

Political Offices: State Legislature: Subject Files: Anti-Trust Law (3 of 3)

Thomas P. Gill Papers

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The State of Wisconsin
Office of Attorney General
Madison

February 7, 1961

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CHIEF INVESTIGATOR


Mr. Charles S. James, Director
Legislative Reference Bureau
University of Hawaii
Honolulu 14, Hawaii

Dear Mr. James:

Pursuant to your request of December 27 we have reviewed the proposals which your bureau has drafted relating to a state antitrust law for the State of Hawaii. I am submitting herewith various comments and suggestions based upon our own experience in this field with the hope that they may be of some assistance to you in evaluating the effectiveness and desirability of the proposed provisions of your draft.

We certainly wish your state all success in its antitrust program and wish to assure you of our willingness to be of any further assistance which we can.

Sincerely yours,


JOHN W. REYNOLDS
Attorney General

GFS:pr

M E M O R A N D U M

Re: Suggested Model Antitrust Code for the
State of Hawaii as Prepared by the
Legislative Reference Bureau - University
of Hawaii - December 1960

SECTION 2.

I approve of the wording of this section as you have it drafted but wish to call attention to certain problems that may arise thereunder. The wording of the Wisconsin statute is such that the term "commodity" was by practical application excluded services except advertising which is specifically covered. Thus it follows that price fixing in the service industries such as laundry, dry cleaning, automobile repair, etc., is by itself not illegal (providing it is not subject to the federal law).

At one point early in the history of our state antitrust enforcement program, the then Assistant Attorney General in charge of antitrust enforcement proposed an amendment to the statute to make it specifically apply to services as well as to articles and commodities. This amendment was vigorously opposed by the medical associations, bar associations, real estate brokers, barbers and many other economic groups in a similar status. Their lobby was so effective that only two members of the Senate out of 33 voted in favor of the bill. It has since been pointed out that an alternative interpretation of our existing statute which would have included these services could have been urged upon the court and might have been adopted. However, in light of this legislative history it would now be difficult to urge such an interpretation.

The net result of this is that the anti-price fixing sections of our law apply to these industries only in such circumstances where the cost of such services is tied of a commodity. An example of this is a case against a funeral directors' association in which it was held that the law applied to agreements to fix the price of a funeral because this included a price of a coffin. By the same token this could be applied to automobile repairs where a price fix~~ed~~ would include the cost of the parts. Subsequent to the defeat of this proposal, the legislature adopted an amendment which included advertising in the definition of a commodity for the purpose of this law.

I would add one thought which you may wish to consider in this connection. In their practical application of the antitrust laws tend to be enforced not exclusively but very predominantly against very large aggregations of capital; where small corporations, partnerships or sole proprietorships are involved it is generally because they have combined with other economic units so that you have the element of size either in some members of the conspiracy or in the conspirators in the aggregate. The same predatory practices which cause public revulsion and tend to defeat our system of free economic enterprise may be extremely serious when performed by someone of great economic power but may be of no significance when performed by a small operator, even though the moral and ethical problems are the same in either case. Since the service industries and the professions do not commonly represent

even medium scale operations in a state such as Wisconsin (with minor exceptions) and since they tend naturally to be highly competitive, the political thought of our state does not seriously object to what price fixing schemes they may effect.

Let us take for example the case of the barbers. We find that they regularly set the price of hair cuts and every time this increases there is a groan from the male public. However, the loss suffered by the public is balanced against the low incomes and low wages of barbers and barber shop owners and operators. In balance the public feels that the barbers must be permitted this degree of restraint of trade to allow them to make a living. In a sense this is analogous to the philosophy of the Appalachian Coals case.

By way of added comment, Japan and a number of the smaller European countries either specifically exempt small businesses from the operation of antitrust laws or actually encourage the formation of price fixing agreements among small businessmen.

I raise these points only to point out that there is a significant policy question involved here. As you have undoubtedly discovered by analyzing the antitrust laws of other states, there is no unanimity on the inclusion of services.

SECTION 4.

In my opinion Section 4 is a very useful addition to a law such as you proposed. We do not have the equivalent but as a substitute we use the extensive body of federal precedents in interpreting equivalent phrases.

SECTION 5.

Because of the historic interpretations of the Sherman Act, I would add to this section a broad prohibition of any combination in restraint of trade.

SECTIONS 6, 7 & 8.

We do not have the equivalent of the specific language of these sections although we have the approximate equivalent by interpreting more general language. I think that it is very desirable that these prohibitions be stated in specific form as you have here done.

SECTIONS 9 & 10.

We do not have the equivalent of these sections. Although I feel that they are desirable as a matter of policy, I am not sure as to how significant they will prove to be for a state. We have had a number of complaints of this nature and have referred them to either the Federal Trade Commission or the United States Department of Justice. The thought occurs to me that this is a field in which you might wish to consider whether or not you want to include a minimum size or some other type of exemption. Again I am reflecting on the political feeling and sentiments of our state in suggesting that we would not feel nearly as offended over mergers and interlocking directorate where the size of the organizations may be small even though this might otherwise technically fall within the prohibitions outlined in your proposal.

So far as I am aware Texas is the only state that has brought an antimerger case. I therefore suggest that you contact Attorney General Will Wilson of Texas for his suggestions on this if you have not already done so.

SECTION 11.

The same comments relative to minimum size which I made on the last two sections would apply here. However, I think this is a valuable part of a state antitrust law as it may be necessary in many instances to stop the constant absorption of local businesses by large nation-wide concerns under circumstances which would otherwise constitute a violation of the spirit of the antitrust laws. The only monopolization case which we have brought so far involves a large dairy moving into a small town, purchasing one of the two independent dairies and then attempting to purchase the other. It is my opinion that in most such cases you will bring a number of counts for other predatory practices in addition to the monopolization count.

SECTION 12.

The concept that "the labor of a human being is not an article or commodity in commerce" as used in the antitrust laws is well established in the federal law and the laws of most if not all of the states. I would be inclined to include with this excellently worded statement a general statement to that effect. We have had only one case involving a labor union and that was a

case in which the union, a Teamsters local, was involved with a group of dairies in fixing the price of milk for home delivery and for store sales. It has been our view that any time a labor union joins with non-labor organizations in activities which violate the antitrust laws, the labor union is as guilty of the infraction as is any other participating party.

SECTION 13.

The exemption of cooperatives from the antitrust laws is on a par with the exemption of labor unions. We consider that cooperatives may engage in cooperative efforts provided for by the cooperative laws without this constituting a combination in restraint of trade. However, if they join with other businesses or other economic organizations in a price fixing agreement or if they engage in price discrimination contrary to the price discrimination laws they have the same responsibilities as any other offending party.

If I were drafting this section, I would not limit this to agriculture cooperatives but would have it apply on an equal basis to cooperatives in other fields.

SECTION 14.

The equivalent provision of the Wisconsin statute goes further than your proposal and provides that a party to a contract which is made in violation of the antitrust law can sue to recover all moneys paid thereunder at any time within six years. I think you will find that most state antitrust laws have provisions

substantially similar to your proposed Section 14. I am not sure in my own mind whether I think this is good or bad legislation.

This type of provision creates certain problems arising from the fact that the federal antitrust law does not have an equivalent provision. In suits between private parties where there is an ^{ANTITRUST} issue as to the validity of a contract there is always raised the question of whether the state law or the federal law applies. Because the state laws are drastic to the point where the application has seemed unreasonable to many courts under the circumstances of the individual case, the courts have had a tendency to rule that the federal law and not the state law governs. To rule otherwise would allow a wrongdoer to escape from the consequences of a contract which he freely made and from which he may have already received the benefit. Rulings of this type complicate the whole question of concurrent state and federal jurisdiction and tend to make precedents which are undesirable when applied to cases where the equities may be different. For this reason I have some reservations over such a provision.

By way of further explanation I might say that so far as I am able to determine the very stringent provisions of the Wisconsin statute in this respect have never been applied nor has there been a case interpreting them. At the same time we have had a very favorable decision on our jurisdiction to enforce the state laws against out-of-state manufacturers engaged in interstate

commerce. See State of Wisconsin vs. Allied Chemical Corp. et al, 9 Wis. 2d 290, 141 N.W. 2d 133 .

SECTION 15.

I would either combine this with Section 24 or put them in juxtaposition.

SECTION 16.

I would be inclined to propose treble damage for the state but recognize that this is a question in which the public opinion might favor your proposal. The federal provisions support your proposal as written.

SECTION 17.

If I were drafting this I would combine this with Section 22 and would add provisions for the concurrent duty of enforcement by the several district or county attorneys upon the advice of the Attorney General. I would also provide for private suits by injured parties to obtain an injunction as well as recovering damages.

SECTION 18.

If it is not already clear from other provisions of your statutes that a corporation is on the same basis as a natural individual in the violation of a criminal section of the statute, I would make sure that this section covers any person including but not limited to the stated classifications. My reason for suggesting this is that we are now facing a test case wherein under a comparably worded statute, the construction that the

criminal penalties do not apply to a corporation is being urged upon the court. In light of the provisions of your Section 1 this should be unnecessary. However, the addition of the words "but not limited to" after "included" might obviate the necessity for a test case.

SECTION 19.

Subsection (C) seems very broad, general and drastic and may require some clarification as to the meaning of the phrase "successor in interest". Supposing for example you had a pineapple cannery convicted of violating your antitrust law and ousted from doing business in the state, would you say the succeeding owner would be a successor in interest and barred from processing pineapple?

SECTION 20.

I think provision for investigative demand is a useful procedure for gathering evidence in an antitrust case, but in my opinion it does not nearly go far enough. I would suggest specifically that you consider statutes comparable to our Inquisitorial Proceedings (Sec. 133.06 Wis. Stats.) or our John Doe proceedings (essentially a one man grand jury) and provisions for interrogatories and administrative subpoenas. You might also wish to consider the Visitorial Powers found in the Texas statutes.

It has been our experience that the flexibility of investigative procedures which we enjoy has been very advantageous

in obtaining evidence. In general we have been able to tie down a sufficient amount of evidence by the use of these varying procedures even before we file a case so that adverse examinations have not ordinarily been necessary. We have also found that these methods have resulted in most defendants fighting only on extraneous issues such as jurisdiction and other issues of law and that when it comes to a trial of the case on merits, their clients have been so firmly committed by admissions against interest that they seek consent decrees rather than contest the case on its merits. In my opinion a thorough investigation is the most important part of an antitrust case. Therefore the prosecuting department should be granted the maximum freedom to secure evidence of violations. Our statute provides that those persons giving evidence are automatically granted immunity from penalty (although this does not apply to the employers or a corporation). Consequently we have no substantial fifth amendment problem in securing such evidence in a form that intends to make the eventual outcome of the case a foregone conclusion.

SECTION 22.

Our statute provides that the Attorney General shall designate one of his assistants to have charge of antitrust law investigations and prosecutions. Additional personnel may or may not be assigned to this task -- likewise this person can be assigned to other work. The result of this has been a more consistent and continuing enforcement of the antitrust laws than would otherwise be the case. I recommend that such a provision should be included in your statute.

SECTION 24.

In addition to what you have provided I think it would be advisable that you specifically define the effect of a plea of nolo contendere.

SECTION 25.

As noted above we have a similar provision in our statute and find that it works well. The only problem we have in connection with it is that many parties still ask for a formal grant of immunity by the court or by the prosecutor, to which we have no objection.

GENERAL COMMENTS:

I presume you have reasons for both including and excluding the various types of antitrust and fair trade practice laws but I call to your attention that we have included in our ^{LAW'S} sections relating to:

1. Resale price maintenance (fair trade).
2. Prohibition of secret rebates.
3. Prohibition of price discrimination.
4. Prohibition of loss leaders.

You may wish to consider where such statutes would fit into your antitrust and trade practice scheme and whether your existing statutes are adequate. Should you desire copies of our statutes in these fields or my comments on them, I should be very happy to oblige.

