

ANTITRUST ENFORCEMENT IN OHIO

EDWIN A. MATTO*
RICHARD M. FIRESTONE**
LAURA F. ROTHSTEIN**
RONALD I. WISEMAN**

Ohio is an important part of this nation's economy, with approximately 5% of the nation's population. [Such a] substantial . . . part of the economy certainly deserves thorough protection from restraints of trade. The General Assembly has provided that protection by embracing the fundamental economic policy of a free competitive marketplace in the Valentine Act. In addition, Ohio has distinguished itself as being a leading state in aggressive antitrust enforcement.¹

Without question, there is a strong revival of the demand for effective antitrust enforcement efforts at the state level.² The Federal Trade Commission and the Antitrust Division of the Department of Justice, although very active in enforcing the federal antitrust laws, are often prevented by resource limitations and the interstate commerce requirement from prosecuting regional or local restraints that nevertheless harm the consumer and tamper with the free market mechanism.³

This reawakening of the demand for effective antitrust enforcement is not limited to the state level. The 94th Congress has, for example, enacted legislation that permits state attorneys general to sue in a *parens patriae* capacity on behalf of the citizens of the state,⁴ broadens the precomplaint discovery authority of the Antitrust Division of the Department of Justice,⁵ and requires notification procedures before a merger.⁶ Congress has also authorized \$30 million in

* Assistant Attorney general, State of Ohio, Chief, Antitrust Section.

** Assistant Attorneys General, State of Ohio.

¹ Testimony of James T. Halverson, Director, Bureau of Competition, Federal Trade Commission, *Hearings on House Bill 600 Before the General Assembly of Ohio, House Judiciary Comm.*, May 8, 1975, at 3 [hereinafter cited as HALVERSON'S TESTIMONY].

² For example, the National Association of Attorneys General (NAAG) has actively begun programs aimed at effective state antitrust enforcement. A review of weekly advance sheets of ANTITRUST & TRADE REGULATION REPORT (BNA) and TRADE REGULATION REPORTER (CCH) indicates a substantial increase in state antitrust cases over the past several years.

³ See HALVERSON'S TESTIMONY, *supra* note 1, at 2.

⁴ The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301 (SEPTEMBER 30, 1976). See text accompanying notes 140-43 *infra*.

⁵ *Id.* § 101.

⁶ *Id.* § 201.

federal aid to state antitrust enforcement agencies.⁷ This strong interest in providing a healthy free-market atmosphere is also evidenced by the ease with which state fair trade laws, and the federal antitrust exemption that permitted these laws, were repealed.⁸

The Ohio General Assembly has specifically authorized by statute⁹ the creation of an Antitrust Section within the Attorney General's Office to represent the state and its agencies in enforcing both federal and state antitrust laws. In addition, the legislature has provided that the Antitrust Section can, by agreement, represent political subdivisions of the state in antitrust matters.¹⁰ Each year since 1967 the Office of the Ohio Attorney General has become more active in enforcing the antitrust laws, in the hope that an effective antitrust enforcement program at both the federal and state levels will have a deterrent effect upon future potential violators, and will thus maintain a competitive marketplace.

Although the Office of the Attorney General does file suits on behalf of the state and its agencies under the federal antitrust laws when the state or its agencies have been damaged,¹¹ this article will provide an overall view of how Ohio's antitrust laws are enforced, what types of violations are covered by these laws, and what may be expected in state antitrust enforcement activities in the future.

I. DEVELOPMENT OF THE ANTITRUST LAWS

A. *Early Federal and State Legislation*

One of the leading proponents of federal antitrust legislation was Senator John Sherman of Ohio, whose efforts resulted in the enactment on July 2, 1890, of "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act.¹² During the debates of Senator Sherman's bill, the Senator described the dangerous characteristics of a trust and urged passage of the bill to protect the public from the evils which followed the elimination of competition:

The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where

⁷ Pub. L. No. 94-503, § 116 (October 15, 1976).

⁸ See text accompanying notes 129-39 *infra*.

⁹ OHIO REV. CODE ANN. § 109.82 (Page 1969).

¹⁰ *Id.* § 109.81.

¹¹ Pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. IV, 1974).

