving identical issue barred from appearing for plaintiff as breach of professional ethics resulting from the improper appearance that prior confidences might not be preserved).

1. 15 U.S.C. § 13(a) (1970), which provides:
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where such commodities are sold for use, consumption, or resale . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . .

2. 15 U.S.C. § 13c (1970): "Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

of the Robinson-Patman Act the purchase by a non-profit institution[3] of "supplies for their own use."[4] The United States Court of Appeals for the Ninth Circuit, in vacating the district court's decision in favor of the non-profit institutions, concluded that a hospital's purchase of drugs was not for its own use if its pharmacy resold the drugs to private consumers.[5] The Supreme Court granted certiorari. *Held, vacated and remanded*: The Non-Profit Institutions Act exempts from the purview of the Robinson-Patman Act discount drug sales to non-profit hospitals only if the use of the discounted drugs is part of or promotes the hospitals' intended institutional operations. *Abbott Laboratories v. Portland Retail Druggists Association,* 96 S. Ct. 1305, 47 L. Ed. 2d 537 (1976).

I. EXEMPTION OF NON-PROFIT INSTITUTIONS FROM THE PURVIEW OF THE ROBINSON-PATMAN ACT

The idea that discriminations in price could be a form of destructive competition which should be regulated by Congress developed shortly after the turn of the twentieth century.[6] Until that time Congress was primarily concerned with dissolving the large monopolistic combinations that had developed in the major industries such as oil and steel. The Sherman Act of 1890 was the first major legislative effort aimed at dissolving these monopolies.[7] It soon became apparent, however, that regulation of the pricing activities of giant United States industries was needed if competition was to be preserved.[8]

The first specific congressional attempt to regulate price discrimination was embodied in section 2 of the Clayton Act as adopted in 1914.[9] The ultimate purpose of the Clayton Act was to secure the protection of the public against the evils which resulted from the lessening of competition,[10]

3. There are a variety of definitions of non-profit institutions. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4437d (Vernon 1976): " 'Nonprofit hospital' means any hospital owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual."

4. Other statutory exemptions provided by the Robinson-Patman Act include: price differentials due to differences in cost; price changes due to changing market conditions; and good faith attempt to meet the competition. *See* 15 U.S.C. §§ 13(a)-(b) (1970).

5. Portland Retail Druggists Ass'n v. Abbott Laboratories, 510 F.2d 486 (9th Cir. 1974).

6. For a definitive treatment of the history of antitrust law see E. KINTNER, AN ANTITRUST PRIMER (2d ed. 1973). *See generally* 16 V. KALINOWSKI, BUSINESS ORGANIZATIONS: ANTI-TRUST & TRADE REGULATION § 1.03, at 1-39 (1970); J. VAN CISE, UNDERSTANDING THE ANTI-TRUST LAWS 1-95 (1976); Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955).

7. 15 U.S.C. §§ 1-7 (1970). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal." *See also* E. KINTNER, *supra* note 6, at 1-55.

8. *See* New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965). *See also* E. KINTNER, A ROBINSON-PATMAN ACT PRIMER (1970).

9. Clayton Act, ch. 323, § 42, 38 Stat. 730 (1914). Unlike the Sherman Act, the Clayton Act sought to reach certain specified practices which had been held by the courts to be outside the ambit of the Sherman Act but which Congress considered dangerous to free competition. The original § 2 of the Clayton Act sought to reach and eliminate regional price cutting employed by large nationwide concerns for the purpose of destroying smaller and weaker rivals and thereby entrenching their monopolistic position. *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962 & Supp. 1964). *See also* 16B V. KALINOWSKI, *supra* note 6, § 21.02 on the background, purpose, and application of the original § 2 of the Clayton Act.

10. Our national economic policy has long been based on the belief in the value of

and, consequently, section 2 was directed at the territorial price discrimination practiced by large monopolies. Section 2, however, applied only where such price discrimination substantially lessened competition or tended to create a monopoly;[11] discounts based on differences in quantities sold were exempted.[12]

The Robinson-Patman Act[13] was adopted in 1936 to remedy inadequacies in the Sherman Act by strengthening the provisions regarding all price discriminations.[14] The opportunity for large volume buyers to gain price preferences was eliminated,[15] and small businesses were protected from discrimination by large interstate concerns.[16] The heart of the Robinson-Patman Act, section 13(a), repeals section 2(a) of the Clayton Act and prohibits sellers from discriminating in price. It does, however, provide a defense when an otherwise unlawful price discrimination could be justified by the seller's expenses.[17]

Shortly after the passage of the Robinson-Patman Act a question arose concerning its possible detrimental effect on the operations of non-profit institutions.[18] Congressional response to this problem came with the passage of the Non-Profit Institutions Act[19] which exempted sales to non-profit institutions of supplies[20] that were for the institutions' own use.[21] Although

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competition; the Sherman, Clayton, and Robinson-Patman Acts sought to remove restraints from competition. Nawalonic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 CLEV. ST. L. REV. 97 (1972).