JOHN W. REYNOLDS
Attorney General

GEORGE F. SIEKER
Assistant Attorney General

A Proposed Uniform State Antitrust Law:
Text And Commentary On A Draft Statute. 1 /

The resurgence of interest in state antitrust law as a vehicle for curbing local restraints of trade has been extraordinary, and it is to be anticipated that recognition of state responsibility in this area will increase still further in the future. State antitrust law enforcement is a necessity, despite the broad scope 2/ of the federal laws. First, there are important areas where state antitrust enforcement may be the only available remedy because of the purely intrastate nature of the practice or the failure of Congress to extend a particular facet of federal antitrust to the full constitutional limit. 3/ In other areas where jurisdiction is concurrent, the states may well be better equipped to treat restraints which, though affecting interstate commerce, are primarily of local impact: the Department of Justice necessarily must give priority in assigning its limited manpower to practices affecting multi-state markets. 4/ And in situations where the Department does bring an action, adequate local relief can sometimes be secured only by state authorities acting under their own laws to correct local aspects of a more widespread combination. 5/

Vigorous state antitrust law enforcement thus appears necessary to insure the protection of the local market places of the states. At the same time, it is a valuable complement to the federal antitrust program,

with benefits to the national competitive climate that are felt beyond state borders. State antitrust enforcement might, however, create serious problems for the business community. The practical burdens created by divergent state antitrust systems are substantial and inevitable, first in terms of decision-making (or compliance), and second in terms of increased complexity of litigation. Whenever a multi-state business embarks on a significant commercial enterprise, antitrust problems may arise. 6/ When, for example, the legality of exclusive dealing contracts or of a franchise system of retail distribution may vary from state to state, and when further differences may exist between federal and state standards, 7/ industry is subjected to serious problems in determining what course of action to follow. When these problems ripen into litigation, the courts may discern still further complexities in the cause of action, because of the multi-state contacts: choosing from the checkerboard of sources of substantive law and the renvoi problems are among them. 8/ At the same time the courts and the bar are deprived of the advantage to be gained from a common and more extensive body of common law precedents (or statutory interpretation). As a result both the governed and the government may suffer the costs of a nation-wide patchwork of state antitrust law.

Although the practical burdens created by diverse antitrust patterns may be substantial, it is doubtful that they are legally cognizable as "burdens on commerce." The obvious interest which the state has in preventing restraints of trade and the traditional authority of the states in this area weigh heavily against such a conclusion. The power of the states to experiment with diverse legal systems is unquestioned. 8.5/

In any case, the "burden on commerce" argument has been rejected by the Supreme Court on the ground that since stateⁿ antitrust law eliminates restraints or burdens on commerce it, therefore, cannot be deemed to burden it. 9/

Nor is it probable that the Sherman Act 9.5/ would be held to preempt the application of multifarious state antitrust systems to interstate commerce. The legislative history indicates the contrary; during the debates Senator Sherman declared that his purpose was to supplement state law in order that federal authorities might cooperate with the states in curbing the monopolies which threatened all of the country. 10/

Moreover, the statutory scheme of the federal antitrust laws is not one of all-pervasive regulation which cannot function properly unless deemed to occupy the entire field. 11/ To be sure, when state economic regulations conflict with the federal antitrust laws, they are invalidated under the supremacy clause. 12/ But it is doubtful that state laws banning restraints of trade, however, disparate from one another or from the federal scheme, would be deemed to conflict with the federal antitrust laws. 13/

It would appear, then, that whatever problems are created by divergent state antitrust systems will not be settled by the courts. The problem is essentially political and involves delicate questions of state and federal sovereignty. 13.5/ The solution called for, therefore, is political, i.e., legislative rather than judicial. For these reasons, it would appear that the most desired course would be one of uniformity of antitrust law -- at least with respect to the substantive provisions. This would provide one reasonably predictable standard of legality for the business community to work with, and at the same time would avoid the legal and pragmatic shortcomings of relying on centralization. 14/ Since we are now only at the outset of an era of state antitrust enforcement activity, there would appear to be no serious state interest in preserving established, distinctive local practice. 15/ The remainder of this article is devoted to a proposed uniform state antitrust law, based on what are believed to be the most desirable of the various codes.

PLAN OF THE STATUTE

In drafting the four major substantive provisions of the law, sections 1 through 4, considerable reliance has been placed on the approach used in sections 1 and 2 of the Sherman Act 16/ and in sections 3 and 7 of the Clayton Act. 17/ Almost the exact language of the Sherman Act provisions has been adopted and, although the specific wording of the Clayton Act was not employed, the exclusive dealing and merger provisions adopted are substantively equivalent to their federal counterparts in most material respects. An important consideration in this choice was the existence of a large body of case law interpreting these statutes, thereby furnishing the courts with an existing corpus of precedents and interpretations, and decreasing the uncertainty frequently attendant to new legislation. 18/ As Mr. Justice Frankfurter has said, "the gloss of history" has been laid over the Sherman Act. 19/ The substantive provisions of section 2 of the Clayton Act 20/ have not been codified into this draft statute, because it is believed that discrimination problems may more adequately be handled in terms of the broad scope of sections 1 and 2 of the act, which reach any predatory, monopolistic, or conspiratorial activity which injures the vigor of competition in the market places of the state. 21/

It is intended that sections 1 through 5, setting out the substantive offenses and the definitions used, be adopted uniformly. These sections comprise Part I of the statute. Part II including sections 6 through 9,

deals with state enforcement and procedure; in this area uniformity is desirable, but not as imperative as in the case of the substantive provisions. Part III, sections 10 through 12, deals with private antitrust sections for damages and injunctive relief; uniformity here is extremely desirable, but again not as important as with regard to Part I. 22 /

THE PROPOSED ACT

[NAME OF STATE] ANTITRUST LAWS

An Act to Curb Monopolies and Outlaw Restraints of Trade.

Be it enacted by the legislature of the State of [Name of State]:

[PART I: SUBSTANTIVE OFFENSES]

Section 1: Restraint of Trade

Every contract, combination, or conspiracy in unreasonable restraint trade is unlawful.

Section 2: Monopolization

It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade.

Section 3: Exclusive dealing

Any contract, agreement, or understanding that one party shall not engage in trade with a competitor of the other party is unlawful if the effect may be to lessen competition substantially in any line of commerce.

Section 4: Acquisitions

It is unlawful for any person not a natural person to acquire an asset from any person if the effect may be to lessen competition substantially in any line of commerce.

Section 5: Definitions

"Person" as used in this Act shall include natural persons, corporations, trusts, unincorporated associations, and partnerships. "Trade" and "Commerce" shall include the purchase or sale of assets or services, and any activity directly or indirectly economically affecting the people of the State of [name of state]. "Assets" shall include any property tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

[PART II:- STATE ENFORCEMENT AND PROCEDURE]

Section 6: Criminal penalties

Any person who conspires to restrain trade unreasonably, or monopolizes, attempts to monopolize, or conspires to monopolize trade, shall be guilty of a misdemeanor and be punished by fine not to exceed \$50,000, or imprisonment not to exceed one year, or both. Whenever a corporation violates this section, the individual directors, officers, or agents of said corporation who have authorized, ordered, or ratified the acts constituting such violation, shall be punishable in accordance with this section. Exclusive jurisdiction to enforce this section is vested in the Superior Courts [or insert name of state court of general jurisdiction] of this State. No action under this section shall be brought more than four years after the commission of the acts constituting in whole or in part the offense charged.

Section 7: Equitable relief and character forfeiture

The Superior Courts [or insert name of state court of general jurisdiction] of this State are granted exclusive jurisdiction to prevent and restrain violations of Sections 1 through 4 of this Act and, in order

to effectuate the purposes of this Act, they may, in appropriate cases, suspend or revoke the corporate charter or the right to do business in this State of any violator. When the party complained of shall have been duly notified that an action has been filed against him, the court shall proceed, as soon as possible, to the hearing and determination of the case; and pending trial the court may at any time make temporary restraining orders or prohibitions as shall be deemed just in the premises. In all equity cases brought by the State in which one or more of defendants are not natural persons, venue may be laid in any county where any defendant may be found or transacts business or in [insert name of county in which state capital is located] County.

Section 8: Enforcement

Exclusive power to enforce Sections 6 and 7 of this Act is vested concurrently in the Attorney General or such person as he may designate and in the District Attorneys of the various counties. When any such action is brought by the District Attorney of a county, however, the Attorney General may assume full control of the litigation by giving appropriate notice to that District Attorney.

Section 9: Civil Investigation demand

(a) Whenever the Attorney General believes that any person may be in possession, custody, or control of any original or copy of any book, record,

(d) Any such demand may be served by any attorney employed by or other authorized employee of this state. Service of any such demand may be made by --

- (1) Delivering a duly executed copy thereof to the person to be served, or, if such person is not a natural person, to any officer of the person to be served; or
- (2) Delivering a duly executed copy thereof to any place of business in this state of the person to be served; or
- (3) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at any place of business in this state, or, if said person has no place of business in this state, to his principal office or place of business.

(e) Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and any authorized employee or representative of the state. In lieu of having such material copied by an employee or representative of the state, the Attorney General may require the person served to furnish copies of the material, the reasonable expense of which shall be borne by the office of the Attorney General.

(f) When documentary material produced pursuant to a demand is not longer required for use in connection with the investigation for which it was demanded, or in any case or proceeding resulting therefrom, or at the end of eighteen months following the date when such material was produced, whichever is the sooner, such organization shall be relieved of the duty to hold such documentary material available for inspection and copying as required by sub-section (a): Provided, however, that any court in which a petition may be filed as set forth in sub-section (h) hereof may, upon good cause shown, extend such period of eighteen months, but no one of such extensions may exceed eighteen months in duration.

(g) The Attorney General or any other authorized employee of the state may use documentary material produced pursuant to a demand, or copies thereof, as he determines necessary in the performance of his official duties in connection with this act, including presentation of any case or proceeding under this act before any court or grand jury. In no other connection shall such material or copies be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the state, without the consent of the person or organization which produced such material, unless otherwise ordered by a Superior Court [or insert name of state court of general jurisdiction] for good cause shown. Material or copies shall be available for inspection and copying by the person who produced such material or any duly authorized representative of such person, under such reasonable terms and conditions as the Attorney General shall prescribe.

(h) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to sub-section (a), stating good cause, may be filed in the Superior Court [or insert name of state court of general jurisdiction] for [insert name of county in which state capital is located] County, or in such other county as the parties may agree. "Good cause" to modify or set aside a demand may be shown only, except in extraordinary circumstances, by failure of the Attorney General to comply with sub-sections (b) or (c) hereof. A petition, stating good cause, to require the Attorney General or any person to perform any duty imposed by the provisions of this section, and all other petitions in connection with a demand, may be filed in the Superior Court [or insert name of state court of general jurisdiction] for [insert name of county in which state capital is located] County, or in such other county as the parties may agree.

(i) A person upon whom a demand is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by an order of court issued under sub-section (h) hereof. Any person who, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand under this section, (1) removes from any place, (2) conceals, (3) withholds, or (4) destroys, mutilates, alters, or by any other means falsifies, any documentary material in the possession, custody, or control of any person which is the subject of any demand duly served upon any person, or who otherwise wilfully disobeys any such demand, shall be guilty of an offense against the state, and shall be subject, up on conviction in any court of competent jurisdiction, to a fine not to exceed \$5,000 or to imprisonment for a term of not more than five years, or both. Failure of the state to serve the demand properly pursuant to subsection (d) hereof shall be a defense to prosecution under this subsection, but invalidity of the demand under subsections (b) and (c) shall not be a defense, and such invalidity may be tested only in an action under subsection (h) to modify or set aside the demand.

(j) Nothing contained in this section shall impair the authority of the Attorney General or any authorized state attorney to (1) lay before any grand jury impanelled before any Superior Court of this state any evidence concerning any alleged antitrust violation, (2) invoke the power of any such court to compel the production of any evidence before any such grand jury, (3) file a civil complaint or criminal information alleging an antitrust violation which is not described in the demand, or (4) institute any proceeding for the enforcement of any order or process issued in execution of such power, or for the punishment of any organization or individual for disobedience of any such order or process.

[PART III: PRIVATE ACTIONS]

Section 10: Private Remedies.

Any person injured in his business or property by a violation of Sections 1, 2, 3 or 4 of this Act, or because he refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of Sections 1,2, 3 or 4 of this Act, may bring a civil action in the Superior Court [or insert name of court of general jurisdiction] of the county in which defendant does business or may be found to enjoin further violations, to recover treble damages for his injuries, and to recover the cost of the suit including a reasonable fee for the service of his attorney. In computing damages under this section the Court may consider reasonable expectation interests. For the purpose of this section "person injured" shall include the State of [name of state], its agencies, its counties, its municipalities, and other political subdivision of this State, but no attorneys fees shall be awarded in such actions to the State, its agencies, its counties, its municipalities or its other political subdivisions.

Section II: Limitation of private damages actions

Any action to enforce a claim for treble damages under Section 10 shall be forever barred unless commenced within four years after the

cause of action accrues. Whenever any action under Section 6 or 7 of this Act is brought by the State of [name of state], the running of the foregoing statute of limitations, with respect to every private right of action for damages under Section 10, which is based in whole or in part on any matter complained of in said Sections 6 or 7 action, shall be suspended during the pendency thereof.

Section 12: Evidentiary effect of judgment in favor of State.

The final judgment or decree rendered in any action brought by the State of [name of state] under Sections 6 or 7, to the effect that defendant has violated Sections 1, 2, 3 or 4, shall be prima facie evidence against such defendant in any action brought by any party against such defendant under Section 10 of this Act, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. This section shall not apply to consent judgments or consent decrees nor to judgments entered under a plea of nolo contendere, when such judgments or decrees are entered both before any testimony has been taken and without any finding of illegality by the court. This section shall in no way be construed to impair any collateral estoppel to which the State is otherwise entitled.