¹² 15 U.S.C. §§ 1-8 (Supp. IV, 1974).

competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. . . . [I]t tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, . . . and the just subject of restraint by the courts¹³

Although the scope of the Sherman Act is quite broad, a number of states, including Ohio, have sought to complement the federal antitrust laws by passing their own antitrust statutes. The Ohio law, commonly known as the Valentine Act, was passed in 1898.¹⁴ Unlike the Sherman Act, the Valentine Act includes a detailed definition of a trust, and declares that a trust is “unlawful and void.”¹⁵ The definition includes a broad prohibition against conduct which restricts trade or commerce,¹⁶ a provision also found in the Sherman Act. Also prohibited are combinations that limit or reduce production or increase or reduce the price of a commodity,¹⁷ or that “prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce or a commodity.”¹⁸ In addition to these rather general provisions, the Ohio legislators, obviously concerned about the effects which trusts would have upon prices, specifically outlawed the fixing of prices to the public or the consumer,¹⁹ and prohibited persons from entering into contracts or agreements relating to the price of a commodity that would have the effect of precluding “free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity”²⁰

B. *The Rule of Reason Test and the Per Se Rule in Ohio*

1. The Sherman Act

After an initial period of indecision the United States Supreme Court determined that section 1 of the Sherman Act²¹ applies only to *unreasonable* restraints of trade.²² This “rule of reason” test in-

¹³ 21 CONG. REC. 2459 (1890), See 1 H. TOULMIN, ANTI-TRUST LAWS § 1.9, at 10 (1949).

¹⁴ Act of April 19, 1898, 93 Ohio Laws 143 (codified at OHIO REV. CODE ANN. ch. 1331 (Page 1962)).

¹⁵ OHIO REV. CODE ANN. § 1331.01 (Page 1962).

¹⁶ *Id.* § 1331.01(B)(1).

¹⁷ *Id.* § 1331.01(B)(2).

¹⁸ *Id.* § 1331.01(B)(3).

¹⁹ *Id.* § 1331.01(B)(4).

²⁰ *Id.* § 1331.01(B)(5).

²¹ See note 43 *infra* for the broad provision.

²² *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

volves a determination of the purpose of the agreement in question, the power of the parties to carry out the agreement, and the effect of the agreement on competition.²³ The peculiar facts of each case and each business situation must be examined; restraints that merely regulate and thereby possibly promote competition, as opposed to restraints that may suppress and even destroy competition, may not be violations.²⁴

Soon after the rule of reason test was firmly established, the United States Supreme Court began developing the per se doctrine which singled out certain restraints as unreasonable by their very nature. The Court succinctly explained in *Northern Pacific Railway Co. v. United States*²⁵ that

there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

The Court has stressed two advantages in using a per se doctrine to classify certain activities as conclusively illegal—simplicity and certainty of application.

Professor von Kalinowski has identified three major areas to which the courts look in determining whether a class of restraints should be termed illegal per se: the economic effect of the restraint in the past, the anticompetitive evil that is feared, and the beneficial purposes served by the restraint.²⁶ If the answers to these inquiries

reveal that the type of restraint studied has had a pernicious effect on competition that is not balanced by any beneficial effects, then that class of restraints will be termed illegal per se. The Court will not permit further inquiry either in that case or in succeeding cases to determine whether the restraint in question is reasonable.²⁷

The following have been found to be illegal per se: price fixing (horizontal and vertical),²⁸ tying arrangements,²⁹ boycotts (horizontal and

²³ See generally 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 6.02 (1975).

²⁴ See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

²⁵ 356 U.S. 1, 5 (1958).

²⁶ See 1 J. VON KALINOWSKI, *supra* note 23, § 6.02(1)(b).

²⁷ *Id.*

²⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (horizontal); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (vertical).

²⁹ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Internat'l Salt Co. v. United States*, 332 U.S. 392, *appeal dismissed*, 332 U.S. 747 (1947).

vertical),³⁰ division of markets (horizontal and vertical),³¹ and reciprocal dealings.³²

2. The Valentine Act

The first difficulty in analyzing the body of cases interpreting the Valentine Act is that none have been decided by the Ohio Supreme Court since 1941,³³ and only ten supreme court opinions were reported prior to that date.³⁴ Similarly, there were only seven court of appeals decisions reported between 1918 and 1961.³⁵ A review of the Ohio cases, however, indicates that the courts have generally taken a rule of reason approach. The Ohio Supreme Court in *List v. Burley Tobacco Growers' Co-operative Association*³⁶ stated that

we are compelled to recognize the condition as it exists, to wit, that the federal courts are now construing the Sherman Act according to the rule of reason. If the United States Supreme Court felt justified in modifying its former decisions interpreting the Sherman Act, then it would seem that the Supreme Court of Ohio might properly at this late date place the same interpretation upon the state enactment which the federal courts have found expedient to place upon the federal enactment.³⁷

³⁰ *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

³¹ *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) (horizontal); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (vertical).