11. *See* FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959). *See also* ABA ANTI-TRUST SECTION, ANTI-TRUST DEVELOPMENTS 1955-68 (1975).

12. Clayton Act, ch. 323, § 42, 38 Stat. 730 (1914). In part the proviso declared that "nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling or transportation."

13. 15 U.S.C. § 13 (1970).

14. United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963). *See also* Hampton v. Graff Vending Co., 478 F.2d 527 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973).

15. FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960). The Robinson-Patman Act sought to proscribe those devices by which large buyers gained preferences over smaller ones by virtue of their greater purchasing power. Section 2 of the Clayton Act was felt by many to be inadequate to deal with what was looked upon as a new danger to the competitive system, namely, the rapid growth of chain stores and the resulting decline of independents. F. ROWE, *supra* note 9, at 3-23. *See also* Elias, *Robinson-Patman: Time for Rechiseling*, 26 MERCER L. REV. 689 (1975).

16. Standard Oil Co. v. FTC, 340 U.S. 231 (1951). *See also* FTC v. Sun Oil Co., 371 U.S. 505 (1963); FTC v. Morton Salt Co., 334 U.S. 37 (1948).

17. See note 4 *supra* for a list of the generally available statutory defenses to the Robinson-Patman Act. 15 U.S.C. § 13(a) (1970) provides: "*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery . . . ." *See also* United States v. Borden Co., 370 U.S. 460 (1962); FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1953); Continental Oil Co. v. Frontier Ref. Co., 338 F.2d 780 (10th Cir. 1964). The Robinson-Patman Act is concerned primarily with possible injury to competition and not to competitors. Hampton v. Graff Vending Co., 478 F.2d 527, 533 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973).

18. The legislation was prompted in good part by a letter from the president of the Hospital Bureau of Standards and Supplies calling attention to hospital supply bills increasing twenty percent as a result of the passage of the Robinson-Patman Act. S. REP. NO. 1769, 75th Cong., 3d Sess. 1 (1938). Legislative history evidences an intent by the Senate and the House to allow non-profit institutions to operate as inexpensively as possible. *See id.*; H.R. REP. NO. 2161, 75th Cong., 3d Sess. 1 (1938).

19. 15 U.S.C. § 13c (1970); *see* note 2 *supra*.

20. 15 U.S.C. § 13c (1970); *see* Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967). See also note 30 *infra* and accompanying text for the definition of "supplies."

21. 15 U.S.C. § 13c (1970). This section, having been enacted after adoption of § 13 of this title, is to be construed as adding to existing exemptions, rather than as repealing exemptions by

litigation involving challenges to this exemption has been sparse, it has centered on controversies over the definitions of "supplies" and purchases "for their own use."

Traditionally, parties bringing actions under section 13(a)[22] have sought to exclude from the exemption practices that are only tangentially related to the purposes of the non-profit institution, and have succeeded only where the activity had an independent profit motive.[23] For example, in *Students Book Co. v. Washington Law Book Co.*[24] the court held that the exemption did not extend to the sale of law books to a university campus bookstore because "the books were not for the use of the university but for resale at profit."[25] In contrast, the court in *Logan Lanes, Inc. v. Brunswick Corp.*[26] held that the sale of bowling lanes to a university bowling facility constructed primarily "to fill the needs of the . . . students, faculty, and staff" was within the exemption.[27] The purchases were exempt despite the availability of the facility to the general public.[28] A public bowling alley had sought relief on the ground that the sale by Brunswick was not within the exemption because the public's use of the university's alleys for a fee meant that the purchases were neither supplies nor for the university's own use.[29] The court interpreted the word "supplies" to include not only stock materials needed for daily operations, but also "anything required to meet the institution's needs, whether it is consumed or otherwise disposed of, or whether it constitutes, or becomes part of, an object utilized to enable the institution to carry on its activities."[30] The court held that even if the supplies had been used substantially by the public, the sale would be exempt because it was made to a non-profit institution for its own use.[31]

II. ABBOTT LABORATORIES V. PORTLAND RETAIL DRUGGISTS ASSOCIATION

The hospital pharmacies involved in *Abbott Laboratories* all resold the items purchased from the drug manufacturers to patients, staff, and the

inference. General Shale Prods. Corp. v. Struck Constr. Co., 37 F. Supp. 598, 603 (W.D. Ky. 1941), *aff'd*, 132 F.2d 425 (6th Cir.), *cert. denied*, 318 U.S. 780 (1942).