COMMENTARY

PART I: SUBSTANTIVE OFFENSES

Section I: Restraints of Trade

Language. This section is essentially equivalent to section 1 of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . ." 23/

The language of section 1 has been altered from that of Sherman Act section 1 in several minor respects. First, the word "unreasonable" has been inserted before "restraint" because the courts have read this limitation into the statute since the landmark case, Standard Oil Co. v. United States. 24/ Second, the phrase "in the form of trust or otherwise" has been omitted in the interest of brevity. 25 /

Scope of statute. The section is intended to be applicable to unreasonable restraints of trade in the most broad jurisdictional sense. Hence, "trade" is defined in subsequent section 5 as to exhaust the full scope of the police power of the state. 26/ "Trade" includes the purchase and sale of goods and services alike, the making of leases or bailments, and any other form of commercial or financial activity -- in short, any activity which may have economic impact on the people of the state.

According to the case law, the inherent police powers of the state provide constitutional authority for legislation covering the full scope of activities affecting the people of a state, wherever such activities are initiated. ^{27/} Thus a conspiracy, wherever formed and carried out, to fix the price at which goods destined for a state, ^{28/} or the price at which goods coming from a state, ^{29/} are to be bought or sold may be reached by section 1 -- so long as sufficient local impact is felt that jurisdiction exists in the state whose law is ^{30/} to be applied. Moreover, it has been recognized that state activity in this sphere is not federally preempted by the Sherman Act or invalidated under the commerce clause. ^{31/}

Standard of "reasonableness." Not every contract, combination, or other joint activity which, to some degree, restrains trade is declared unlawful by section 1. Since, as the Supreme Court has recognized, ^{32/} every contract necessarily restrains the trade of both the parties and strangers to the contract, to some extent, a "rule of reason" must be invoked to determine the legality of a questioned restrictive practice. ^{33/} This "rule of reason" removes from the ban of the statute those restraints which do not have any significant ^{34/} anticompetitive tendency. More specifically, restraints of trade are deemed unlawful only if: (1) they have an actual and significant adverse effect ^{35/} on the market; ^{36/} (2) they have a potential significant adverse effect on the market, for example, by erecting barriers to the entry of new competition or by throttling

innovation; or (3) the intent, whether specific or implied from the character of the practice or its tendency, of those who adopt the restrictive practice is to impair significantly the vigor of competition.

Although, as a general rule, the courts must essay some measure of economic analysis to determine whether a challenged activity offends section 1 by injuring or tending to injure competition in the market place, there are certain practices which, because of their necessarily "pernicious effect on competition and lack of any redeeming virtue,"^{37/} justify the courts in concluding "that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary . . . to do wrong to the general public and to limit the right of individuals."^{38/} Among these practices that the courts have declared to be conclusively presumed illegal -- i.e., have declared "illegal per se" -- are (1) efforts to control the market^{39/} by direct agreement on price level, by limitation of production, or by allocation of customers or markets, and (2) efforts to exclude competitors from the market by predatory conduct, such as by boycott.

Price-fixing was recognized as illegal per se at common law.^{40/}

Moreover, almost every state in the Union has now passed specific legislation outlawing price fixing.^{41/} In those states where price-fixing

is not expressly prohibited, it is generally held illegal under broad antitrust statutes which, like the Sherman Act, condemn all conspiracies in unreasonable restraint of trade without defining specific violations.^{42/} Conspiracies to limit production are recognized to be in the same category with price fixing.^{43/} Allocation of markets is still another substitute for price-fixing: instead of agreeing on common price schedules, the conspirators split up the market and let each conspirator do as he pleases in his sector.^{44/} Allocation schemes may also be non-geographic: thus the conspirators may agree not to poach on one another's customers,^{45/} or they may divide up different fields of use of a commodity among themselves, or allocate functionally related markets.^{46/}

Like price-fixing conspiracies, concerted efforts to drive competitors from the market have long been disfavored by the law.^{47/} The prevailing view, expressed by the Supreme Court in Klor's, Inc. v. Broadway-Hale Stores, Inc.,^{48/} is that such practices are illegal per se, and cannot be justified by legitimacy of the conspirators' motives or defended by reference to their lack of success in achieving their goals. The boycotting group --

. . . is in reality an extra-governmental agency which prescribes rules for the regulation and restraint of . . . commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the . . . legislature. . . ^{49/}

Not every refusal to deal, however, is declared unlawful by this statute. To be sure, a horizontal combination among competitors to exclude an outside competitor from the market constitutes a boycott and is a crime. 50/ But the freedom of the individual businessman to select his customers and unilaterally to refuse to deal with anyone with whom he chooses not to do business is recognized by the courts. 51/

Remedies and relief Section 1 declares unreasonably restrictive practices "unlawful," but it does not specify any remedy or penalty. These are dealt with by the subsequent sections 6, 7, and 10. The unlawfulness of a restrictive contract may also be raised as a defense to an action for damages or an injunction based on breach of the contract, 52/ or used as the basis of a declaratory judgment that the contract is unenforceable. 52.5/ The relief usually sought by the state in a section 1 type of civil proceeding is an injunction against the practice which is challenged as unreasonably restrictive.

Section 2: Monopolization

Language: This section is based on section 2 of the Sherman Act; "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall

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Following page is 22.

be deemed guilty of a misdemeanor. . ."^{53/} The phraseology adopted in section 2 of the proposed statute differs from the federal provisions in no material respect other than the elimination of the interstate commerce requirement.

Monopoly and monopolization: Monopoly, the ultimate in restraint of trade,^{54/} has been defined by the United States Supreme Court as the power of a business concern to set market price or exclude competitors from the market.^{55/} Unlike conspiracies to restrain trade, where the success or lack of success of the scheme is legally immaterial, monopoly exists only when competition is actually eliminated or the restraint of trade is consummated. Monopoly by itself, however, is not necessarily considered illegal. Where a monopoly has been acquired by statutory grant, through superior business efficiency,^{56/} or even by chance,^{57/} something beyond mere possession of power must be shown to justify a civil or criminal action against the possessor of that power. Indeed, in any anti-monopoly case, however the monopoly has been attained, in order to prevail the plaintiff must show an element of deliberateness in addition to the existence of monopoly power. Such deliberateness may be established by (1) a history of predatory behavior,^{58/} (2) the absorption of competitors by mergers,^{59/} or (3) a showing that the accused monopolist took steps to preserve his power and prevent entry of new competition.^{60/} When such elements are compounded with monopoly, then the offense of monopolization may be established.

Monopolization may be incomplete and unsuccessful -- and yet be proscribed, for attempted monopolization is also illegal. Like monopolization, attempted monopolization does not require that a plurality of persons be involved. Unlike monopolization, it does not require the existence of power over price or power to exclude competitors; specific intent to secure such power is enough. 61/ Generally speaking, the standard of proof for this offense is intermediate between that of conspiracy in restraint of trade and that of monopolization. 62/

Standard of legality: Like restraint of trade, monopoly power must exist in some relevant market or area of competition. This may be identified geographically 63/ or in terms of the distribution 64/ or manufacturing 65/ characteristics of the products or services involved. The Attorney General's National Antitrust Committee has thus characterized the concept of market: "For purposes of economic analysis, the 'market' is the sphere of competitive rivalry within which the crucial transfer of buyers' patronage from one supplier of goods or services [to another] can take place freely." 66/ In a state antitrust case, the relevant market might comprise, for example, all drug stores in a city, all feed stores in a county or perhaps in the whole state or even in a multi-state area, all drive-in theaters in and around a town, all variety stores in down-town areas of the cities of the state, all garages in a city which specialize in fender repairs.

Once the relevant market has been determined it becomes possible to measure the defendant's power over the trade in that market. The power over price or the power to exclude competitors which the law condemns need not be absolute. A significant degree of power over price, for example, may violate the law, even if others may also have such power. And the more readily the economic characteristics of a particular market afford a dominant company effective control because, for instance, of the difficulties of entry into the industry, then the relatively smaller the

percentage of the market is that may be adequate to confer monopoly power. It should be emphasized that what the law seeks to eliminate is the retention of power to control the market, irrespective of the actual exercise of such power 67/ and that it is not, therefore, necessary to establish "abuse" of monopoly power to make out a violation, nor necessary to show "complete monopolization."

Remedies and relief: As in the case of section 1, the customary civil relief sought by the state in a monopolization case is an injunction against the illegal practice. Dissolution of the monopoly may sometimes be deemed the only relief adequate to dispel the harmful effects of the violation. 68/ While such relief may be highly appropriate for an intra-state monopoly, the propriety of dissolution as a relief measure against out-of-state monopolists may be questioned. 68.5/ In such circumstances it would appear that ouster of the violator from the state would be more appropriate. 69/

Section 3: Exclusive Dealing

Language: This section is based on section 3 of the Clayton Act. 70/ The language of the proposed statute, however, has been considerably shortened (1) in the interest of simplicity and (2) in order to eliminate two loopholes in Clayton Act section 3. By its terms, the Clayton Act prohibition is limited to "goods, wares, merchandise, machinery, supplies, or other commodities," and, therefore, contracts concerning non-commodities,

such as land, services, financing, or choses in action, are not within the scope of the statute. 71/ Moreover, the federal statute comes into play only with respect to conditions imposed upon the buyer, and contracts restricting sellers are immune to Clayton Act section 3. 72/ For these reasons, a more general form of expression has been used in drafting this statute, in order to embrace all exclusive arrangements, whether, for example, by full or partial requirements or output contracts, or by tie-ins. Examples of exclusive contracts within the purview of section 3 if their effect may be to lessen competition substantially, are: a contract between a gasoline distributor and a service station providing that the station buy 80 per cent of its gasoline requirements from the distributor, a contract between an icecream plant and a dairy for the dairy's entire output of milk not sold for consumption as fluid milk, a contract between a local T.V. station and a film broker which gives the station the Marilyn Monroe pictures it wants on the condition that it buy also some Abbott and Costello pictures it did not want, a franchise for the distribution of outboard motors by which the franchise agrees to sell no competitive motors and the manufacturer agrees to allow no one else to sell the brand in the same county with the franchise.

The phrase "contract, agreement, or understanding" parallels the Clayton Act terminology and emphasizes the broad reach of the provision. Exclusive dealing contracts or understandings may be inferred from special discounts for exclusivity, 73/ or from a course of action, such as refusals to deal with those seeking non-exclusive agreements. 74/ And prohibited exclusive agreements will be discerned even where they are effectuated more indirectly, through agency contracts, contracts for fixed quantities, or informal understandings backed up by threat of refusal to deal with violators of the understanding. 75/

Scope: As is the case with section 1, the intention is to make section 3 cover any contracts, agreements, or understandings which economically affect the state, to use the full scope of the police power of the state. 76/

Standard of legality: Exclusive dealing is not illegal per se, either under the general prohibition of section 1, or the more specific rule of section 3. 77/ Exclusive dealing is unlawful under section 1 if it has, or will probably have, the effect of unduly restraining competition, or it is adopted in order to achieve this purpose. It is unlawful under Section 3 if the effect may be to lessen competition substantially. The practical distinction between these standards may well prove not to be substantial. 77.5/ It would appear, however, that a somewhat weaker standard of proof sometimes called the "incipiency" test, 78/ satisfies the latter standard. 79/ The test of tendency to substantial lessening of competition within this section is met when it is reasonable to infer that actual or potential competitors are foreclosed from effective 80/ access to the market, i.e., when the exclusive contracts, whether made by defendants alone, 81/ or (if, as is more common, he is one of several firms which together dominate the market) made by the major firms in the industry, 82/ cover sufficiently large a percentage 82.5/ of the market and leave so small a percentage free to competition that the effect is "to enable the established suppliers individually to maintain their own standing and at the same time collectively even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market." 83/

Relevant Market. Determination of the relevant market must be made by the court to determine the foregoing competitive impact under section 3 as it must under sections 1 and 2.^{84/} In section 3 (as in subsequent section 4) the relevant market is mentioned expressly -- "line of commerce" -- but in sections 1 and 2 the concept of market is subsumed under "trade." Although it was believed, when drafting this section, that the phrase "line of commerce" was surplusage and the use of the word "competition" adequately indicated that the competition involved in this section must occur in the context of some relevant market, enough doubt existed that the expression was retained in order to avoid the suggestion that this legislation sought to depart from the legal test established under the Clayton Act.

