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NEW MEXICO RESTRAINT OF TRADE STATUTES—A LEGISLATIVE PROPOSAL

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> The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. This is especially true of such common and widespread practices as price-fixing, which usually result in higher prices for the consumer, regardless of the level in the chain of distribution at which the violation occurs. . . . Moreover, antitrust violations almost always contribute to inflation. They introduce illegal and artificial forces into the market place, thus undermining our economic system of free enterprise.[1]

As a consequence of the substantial increase in consumer prices and continued inflation of the 1970's,[2] there has been a renewed interest on the part of Congress and state legislatures to improve enforcement of antitrust violations. This interest has resulted in improved antitrust laws and increased budgets for federal and state enforcement efforts. Congressional action has led to stronger penalties on the federal level for antitrust violators. Violators are now subject to felony charges which carry a maximum jail term of three years and a $100,000 fine for individuals and a fine of $100,000,000 for corporations.[3] Congress has also expanded the investigative tools of the U.S. Department of Justice, Antitrust Division.[4]

Recognizing that the "State attorney general is an effective and ideal spokesman for the public in antitrust cases,"[5] Congress has set the stage for expanded state enforcement of antitrust violations. Amendments to the Clayton Act[6] permit state attorneys general to recover damages on behalf of natural persons residing in their state

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1. H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 3-4 *reprinted in* [1976] U.S. Code Cong. & Ad. News 2573.

2. See statement of President Ford, September 30, 1976, on signing the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

3. Antitrust Procedures and Penalties Act, 15 U.S.C. § 2 (1976).

4. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 1311-1314 (1976).

5. H.R. Rep. No. 94-499, *supra* note 1, at 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 2575.

6. Clayton Act, ch. 323, §§ 1 to 26, 38 Stat. 730-40 (1914), (current version at 15 U.S.C. §§ 12 to 14, 19 to 22, 27 (1976) and 29 U.S.C. §§ 52-53 (1976)).

for antitrust violations.[7] Congress has also authorized federal funding for state antitrust enforcement.[8] In fiscal year 1978, the first year of the availability of the funding, $10,787,337 was distributed to states by the U.S. Department of Justice, Antitrust Division.[9]

The state legislatures have been equally active. Since 1970, eighteen states have passed antitrust laws either modernizing previous statutes or enacting new laws.[10] To finance state enforcement efforts, the legislatures of thirty states had budgeted funds specifically for state antitrust enforcement efforts during the mid-1970's.[11]

The New Mexico law originally enacted in 1891, however, remains substantially unchanged and has not proven to be an effective enforcement tool. It is anticipated that legislation will be introduced in the 1979 legislative session to permit meaningful efforts, by both the State and private litigants, to combat anti-competitive practices. The need for and the advantages of this legislation will be the focus of this article.

THE NEED FOR STATE ANTITRUST LAWS

Federal antitrust law has not removed the need for the states to have similar laws or to engage in active enforcement of antitrust violations. The Sherman Act[12] was designed "to supplement the enforcement . . . by the courts of the several States,"[13] and is limited to activity which is in or affects interstate commerce. There is, further, a distinct area of intrastate commerce in which federal jurisdiction is lacking. The Supreme Court has refused to find a conspiracy among local taxicab owners[14] or an allocation of terri-

7. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c (1976).

8. Crime Control Act of 1976, 42 U.S.C. § 3739 (1976).

9. BNA Antitrust & Trade Reg. Rep. No. 830, Sept. 15, 1977 at D-3.

10. [1974] 4 Trade Reg. Rep. ¶¶ 30, 101 to 40, 506. Arizona (1974); Connecticut (1971); Iowa (1976); Maine (1977); Maryland (1972); Massachusetts (1978); Minnesota (1971); Missouri (1974); Nebraska (1974); Nevada (1975); New Hampshire (1973); New Jersey (1970); Oregon (1975); South Dakota (1977); Virginia (1974); Washington (1972); and West Virginia (1978). California has passed significant amendments pertaining to antitrust provisions, raising maximum fines to $1,000,000 for a corporation and to $100,000 for an individual, and providing for possible imprisonment of up to three years (1975). In addition, Puerto Rico (1973) and the Virgin Islands (1973) have passed antitrust legislation.

11. National Associations of Attorneys General, Antitrust Manual ¶ 1.61 (1976). In a survey conducted by the National Association of Attorneys General for fiscal year 1977-78, of thirty-six states reporting on state funding, twenty-four indicated the receipt of state funds for antitrust enforcement. 5 National Association of Attorneys General Antitrust Bulletin 17 (July 14, 1978).

12. Sherman Act, ch. 647, § 1 to 8, 26 Stat. 209-10 (1890) (current version at 15 U.S.C. § § 1 to 7 (1976)).

13. 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman).

14. United States v. Yellow Cab Co., 332 U.S. 218 (1947).

tories by doctor-sponsored medical plans[15] to be within the reach of the Sherman Act. The Tenth Circuit, in addition, has held that allegations of antitrust violations in the practice of healing arts,[16] the distribution of bread,[17] the business of practicing medicine[18] and furnishing medical services,[19] as well as the activities of city real estate boards[20] may be wholly within intrastate commerce, immune from Sherman Act attack, and subject only to antitrust actions under state law. Although in earlier cases there was a clear distinction made between the jurisdiction of the state courts for intrastate violations and that of the federal courts for interstate violations, the present thought is that there is a substantial area of concurrent jurisdiction. This idea of concurrent jurisdiction permits state jurisdiction over activity which "affects" or is "in" interstate commerce, but which retains a local impact.[21]

Strong state antitrust laws and enforcement are required because the Justice Department and the Federal Trade Commission, even when jurisdiction is available to them, do not have the resources to pursue many of the violations brought to their attention.[22] John H. Shenefield, Assistant U.S. Attorney General in charge of the Antitrust Division, has remarked:

> The Antitrust Division and the Bureau of Competition of the Federal Trade Commission, together simply do not have the re-

15. United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952).

16. Spears Free Clinic & Hosp. for Poor Children v. Cleere, 197 F.2d 125 (10th Cir. 1952).

17. Mead's Fine Bread Co. v. Moore, 208 F.2d 777 (10th Cir. 1953). In holding that alleged discriminatory prices did not violate the Robinson-Patman Price Discriminatory Act, 15 U.S.C. § 13(a) (1975), the tenth circuit held that sales made in the course of interstate commerce must be the means of the elimination of the local competition for the act to apply. 208 F.2d at 780. *See also* Moore v. Mead Serv. Co. 184 F.2d 338 (10th Cir. 1950).

18. Polhemus v. American Medical Ass'n, 145 F.2d 357 (10th Cir. 1944).

19. Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975).

20. Bryan v. Stillwater Bd. of Realtors, 1978-1 Trade Cas. (CCH) ¶ 62,078; Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors, 1978-1 Trade Cas. (CCH) ¶ 62.079.