³² *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D. N.Y. 1966).

³³ *Rayess v. Lane Drug Co.*, 138 Ohio St. 401, 35 N.E.2d 447 (1941).

³⁴ *Id.*; *Stark County Milk Producers' Ass'n v. Tabelaing*, 129 Ohio St. 159, 194 N.E. 60 (1934); *Early v. Co-operative Pure Milk Ass'n*, 115 Ohio St. 185, 152 N.E. 290 (1926); *List v. Burley Tobacco Growers' Co-operative Ass'n*, 114 Ohio St. 361, 151 N.E. 471 (1926); *Columbus Packing Co. v. State ex rel. Schlesinger*, 106 Ohio St. 469, 140 N.E. 376 (1922); *Guyton v. Eastern Elec. Co.*, 91 Ohio St. 106, 110 N.E. 189 (1914); *Lemmon v. State*, 77 Ohio St. 427, 83 N.E. 608 (1908); *Hammond v. State*, 78 Ohio St. 15, 84 N.E. 416 (1908); *State v. Gage*, 72 Ohio St. 210, 73 N.E. 1078 (1905); *State ex rel. Monnett v. Buckeye Pipe Line Co.*, 61 Ohio St. 520, 56 N.E. 464 (1900).

³⁵ *Broadway Properties v. Crouch*, 114 Ohio App. 30, 180 N.E.2d 162 (1961); *Daily Monument Co. v. Crown Hill Cemetery Ass'n*, 114 Ohio App. 143, 176 N.E.2d 268 (1961); *Orth v. Lauther*, 95 Ohio App. 394, 120 N.E.2d 313 (1953); *Oliver v. All-States Freight*, 156 N.E.2d 190 (1957), *appeal dismissed*, 167 Ohio St. 299, 147 N.E.2d 856 (1958), *rev'd*, 358 U.S. 283 (1959); *Superior Dairy, Inc. v. Stark Cty. Milk Producers' Ass'n*, 89 Ohio App. 26, 100 N.E.2d 695 (1950); *H. Lipman & Sons, Inc. v. Brotherhood of Painters*, 63 Ohio App. 157, 25 N.E.2d 853 (1939); *Clover Meadow Creamery Co. v. National Dairy Products Co.*, 17 Ohio L. Abs. 231 (1934).

³⁶ 114 Ohio St. 361, 151 N.E. 471 (1925).

³⁷ 114 Ohio St. at 374, 151 N.E. at 475. *See also* *Stark County Milk Producers' Ass'n v. Tabelaing*, 129 Ohio St. 159, 194 N.E. 16 (1934); *Columbus Packing Co. v. State ex rel. Schlesinger*, 106 Ohio St. 469, 140 N.E. 376 (1922).

The lower courts have generally taken a similar approach.³⁸ It is thus evident from the cases that the rule of reason test has been adopted in Ohio.

The most recently reported Valentine Act decision of the Ohio Supreme Court was the 1941 case of *Rayess v. Lane Drug Co.*,³⁹ which involved an agreement between substantially all cigarette jobbers and retailers in Ohio to fix the retail price of substantially all brands of cigarettes sold within the state. The court cited language from the Valentine Act⁴⁰ indicating that the agreement came within the prohibitions of the Act and was therefore void, basing its decision on the factual conclusion that this was, in effect, a horizontal agreement to fix prices. It then cited as authority several state cases⁴¹ and *United States v. Socony-Vacuum Oil Co.*,⁴² one of the leading Sherman Act cases on the application of the per se doctrine to price fixing.