In defining the area of effective competition, in order to determine what effect a challenged practice had, a number of verbal tests have been applied. In United States v. E. I. du Pont de Nemours & Co. [Cellophane],^{85/} the Court referred to the composition of the market as those "products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered."^{86/} In United States v. E. I. du Pont de Nemours & Co. [GM],^{87/} the Court found the market composed of products which "have sufficient peculiar characteristics and uses" to make them distinguishable from similar products. Irrespective of the verbal formula used, however, the factual determination of area in which

competitive effect is felt must be made.^{87.5/} There may be no one, determinate "market," and process of approximation and compromise is often necessary to settle on "the" relevant market for the case. Experience shows, however, that the courts have been able to evolve workable standards which prove adequate to the needs of litigation.

This factual determination of the market, it should be noted, is not dependent on the standard of legality,^{88/} which may differ to some degree among sections 1, 2, and 3. Definition of the market precedes the determination of whether the impact in that market "unreasonably restrains trade," "monopolizes trade," or "may substantially lessen competition."^{89/} Whatever differences there are between the statutory tests come into play but once, at the stage when impact is determined, and thus there is no "double use of incipency" or "incipient incipency" under this law.^{90/}

Remedies. The remedies, which are purely civil, against violation of this section are set out in sections 7 and 10 of the statute. In addition, under the common-law doctrine against restrictive agreements, contracts in violation of section 3 are unenforceable at law or equity, by either party, unless the restrictive conditions are properly severable.^{91/}

SECTION 4: ACQUISITIONS

Language. This section is based on section 7 of the Clayton Act.^{92/}

The proposed uniform statute, unlike the federal statute, is not limited to

acquisitions made from a corporation: any acquisition made by a non-natural person is subject to the law, whether the vendor is a corporation or a natural person.^{93/} The other changes in the wording represent deletion of matter inapplicable to a state antitrust law or shortening and simplification of the language.

Necessity for legislation. State antitrust action against mergers is particularly significant to maintenance of the vigor of competition in our economy because of the relatively limited power of the Antitrust Division of the United States Department of Justice. First, the number of mergers in commerce occurring every year is so great that the Department cannot fully cope with them, especially when the anti-competitive impact is felt primarily locally rather than in a multistate market. Second, in some of the most important segments of the economy -- such as banking^{94/} and insurance^{95/} -- the states have particular responsibility because Congress has chosen to rely on state regulation in the area. Third, even outside such reserved areas in commerce which have been committed to state monitoring, there is a large number of mergers involving firms not in commerce, although they may affect commerce. Such mergers are more susceptible to control under state antitrust jurisdiction, because Congress did not exhaust the full scope of the commerce clause in the specific federal antimerger law.^{96/} These mergers may create clouds

over various markets -- the sum of which clouds may substantially inhibit the vitality of national as well as local competition. State antitrust law, then, has particular significance in the merger field under our system of concurrent state-federal jurisdiction.

In addition to the foregoing categories involving mergers with interstate consequences, there are, of course, the many mergers which have purely intrastate impact. When, for example, one dry-cleaning firm threatens to dominate the market in a city, because of its acquisitions of its competitors, state antitrust action is the only possible remedy.

Standard of legality. Because this section uses the same language in setting forth the standard of legality as does section 3 -- "if the effect may be to lessen competition substantially in any line of commerce" -- the general test here is essentially that discussed supra, under section 3. In horizontal merger cases, the important factors in establishing illegality are: percentage command of the market by defendant, size of the other large firms (concentration of the industry militating against allowance of additional merger), importance to the market of the competition eliminated by the merger, and, extremely important, the ease and likelihood of the entry of new competition. In vertical merger cases -- where a customer or supplier is acquired -- the consideration is essentially that involved for exclusive dealing contracts, discussed under section 3, i.e., the degree of market foreclosure ^{97/} suffered by the acquiring firm's actual and potential competitors; the principal difference is the greater permanence of the merger-tie and the consequently greater threat to competition.

Specific intent is not a necessary element of the violation under section 4. When a merger is undertaken, however, with the specific intent of eliminating a troublesome rival or cutting off his source of supply or means of distribution, then the intent of the acquiring firm goes a long way toward supporting the inference that the effect of the acquisition may indeed be to lessen competition substantially. ^{98/}

In other words the courts are entitled to take the defendant at his own word, and if he manifests a belief or intent that his acts will have an anticompetitive effect, then a "dangerous probability" of success exists; it would appear, certainly, that the courts are justified in not believing that such defendants are merely self-deluded. ^{99/}

Remedies. The remedies, which are purely civil, for violation of this section are set out in sections 7 and 10. For the state, proceeding under section 7, the principal relief sought is the undoing of unlawful mergers (i.e., divestiture of the acquired property). Subsidiary relief may include re-establishment of the acquired firm as a viable business ^{100/} and injunction against further similar acquisitions by the acquisitive firm. Private equity actions under section 10 may be brought by the management on behalf of the acquired firm, ^{101/} or by a dissenting minority. ^{102/} Moreover, adversely affected parties may secure ^{103/} damages in appropriate cases. Finally, a contract for an unlawful acquisition is, like any other illegal contract, unenforceable.

Section 5: Definitions

The definitions adopted are intended to exhaust the constitutional scope of state police power.^{104/} The term "trade" has been discussed previously under section 1, and the same definition applies to "commerce." A similarly broad definition of "assets" is used, based on the recent decision of Judge Herlands in United States v. Columbia Pictures Corp.^{105/} Thus, the term includes realty and personalty, tangibles and intangibles, expectancies and interests of any description, choses in action, stock, inventories -- in short, the whole or any part of any thing of value.

Part II: State Enforcement and Procedure

SECTION 6: CRIMINAL PENALTIES

The criminal penalties for violation of the proposed statute which are set out in section 6 parallel the federal provisions.^{106/} Criminal penalties are restricted by this section to only the more serious offenses against public order, such as conspiracy or monopolization. Mergers, for example, unless they are part of a conspiracy to restrain trade or a monopolization, would not be subject to criminal sanctions. It is believed that the better practice is to restrict the use of criminal prosecutions to only those cases where the law, as developed in prior civil or criminal cases, is clear or the facts reveal a flagrant offense, such as monopolization, price-fixing or boycott conspiracies, other

predatory behavior, or a history of repeated violation.^{107/} Contracts in restraint of trade, to some degree covered by section 3 as well as section 1, are not made punishable criminally by this statute. In extreme cases, however, where the contracts rise to the level of "conspiracy," the attorney general would have discretion to move against them criminally.

Scienter is a requirement under this section. But proof of subjective intent or purpose is not required, since the accused is presumed to appreciate the necessary consequences of his acts.^{108/}

In conformity with familiar principles of criminal law,^{109/} the provisions of this section are applicable to officers and directors of a corporation who authorize or carry out antitrust violations by their corporation,^{110/} and they may be prosecuted together with or independently of their firm. This portion of section 6 of the statute codifies section 14 of the Clayton Act.^{111/}

Civil penalty alternative. An alternative to the criminal penalty has been suggested in the State of Washington -- a civil penalty.^{111.2/} This measure has several significant advantages over the conventional criminal action.

First, it does away with the stigma of criminal conviction, which some believe inappropriate in the case of a crime like conspiracy in restraint of trade.^{111.25/}

Second, it substitutes the civil burden of proof for the more stringent criminal standard,^{111.3/} thereby facilitating enforcement.^{111.35/} Finally, it makes possible for the state an appeal from

adverse rulings in trial courts, which is unavailable in most juris-

dictions. ^{111.4/} The federal experience shows that the inability to

appeal rulings in criminal cases is frequently brought home to the

prosecutor. ^{111.5/}

For these reasons, a text for a civil penalty alternative to the criminal provisions is set out in the margin. ^{111.6/} The foregoing commentary on the criminal version of the statute is applicable in all material respects to the civil penalty version. It should be noted that the civil penalty is cumulative to, rather than alternative to, the equity action under section 5 and (when it is appropriate) the state damages action under section 10.

SECTION 7: EQUITABLE RELIEF AND CHARTER FORFEITURE

Injunction. Section 7 enables the state to invoke the equity power of the courts of general jurisdiction to restrain violations of the substantive provisions of this statute by temporary injunction or restraining order and by permanent injunction. No proof is required that an adequate remedy at law does not exist.

Charter forfeiture. The section permits the courts, in their discretion, to order an ouster of, or charter forfeiture by, corporate antitrust violators. ^{112/} The courts may also suspend a charter or the right to do business in the state in lieu of permanent expulsion.

It is assumed that such drastic remedies will be reserved for flagrant

violations, such as those which would warrant imprisonment were an individual guilty of them.^{113/} But it is not necessary to bring a criminal action as a prerequisite for this relief, nor does such action preclude this one.^{114/}

Expedition. The courts are directed by this section to proceed to the hearing and determination of antitrust equity cases brought by the state "as soon as possible." It is intended that such cases should usually take precedence of all other business except criminal cases.^{115/} However, it is believed better practice not to restrict the administration of the courts by any more definite a direction than that used in the phrase adopted.

Venue. In the case of defendants who are not natural persons, state equity suits may be brought in any county where defendant does business or may be found or in the county in which the state capital is located. This type of venue provision has been adopted for antitrust or related purposes in several states.^{116/}

SECTION 8: ENFORCEMENT

Concurrent jurisdiction to enforce this statute is vested in the attorney general and the district attorneys of the various counties. The attorney general is given the power, however, to assume the control of any case brought by a district attorney. The purpose of this provision

is to enable the state to maintain a consistent litigation policy, and, when necessary, in view of the specialized nature such trials may have, to assure development of a record adequate for an effective appeal to the state supreme court. Some have suggested that exclusive enforcement authority should be confided in the state attorney general. ^{116.5/}

But concurrent jurisdiction over antitrust enforcement is the more common practice, ^{117/} and the provisions contained in section 8 are believed to constitute the most politically acceptable compromise.

SECTION 9: CIVIL INVESTIGATIVE DEMAND

The civil investigative demand provision enables the attorney general to compel the production of documentary material during the pre-complaint stage of antitrust investigation where civil, rather than criminal, proceedings are contemplated. Several states have similar provisions for investigation. ^{118/}

Need for legislation. The inevitable generality of most statutory antitrust prohibitions renders facts of paramount importance. Accordingly, effective enforcement requires full and comprehensive investigation before formal proceedings, civil or criminal, are commenced. Incomplete investigation may mean proceedings not justified by more careful search and study. Public retreat by the prosecutor may then be difficult, and the result may be a futile trial exhausting the resources of the litigants and increasing court congestion. Thus the adequacy of investigatory processes can make or break any enforcement program.

It is believed that filing of a skeleton complaint, in hopes that civil discovery procedures will unearth the facts necessary to proof of what is charged in the complaint, is undesirable. The law should not compel the attorney general to "pretend to bring charges in order to discover whether actual charges should be brought."^{119/}

Hence, this section permits the state attorney general to obtain a limited measure of civil discovery in order to determine whether initiation of a civil action is warranted in the circumstances.

Procedure. Section 9 provides that the attorney general may serve on any person that he believes possesses documentary evidence relevant to an antitrust investigation, a demand for production of such documents for the purpose of examination and copying. "Documentary evidence" as used here refers to papers, photographs, mechanical transcriptions such as disc or tape recordings, or any other method of tangible recording of information, wherever situate. The demand must describe what is sought with sufficient particularity as fairly to identify or designate the material in question, and a reasonable time for compliance is to be allowed. No documents may be required which would be privileged from disclosure if demanded in a grand jury subpoena duces tecum. The material disclosed may not be revealed to unauthorized persons or used for non-antitrust purposes. If the person on whom a demand is served believes that the demand is not permissible within this statute, or that

the attorney general is otherwise acting unlawfully or unreasonably in the premises, he may file a petition in the superior court for the county in which the state capital is located, or in such other county as the parties may agree, in the form of a motion to quash, set aside, extend the return date for, or otherwise modify the demand. Criminal penalties for fraudulent behavior or willful refusal to comply with the statute are provided.

PART III: PRIVATE ACTIONS

SECTION 10: PRIVATE REMEDIES

This section is based on sections 4 and 16 of the Clayton Act.^{120/} Section 10 differs from these sections, however, in several important respects. First, it removes an important loophole which a number of federal courts have found to exist in federal section 4, and which is criticized in the vigorous dissent by Judge Rives in Nelson Radio & Supply Co. v. Motorola, Inc.^{121/} According to that case's interpretation of section 4 of the Clayton Act, a businessman, who is injured because he refuses to join a conspiracy in restraint of trade or otherwise accede to an unlawful scheme in violation of the antitrust laws, is denied any legal redress.

In the Nelson case a radio jobber was cut off by his supplier when he refused to accede to a demand that he deal on an exclusive basis.