21. Rubin, *Rethinking State Antitrust Enforcement,* 26 U. Fla. L. Rev. 653, 670 (1974). A discussion of the boundaries of federal-state jurisdiction is beyond the scope of this article. For a thorough discussion of that topic, see J. Flynn, Federalism and State Antitrust Regulation (1964); Rubin, *supra;* and Note, *The Commerce Clause and State Antitrust Regulation,* 61 Col. L. Rev. 1469 (1961). For an up-to-date codification see Fellmuth and Papageorge, A Treatise on State Antitrust Law and Enforcement: With Models and Forms, BNA Antitrust & Trade Reg. Rep. No. 892, Dec. 7, 1978 (Supp. No. 1). With respect to enforcement of restraints of trade within the area of concurrent jurisdiction, the U.S. Department of Justice has taken the position that the states may be better equipped to treat restraints which affect or are in interstate commerce, but which have primarily local impact. U.S. Department of Justice, Antitrust Handbook, Federal-State Conference on Antitrust Problems 1-2 (1969).

22. Javits, *The Role of State Antitrust Laws,* 1956 N.Y. St. Bar Ass'n. Antitrust Symposium 56.

> sources to investigate and prosecute all of the violations that experience leads us to believe are occurring. We are forced to make decisions on utilization of our own scarce resources; is it, in effect, better to attack a huge violation that costs each of 220 million Americans a few cents or dollars each, or a smaller, local conspiracy that costs a comparative handful of people each a great deal more? The answer is evident, for if we do not prosecute the larger cases there is no one else who really can. The smaller cases—smaller but no less significant to their victims—require the attention and diligence that state enforcement authorities can bring.[23]

As a result, cases with local impact are referred by the U.S. Department of Justice to state enforcement authorities.[24]

Many of the potential violations in New Mexico are of the local nature described by Mr. Shenefield. These violations are not only beyond the practical limitations of federal authorities, but may be beyond the reach of interstate commerce. The reach of interstate commerce in New Mexico with its small, isolated communities which are, by the absence of adequate public transportation, as close to self-sufficient as can be found in modern society, may be more limited than in an industrial state. Yet it is for the same reasons that anti-competitive activity can develop and be maintained so easily. Effective state laws are necessary in order to stop this activity.

NEW MEXICO RESTRAINT OF TRADE STATUTES

In 1891, one year after the Sherman Act was signed into law, the legislature of the Territory of New Mexico enacted antitrust legislation,[25] which, with the exception of minor amendments in 1907[26] and 1923,[27] remains the present law. Substantively, this legislation[28] parallels in many respects Section 1 and 2 of the Sherman Act[29] although the penalty provisions are far less severe.

Section 1 of the Sherman Act reads:

> 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. . . .[30]

23. Testimony of John H. Shenefield, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to the House Appropriations Comm. of the Vermont State Legislature, March 2, 1978.
24. *Id.*
25. 1891 N.M. Laws, ch. 10, § § 1 to 3.
26. 1907 N.M. Laws, ch. 18, § 1.
27. 1923 N.M. Laws, ch. 37, § 1.
28. N.M. Stat. Ann. § § 57-1-1 to 4 (1978).
29. 15 U.S.C. § § 1, 2 (1976).
30. 15 U.S.C. § 1 (1976).

The comparable New Mexico statute[31] prohibits a contract or combination, but not conspiracy as in the Sherman Act, which has for its object to, or which operates to, restrict trade or commerce. A violation of the state statute is a misdemeanor and is punishable by a fine of $100 to $1,000 "and by imprisonment at hard labor not exceeding one [1] year, or until such fine has been paid."[32] A federal violation is a felony, with a maximum jail term of three years and a $100,000 fine for individuals and $1,000,000 for corporations.[33] Originally, the Sherman Act was read literally to include every restraint of trade regardless of its reasonableness. The U.S. Supreme Court altered this approach in 1911 when it adopted the "rule of reason," holding that only unreasonable restraints of trade fall within the prohibition of this language.[34] It was the Court's purpose to permit judicial interpretation to determine whether, on a case by case basis, a particular restraint of trade was unreasonable. The "rule of reason" has been followed by New Mexico courts.[35]

Subsequently, the U.S. Supreme Court has modified the "rule of reason" approach and delineated certain actions which are per se violations of the Sherman Act. Thus, certain conduct, because of its inherent anti-competitive nature, is illegal regardless of its purpose or harm, and the introduction of evidence of the reasonableness of the conduct is precluded. Per se violations reach both horizontal and vertical arrangements.[36] Among competitors, agreements to raise, depress, peg, stabilize, maintain or fix prices,[37] or to allocate markets or customers[38] are per se violations. In the vertical chain of distribution, the per se rule prohibits the maintenance of a resale price imposed by a supplier upon a distributor or retailer.[39] Tying arrangements, which are the conditioning of the sale or lease of one product on the sale or lease of another when the seller has sufficient economic power in the tying product market to diminish competi-

31. N.M. Stat. Ann. § 57-1-1 (1978).

32. *Id.* Subjecting a person to imprisonment because of his inability to pay a fine has been held by the U.S. Supreme Court to constitute invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Tate v. Short, 401 U.S. 395 (1971).

33. Antitrust Penalties and Procedures Act, 15 U.S.C. § 2 (1976).

34. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

35. State v. Gurley, 25 N.M. 233, 252 P. 1000 (1919); Elephant Butte Alfalfa Ass'n v. Rouault, 33 N.M. 136, 262 P. 185 (1926).

36. Horizontal arrangements are those between or among competitors on the same level of the chain of distribution. Vertical arrangements include one or more levels of the chain of distribution.

37. United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

38. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

39. Albrecht v. Herald Co., 390 U.S. 145 (1908).

tion in the market of the other product,[40] are per se violations. Group boycotts or concerted refusals to deal which exclude a competitor of one or more of the members of the combination from the market are also considered to be violations per se.[41] The New Mexico courts have not addressed the question of per se violations.[42]

As clearly set forth in the New Mexico statute, the restraint of trade need not be effected for a violation to occur.[43] In order for a violation to be found, some form of agreement is required, although under federal case law it may be inferred.[44] Conscious parallel activity, in addition to other evidence consistent with a conspiracy, may be sufficient under federal law.[45]

Another section of the New Mexico Restraint of Trade Statutes declares the monopolization, or attempt, combination, or conspiracy to monopolize any part of the trade or commerce of New Mexico to be a misdemeanor, punishable by a fine not exceeding $1,000 and/or imprisonment of up to one year.[46] Section 2 of the Sherman Act proscribes the same conduct.[47] Under federal decisions, the Supreme Court has defined the offense of monopoly as (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[48] Monopoly power is the power to control process or exclude competition,[49] and the relevant market

40. United States v. Loew's Inc., 371 U.S. 38 (1962); Northern Pacific Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947). See United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) for limitations.

41. Klor's, Inc. v. Broadway-Hale Stores, Inc., 356 U.S. 207 (1959); Eastern States Retail Lumber Dealer's Assn. v. United States, 234 U.S. 600 (1914).

42. An argument can be made that the language of N.M. Stat. Ann. § 57-1-1 (1978) declaring to be illegal contracts or combinations "having for its object or which shall operate to restrict trade or commerce or control the quantity, price, or exchange of any article of manufacture or product of the soil or mine" requires proof of the intent or operation of the illegal contract or combination and precludes the existence of per se violations under the statute. Such contention has not been raised in any reported decision in the New Mexico courts.