22. See 15 U.S.C. § 13(a) (1970) for the remedies available to aggrieved parties.

23. E. KINTNER, *supra* note 8, at 201.

24. 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956).

25. *Id.* at 51 n.5. The court decided for Washington Law Book Company because it found the transactions with the university bookstore were consignments rather than sales, thereby making the bookstore the sales agent instead of the buyer. The transactions were not, therefore, in violation of the Robinson-Patman Act. *Id.* at 52.

26. 378 F.2d 212 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967).

27. *Id.* at 215. Here all income resulting from use of the purchased supplies was used to finance student activity programs or to expand or improve the university. One of the uses of the equipment was to fulfill the physical education requirement, thus making the purchase of the supplies "for their own use." *Id.* at 216.

28. Affidavits showed that approximately 2,000 of the 125,000 games bowled on these lanes were by the general public. *Id.*

29. The plaintiff in *Logan Lanes* relied on *Students Book Co.* to assert that the purchases were made for a self-sustaining student facility for resale at a profit. The circuit court distinguished *Students Book Co.* on the basis of the physical educational requirement.

30. 378 F.2d at 216; *see* Nawalonic, *supra* note 10, at 102-04.

31. 378 F.2d at 216. The Ninth Circuit did not seem influenced by the fact that the general public had full use of the facility. Indeed, because the supplies in question were capital items incapable of being divided for use by different types of patrons, the fact that one of the purposes was to fulfill the physical education requirement meant that the entire purchase was for the institution's own use.

general public.[32] The issues demanding the Court's attention were the proper construction of the language in the Non-Profit Institutions Act and the extent to which judicial recognition and protection should be given to the expanding community service role of the modern non-profit hospital.[33] A novel situation was presented in *Abbott Laboratories* since there were various categories of dispensations made by the hospital pharmacies of the drugs purchased from the petitioners. Most of the sales, such as to emergency room visitors and hospital inpatients, were unquestionably within the statute's exemption as being "for their own use."[34] Sales to outpatients, employees, walk-in customers, and refill sales, however, were not so precisely defined. Thus, the problem for the Court was clearly in focus; a line had to be drawn,[35] and in so doing a proper construction of the statute's language had to be determined.[36] Tangentially, the Court, in clarifying the statute, would define the limits of the activities in which non-profit hospitals could engage and still come under the aegis of the Non-Profit Institutions Act.

The district court decided on the evidence presented that the hospitals were non-profit institutions and that their purchases of drugs for resale in their pharmacies were for their own use within the meaning of the statute, and, therefore, granted summary judgment in favor of the defendants.[37] The district court found that a vast majority of the products purchased were clearly for the hospitals' use, that the outpatient treatment was not outside the purview of the Act, that take-home drugs and drugs sold to staff physicians and employees were also properly exempt, and that sales to walk-in traffic were of insufficient quantities to withdraw the exemption.[38] On appeal the Ninth Circuit agreed that most of the sales were clearly within

32. The Court found that sales by the hospital pharmacies fell into several categories: (1) to the inpatient for use in his treatment at the hospital; (2) to the emergency room patient for use in the patient's treatment on site; (3) to the outpatient for personal use on the hospital premises; (4) to the inpatient or emergency room patient upon his discharge for personal use away from the hospital; (5) to the outpatient for personal use away from the premises; (6) to former patients, by way of refills; (7) to a hospital employee or student for personal use or the use of his dependent; (8) to the staff physician for personal use or the use of his dependent; (9) to the staff physician for use in his private practice; and (10) to the non-patient walk-in customer. 96 S. Ct. at 1312, 47 L. Ed. 2d at 549.

33. *Id.* at 1310, 47 L. Ed. 2d at 544. For a general discussion of the expanding role of the non-profit institution see Nawalonic, *supra* note 10. *See also* Oleck, *Proprietary Mentality and the New Non-Profit Corporation Laws*, 20 CLEV. ST. L. REV. 145 (1971); Oleck, *Non-Profit Types, Uses and Abuses: 1970*, 19 CLEV. ST. L. REV. 207 (1970).

34. 96 S. Ct. at 1312, 47 L. Ed. 2d at 549; *see* note 32 *supra*.