The cancelled dealer's complaint was dismissed by the court for failure to state a cause of action, because no illegal contract had been entered into by the plaintiff dealer. This technical approach is expressly rejected in the proposed damages provision. Section 10 provides that the businessman injured because he refuses to be a party to an unlawful arrangement -- i.e., one that would violate the substantive provisions of this statute -- may be made whole by the courts, including the extent of his reasonable expectation damages. It is believed necessary to avoid this loophole in the antitrust damages law because the ordinarily legitimate right of a company to choose those with whom it will deal has, unfortunately, often led to abuse, oppression, and the coercion of independent local businessmen by powerful national firms who choose to disregard the antitrust laws.^{122/}

Second, the proposed law eliminates the deficiency in federal section 16 with respect to reasonable attorney fees in equity suits. Although the private litigant who vindicates the public interest -- thereby functioning as a private attorney general --^{123/} by winning a damages verdict against an antitrust violator who has injured him is compensated for the cost of his suit by an award to cover his lawyer's fee, the private attorney general who wins only an injunction against an anti-trust violator injuring him is given no compensation under federal law for the expense of hiring his attorney. The proposed uniform section 10

puts the law and equity actions on a par with one another in this respect, in order further to encourage private parties to vindicate the public interest in free and unfettered competition.

The elements of the damages cause of action. Under section 10, as under the federal law, there are three elements to the cause of action: (1) an antitrust violation by defendant, or, in the case of a refusal to deal suit, a proposal which if complied with would result in such a violation, (2) an injury to plaintiff, and (3) a proximate-cause relationship between the violation and the injury. "Public injury" is not an additional element to the cause of action, which must be pleaded or proved as such. To the extent that factor (1)--antitrust violation -- cannot be present except when there is public injury, i.e., actual or potential injury to competition itself rather than a mere private injury -- then "public injury" is indirectly an element of the cause of action. However, it need not be alleged as such nor need it be proved separately from violation itself. ^{124/}

As to the general pleading requirements in such cases, so long as the foregoing elements of the cause of action are alleged, plaintiffs have been held only to the standard associated with ordinary negligence cases. ^{125/} Hence, the extent of damages need not be pleaded precisely. ^{126/}

And the causal connection between damage and violation may be alleged in the form of general conclusions or ultimate facts. ^{127/}

Standard of proof. The proof of the extent of damages is necessarily difficult in these cases because the fact finder must compare what would have happened but for the violation with what did happen, and then estimate the financial difference to the plaintiff. If the conspiracy in restraint of trade has been so effective that it has eliminated any independent competitive market that could be available for comparison purposes, the problem becomes extremely difficult.^{128/} In such cases, the courts have allowed juries considerable latitude in basing verdicts on whatever evidence was available with respect to both the fact of damage being caused by the scheme and the measurement of such damage. As the Supreme Court replied to one wrongdoer who asserted the defense that the damages involved were speculative:

The wrongdoer is not entitled to complain that they [the damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of the injured party.^{129/}

Damages actions by state bodies. Section 10 further provides that treble damages actions may be brought by the state or its political subdivisions. In such cases, however, it was deemed inappropriate to allow attorney fees also. The propriety of multiple damages for state

bodies might be questioned as well,^{129.4/} but, since federal law allows state bodies treble damages,^{129.6/} denying it under state law will probably only work a change in forum when (as is frequent in state damages cases) federal jurisdiction exists.

Invalidity as a defense. Codification, into this section or another, of the common-law doctrine that contracts in restraint of trade are unenforceable, was omitted as inappropriate, because: (1) The common law doctrine is well recognized,^{130/} and this statute does not supersede it. (2) The doctrine is merely one special case of the general contract law principle that illegal contracts are unenforceable, rather than a special antitrust law principle. Therefore, cases involving enforceability would best be treated, once antitrust illegality has been determined, in the same manner as would, in the particular state, any other question of the enforceability of an unlawful contract.

The fact that a contract violates sections 1, 2, 3 or 4 of this statute can be raised as a defense, then, by either party, at law or equity.^{131/} The effectiveness of in pari delicto as a defense has been considerably limited in such cases.^{132/} When restrictive conditions are properly severable, however, the contract may be enforced, in accordance with ordinary contract law principles.^{133/}

SECTION 11: LIMITATION OF ACTIONS

Section 11 provides a four-year statute of limitations for private damages actions brought under section 10. The statute is tolled, however,

during the course of any action brought by the state against the violation on which the section 10 action may be based. The purpose of such tolling is to enable the plaintiff to take full advantage of the provisions of section 12, which make the state's case available as evidence to the private plaintiff. This section is similar to section 5(b) of the Clayton Act.^{134/}

SECTION 12: EVIDENTIARY EFFECT OF JUDGMENT IN FAVOR OF STATE

Section 12 provides that private litigants proceeding under section 10 may use final judgments or decrees rendered in favor of the state, in civil or criminal actions under sections 6 or 7, as prima facie evidence that the defendant did violate the antitrust laws with respect to those acts involved in such judgment or decree. Consent decrees and nolo pleas are excluded from this provision when they involve no determination by the court of illegality. This section is similar to section 5(a) of the Clayton Act.^{135/}

This section further provides that the state shall remain entitled to any collateral estoppel to which it is entitled against defendants when it brings its own treble damages actions following a successful civil or criminal prosecution. The purpose of this provision is to avoid depriving the state of a conclusive presumption of illegality in cases where it would enjoy one, but for the statutory prima facie provision. Whether this collateral estoppel is to extend to political subdivisions of the state, as well as to the state itself, has been left to be determined

by the state law on the scope of collateral estoppel.

It shall be noted that this provision does not extend to section 10 litigants the use of federal antitrust decrees obtained by the United States. Perhaps it would be more desirable to make federal decrees available to state court suitors in such cases, but a scrupulous regard for the preservation of state sovereignty appeared to dictate avoidance of interaction between state and federal judiciary systems. And in most cases, treble damage litigants to whom the provisions of a federal decree would be applicable will have federal remedies and the federal forum available should they decide that they require the benefit of Clayton Act section 5(a).

FOOTNOTES

• TO "A PROPOSED UNIFORM STATE ANTITRUST LAWS:

TEXT AND COMMENTARY ON

A DRAFT STATUTE"

1 / This text and commentary has been prepared for the use of State governmental officials for the purpose of adaptation into a legislative analysis or committee report on the draft statute contained herein. It has been revised repeatedly as the result of the many helpful suggestions of persons interested in uniform State antitrust law, within the State and Federal Governments. We have prepared additional materials, not reproduced herein, but described, infra, in note 22, which are available on request to State executive or legislative officials.

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2 / In enacting the Sherman Law, Congress meant "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements," United States v. Southeastern Underwriters Ass'n., 322 U. S. 533, 558 (1944), and to exercise "all the power it possessed." Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). See, generally, on the scope of the commerce clause, United States v. Women's Sport-wear Mfg. Ass'n., 336 U.S. 460, 464 (1949); NLRB v. Fainblatt, 306 U.S. 601, 607 (1939).

3 / See, e.g., Federal Trade Commission v. Bunte Bros., 312 U. S. 349 (1941) (Federal Trade Commission Act prohibitions on unfair competition and unfair and deceptive practices "in commerce" [15 U.S.C. § 45(a) (1958)] does not extend to practices merely affecting commerce). See infra notes 76, 93-96.

4 / U. S. Dept. of Justice, State Antitrust Law Reference Handbook
2 (1960).

5 / Ibid.; cf. Georgia v. Pennsylvania R.R., 324 U. S. 439 (1945).

6 / "Every agreement concerning trade... restrains" the trade of parties or strangers to the agreement. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61 (1933); Board of Trade v. United States,

246 U.S. 231, 238 (1918). The real legal problem is whether the restraint is "unreasonable" (i.e., substantially detrimental to the general vigor of competition in the market). See Standard Oil Co. v. United States, 211 U.S. 1, 60, 63.

7/ Compare Florsheim Shoe Co. v. Leader Dep't Stores, 212 N.C. 75, 193 S.E. 9(1937); Ford Motor Co. v. State, 142 Tex. 5, 175 S.W.2d 230 (1943); Wright v. Southern Ice Co., 144 S.W.2d 933 (Tex. Civ. App. 1940); Rogers v. Westinghouse Elec. Supply Co., 116 S.W.2d 886 (Tex. Civ. App. 1938); with Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957), cert. denied, 355 U.S. 822 (1957); Schwing Motor Car Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D. Md. 1956), aff'd per curiam, 239 F.2d 176 (4th Cir. 1956), cert. denied, 355 U.S. 823 (1957); Dye v. Carmichael Prod. Co., 64 Ind. App. 653, 116 N.E. 425 (1917); Cole Steel Equip. Co. v. Art-Lloyd Metal Prods. Corp., 1 App. Div. 2d 148, 148 N.Y.S.2d 440 (1956); Thomas v. Blaylock, 187 Okla. 258, 102 P.2d 585 (1940); State v. Fairbanks-Morse & Co., 246 S.W. 2d 647 (Tex. Civ. App. 1952); Brown v. Faulk, 231 S.W. 2d 743, 745 (Tex. Civ. App. 1950).

8/ Compare Bulova Watch Co. v. Stolzberg, 64 F. Supp. 43 (D. Mass. 1947), with Dwinell-Wright Co. v. National Fruit Prod. Co., 47 F. Supp. 499 (D. Mass. 1942), aff'd on other grounds, 140 F.2d 618 (1st Cir. 1944), dealing with the similar conflict of laws problem

8 (cont'd) / in unfair competition cases. See also Zlinkoff, Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition, 42 Colum.L.Rev. 955, 986 (1942) ("endless complications ... fine-split distinctions").

8.5/ See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

9/ See Standard Oil Co. v. Tennessee, 217 U.S. 413, 423 (1910)

(Holmes, Jr.: "The mere fact that it may happen to remove an interference with commerce among the States . . . does not invalidate it.") Query: Does Justice Holmes' analysis really reach the issue?

Compare Southern Pac. R.R. v. Arizona, 325 U.S. 761 (1945). The author suggests that the conclusion in the text supra may not follow from the premise.

9.5/ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-8 (1958).

10/ This bill ... has for its ... object to invoke the aid of the courts of the United States to deal with the combinations... when they affect injuriously our foreign and interstate commerce... and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the the industrial liberty of the citizens of those states. It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States ...

21 Cong. Rec. 2457 (1890). See also Gibbs v. Buck, 307 U. S. 66, 77, 83 (1939) (dissenting opinion), modified sub nom. Watson v. Buck, 313 U.S. 387 (1940); Standard Oil Co. v. Tennessee, supra note 9.

11/ Compare the federal labor law cases holding that the Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1958), preempts state antitrust or labor relations laws. *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *Guss v. Utah Labor Relations Bd.*, 353 U. S. 1 (1957). See also *Pennsylvania v. Nelson*, 350 U. S. 497 (1955).

12/ See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); cf. *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 562 (1946). But cf. *Parker v. Brown*, 317 U. S. 341 (1943).

13/ But see *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942). See, generally, *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218 (1947).

13.5/ Compare *Colegrove v. Green*, 328 U.S. 549 (1946). On the political function of the State as parens patriae, compare *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), with *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

14/ Among the standards adopted by the National Conference of Commissioners on Uniform State Laws for determining whether a subject matter is appropriate for uniform legislation by the several states are whether what is involved concerns -- commercial activities carried on by individuals or companies operating in a number of states, situations which are apt to have contacts with two or more states so that uniform legislation would avoid litigation to resolve difficult

questions as to which state law applies, and matters of national concern which under our constitutional system are proper subjects for state legislation. National Conference of Commissioners on Uniform State Laws, Handbook 265 (1959).

15/ But see N. Y. Bar Ass'n, Section on Antitrust Law, Report of the Special Committee to Study the New York Antitrust Laws 8 (1957) (despite "verbosity, turgidity and complexity of the New York legislative language" and the undesirability of "placing businessmen in the dilemma of having to comply with conflicting standards," the discrepancies are not acute and substitution of new language might "produce more confusion than it would allay").

16/ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1958).

17/ 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 14, 18 (1958).

18/ Compare the adoption of the Federal Rules of Civil Procedure, apparently motivated by similar considerations, in Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Kentucky, Maine, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Utah, West Virginia, and Wyoming.

19/ FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 405 (1953) (dissenting opinion).

20/ 38 Stat. 730 (1914), as amended, 15 U.S.C. §13. See also 15 U.S.C. § 13a.

21/ See, generally, Atty. Gen. Nat'l. Comm. Antitrust Rep. 200-01 (1955)(discussion of similar §3 problems).

22/ Part IV, including miscellaneous "boiler plate" provisions usually deemed appropriate in such an act -- e.g., severability, short title, interpretation, service of process without the state, effective date-- has been omitted from this Article in the interest of brevity. Also omitted, for the same reason, is the appendix of pleading forms-- something which is reasonably owed the bar of any jurisdiction proposing to enforce its antitrust laws.

23/ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

24/ 221 U. S. 1 (1911).

25/ The "trust" combination, so dangerous to the public welfare in 1890 that special mention of it was then deemed appropriate, at this date no longer deserves special emphasis or singling out. The outright merger or acquisition, for example, is a far more common method of combination today than is the trust.