43. N.M. Stat. Ann. § 57-1-1 (1978) prohibits a contract or combination which has "for its object" the restriction of trade or commerce. See W. T. Rawleigh Co. v. Jones, 39 N.M. 381, 47 P.2d 906 (1935).

44. United States v. American Tobacco Co., 328 U.S. 781, 809 (1946); Frey & Sons Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921).

45. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1959); Theater Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

46. N.M. Stat. Ann. § 57-1-12 (1978).

47. 15 U.S.C. § 2 (1976) which condemns: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. . . ."

48. United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

49. United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377 (1956).

includes both the geographic and product markets.[50] "An intent to bring about the forbidden act"[51] is sufficient to uphold a monopolization charge while specific intent is required for the offense of an attempt to monopolize.[52]

The New Mexico law provides that any contracts or agreements in violation of the foregoing two sections shall be void.[53] A similar provision is not set forth in the federal law. The New Mexico statute further provides, through a 1907 amendment, for civil redress for actual damages.[54] By amendment adopted in 1923, New Mexico allows the agricultural or horticultural organizations, and the labor of a human being exceptions found in the Clayton Act.[55]

THE USE OF THE PRESENT RESTRAINT OF TRADE STATUTES

Private Cases

Reported decisions indicate that the New Mexico restraint of trade statutes have not been used frequently and reflect the difficulty of the private litigant to achieve recourse. The statutes have most often been invoked by defendants to void restrictive covenants against competition as in leases,[56] in employment contracts,[57] or in supply[58] or franchise[59] contracts. In these situations claims have been made that the restrictive covenants are void under Section 49-1-3 for being in restraint of trade under Section 49-1-1. The genesis for these cases had been in the common law rule that restrictive covenants would be held void as against public policy unless the covenant was merely ancillary to the main purpose of the contract and was necessary to protect one of the parties from injury in the execution of the contract or the enjoyment of its fruits.[60] The New Mexico Supreme Court in *Winrock Enterprises* recently followed this

50. *Id.*
51. United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945).
52. *Id.;* Swift & Co. v. United States, 196 U.S. 375 (1905).
53. N.M. Stat. Ann. §57-1-3 (1978).
54. *Id.*
55. N.M. Stat. Ann. §57-1-4 (1978).
56. Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, 91 N.M. 661, 579 P.2d 787 (1978); Gonzalez v. Reynolds, 34 N.M. 35, 275 P. 922 (1929).
57. Nichols v. Anderson, 43 N.M. 296, 92 P.2d 781 (1939); *see also* Excelsior Laundry Co. v. Drehl, 32 N.M. 169, 252 P.2d 991 (1927) in which competitive activity was enjoined in absence of a contractual provision prohibiting it.
58. Thomas v. Garvin, 15 N.M. 660, 110 P.2d 841 (1910).
59. Yarborough v. Harkey, 67 N.M. 204, 354 P.2d 137 (1960).
60. Gross-Kelly & Co. v. Bibo, 19 N.M. 495, 145 P. 480 (1914). The common law position was adopted to avoid one deprived of his livelihood from becoming a public charge. Areeda, Antitrust Analysis, 2 Ed. ¶ 139 (1974).

rule.[61] In all but one case,[62] the contractual provision has been upheld.

Other uses of the statutes by private litigants have been sporadic and equally unsatisfying to those raising antitrust claims. The New Mexico Supreme Court rejected an antitrust claim of a distributor, being sued by the manufacturer on a contract, who alleged, *inter alia*, that the contract contained illegal resale price maintenance provisions.[63] In another case, the Supreme Court upheld the exemption of a cooperative marketing association from antitrust prohibitions.[64] A third case involved a suit by a materialman against a contractor in which the contractor claimed that a contract between him and a third party was in restraint of trade. The claim was rejected by the Supreme Court because of lack of standing.[65] The Court of Appeals declined to rule on whether the requiring of membership in the Albuquerque Board of Realtors for participation in its multiple listing service created a combination tending to monopolize trade.[66] Violations of state law were also raised in a pendant claim in a case in the U.S. District Court, District of New Mexico alleging price discrimination in violation of the Robinson-Patman Act[67] and conspiracy in restraint of trade in violation of the Sherman Act. The state claim did not proceed to litigation.[68]

Recent cases concerning uranium contracts demonstrate the potential of private state antitrust litigation.[69] In those cases, suppliers of uranium had entered into supply contracts and sought to

61. 91 N.M. 661, 579 P.2d 787 (1978).

62. Gross-Kelly & Co. v. Bibo, 19 N.M. 495, 145 P. 480 (1914). *See also* Gallup Elec. Light Co. v. Pac. Improvement Co., 16 N.M. 86, 113 P. 848 (1911), in which the Supreme Court upheld a contractual restraint attacked for violation of the Sherman Act.

63. W. T. Rawleigh Co. v. Jones, 39 N.M. 381, 47 P.2d 906 (1935).

64. Elephant Butte Alfalfa Assn. v. Rouault, 33 N.M. 136, 262 P. 185 (1926).

65. State *ex rel.* McGraw-Edison Co. v. Elec. City Supply Co., Inc., 74 N.M. 295, 393 P.2d 325 (1964).

66. Wilson v. Albuquerque Bd. of Realtors, 82 N.M. 717, 487 P.2d 145 (1971).

67. 15 U.S.C. § § 12(f), 13 (1976).

68. Ingram v. Phillips Petroleum Company, 252 F. Supp. 674 (1966). In another federal case, Moore v. Mead Serv. Co., 184 F.2d 338 (10th Cir. 1950), the tenth circuit found that an agreement between the plaintiff bread manufacturer and local businesses not to purchase the bread of defendant manufacturer constituted a restriction of competition in violation of the New Mexico restraint of trade and federal antitrust laws. The judgment was vacated by the United States Supreme Court because the plaintiff was denied recovery on the basis of this activity. 340 U.S. 944 (1951). The complaint alleged violations of Sections 57-1-1 through 57-1-3 and violations of the Price Discrimination Act, N.M. Stat. Ann. § § 57-14-9 (1978).

69. United Nuclear Corporation v. General Atomic Company, No. 50827, (N.M. Dist. Ct., Santa Fe Cty. filed Dec. 21, 1975); General Atomic Co. v. Ranchers Exploration & Dev. Corp., No. 2-76-00598 (N.M. Dist. Ct. Bern. Cty. filed Feb. 10, 1976); Reserve Oil & Mineral Corp. v. Gen. Atomic Co., No. 77-592C (D. N.M. filed Sept. 22, 1977).

have the contracts declared void under Section 49-1-3.[70] The *United Nuclear* case is illustrative. In that case United Nuclear Corporation, which had entered into contracts with Gulf Oil Company, claimed (1) that the contracts violated Section 49-1-1 because Gulf controlled production and precluded United Nuclear's product from competing with the production of others with whom Gulf had joined in a cartel; (2) that the contracts were part of an illegal attempt to monopolize under Section 49-1-2 in that Gulf had taken predatory acts against competitors and attempted to eliminate competition in New Mexico; (3) that Gulf conspired with others to monopolize New Mexico uranium in violation of Section 49-1-2; and (4) that Gulf illegally monopolized the New Mexico uranium market in violation of Section 49-1-2 by virtue of its ownership and control of uranium reserves in New Mexico and its monopoly power in other markets which gave it the power to fix the price of New Mexico uranium and to exclude competition from the New Mexico market. The claims of the other uranium supplier litigants are similar, but include, in addition, a prayer for damages under Section 49-1-3. None of these claims have been litigated, although defendant's motion for summary judgment in the *United Nuclear* case was denied.[71]

Public Enforcement

The paucity of cases under the New Mexico Restraint of Trade Statutes is not limited to private litigation. Only one case of public enforcement has been reported under the statutes since their enactment.[72] The case was, by necessity, a criminal action as the State does not have civil enforcement powers under the law.[73] The pros-

70. As section 57-1-3 does not provide for treble damages as available to federal litigants, the ability to have a contract declared void is the most effective tool provided by New Mexico law.