35. The definition the Court placed on "for their own use" mandated that some purchases necessary to carry on the hospital's functions could not be considered for their own use. As long as the institution's intended operation was thought to be the care of its patients, sales not tangentially related to such operation could not be exempt from the Robinson-Patman Act. *Id.* at 1316, 47 L. Ed. 2d at 550-51.

36. The primary purpose of the Court in hearing this case was to resolve the confusion caused by the Ninth Circuit's holdings in *Logan Lanes* and *Abbott Laboratories*. *See* Portland Retail Druggists Ass'n v. Abbott Laboratories, 510 F.2d 486 (9th Cir. 1974). The circuit court distinguished *Abbott Laboratories* from *Logan Lanes* on the ground that plant equipment, such as bowling lanes, could not be segregated as to use, while consumptive supplies could. Since the hospital could have segregated the supplies as to intended use, and since they sold some of these to the public for profit, the purchases could not be called "for their own use." *Id.* at 489; *see* note 29 *supra*.

37. The district court's opinion was delivered orally. A summary of that court's holding can be found in the Supreme Court's opinion. 96 S. Ct. at 1310, 47 L. Ed. 2d at 546.

38. *Id.* at 1306, 47 L. Ed. 2d at 538.

the proper definition of "for their own use."[39] All the sales were "proper hospital functions" and could thus be justified as a proper and useful community service. The court held, however, that these sales, although proper hospital services, were not always "purchases for their own use" for the purpose of antitrust exemptions. The Ninth Circuit decided that for the sale to be exempted from antitrust scrutiny the hospital had to be the actual consumer. Therefore, the court held that the concept of "for their own use" only applied to traditional sales by the hospital to a private consumer where the drugs sold were prescribed and administered incident to treatment at the hospital.[40]

The Supreme Court recognized the parties' respective interpretations of the legislative history of the Act, but was persuaded by neither.[41] Instead, the Court held that while the exemption to the non-profit institutions should not be strictly confined to their traditional activities, the exemption could not automatically be extended to any new venture that the non-profit institution found attractive.[42] Exemptions from antitrust statutes are to be construed strictly[43] since the Robinson-Patman Act is to be read broadly to effectuate its purposes.[44] The Court properly concluded, therefore, that the exemption is a limited one;[45] the test for exemption is the obvious one inherent in the statute's language, with "for their own use" meaning that which is reasonably regarded as use by the hospital in that such use is part of or promotes the hospital's intended institutional operation.[46]

In order to determine which uses came within this limitation the Court reviewed the various categories of sales by the hospital pharmacies. Apart from the categories such as sales to inpatients, emergency room patients, and outpatients, over which there is no dispute as to the exemption's applicability,[47] the Court held that take-home prescriptions also should be within the exempt status since to rule otherwise would arbitrarily draw a line at the hospital door which would be inconsistent with the intent of the

39. Portland Retail Druggists Ass'n v. Abbott Laboratories, 510 F.2d 486, 489 (9th Cir. 1974).

40. *Id.* The court held that hospital use under § 13c must be limited to use in dispensing drugs for hospital or clinic treatment of inpatients or emergency room visitors. Thus, the court believed "own use" meant only use by patients in the hospital's beds or on their tables.

41. 96 S. Ct. at 1314, 47 L. Ed. 2d at 548. The commercial pharmacies asserted that the exemption was never intended to countenance a mass invasion of the retail market by hospitals and that Congress had only the hospitals' traditional roles in mind. The petitioners, however, asserted that the focus was to be on the character of the institution, not the particular features of the program.

42. *Id.* at 1314, 47 L. Ed. 2d at 549. The Court noted that the exemption as passed deleted the original restriction that only sales to non-profit institutions supported by public subscriptions would be exempt. *See* 86 CONG. REC. 6065 (1938). Therefore, an intent was evidenced not to limit the hospital's traditional role for the purpose of allowing an antitrust exemption. The language did not, however, give non-profit institutions a blank check.

43. United States v. McKesson & Robbins, 351 U.S. 305, 316 (1956). *See also* Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Perkins v. Standard Oil Co., 395 U.S. 642, 646-47 (1969).

44. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

45. 96 S. Ct. at 1314, 47 L. Ed. 2d at 549.

46. *Id.* The Court held that this interpretation properly changes the focus from the purchase to the use, as § 13c requires. *Id.* The Court showed an intention to be more concerned with the motives and status of the institution than its practices.

47. *Id.* at 1315, 47 L. Ed. 2d at 549. The druggist association agreed that sales of this type were clearly "for their own use."