26/ See *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 297-98 (1945); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932).

27/ See *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911); *Gratz v. Cloughton*, 187 F.2d 46, 50 (2d Cir. 1951), cert. denied, 341 U.S. 920 (1951); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 443 (2d Cir. 1945); *Mortensen v. State*, 214 Ark. 528, 217

27 cont'd/ S.W.2d 325 (1949); State ex rel. Gilder v. Kriss, 191 Md. 568, 62 A.2d 568 (1948); Travelers Health Ass'n. v. Commonwealth, 188 Va. 877, 51 S.E. 2d 263 (1949), aff'd, 339 U.S. 643 (1950). State v. Piver, 74 Wash, 96, 132 Pac. 858 (1913); Restatement (Second) Conflict of laws § 43f(1)(e), comment h (Tent.Draft No. 3.) (1956); id. at §§ 84, 85, 91a, 92. Restatement, Conflict of Laws § 428 (1934). See also id. §§ 377, 378.

28/ See Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948) (destined interstate); State v. Allied Chemical & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960) (destined to state).

29/ See United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945) (goods had travelled in commerce).

30/ Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) (venue). See also International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) ("Some single or occasional acts..because of their nature and quality and the circumstances of their commission, may be deemed sufficient"); Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507, 509 (4th Cir. 1956).

31/ See Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910); State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960); Dep't of Justice, State Antitrust Law Reference Handbook, ch. 1 (1960).

32/ See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61 (1933); Board of Trade v. United States, 246 U.S. 231, 238 (1918).

33/ See Standard Oil Co. v. United States, 221 U. S. 1 (1911).

34/ "Significant" as used here means "not insubstantial" or "beyond de minimis"; i.e., the anticompetitive impact must be sufficient to merit legal cognizance, even though not necessarily "formidable."

35/ It should be recognized that "effect" on the market is not identical with amount of commerce "affected." Generally, a fairly substantial amount of commerce must be affected by a restrictive practice for any significant market effect to be felt. Thus, in some cases practices may affect a share of the market beyond de minimis without impairing the vigor of competition in that market. See Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); United States v. Columbia Steel Co., 334 U.S. 495 (1948).

36/ While this effect is most commonly measured in terms of increased price or deteriorated quality, these categories do not exhaust the methods of measuring market impact. Fashion Originators Guild v. FTC, 312 U.S. 457, 466 (1941).

36.5/ Effects in this category are those which are likely to be translated in time into the previous category, whereupon they would become measurable, e.g., in terms of increased prices or deteriorated quality. Compare the "incipiency" standard, infra, note 79.

37/ Northern Pac. Ry. v. United States, 356 U. S. 1, 5 (1948).

38/ Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

39/ Because price-fixing conspiracies are illegal per se, it is no defense to such a charge that the price-level fixed is not unreasonably high, that the conspirators' efforts were unsuccessful, or that the prior state of competition was "ruinous." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59; United States v. Trenton Potteries Co., 273 U. S. 392 (1927).

40/ See King v. Norris, 2 Ken. 300, 96 Eng. Rep. 1189 (K.B. 1758).

American cases on this point are collected in United States v.

Trenton Potteries Co., 273 U.S. 392, 400 n. 1 (1927).

41/ See map facing p. 12, Dep't of Justice, State Antitrust Law Reference Handbook (1960).

42/ Horizontal price fixing arrangements and combinations to prevent competition have been held to be unlawful conspiracies within the meaning of such provisions. Chicago W. & V. Coal Co. v. People, 214 Ill. 421, 73 N.E. 770 (1905); Commonwealth v. International Harvester Co., 167 Ky. 318, 180 S.W. 522 (1915); Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 90 So.2d 343 (1956); People v. Dwyer, 145 N.Y. Supp. 748, 160 App.Div. 542 (1914); People v. Shell Co., 56 P.R. Fed. 55, 67 (1940). See Powell v. Graham, 183 Wash. 452, 48 P.2d 953 (1935).

Although some state antitrust laws specifically mention price-fixing and limitation of production, it is believed that a broad and general prohibition which is not restricted by reference to enumerated violations will more conveniently serve the legislative needs of the state. As Chief Justice Hughes stated, in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933): "As a charter of freedom, the act has a generality and adaptability comparable to that found in Constitutional provisions. It does not go into detailed definitions which might either work injury

42 (cont'd)/ to legitimate enterprise or through particularization defeat its purpose by providing loopholes for escape."

43/ The leading Supreme Court case on the point, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which involved purchase of "distress" gasoline by the major oil refiners from independents, who would otherwise have sold it on the open market thus lowering price levels. The effect of the scheme was to put a floor under gasoline prices. The Court declared that "raising, depressing, fixing, pegging, or stabilizing the price of a commodity ... is illegal per se." *Id.* at 223. Antitrust law, state or federal, "places all such schemes beyond the pale and protects . . . our economy against any degree of interference" with the free play of market forces. *Id.* at 22.

Among state antitrust cases prohibiting schemes for the limitation of production are: *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391 (1888); *Arctic Ice Co. v. Franklin Elec. & Ice Co.*, 145 Ky. 321, 139 S.W. 1080 (1911); *Clark v. Needham*, 125 Mich. 84, 83 N.W. 1027 (1900); *Hastings Indus. Co. v. Baxter*, 125 Mo. App. 494, 102 S.W. 1075 (1907); *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N.W. 155 (1890); *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 24 N.E. 660 (1890); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159 (1871).

44/ Such practices have been held to violate the general common law doctrine against restraint of trade. See, e.g., American Laundry Co. v. E. & W. Dry-Cleaning Co., 199 Ala. 154, 74 So. 58 (1917); Chicago Gas Light & Coke Co. v. Peoples Gas Light & Coke Co., 121 Ill, 530, 13 N.E. 169 (1887); Charlestown Natural Gas Co. v. Kanawha Natural Gas Co., 58 W. Va. 22, 50 S.E. 876 (1905). For an example of application of a general antitrust statute in prohibition of restraint of trade against such practices, see State v. Jackson Cotton Oil Co., 95 Miss. 6, 48 So. 300 (1909). The leading federal case is Judge (later Chief Justice) Taft's opinion in Addyston Pipe & Steel v. United States, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899)

45/ See Consolidated Laundries, Inc. v. United States, F.2d , (2d Cir. 1961); People v. Building Maintenance Ass'n, 41 Cal. 2d 719, 264 P.2d 31 (1953).

46/ In American Laundry Co. v. W. & W. Dry-Cleaning Co., 199 Ala. 154, 74 So. 58 (1917), wet-laundry and dry-cleaning were allocated to different firms. In Ricou v. Crosland, 81 Fla. 574, 88 So. 380 (1921), certain seafood middlemen appear to have allocated different species of fish among one another; thus, one was to buy all mullet at Miami, another all Key West mackerel.

47/ See King v. Eccles, 1 Leach 274, 168 Eng. Rep. 240 (K.B. 1783),

where Lord Mansfield sent seven tailors to jail for six months for conspiring to drive another tailor out of business. Among the American common law cases are Denver Jobbers Ass'n v. People, 21 Colo. App. 326, 122 Pac. 404 (1912); Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co., 3 Misc. 582, 24 N. Y. Supp. 647 (1893); Delz v. Winfree, 80 Tex. 400, 16 S.W. 111 (1891); Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607 (1899); Hawarden v. Younghiogheny & L. Coal Co., 111 Wis. 545, 87 N.W. 472 (1901).

48/ 359 U.S. 207 (1959). See also Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

49/ 312 U.S. 465. As the Supreme Court of Vermont has put it, the individual should not be "exposed to the operation of some secret code of law, in the framing of which he had no voice" State v. Stewart, 59 Vt. 273, 286, 9 Atl. 559, 567 (1887).

50/ See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959). And it is immaterial whether the boycott is threatened or consummated, or whether the boycott is primary (i.e., the conspirators agree among themselves not to deal with the victim of the boycott), see, e.g., Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N.E. 823 (1909), or secondary (i.e., the agreement is not to deal with any third parties, e.g., customers or suppliers,

50 (cont'd)/ who continue to deal with the victim of the primary boycott), see *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U. S. (1961); *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 3 Misc. 582, 24 N.Y. Supp. 647 (1893); *Martell v. White*, 185 Mass. 255, 69 N.E. 1085 (1904); *Ertz v. Produce Exch. Co.*, 79 Minn. 140, 81 N.W. 737 (1900); *Delz v. Winfree*, 80 Tex. 400, 16 S.W. Ill. (1891); *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 608 (1899). Boycotts are often made criminally punishable by specific statutes. See, e.g., Ala. Code title 14, § 54 (1940); Idaho Code Ann. § 48-104 (1947); Ind. Ann. Stat. § 23-112 (1950); Mo. Rev. Stat. § 416.030 (1949); S. C. Code § 66-64 (1952); Tex. Pen. Code art. 1637 (1948).

51/ See *United States v. Colgate & Co.*, 250 U.S. 300 (1919), as limited by *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Such freedom is not recognized, however, for those who enjoy a virtual monopoly however lawfully obtained, see *Gamco v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952); cert. denied, 344 U.S. 817 (1952), nor for those who seek to monopolize the market. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

It would appear that use of refusal to deal, to coerce exclusive dealing which would be in violation of the antitrust laws, is also illegal. See Dep't of Justice, State Antitrust Law Reference Handbook

51 (cont'd)/ 20 (1960); cf. Parke Davis, supra. Section 10 of this statute, analyzed infra pp. , contains a specific provision creating a remedy against such coercive use of refusal to deal.

52/ See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); Addyston Pipe & Steel Co. v. United States, 85 Fed. 271, 279, 286 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

52.5/ Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir. 1960), rev'd. on other gnds, U.S. (1961).

53/ 26 Stat. 209 (1890), as amended, 15 U.S.C. §2 (1958).

54/ See United States v. Aluminum Co. of America, 147 F. 2d 416, 428 (2d Cir. 1945) (L. Hand, J.) ("...[I]t would be absurd to condemn such contracts [pricefixing] unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control that monopoly confers: they are really partial monopolies.") See also People v. American Ice Co., 120 N.Y. Supp. 443 (Sup. Ct. 1909); Eli Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939).

55/ United States v. Griffith, 334 U.S. 100, 107 (1948); American Tobacco Co. v. United States, 328 U.S. 781, 809, 811 (1946); accord, Commonwealth v. Dyer, 243 Mass. 472, 138 N.E. 296 (1922), cert. denied, 262 U.S. 751 (1922); Attorney General v. National Cash Register Co., 182 Mich. 99, 108, 148 N.W. 420 (1914); State v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902 (1909) (power to raise prices or destroy competition at pleasure), aff'd, 224 U.S. 270

55 (cont'd)/ (1912); see *Tooke v. Reynolds & Bastrop Ice Co.*,

172 La. 781, 135 So. 239 (1931).

56/ See *United States v. Aluminum Co. of America*, 148 F.2d 416,

432 (2d Cir. 1945); *United States v. United Shoe Mach. Co.*, 110

F. Supp. 295, 342-44 (D. Mass. 1953), aff'd per curiam, 347 U.S.

521 (1954).

57/ See *United States v. Griffith*, 334 U.S. 100, 106 (1948)

(only theatre in town); *American Tobacco Co. v. United States*, 328

U.S. 781, 786 (1946) (original entrant into new field).

58/ See *American Tobacco Co. v. United States*, 221 U.S. 106 (1911);

Standard Oil Co. v. United States, 221 U.S. 1 (1911); *Attorney*

General v. National Cash Register Co., 182 Mich. 99, 148 N.W. 420

(1914); *State v. Central Lumber Co.*, 24 S.D. 136, 123 N.W. 504 (1909).

59/ See the Standard Oil and Tobacco cases, supra, note ***.

60/ See *United States v. United Shoe Mach. Co.*, 110 F. Supp. 295, 344-45

(D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954), where defendant

strengthened its lawful patent monopoly into impregnable market

dominance by licensing arrangements calculated to bar new entry

by competitors. See also *United States v. Griffith*, 334 U.S. 100

(1948) (abuse of monopoly acquired by chance).

The showing of deliberateness need not include proof of specific intent. *Commonwealth v. Dyer*, 243 Mass. 472, 138 N.E. 296 (1922), cert. denied, 262 U.S. 751 (1922) ("malevolent purpose" unnecessary); *Gaddy v. Republic Ins. Co.*, 74 S.W. 2d 728 (Tex.Civ. App. 1934).

61/ The leading case is *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). See also *United States v. Columbia Steel Co.*, 334 U.S. 495, 530-32 (1948) (dictum). Essentially the same considerations apply for conspiracy to monopolize.

62/ But see *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-32 (1948) (dictum: attempt to monopolize may violate § 2 but not § 1). Roughly speaking, both conspiracy in restraint of trade and attempted monopolization may be considered lesser included offenses under monopolization, since each of the former is in the nature of a preliminary step toward the latter. See supra note 54.