71. In United Nuclear Corp. v. Gen. Atomic Co., No. 50827 (N.M. Dist. Ct. Santa Fe Cty. filed Dec. 21, 1975), plaintiff's Motion for Default Judgment and other sanctions under Rule 37 of the New Mexico Rules of Civil Procedure was granted for failure to comply with the trial court's discovery orders. The judgment is presently on appeal to the New Mexico Supreme Court. A settlement has been reached in General Atomic Co. v. Ranchers Exploration and Dev. Corp. No. 2-76-00598 (N.M. Dist. Ct. Bern. Cty. filed Feb. 10, 1976). *See also* Homestake Mining Co. v. Enerdyne, No. 77-609M (D. N.M., filed Sept. 29, 1977), an action for declaratory judgment under a uranium development agreement in which the defendant counterclaimed for damages alleging the plaintiff had used the agreement to withhold and delay the production of uranium in violation of the New Mexico restraint of trade statutes and the federal antitrust laws. The plaintiff has filed a motion with the judicial panel on multidistrict litigation to transfer the counterclaim to the U.S. District Court for the Northern District of Illinois for consolidated pretrial proceedings in *In re* Uranium Industry Antitrust Litigation, M.D.L. No. 342.

72. State v. Gurley, 25 N.M. 233, 252 P. 1000 (1919).

73. N.M. Stat. Ann. § § 57-1-1 to 4 (1978).

ecution was unsuccessful in that case as the Supreme Court, applying the "rule of reason," found that an agreement to control all the broom corn produced in Curry County in 1917 did not fall within the restraint of trade statutes.

In view of the inability of federal authorities to pursue localized antitrust violations,[74] the consequence of the failure of the State to engage in public enforcement is that violations "go undetected and . . . illegally gained dollars . . . remain unrecovered from the purses of the violators."[75]

The reasons for inactive state antitrust enforcement have been the subject of frequent comment. Professor Rubin notes the importance of lack of legislative appropriations and attorney general interest as well as "such factors as inefficient or nonexistent investigative procedures, the lack of trained full-time personnel, cumbersome and often unworkable remedies and sanctions, antiquated laws and procedures, the apprehension in many state capitols that vigorous enforcement will drive industry from the state, and the forceful opposition of business and their attorneys to meaningful state reform."[76] Presently in New Mexico, neither a lack of funding or staff[77] nor a lack of attorney general interest[78] are impediments to active enforcement. The remaining factors discussed by Professor Rubin point to the deficiencies of the New Mexico laws in accomplishing effective enforcement in the modern society of commerce and industry. The activity in sister states and the number of complaints from businessmen and consumers received by the Office of the Attorney General indicate that the lack of cases in New Mexico is not caused by the absence of antitrust violations in the State.[79]

In the 1970's, the citizens of Arizona have learned the significance of antitrust enforcement by state authorities. In 1974, prior to the enactment of the Uniform State Antitrust Act by Arizona, the State brought cases alleging Sherman Act violations in the Arizona

74. *See* note 23 and accompanying test, *supra.*

75. Testimony of John H. Shenefield, *supra* note 23.

76. Rubin, *supra* note 21, at 697-98. *See also* National Association of Attorneys General, State Antitrust Laws and Their Enforcement 2 (1974).

77. The Office of the Attorney General received a grant of $230,503 for federal fiscal year 1978 from the Department of Justice, Antitrust Division under the Omnibus Crime Control and Safe Streets Act, *supra,* Note 8, to establish an Antitrust Unit.

78. Both Attorney General Jeff Bingaman and former Attorney General Toney Anaya, have publicly expressed their interest in antitrust enforcement. See Santa Fe New Mexican, Oct. 16, 1978, at 10 and Albuquerque Journal, Dec. 22, 1977, at G5.

79. In the eleven months since establishing its Antitrust Unit, the Office of the Attorney General has opened thirty-three files involving potential antitrust violations within New Mexico.

bakery[80] and dairy product industries.[81] As a result of a consent decree, $2,330,000.00 was distributed to over 250,000 households which purchased bakery products. At least $4,000,000 will be distributed to purchasers of dairy products, and the State has received approximately 345,000 claims from consumers.[82]

The Arizona Uniform State Antitrust Act[83] became effective in August 1974, and since its enactment eleven cases have been filed by the Attorney General.[84] The focus of these cases has been alleged price fixing in industries providing a variety of goods and services, including suppliers of school districts,[85] mortuaries,[86] retail liquor dealers,[87] garbage collectors,[88] automobile towers,[89] cement and ready-mix suppliers,[90] veterinarians,[91] and insurance agents.[92] In addition, a pendant claim under the Act was alleged by the State in a federal action seeking an injunction and declaratory relief against the use of relative value and fee schedules by doctors.[93] Consent decrees providing for an injunction have been entered in four cases and damages and/or civil penalties have been obtained resulting in a recovery to the State of $141,125.00.[94] In addition to state enforce-

80. State of Arizona v. Holsum Bakery, Inc., Civ. Action No. 74-330 PHX-CAM (D. Ariz., filed May 8, 1974).

81. State of Arizona v. Borden, Inc., Civ. Action No. 74-594 PHX-CAM (D. Ariz., filed August 28, 1974).

82. Interview with Kenneth R. Reed, Director, Antitrust Section, Economic Protection Division, Office of the Attorney General, State of Arizona, July 26, 1978.

83. Ariz. Rev. Stat. § § 44-1401 to 44-1413 (1974).

84. Interview with Kenneth R. Reed, *supra* note 82. One case, Arizona Trust Co. v. Arizona, No. 2330 State of Arizona Dept. of Ins. (Mar. 4, 1977) was litigated before the Arizona Department of Insurance after the insurance agents, who were the subject of an investigation by the state, petitioned the department to enjoin the state from commencing any action against them.

85. State of Arizona *ex rel.* Babbitt v. Marston's, Inc., No. C 337771 (Ariz. Super. Ct., Mari. Cty., Aug. 24, 1976).

86. State of Arizona *ex rel.* Babbitt v. Abbey Funeral Chapel, Inc., No. C 15692 (Ariz. Super. Ct., Pima Cty., Sept. 25, 1975).

87. State of Arizona *ex rel.* Babbitt v. Arizona Licensed Beverage Assoc., Inc., No. C 324225 (Ariz. Super. Ct., Mari. Cty., Dec. 3, 1975).