Non-Profit Institutions Act.[48] Similarly, sales to employees and staff physicians for their personal use and use by their dependents were determined by the Court to be essential to the smooth functioning of the hospital[49] and, thus, within the Court's definition of "for their own use."

The Court excluded from the exemption sales to employees and staff for other than personal use,[50] refills of prescriptions,[51] and sales to the general public on a walk-in basis.[52] The parameter thus drawn seems consistent with the Court's view that "for their own use" means use that is part of or promotes the care of persons who are its patients. Though acknowledging the fact that the modern hospital has assumed an expanded role in the health care of the community,[53] the Court believed that the extension of section 13c to the walk-in public citizen would make the hospital pharmacy a community drug store occupying a position of unfair economic advantage devastating to competing commercial pharmacies.

The Court correctly believed that the overriding purpose of the exemption was to allow non-profit institutions to operate as inexpensively as possible.[54] In addition, however, the proper purpose of the "for their own use" limitation is to preclude the institution from taking advantage of the antitrust exemption by buying low-cost supplies solely for the purpose of reselling them at a profit.[55] The focus of the Court's attention was, correctly, the nexus between the particular sales and the institution's charitable activities. The nexus should be more closely scrutinized when a profit is made to assure the sales are not made primarily for that purpose.[56] A concurring opinion by Justice Marshall[57] made it clear that the Court welcomes expansion of charitable institutions' exempted activities and that the Court will not follow the circuit court's reasoning that purchases will not be called "for their own use" unless they are for the institution's consumption.[58] Rather, if

48. This type of treatment is the next link in the chain. Although medical and hospital supervision decreases, the link is still continuous and real. Thus, these types of sales do promote the hospital's intended operation. *Id.* at 1315, 47 L. Ed. 2d at 550.

49. Here again these sales promote the intended operation of the hospital because the employers and staff enable it to function. *Id.* The Court was not convinced, however, by the petitioner's argument that sales of this type were often required in current collective bargaining agreements.

50. *Id.* at 1316, 47 L. Ed. 2d at 550.

51. The line was drawn at this point because the Court was of the opinion that after the patient had been treated at the hospital and given medication to continue the healing process at home the hospital's intended function had ceased. Sales beyond that point were too attenuated to be within the intended exemption. *Id.* at 1315, 47 L. Ed. 2d at 550.

52. *Id.* at 1316, 47 L. Ed. 2d at 551. The institutions' intended purposes were clearly exceeded in sales of this type. At this point the hospital pharmacies became merely retail competitiors.

53. *See* E. FISCH, D. FREED & E. SCHACHTER, CHARITIES AND CHARITABLE FOUNDATIONS § 322 (1974). *See also* Bromberg, *The Charitable Hospital*, 20 CATH. U.L. REV. 237, 238-40 (1970).

54. *See* S. REP. NO. 1769, *supra* note 18. *See also* H.R. REP. NO. 2161, *supra* note 18.

55. 96 S. Ct. at 1314, 47 L. Ed. 2d at 544.

56. When sales are for profit, analysis is furthered by recognition of the "for their own use" limitation. Thus, sales only arguably within the scope of the institution's charitable activities might be exempted when made on a non-profit basis and not exempted when made for profit. *Id. See* E. KINTNER, *supra* note 8, at 201-02. The weight given to non-profit status should decrease when non-profit institutions become involved with profit-making activities in competition with commercial concerns.

57. 96 S. Ct. at 1318, 47 L. Ed. 2d at 552.

58. Portland Retail Druggists Ass'n v. Abbott Laboratories, 510 F.2d at 489.

the activity can properly be said to be promoting the intended institutional operation, then purchases for that activity will enjoy exempt status.

III. CONCLUSION

The concept of the non-profit institution and its necessary and appropriate activities has vastly changed since the Non-Profit Institutions Act was passed in 1938, and it has become necessary to reevaluate the scope of the protection required to insure their continued existence. Helping non-profit institutions operate as inexpensively as possible by exempting certain of their purchases of supplies from antitrust scrutiny is still a workable and practical legislative aid. As the scope of activities assumed by such institutions broadens, however, the competition they offer to commercial counterparts correspondingly intensifies. In *Abbott Laboratories* the Supreme Court recognized the potential economic burdens the Non-Profit Institutions Act may cause and logically delineated the limits within which the Act's exemption may be used. If the purchase of equipment has a direct relationship to the organization's non-profit purpose, then a broad exemption to such an organization under the Non-Profit Institutions Act is both reasonable and warranted.

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