63/ See, e.g., *Indiana Farmers' Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268 (1934).

64/ See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 172-73 (1948).

65/ See, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-511 (1948).

66/ Att'y Gen. Nat'l Comm. Antitrust Rep. 322 (1955). See, more generally, the discussion of relevant market, infra, as to Section 3, pp. * * *.

67/ American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

68/ See, e.g., United States v. American Tobacco Co., 221 U.S. 106

(1911); Standard Oil Co. v. United States, 221 U. S. 1 (1911).

68.5/ Application of this drastic remedy against out-of-state corporations might well exceed the jurisdiction of the courts of the State,

as well as amount to a burden on commerce. It is not clear that an

equity court may issue a mandatory injunction of this type, requiring

out-of-state changes in the corporations' status. According to the

Restatement (Second), Conflict of Laws §94 (Tent. Draft No. 4, 1957) --

"A state can order a person, who is subject to its jurisdiction to

do an act in another state." In the antitrust field, this view is

supported by two cases ordering defendants to commit foreign breaches

of contract. United States v. Holophane Co., 119 F. Supp. 114 (S.D.

Ohio 1954), aff'd, 352 U.S. 903 (1956); United States v. Imperial

Chem. Indus., Ltd., 100 F. Supp. 215 (S.D.N.Y. 1952). Contra,

British Nylon Spinners v. Imperial Chem. Indus., Ltd., (1952) All

E. R. 780 (C.A.). On the other hand, International Shoe Co. v.

Washington, 326 U.S. 310 (1945), suggests that the proper approach re-

quires a balancing of the interests of the state asserting juris-

diction against the seriousness of the out-of-state effects of

sustaining jurisdiction. Certainly, grave comity problems exist.

The willingness, for example, of Michigan to give full faith and

credit to a Texas decree ordering General Motors to divest itself

70/ 38 Stat. 731 (1914); 15 U.S.C. § 14 (1958):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. • •

71/ See Northern Pac. Ry. v. United States, 356 U.S. 1, 13 & n. 1 (1958); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 609 n.27 (1953); cf. General Shale Prods. Corp. v. Struck Constr. Co., 132 F.2d 425 (6th Cir. 1942); Fleetway, Inc. v. Public Serv. Interstate Transp. Co., 72 F.2d 761 (3d Cir. 1934); United States v. Investors Div. Servs., Inc., 102 F. Supp. 645 (D. Minn. 1951).

72/ Handler, Antitrust in Perspective 44-45 (1957); cf. 81 Cong.

Rec. 2340 (1936) (informal opinion of FTC on applicability to output contract of analogous provision of §2 of act).

73/ See Commonwealth v. Strauss, 191 Mass. 545, 78 N.E. 136 (1906), cert. denied, 207 U.S. 599 (1906).

74/ See United States v. Sun Oil Co., 176 F. Supp. 715 (E.D.Pa.

1959); Timken Roller Bearing Co., 1961-1962 CCH Trade Reg. Rep. FTC Cases

¶ (1961), 1957-1958 CCH Trade Reg. Rep. FTC Cases ¶27,224 (1958);

Whisenant v. Shores-Mueller Co., 194 S.W. 1175 (Tex. Civ. App. 1917).

75/ See Department of Justice, State Antitrust Law Reference Handbook

20 (1960); Kessler & Stern, Competition, Contract, and Vertical

Integration, 69 Yale L.J. 1, 37-42, 79-84 (1959). See also United

States v. Paramount Pictures, Inc., 334 U.S. 131, 151 (1948)

("A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety.")

76/ Clayton Act § 3, supra note 70, does not appear to exhaust the

full scope of Congress' power, since it has an "in commerce" limitation.

See FTC v. Bunte Bros., 312 U.S. 349 (1941).

77/ See Tampe Elec. Co. v. Nashville Coal Co., 364 U.S. ,

(1961); Columbia Steel Co. v. United States, 334 U.S. 495, 522-23,

524 (1948).

77.5/ The distinction is important, however, when the exclusive arrangement falls into a per se category under § 1, since that

eliminates the necessity for market analysis. See *Klor's, Inc. v. Broadway-Hales Stores, Inc.*, 359 U.S. 207 (1959). An example of a practice involving a § 1 boycott conspiracy and a § 3 arrangement or understanding is given in Loevinger, Treble Damage Litigation and the Small Businessman, 16 A.B.A. Antitrust Section Proceedings 106, 108 (1960): The association of record dealers in a city decided that a newcomer should be eliminated as a superfluous dealer, and they advised the national distributors to stop selling to the newcomer (presumably as the condition of enjoying the custom of the association members); when the distributors acceded to the demand, an antitrust suit was brought by the newcomer. The boycott here is, of course, a § 1 violation; the sales to association members made under the demand that the seller not deal with the newcomer are contracts in restraint of trade under § 1 and exclusive dealing arrangements under § 3 of the draft act. See also *FOGA v. FTC*, 312 U.S. 457 (1941).

78/ See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356 (1922).

79/ See *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 567 (1953) ("a lower standard of proof of the same kind of facts . . . evidence . . . less impressive than where the Sherman Act is involved"); Levi, Mergers, in Conf. on Antitrust Laws and Att'y Gen. Nat'l Comm. Antitrust Rep. 69, 78 (1955). The "incipiency" test does not, of course, shift the

burden of proof to defendant or eliminate the necessity for substantial, reliable evidence.

80/ By loss of "effective" access, more is meant than mere loss of business by or injury by one competitor to another. "Effective" access looks to the vigor of overall competition in the relevant market -- to the importance of the sum of injuries to all competitors.

81/ See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

82/ See FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392 (1953); Standard Oil Co. v. United States, 337 U.S. 293 (1949); cf. Tampa ("myriad outlets with substantial sales' volume coupled with world-wide practice of relying on exclusive contract as in Standard Oil.")

82.5/ See Tampa Elec. Co. v. Nashville Coal Co., 364 U.S. (1961) (to determine substantiality, it is necessary to compare "the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market" and "a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence"); id. at ("dollar volume, by itself, is not the test"). See also Standard Oil, 337 U.S. at 299 n.5. See also Tampa Elec. Co. v. Nashville Coal Co., 364 U.S.

(1961) ("The opportunities for other traders to enter

into or remain in that market must be significantly limited"). This percentage will necessarily vary from case to case, under section 3 as it does in general under section 1, depending on factors such as the ease of entry into the market and the fewness of major competitors in the industry. Market percentage is but a first approximation to economic impact, and the relative effect of percentage command of the market varies with the individual market setting in which this factor is placed. *United States v. Columbia Steel Co.*, 334 U.S. 495, 528 (1948); see *Times-Picayune Pub. Co. v. Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 (1953).

See note 88 infra, for discussion of the relationship between product interchangeability and the importance of the percentage command of the market.

84/ Thus the Court declared, in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957), that defining "the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition' [citing Standard Oil, 337 U.S. at 299 n.5]." The Court went on to state, "Substantiality can be determined only in terms of the market affected." Ibid. See also *Tampa Elec. Co. v. Nashville Coal Co.*, 364 U.S. _____, _____ (1961) ("The area of effective competition in the known line of commerce must be charted by careful selection").

It should be noted, however, that relevant market is immaterial in a section 1 per se case.

85/ 351 U.S. 377, 404 (1956).

86/ See also 351 U.S. at 395: ". . . no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up that 'part of trade or commerce,' monopolization of which may be illegal." In addition to the product-interchangeability from the consumer standpoint, considered as a factor in the Cellophane case and in Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953), the courts have looked to the ability of other firms to switch their productive facilities into the relevant market in question. See United States v. Columbia Steel Co., 334 U.S. 495 (1948).

87/ 353 U. S. 586, 593-94 (1957).

87.5/ See U.S. v. Columbia Pictures Corp. 1960 CCH Trade Cases ¶ 69,766 at _____ (S.D.N.Y. 1960): "The tests enunciated . . . are but different verbalizations of the same criterion. They require the same accumulation and scrutiny of facts and application of judgment." • •

88/ On the other hand, the specific measure of legality for the case, under any section of the law, may be influenced by the relevant market determination. That is, the percentage of the market affected which is deemed sufficiently large to justify an inference of anticompetitive impact may well vary with the degree of product interchangeability of competing goods. For example, as a substitute for determining whether waxed paper

is in the same market as cellophane, because it is "in" for some purposes and at some prices but "out" in other circumstances, the court might (1) choose to exclude waxed paper from the market and take only cellophane into account, in computing the quantitative percentage share of the market that a cellophane firm has, but (2) take waxed paper into account as a factor lessening the qualitative economic importance of that percentage share (of cellophane alone) which had been established in the market found relevant. By the same token, the court might, instead, (1) include waxed paper in computing the quantitative percentage share of the market that the cellophane firm has, and then (2) take the imperfect substitutibility of waxed paper into account as a factor increasing the qualitative importance of that percentage command of the market.

89/ See 353 U.S. at 593. See also *Tampa Elec. Co. v. Nashville Coal Co.*, 364 U.S. _____, _____ (1961). In determining the relevant market in Tampa, a Clayton Act §3 case, the Court relied, on two Sherman Act cases for guidelines, *International Boxing Club v. United States*, 358 U.S. 242 (1959) (§2), and *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (§1). See 364 U. S. at _____.

90/ The alternative approach, to define the market more narrowly or widely in each case, depending on whether an "incipiency," "unreasonable restraint," or "monopoly" test is subsequently to be applied, is not adopted here because it is believed that such a practice would substantially decrease the value of precedent and render appellate review much more difficult, in that each case would stand only for its own facts. Thus, to help assure plaintiffs and defendants a reasonable basis for expectations, the principle of area of effective competition should be recognized as the same practical notion irrespective of which section of the statute the plaintiff elects to proceed under.

91/ See discussion of remedies, infra, pp. ***, at to section 10.

92/ No corporation engaged in commerce shall acquire, directly, or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

92 (cont'd)/ No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition or to tend to create a monopoly . . .

As amended, 64 Stat. 1125 (1950), 15 U.S.C. §18 (1959).

Similar provisions exist in several states. See La. Rev. Stat. § 51:125 (1950); Miss. Code Ann. § 1094 (1942); Minn. Stat. § 623:01 (1957); N.J. Rev. Stat. §14:3-10 (1937); S.C. Code § 66-61 (1952); Tex. Rev. Civ. Stat. art. 7427 (1948). See also Ga. Const. art 4, § 2-2504, par. 4; Okla. Const. art. 9 § 41; Wyo. Const. art. 10, § 8. 93/ This provision represents a compromise between subjecting all persons to the act and subjecting only corporations to the act, as in Clayton Act §7. Another exception to coverage by the merger provisions (although not the conspiracy provisions) is comprised by the class of corporations subject to the primary jurisdiction of a federal regulatory agency. See, e.g., 49 U.S.C. § 5(11) (1948), 47 U.S.C. § 222 (1958).

94/ See Peoples Sav. Bank v. Stoddard, 351 Mich. 342, 88 N. W. 2d 462 (1958).

95/ See McCarran Act, 59 Stat. 33 (1945), 15 U.S.C. § 1011 (1958).

96/ Clayton Act § 7, 15 U.S.C. § 18 (1958), applies only to corporations in commerce. See FTC v. Bunte Bros., 312 U.S. 349 (1941). Compare 15 U.S.C. §§ 1-2 (1958), and more general commerce clause cases cited supra note 2.

97/ The seriousness of the foreclosure may be gauged often by the significant horizontal merger factors listed supra, e.g., ease and likelihood of new entry to replace the acquired firm.

98/ See Maryland-Virginia Milk Pro. Ass'n v. United States, 362 U.S. 458 (1960). The identical principle applies in section 3 cases. Moreover, it appears that this is the rationale for intent as an alternative to or substitute for effect under Section 1's "rule of reason", and for the "per se unreasonableness" of practices such as price fixing. See Dep't of Justice, State Antitrust Law Reference Handbook 10 (1960).

99/ See generally Swift & Co. v. United States, 106 U.S. 375, 396 (1905) (Holmes, J.).

100/ Joining the acquired firm as a defendant for the purpose of securing such relief may prove necessary.

101/ American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F. 2d 524 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738 (2d Cir. 1953).

102/ DeKoven v. Lake Shore & M.S. Ry., 216 Fed. 955, 957-958

(S.D.N.Y. 1914).

103/ See Ramsburg v. American Inv. Co., 231 F.2d 333 (7th Cir.

1956); Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d

731 (2d Cir. 1953); Gottesman v. General Motors Corp., 171 F. Supp.

661 (S.D.N.Y. 1959), appeal dismissed, 268 F.2d 194, (2d Cir. 1960);

Kogan v. Schenley Indus., Inc., 20 F.R.D. 4 (D.Del. 1956).