88. State of Arizona *ex rel.* Babbitt v. Universal Waste Control, No. C 336221 (Ariz. Super. Ct., Mari. Cty., July 21, 1976).

89. State of Arizona *ex rel.* Babbitt v. Central Arizona Towing Association, No. C 322380 (Ariz. Super. Ct., Mari. Cty., Oct. 29, 1975).

90. State of Arizona *ex rel.* Babbitt v. Arizona Portland Cement Co., C 339216 (Ariz. Super. Ct., Mari. Cty., Sept. 23, 1976).

91. State of Arizona *ex rel.* Babbitt v. Arizona Veterinary Medical Ass'n, Inc., No. C 334115 (Ariz. Super. Ct., Mari. Cty., June 9, 1976).

92. Arizona Trust Co. v. Arizona, No. 2330 State of Arizona Dept. of Ins. (March 4, 1977).

93. State of Arizona v. Maricopa County Medical Society, Civ. Action No. 78-800 PHX (D. Ariz. 1978).

94. Interview with Kenneth R. Reed, *supra* note 82.

ment, the Arizona Act has encouraged private litigation, permitting one case for which an exemption from the federal law would arguably have precluded suit.[95]

In Colorado, the antitrust statute[96] was enacted in 1957. It also was patterned after the Sherman Act and provides both criminal and civil penalties for violations,[97] and, importantly, injunctive powers not available under the New Mexico statutes. It does not contain a private civil remedy. Since 1975, the Colorado Attorney General has successfully used the statute in obtaining consent decrees for injunctive relief against retail price maintenance agreements between retailers and manufacturers or distrubutors of ski bindings,[98] alcoholic beverages,[99] and bedding products.[100] Injunctive relief was also obtained in cases against two professional groups, certified shorthand reporters[101] and land surveyors.[102] These two injunctions prohibited the use of minimum fee schedules or professional codes of ethics to maintain or fix prices. In addition, criminal enforcement in Colorado has resulted in the imposition of fines in cases brought by the Antitrust Section in the amount of $237,000.00 in three cases.[103]

The use of the injunctive powers by the Attorneys General of Arizona and Colorado illustrate the beneficial effect on the market place of such powers. In Arizona, prior to the State's action in the mortuaries case, the lowest priced funeral offered Arizona consumers was approximately $250.00, and mortuaries did not advertise prices.

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95. Sterman v. Transamerica Title Ins. Co., 119 Ariz. 268, 580 P.2d 729 (Ct. App. 1978).

96. The Restraint of Trade and Commerce Act, Colo. Rev. Stat. § 6-4-101 to 109 (1973).

97. Criminal violations are misdemeanors, carrying a fine of not less than $1,000 nor more than $5,000 for individuals and/or imprisonment of up to one year. A business entity is subject to the same fine for a first offense and a maximum of $10,000 for subsequent offenses. (Colo. Rev. Stat. § 6-4-107 (1973).

98. State of Colorado v. Salomon/North America, Inc., Civil Action No. C-60727 (Colo. Dist. Ct., Denver, Colo., Dec. 18, 1975).

99. State of Colorado v. James G. Beam Distilling Co., [1976] 1 Trade Reg. Rep. (CCH) ¶ 60,920 (Colo. Dist. Ct., Denver).

100. State of Colorado v. Simmons Co., Civil Action No. C-61646 (Colo. Dist. Ct., Denver, Colo., Jan. 30, 1976).

101. State of Colorado v. Colorado Certified Shorthand Reporters, Civil Action No. C-11397 (Colo. Dist. Ct., Denver, Colo., Jan. 5, 1976).

102. State of Colorado v. Professional Land Surveyors of Colorado, Civil Action No. C-48514 (Colo. Dist. Ct., Denver, Colo., Jan. 5, 1976).

103. Although the thrust of the antitrust enforcement in Arizona and Colorado has been civil, other states have concentrated on criminal enforcement. Wisconsin, upon whose statute the Colorado statute is based, successfully prosecuted thirty (30) individuals and ninety-four (94) business entities since 1972. These prosecutions resulted in $470,600 fines as well as jail sentences.

As a result of the order of the court, lowest funeral prices dropped to approximately $150.00 and the citizens of Arizona have benefitted by the advertising of the price of mortuarial services.[104] In Colorado, before the court order prohibiting the setting of uniform prices for depositions and other services in the shorthand reporter's case, shorthand reporters were charging $2.15 to the Office of the Attorney General per page of typed manuscript in addition to an appearance fee of $60.00. After the order was entered, the price per page was reduced to $1.25, and no appearance fee was charged.[105]

PROPOSAL FOR ANTITRUST LEGISLATION

The importance of competition to the businessman and consumer in New Mexico's developing economy requires effective laws against anti-competitive practices. Legislation to enact provisions which have proven to be effective in other states and on the federal level will be introduced in the 1979 legislative session. Such legislation need not substantially amend the substantive provisions of the existing law in order to make them conform to federal violations.[106] It should particularly focus on remedying the inadequacies in the procedural and relief provisions in the present law to facilitate public enforcement and encourage private actions. Recommended provisions granting the State civil remedies, allowing for pre-complaint investigation by the State, strengthening criminal sanctions, incorporating federal decisions, and facilitating private remedies are discussed below.

State Civil Remedies

The present restraint of trade statutes do not make provision for civil penalties or injunctive relief at the request of the State. Therefore, when the State discovers an ongoing antitrust violation, its only remedy is to prosecute criminally. The result is that the anti-competitive practice continues at the expense of the public, and, in many instances, an injured businessman until a criminal prosecution occurs. Further, some types of anti-competitive activity, particularly tie-in arrangements or non-per se violations absent specific evidence of

104. Interview with Kenneth R. Reed, *supra* note 82.

105. Interview with Robert F. Hill, former First Assistant Attorney General in charge of the Colorado Office of Attorney General, Antitrust Division, August 16, 1978.

106. The exceptions being the inclusion of "conspiracy" within N.M. Stat. Ann. § 49-1-1 to conform with the prohibitions of The Sherman Anti-Trust Act, 15 U.S.C. § 1 (1976) and the removal of the language which can be construed to include per se violations. See note 42 *supra*.

willfullness, are typically not prosecuted as criminal violations,[107] and in such cases, the activity, unless proceeded upon civilly, may continue indefinitely.

Civil enforcement, therefore, is a substantial tool in the State's enforcement capabilities. Injunctive relief is available to thirty-five states.[108] The National Conference of Commissioners on Uniform Law recognized the significance of state civil remedies, and included in the Uniform State Antitrust Act the power for the State not only to seek an injunction,[109] but also a civil penalty of no more than $50,000 for each violation[110] and the right to seek damages.[111] Such authority would be appropriate in New Mexico. Under the present law, a maximum fine of $1,000 can be viewed as insignificant and absorbed as a cost of doing business if caught. The increase in civil penalties is designed to help maintain a competitive marketplace[112] by acting as a deterrent to potential violators. As has been

107. Remarks of Donald I. Baker, former Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Antitrust Law Briefing Conference, February 28, 1977.

108. Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Virginia, Washington, West Virginia, and Wisconsin.

109. [1974] 4 Trade Reg. Rep. ¶ 30,101, § 8.

110. [1974] 4 Trade Reg. Rep. ¶ 30,101, § 7. Presently twenty-seven states have the power to seek civil penalties of money or property: Alaska, Arizona, Arkansas, Connecticut, Idaho, Illinois, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and Wisconsin. In addition, under the statutes of twenty-seven states, the right to do business of corporations engaged in antitrust violations is subject to forfeiture: Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

111. [1974] 4 Trade Reg. Rep. ¶ 30,101, § 8. Provisions specifically enabling the state to bring an action for damages incurred by the state or political subdivisions have been enacted in twenty-five states: Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, South Dakota, Virginia, Washington, West Virginia. Further, California, Connecticut, Massachusetts, Nevada and West Virginia have the authority to recover damages as parens patriae of the residents of the state who have sustained damages, and Kentucky has the right to obtain restitution for its citizens. Such provisions are comparable to the authority recently granted to the states by Congress enabling the States' Attorneys General to maintain actions under the federal antitrust laws on behalf of the natural residents of their states. 15 U.S.C. § 15(c) (1976).

112. "Civil penalties are effective only if the amounts involved are large enough to be of some significance to the violator. With the decrease in the value of the dollar and the increase in corporate profits, several states have recently increased or attempted to increase antitrust penalties while some states with new antitrust laws have set higher maximum fines than most older laws." National Association of Attorneys General, note 76 *supra*, at 26.

the experience in Colorado, appropriate cases could be concluded with the use of a consent judgment.[113]

Civil Investigative Demand

The most significant procedural amendment necessary is the addition of pre-complaint investigatory powers, some form of which are presently available in twenty-seven other states.[114] The purpose of this authority is to permit the Attorney General to fully investigate any complaints and properly evaluate the impact upon the public and businesses involved before any action is filed. The need of such authority has been expressed by the Chief of the U.S. Department of Justice, Antitrust Division:

> I think it is widely recognized that no field of litigation involves facts that are more complex than those found in antitrust cases . . . What on the surface may seem like a clear cut civil antitrust violation may, after a thorough investigation, turn out to be of no antitrust significance. Only an adequate investigation can provide the facts that are necessary for an informed prosecutorial judgment.[115]

Absent such authority, civil enforcement by the State is substantially weakened. Alternative methods of developing information civilly are inadequate. These include: (1) relying on the voluntary cooperation of the party under investigation or third parties such as competitors, suppliers, or customers, all of whom have traditionally refused to cooperate with the U.S. Department of Justice and whose statements, not under oath, are of limited value, and (2) filing an action and relying upon broad discovery, a procedure which "is often

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113. Interview with Robert F. Hill, *supra* note 105.

114. Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Virginia, Washington and West Virginia. In addition, Kansas, Louisiana, Texas, and Wisconsin have pre-filing investigatory authority upon application to the court.

115. Testimony of John H. Shenefield, Assistant Attorney General, U.S. Department of Justice, Antitrust Division before the Judiciary Committee of the Ohio Senate, September 20, 1977, at 2. Tom Kauper, former Assistant Attorney General, U.S. Department of Justice, in charge of the Antitrust Division, has stated with respect to precomplaint investigation:

> It is important to remember that the Department's objective at the pre-complaint stage of the investigation is not to "prove" its case but rather to make an informed decision on whether or not to file a complaint. In over 80% of our investigations in which CIDs are issued, we ultimately decide not to file a case. There can be no doubt that this is preferable to filing complaints based upon sketchy or inaccurrate (sic) information.

Id. at 4.

wasteful . . . and universally condemned."[116] The result of not having pre-complaint investigatory powers will be a predominance of criminal proceedings through grand jury investigations.[117]

Under the Uniform State Antitrust Act, upon reasonable cause to be believed that a violation of the Act has occurred and a person or business entity has relevant information, the person or entity may be required to answer questions under oath or produce documents for inspection.[118] Such authority is not new to New Mexico officials as the Attorney General already has the authority to issue a civil investigatory demand (CID) for documents prior to filing an action under the Unfair Practices Act.[119] Additionally, the Commissioner of Banking[120] and the Director of the Securities Division[121] have the authority, by use of subpoena, to obtain documents, oral testimony, and answers to interrogatories.

Such pre-complaint authority also parallels that of the U.S. Department of Justice, Antitrust Division as recently expanded by Congress.[122] This Division was originally granted pre-complaint investigating powers in 1962,[123] and civil investigative demands were limited to the obtaining of documentary evidence as under the New Mexico Unfair Practices Act.[124] The experience of the Antitrust Division, however, indicated that oral testimony or answers to interrogatories were, in certain circumstances, the only means of ascertaining relevant facts to determine whether an antitrust viola-

116. H.R. Rep. No. 94-1343, 94th Cong. 2d Sess. 6 (1976). *See also,* Siegel, *The Antitrust Civil Process Act: The Attorney-General's Pre-Action Key to Company Files,* Vill. L. Rev. 413, 416 (1965); The Report of Attorney General's National Committee to Study the Antitrust Laws, 344-345 (1955). *See also In re* Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam* 325 F.2d 1018 (8th Cir. 1964); Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964).

117. See United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958) in which Justice Douglas stated that the prosecution's "using criminal procedures to elicit evidence in a civil case . . . would be flouting the policy of the law." Such practice has been further criticized for it "debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality." Report of the Attorney General's National Committee to Study the Antitrust Laws 342 (1955).

118. [1974] 4 Trade Reg. Rep. ¶ 30,101, § 6(a).

119. N.M. Stat. Ann. § 57-12-12 (1978).

120. N.M. Stat. Ann. § 58-1-34 (1978).

121. N.M. Stat. Ann. § 58-13-36 (1978).

122. 15 U.S.C. § § 1311 to 1314 (1976).

123. The Antitrust Civil Process Act of 1962, Pub. L. 87-664, 76 Stat. 548 (1962). The use of CID authority has been held not to be an unreasonable search and seizure under the Fourth Amendment. *In re* Gold Bond Stamps Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam* 325 F.2d 1018 (8th Cir. 1964); Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964).

124. The Antitrust Civil Process Act of 1962 also restricted the issuance of CIDs to non-natural persons. This limitation was removed by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 1312(a) (1976).

tion had taken place[125] and, as a result, Congress granted such power.[126]

Safeguards to protect business from potential abuse are essential to the granting of such governmental power. Any information obtained pursuant to a CID must be kept confidential until an action has been filed.[127] A similar provision in the Unfair Practices Act[128] has been successful in preventing disclosure of business information. Under an antitrust statute the demand must contain a description of the nature of the conduct under investigation,[129] and there must be the right to counsel at any stage, in preparing responses, answering written interrogatories, and testifying under oath.[130] Questions of self-incrimination can be avoided and compliance encouraged with a provision comparable to that formerly present in the Securities Act of New Mexico[131] prohibiting the use of information obtained by the demand for criminal prosecution. By the federal courts' inter-

125. Testimony of John H. Shenefield, *supra,* note 115.

126. 15 U.S.C. § § 1311-1314 (1976). In the first fourteen months that the Antitrust Division had the expanded authority, 187 CIDs were issued for documents, 23 for absences to written interrogatories, and 22 for oral testimony. Testimony of John H. Shenefield, *supra,* note 115.