104/ Compare Atlantic Cleaners & Dyers, Inc. v. United States,

286 U.S. 427, 435 (1932).

105/ 1960 CCH Trade Cas. ¶ 69,766 at 77,006-07 (S.D.N.Y. 1960).

See also Kessler & Stern, Competition, Contract, and Vertical

Integration, 69 Yale L.J. 1, 75-78 (1959).

106/ See 69 Stat. 282 (1958), 15 U.S.C. §§ 1-2 (1958). Similar

criminal provisions exist in about three-quarters of the states.

See map facing p. 16, Dep't of Justice, State Antitrust Law Reference

Handbook (1960). . .

107/ See, generally, Att'y Gen. Nat'l Comm. Antitrust Rep. 349-51

(1955). Although the wording of the proposed uniform section provides

for a smaller area of criminal responsibility than does the federal

statute, it codifies the actual federal practice. See ibid.

108/ United States v. Patten, 226 U.S. 525, 543 (1913); United States v. Gold, 115 F.2d 236, 238 (2d Cir. 1940) (Hand, J.: "But purpose is never an excuse in these cases; only the intent of the accused, or the necessary result of his conduct, counts, and it would appear enough that they intended to stop all 'marketing' of service."); United States v. Anderson, 101 F.2d 325, 330-331 (7th Cir. 1937), cert. denied, 307 U.S. 625 (1938). See also Beall v. State, 203 Md. 280, 286, 101 A.2d 233, 236 (1953); People v. Connors, 253 Ill. 266, 97 N.E. 643 (1912).

109/ See Williams, Criminal Law 686-690 (1953).

110/ Among the federal antitrust cases in which corporate officers have been indicted for offenses they carried out on behalf of their corporation are Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Borden Co., 308 U.S. 188 (1939). That the corporate officers' acts were for the benefit of the firm, rather than their own immediate gain, is not recognized as a defense. See United States v. Bach, 151 F.2d 177 (7th Cir. 1945); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F. Supp. 728, 738 (W.D. Ky. 1941), aff'd sub. nom. Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943).

111/ 38 Stat. (1914), 15 U.S.C. § 24 (1958).

111.2/ See Wash. S. Bill No. 55, 37th Reg. Sess. § 14 (1961). Compare S. 2719, 76th Cong., 1st Sess. (1939), printed and explained in 84 Cong. Rec. 8191-92 (1939).

111.25/ Stigma and antitrust violation are discussed generally in

Sutherland, White Collar Crime, ch. (1949) (contrasting the blue and white collar criminals). A collection of authorities on criminal stigma in general is found in Goldstein, Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543, 590-91 (1960) (status degradation ceremonies).

For the view that criminal sanctions are essential as a deterrent to anti-trust violators, see Arnold, Antitrust Law Enforcement, Past and Future, 7 Law & Contemp. Prob. 5, 16 (1940); Berge, Remedies Available to the Government Under the Sherman Act, id. at 104.

111.3/ See United States ex rel. Marcus v. Hess, 317 U.S. 537, 550-52 (1944); Berge, supra, note 111.

111.35/ Some of the obstacles to criminal enforcement as compared to civil litigation are discussed in Berge, Some Problems in the Enforcement of the Antitrust Laws, 38 Mich. L. Rev. 462, 470-71 (1940).

111.4/ See generally Palko v. Connecticut, 302 U.S. 319 (1937).

111.5/ For example, when the Government's criminal case for price fixing against Parke Davis ended with a non-reviewable decision granting a motion

for acquittal, the Government brought a civil action against the drug manufacturer, on the same facts. Again the district court dismissed the case, for the same reason, failure to make out a prima facie case, but this time the decision was appealable, and the Supreme Court reversed, holding that the facts made out a per se violation of the Sherman Act. United States v. Parke, Davis & Co., 362 U.S. 29 (1960). See also United States v. Parke, Davis & Co., 364 U.S. (1961). Other recent Sherman Act criminal cases which were lost on unreviewable motions for acquittal include United States v. Arkansas Fuel Oil Co., 1960 CCH Trade Cases, ¶ 69,619 (E.D. Okla. 1960) (the Suez crisis oil price-fixing case); United States v. Eli Lilly Co., 1959 CCH Trade Cases ¶ 69,482 (D. N.J. 1959) (the polio vaccine price-fixing case). Compare United States v. Bitz, 282 F. 2d 465 (2d Cir. 1960) (Government victory on Sherman Act appeal after dismissal subject to review under 18 U.S.C. § 3731 (1958)). Thus important questions may come up in a criminal posture and never receive authoritative appellate resolution. See, e.g., the posture of the dismissal of the indictment in United States v. Maryland & Virginia Milk Producers Association, 145 F. Supp. 151 (D. D.C. 1956) (dismissal based on construction of statute, but after Government opened case).

111.6/ Section 6: Civil penalty.

Any person who conspires to restrain trade unreasonably, or monopolizes, attempts to monopolize, or conspires to monopolize trade

shall pay the State of [insert name of state] a civil penalty not to exceed \$50,000, which sum shall be recoverable in a civil suit brought in the name of the State of [insert name of state]. Whenever a corporation is liable under this section, the individual directors, officers, or agents of said corporation who have authorized, ordered, or ratified the acts creating such liability, shall themselves be liable in accordance with this section. Exclusive jurisdiction to enforce this section is vested in the Superior Courts [or insert name of state court of general jurisdiction] of this state. No action under this section shall be brought more than four years after the commission of the acts giving rise in whole or in part to the cause of action.

Similar federal provisions are found in sections 11(1) of the Clayton Act and 5(1) and 10 of the Federal Trade Commission Act, as amended, 15 U.S.C. §§ 21(1) (Supp. I 1959), 45(1), 50 (1958).

112/ Approximately 60% of the states have such provisions in their anti-trust laws. See map facing p. 16, Dep't of Justice, State Antitrust Law Reference Handbook (1960). There is also authority that such an action would lie in a quo warranto proceeding at common law or under general corporation law, even in the absence of a specific antitrust charter forfeiture statute or constitutional provision. See *People v. Milk Producers Ass'n*, 60 Cal. App. 439, 212 Pac. 957 (1923); *State v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909), aff'd, 224 U.S. 270 (1912);

State v. Nebraska Distilling Co., 29 Neb. 700, 46 N.W. 155 (1890); State v. Gamble-Robinson Fruit Co., 44 N.D. 376 N.W. 103 (1919). See, generally, Terret v. Taylor, 9 Cranch. 51 (U.S. 1815) (Story, J.). Query: May the state oust a violator from doing interstate business? Cf. Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954) (ICC permit may not be invalidated by state action); Gibbons v. Ogden, 9 Wheat. 1 (1824). A recent case raising this issue, but not presenting it properly for review, for procedural reasons, is Ford Motor Co. v. Pace, ___Tenn.___, 335 S.W. 2d 360 (1960), appeal dism'd for want of a properly presented federal question, 364 U.S. 444 (1960).

113/ See discussion under section 6, supra.

114/ See State v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902 (1909), aff'd, 224 U.S. 270 (1912).

115/ See Tex. Rev. Civ. Stat. art. 7438 (1948). See also the Federal Antitrust Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 28 (1958).

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116/ Tex. Rev. Civ. Stat. art. 7431 (1948); Tex. Pen. Code art. 1641 (1948); see Wash. Rev. Code § 69.04.050; W. Va. Code Ann. § 5311.

116.5/ See e.g., Ark. Stat. § 70-110 (1947); Idaho Code Ann. § 48-107 (1947); Me. Rev. Stat. Ann. Ch. 137, § 48 (1954); Mont. Rev. Codes Ann. §§ 94-1108,-1112 (1947). See also Alaska H. Bill No. 23, 2d Leg., 1st Sess. § 8 (1961); Wash. S. Bill No. 55, 37th Reg. Sess. §§ 8, 10, 11, 14 (1961). In any case, as indicated supra at note 22, § 8 is not a portion

of the statute where uniformity indicated is necessary.

117/ Concurrent jurisdiction is the pattern in most states. See map facing p. ii, Dep't of Justice, State Antitrust Law Reference Handbook (1960).

118/ See, e.g., Mo. Rev. Stat. § 416.310 - .360; Tex. Rev. Civ. Stat. art. 7439, 7441. See, generally, Fein & Stackable, The Subpoena Power of the Attorney General (Mich. State Univ. Bur. Soc. & Pol. Research 1959).

119/ See U. S. Judicial Conf., Report on Procedure in Antitrust

Cases, 13 F.R.D. 62, 67 (1951). For similar analysis of the problem

and endorsement of such legislation, see, generally, Att'y Gen. Nat'l

Comm. Antitrust Rep. 343-347 (1955); Hearings on S. 716 and S. 1003

Before the Antitrust and Monopoly Subcommittee of the Senate Judiciary

Committee, 86th Cong., 1st Sess. 37, 41 (1959) (statement of American

Bar Ass'n Antitrust Section).

120/ 38 Stat. 731, 737 (1914), 15 U.S.C. §§ 15, 26 (1958):

Section 4. Any person who shall be injured in this business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . . [W]hen and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such

proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . .

See also §§ 4A, 4B of the Clayton Act, 69 Stat. 282 (1955), 15 U. S. C. §§ 15A, 15B (1958).

121/ 200 F. 2d 911, 916 (5th Cir. 1952), cert. denied, 345 U. S. 925 (1953). This criticism has been echoed in 6 Corbin, Contracts § 1417 (Supp. 1959); Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 83-91, 115-116 (1959).

112/ See, in addition to the Nelson case, United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 48 (1941); McElhenney Co. v. Western Auto Supply Co., 167 F. Supp. 949 (W.D.S.C. 1958), aff'd, 269 F.2d 332 (4th Cir. 1959).

123/ See Maltz v. Sax, 134 F.2d (7th Cir. 1943), cert. denied, 319 U.S. 772 (1943); Weinberg v. Sinclair Ref. Co., 48 F. Supp. 203, 205 (E.D. N.Y. 1942); Quemos Theater Co. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949, 950 (D.N.J. 1940); Comment, 49 Yale L. J. 284, 296 (1939).

124/ See Radovich v. National Football League, 352 U. S. 445 (1957). See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. (1961).

125/ See *Niagara of Buffalo, Inc. v. Niagara Mfg. & Distrib. Corp.*, 262 F. 2d 106 (2d Cir. 1958); *New Home Appliance Center v. Thompson*, 250 F. 2d 881 (10th Cir. 1957); *Nagler v. Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957); *Package Closure Corp. v. Sealright Co.*, 141 F. 2d 972, 978 (2d Cir. 1944); Clark, Special Pleading in the "Big Case," 21 F. R. D. 45 (1957).

126/ In *Noerr Motor Freight, Inc. v. Eastern R.R. Conf.*, 113 F. Supp. 737, 744-745 (E.D. Pa. 1953), plaintiffs were permitted in their complaint to allege "generally that they have been financially damaged by defendants' activities by increased expense of operation and by loss of profits and prospective profits," since it was asserted that "these damages are presently incapable of exact ascertainment but will be proved at time of trial."

127/ See *Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255, 261 (1940) (plaintiff "has been damaged in that its business was rendered unprofitable, and [its] profits . . . have diminished, and the plaintiff company has suffered loss and been damaged thereby," held sufficient allegation); *Package Closure Corp. v. Sealright Co.*, 141 F. 2d 972, 979 (2d Cir. 1944).

128/ See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 260-264 (1946); cf. *Bondonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 176 F. 2d 594, 597 (2d Cir. 1949).

129/ Story Parchment Co. v. Paterson Co., 282 U. S. 555, 563 (1931).

See also Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 264 (1946)

("Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim").

129.4/ Compare Clayton Act, § 4A, 69 Stat. 282 (1955), 15 U.S.C. § 15a (1958).

129.6/ See Georgia v. Evans, 316 U.S. 159 (1942); Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906).

130/ This doctrine has been recognized repeatedly by the United States Supreme Court, although no federal statute on the subject exists. See Standard Oil Co. v. United States, 221 U.S. 1 (1911), and United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), analyzing the English common law cases.

131/ See Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 (1922). Antitrust illegality of a contract may also be raised in a declaratory judgment action. Tampa Elec. Co. v. Nashville Coal Co., 216 F.2d 766 (6th Cir. 1960), rev'd on other grounds, _____ U.S. _____ (1961).

132/ Banana Distribs. Inc. v. United Fruit Co., 162 F. Supp. 32, 45 (S.D. N.Y. 1958) (collecting authorities).

133/ See Beloit Culligan Soft Water Serv., Inc. v. Culligan, 274 F.2d 29 (7th Cir. 1959).

134/ As amended, 69 Stat. 823 (1955), 15 U.S.C. § 16(b) (1958).

135/ As amended, 60 Stat. 283 (1955), 15 U.S.C. § 16(a) (1958).