127. See Uniform State Antitrust Act, [1974] 4 Trade Reg. Rep. ¶ 30,101, § 6(c) and Antitrust Civil Process Act, 15 U.S.C. § 1313(a)-(f) (1976).

128. N.M. Stat. Ann. § 57-12-12F (1978).

129. The Antitrust Civil Process Act, 15 U.S.C. 1312(b)(1)(A) (1976) and the Uniform State Antitrust Act, [1974] 4 Trade Reg. Rep. (CCH) ¶ 30,101, § 6(a)(2) have such provisions. *See In re* Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam* 325 F.2d 1018 (8th Cir. 1964); Lightning Rod Mfg. Assn. v. Stoal, 339 F.2d 346 (7th Cir. 1964).

130. The Antitrust Civil Process Act, as amended, 15 U.S.C. 1312(i)(7)(A) (1976) provides:

> Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 1314 of this title for an order compelling such person to answer such question.

131. N.M. Stat. Ann. § 58-13-36 (1978). Prior to 1971 the Securities Act of New Mexico prevented one from failing to comply with a subpoena on the grounds that the evidence or testimony would be incriminating or would subject one to a penalty or forfeiture. The Act gave immunity from prosecution, penalty or forfeiture to a person for any matter on which testimony or evidence was compelled after a claim of privilege was made.

pretation of the Antitrust Division's powers, a CID must be issued in good faith[132] and must be relevant.[133] It may not be too indefinite,[134] and cannot be used for purposes of harrassment or to place under duress,[135] or for a fishing expedition.[136] Documents in the possession of a private antitrust plaintiff received during litigation are denied access.[137]

Furthermore, legislation must include procedures to enable the person to whom the civil investigative demand is directed to formally contest an objection. Under the Uniform Act, when there is objection, the recipient may refuse to comply with the demand, requiring the Attorney General to petition the court to enforce the demand.[138] To order compliance, the court must find that the demand is proper and there is reasonable cause to believe that there has been a violation and that the information or document sought is relevant to the violation.[139] The court may further modify the demand to protect the person from unreasonable annoyance, embarrassment, oppression, burden or expense.[140]

Criminal Remedies

The existing restraint of trade statutes reflect the legislative intent that violations of antitrust laws should be treated as criminal conduct. The value of such treatment is that criminal sanctions act as a deterrence based upon the impact of the threat of a jail term to businessmen and of the stigma of being considered a criminal.[141]

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132. *In re* Emprise Corporation, 344 F. Supp. 319 (W.D.N.Y. 1972); *In re* Cleveland Trust Co. [1972] Trade Cases (CCH) ¶ 73,991 (W.D. Pa. 1972).

133. Material Handling Institute, Inc. v. McLaren, 426 F.2d 90 (3d Cir. 1970).

134. *In re* Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam* 325 F.2d 1018 (8th Cir. 1964).

135. Chattanooga Pharmaceutical Assn. v. United States Dept. of Justice, 358 F.2d 864 (6th Cir. 1966); American Pharmaceutical Assn. v. United States Dept. of Justice, 344 F. Supp. 9 (E.D. Mich. 1971).

136. *In re* Gold Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam* 325 F.2d 1018 (8th Cir. 1964).

137. United States v. G.A.F. Corp., [1978-1] Trade Cases (CCH) ¶ 62,015 (S.D.N.Y. 1978).

138. [1974] Trade Reg. Rep. (CCH) ¶ 30,101, § 6b.

139. *Id.*

140. *Id.* See Upjohn Company v. Bernstein, [1966] Trade Cases (CCH) ¶ 71,830 (D.D.C. 1966).

141. The subject of the type of criminal sanctions which are appropriate for antitrust violations has been the subject of much debate. See National Association of Attorneys General, note 76, *supra;* J. Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws,* 45 Tex. L. Rev. 1301 (1967). See Sutherland, White Collar Crime (1964) for positions supporting jail terms for deterrent purposes, and Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis,* 86 Harv. L. Rev. 693 (1973) for an argument supporting increased fines.

Such sanctions are sought by the U.S. Department of Justice only for willful violations, most commonly price fixing and market allocation,[142] and Congress has recently increased the penalties so that a violation will constitute a felony.[143] On the state level, as one writer has observed, the deterrence can be even more effective as local violations are usually clear-cut per se violations by small businesses.[144] Currently antitrust violators are subject to criminal sanctions in thirty-seven states.[145]

The present law creates only a misdemeanor, punishable by a fine of no more than $1,000 and no less than $100.[146] A recent Colorado case[147] demonstrates the lack of impact of such a penalty. Violations of the Colorado statutes are punishable as a misdemeanor carrying a maximum fine of $5,000 without a potential jail term. The defendants, charged with the fixing of prices, requested to change their plea from not guilt to nolo contendere, agreeing to pay the maximum fine. The judge, expressing his concern about the statutory limitations placed upon him, observed on permitting the change of plea:

> I am willing to state publicly here now that I think that, in view of what we know of the use of corporate power in this country . . . the State Legislature should do just as the Congress has done and make this the kind of a crime that the people contend that it is and make the punishment fit the crime.[148]

The New Mexico Legislature, in updating the penalties it established in 1891, should be guided by the experience in antitrust prosecutions in federal courts and in sister states such as Colorado, and establish a fourth degree felony for antitrust violations to create an effective deterrent to illegal activity.

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142. Remarks of Donald I. Baker, *supra* note 107.

143. Antitrust Procedures and Penalties Act, 15 U.S.C. § 2 (1976).

144. Flynn, *supra,* note 141.

145. Alabama, Alaska, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming.

146. N.M. Stat. Ann. § 57-1-1 (1978).

147. People v. Elder-Quinn & McGill, Inc., Crim. Action No. CR-8598 (Colo. Dist. Ct., Denver, Colo., Nov. 10, 1977).

148. Opinion of the Honorable Edward C. Day, retired Supreme Court Justice, Acting District Court Judge. In another Colorado case in which the defendants were charged with price fixing, the Honorable J. E. DeVilbiss, District Judge, remarked: "The strictures placed upon this Court in assessing punishment in a case of this type necessarily diminish the Court's ability to adequately express the odiousness of this sort of behavior." People v. Valley Petroleum Co., Crim. Action No. 2902 (Colo. Dist. Ct. Glenwood Springs, Colo., Nov. 23, 1977).

Construction with Federal Laws

Because there have been only infrequent appellate decisions in the almost ninety years since the enactment of the restraint of trade statutes, a comprehensive interpretation by the courts has not occurred. As a result, substantial areas of antitrust law which have been developed in the federal courts have not been raised in New Mexico courts.[149] Yet the New Mexico Supreme Court has generally followed interpretations of the federal law.[150] As proposed legislation should be similar in many respects to the federal statutes, it should provide that the New Mexico restraint of trade statutes shall be construed in harmony with judicial interpretations of comparable federal statutes.[151]

Private Remedies

Private litigation under the antitrust laws plays an important role in the enforcement of antitrust violations. It supplements public enforcement, "increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct."[152]

The present law permits an injured party to seek to void illegal contracts and agreements and to recover damages occasioned by violations in restraint of trade.[153] The voiding of illegal contracts is not reflected in the federal statutes nor found in the Uniform Act. It is, however, an effective remedy which should not be prevented by proposed legislation. With respect to the damage provision, the Uniform Act expands upon it by adopting the language on standing of the Clayton Act, granting the right to sue to any person threatened with injury or injured in his business or property and by specifically permitting injunctive relief as well as costs and attorneys'

149. An important example is the rule of per se violations long-recognized in the federal courts. See text accompanying notes 36 to 41 *supra.*

150. See W. T. Rawleigh Co. v. Jones, 39 N.M. 381, 47 P.2d 906 (1935); State v. Gurley, 25 N.M. 233, 180 P. 288 (1919).

151. Similar provisions have been enacted in thirteen states: Arizona, Illinois, Iowa, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, South Dakota, Virginia, Washington, and West Virginia.

152. Areeda & Turner, Antitrust Law—An Analysis Antitrust Principles and Their Application, Vol. II, § 311(a). Damages are available to private litigants in thirty-eight states: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin. In addition, the right to damages has been implied under the Texas statute. N. Texas Gin Co. v. Thomas, 277 S.W. 438 (Tex. Civ. App. 1925).

153. N.M. Stat. Ann. § 57-1-3 (1978).

fees.[154] In addition, it permits recovery of treble damages if the trier of fact finds that the violation is flagrant.[155] For failing to permit treble damages in all private cases as under the Clayton Act[156] and twenty-one state statutes,[157] the Uniform Act has been attacked for allowing forum shopping and diluting the deterrent effect of private actions.[158] As the most eggregious violations are the per se violations which are the focus of state enforcement, an alternative provision would provide that such violations are "flagrant" unless the trier of fact found otherwise.

Private litigation should be encouraged by state law in a manner paralleling Section 5(a) of the Clayton Act[159] and the law of eighteen states[160] which facilitates proof in a private action following a final judgment or decree in an action brought by the U.S. Government. It provides that a final judgment or decree in a civil or criminal proceeding that a person has violated the antitrust laws in an action brought by or on behalf of the United States Government is prima

154. [1974] 4 Trade Reg. Rep. ¶ 30,101, § 8(b). As a result of the decision of the U.S. Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), indirect purchasers may not maintain damage actions under the Clayton Act when they have paid overcharges resulting from antitrust violations. Legislation to permit recovery by such purchasers was defeated in the 95th Congress. As a method of encouraging private enforcement of antitrust violations within the State, consideration should be given by the New Mexico Legislature to permit actions by indirect purchasers who have suffered injury by virtue of violation of the antitrust laws.

155. [1974] 4 Trade Reg. Rep. ¶ 30,101, § 8(b). Similar provisions have been adopted by Arizona, New Hampshire (if willful or flagrant) and Virginia. The language of the Uniform State Antitrust Act was recently upheld by the Arizona Supreme Court against a constitutional challenge for vagueness. Western Waste Service Systems, Inc. v. Superior Court of the State of Arizona for the County of Maricopa, No. 13717 (Super. Ct., Mari. Cty., filed Sept. 8, 1978).

156. 15 U.S.C. § 4 (1976).

157. Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Missouri, Nevada, New Jersey, North Carolina, Oregon, South Dakota, Utah, Washington, West Virginia, Wisconsin. In addition, the Michigan and Ohio laws provide double damages, as does the Iowa statute in the discretion of the court.

158. The National Association of Attorneys General has taken the position, with respect to the treble damages provision, that:

> state law should be identical with federal if shopping for the most favorable forum by a potential plaintiff is to be avoided . . . Furthermore, it is often stated that the treble damages provision of Section 4 of the Clayton Act is meant to be an effective deterrent to potential violators of the antitrust laws. Making actual damages the measure of recovery in a private antitrust action can hardly be said to constitute an effective deterrent; the potential violator of an antitrust law is not likely to be dissuaded by the prospect of paying back, except in extraordinary cases, only what he made through his illegal activity.

National Association of Attorneys General, *supra,* note 76, at 24.

159. 15 U.S.C. § 16(a) (1976).

160. Alaska, Arizona, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, Oregon, South Dakota, Virginia, Washington, and West Virginia.

facie evidence against such person in a private action brought under the Act as to all matters with respect to which the judgment or decree would be an estoppel between the parties to the action. Defendants may produce evidence in rebuttal,[161] and the provision does not apply to a consent judgment or decree[162] or to a nolo contendere plea to a criminal charge.[163] Private actions frequently follow actions brought by the Justice Department. With the improvement of state laws and with the effect of such a provision, more intrastate cases will be brought following enforcement actions by the states.[164] The result will be an increased role of private enforcement against antitrust violations.

CONCLUSION

The importance of antitrust laws is well recognized. According to the U.S. Supreme Court:

> Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And a freedom guaranteed each and every business, no matter how small, be it the freedom to compete . . .[165]

So crucial are antitrust laws to the economy of the state that the New Mexico Constitution mandates the enactment of laws "to prevent trusts, monopolies and combinations in restraint of trade."[166] Such competitive ideals can only be understood in the present economy when resources are becoming scarce, prices are rising, and inflation is consuming purchasing power.

To insure that the ideals of free competition are carried out, effective enforcement of antitrust violations, public and private, is re-

161. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

162. 15 U.S.C. § 16(a) (1976).

163. City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964).

164. The following lawsuits were filed in Wisconsin state courts following prosecutions by the State. City of Madison v. C. A. Hooper Co., Civ. Action No. 140428 (Wisc. Cir. Ct. Dane Cty., Sept. 28, 1973) (recoveries to date of $72,000); City of Janesville v. Barry, Civ. Action No. 16170 (Wisc. Cir. Ct. Rock Cty., Mar. 30, 1973) (recovery of $225,000); City of Madison v. Burch Construction Co., Civ. Action No. 141-487 (Wisc. Cir. Ct., Dane Cty., Jan. 17, 1974) (recovery of $121,000); City of Madison v. Construction Supply, Inc., Civ. Action No. 142-107 (Wisc. Cir. Ct., Dane Cty., Mar. 8, 1974) (recoveries of $200,000); and City of Madison v. Janisch, Civ. Action No. 151-131 (Wisc. Cir. Ct., Dane Cty., Mar. 29, 1976).

165. United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

166. N.M. Const. Art IV, § 38.

quired. The federal government cannot prosecute all violations, and the State is "ideally situated to protect the rights of the consumer, the small businessmen, and the honest businessmen of any size."[167] The New Mexico restraint of trade statutes, however, do not permit such enforcement in the present complex economy. The preservation of competition within New Mexico calls for legislation which would help ensure businessmen the opportunity to operate their businesses free of illegal restraints and the consumer the ability to purchase goods and services at the most competitive price.

(*Editor's Note:* During the 1979 New Mexico legislative session much of the legislation proposed in this article was contained in H.B. 273 sponsored by George Fettinger (D. Otero). At printing time the legislation is awaiting the Governor's signature. In substance most of the proposals in this article are contained in this new Antitrust Act. In the next issue of the New Mexico Law Review there will be an update of this article informing the readers of the nature of this legislation.)

167. Remarks to the U.S. Senate of Senator Morgan, North Carolina, co-sponsor of the Omnibus Crime Control and Safe Streets Act of 1976.