It is clear from the *Rayess* case that the court applied the per se doctrine to price fixing. It is less clear whether the per se doctrine applies to the other classes of restraints held to be per se illegal under the Sherman Act. However, a comparison of the state and federal laws is revealing. In enacting the Ohio antitrust law, the legislature included a broad prohibition against restraints of trade very similar to that included by Congress in section 1 of the Sherman Act.⁴³ The Ohio legislature went further than Congress, however, by enumerating specific agreements and practices which would be illegal under the Valentine Act.⁴⁴ The Ohio Supreme Court has recognized that the Valentine Act was patterned after the Sherman Act, but that the Valentine Act had "broader and stronger terms."⁴⁵ Thus it appears that agreements and conduct specified in the Act are likely to be interpreted by the courts as per se illegal. The Ohio courts have taken this approach on several occasions, primarily in price-fixing cases.⁴⁶

³⁸ See, e.g., *Broadway Properties, Inc. v. Crouch*, 114 Ohio App. 30, 180 N.E.2d 162 (1961); *Daily Monument Co. v. Crown Hill Cemetery Ass'n*, 114 Ohio App. 143, 176 N.E.2d 268 (1961); *Orth v. Lauther*, 95 Ohio App. 394, 120 N.E.2d 313 (1953); *H. Lipman & Sons, Inc. v. Brotherhood of Painters*, 63 Ohio App. 157, 25 N.E.2d 853 (1939).

³⁹ 138 Ohio St. 401, 35 N.E.2d 447 (1941).

⁴⁰ OHIO REV. CODE ANN. § 1331.01(B)(5) (Page 1962).

⁴¹ 138 Ohio St. at 407, 35 N.E.2d at 450.

⁴² 310 U.S. 150 (1940).

⁴³ OHIO REV. CODE ANN. § 1331.01(B)(1) (Page 1962) prohibits combinations "to create or carry out restrictions in trade or commerce." Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. IV, 1974), prohibits contracts, combinations, or conspiracies "in restraint of trade or commerce . . ."

⁴⁴ OHIO REV. CODE ANN. §§ 1331.01 (B)(2)-(B)(5) (Page 1961). See text accompanying notes 17-20 *supra*.

⁴⁵ *List v. Burley Tobacco Growers' Co-operative Ass'n*, 114 Ohio St. 361, 369, 151 N.E. 471, 474 (1926).

⁴⁶ See, e.g., *State ex rel. Cullitan v. Greater Cleveland Livery Owners Ass'n*, 35 Ohio Op.

Beyond these specific prohibitions, the Act's broad prohibition of restraints of trade embraces the full range of Sherman Act provisions. Ohio courts have recognized this and have consistently relied upon continuing federal court interpretations of the Sherman Act as persuasive precedent.⁴⁷ Thus restraints that are per se illegal under federal antitrust laws will receive similar per se treatment under the broad Ohio provision.

II. TYPES OF ANTITRUST VIOLATIONS

A. Price Fixing

In *United States v. Socony-Vacuum Oil Co.*, Justice Douglas described price fixing as "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . ." ⁴⁸ That definition has been expanded by the Supreme Court to include combinations affecting the prices of services as well.⁴⁹ Although price fixing is not specifically proscribed by the Sherman Act, the courts have consistently held such conduct to be in violation of the Act.⁵⁰

In Ohio, the Valentine Act includes a specific prohibition of price fixing.⁵¹ As under the federal law, price-fixing agreements are per se violations.⁵²

An examination of the enforcement of both the federal and Ohio antitrust laws reveals that, although there is a variety of methods by which competition can be reduced or eliminated, price fixing is by far the most common anticompetitive device.⁵³ In examining price-fixing cases brought by the Ohio Attorney General, one finds that there was little or no activity in antitrust enforcement until the 1960's. Since 1967 the Ohio Office of the Attorney General has

68, 74 N.E.2d 104 (C.P. Cuyahoga Cty. 1947); *McCall Co. v. O'Neil*, 17 Ohio N.P. (n.s.) 17 (C.P. Franklin Cty. 1914).

⁴⁷ See, e.g., *Rayess v. Lane Drug Co.*, 138 Ohio St. 401, 35 N.E.2d 447 (1941); *List v. Burley Tobacco Growers' Co-operative Ass'n*, 114 Ohio St. 361, 151 N.E. 471 (1926); *State ex rel. Monnett v. Buckeye Pipeline Co.*, 61 Ohio St. 520, 56 N.E. 464 (1900).

⁴⁸ 310 U.S. 150, 223 (1940).

⁴⁹ See *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950). See generally 11 J. VON KALINOWSKI, *supra* note 23, § 77.02[1] n.7.

⁵⁰ See cases cited note 28 *supra*; M. HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS*, S. Monograph No. 38, 76th Cong., 3d Sess. 10 (1941).

⁵¹ OHIO REV. CODE ANN. § 1331.01(B)(2), (B)(4), (B)(5) (Page 1962).

⁵² *State ex rel. Brown v. Andrew Palzes, Inc.*, 39 Ohio Misc. 155 (C.P. Cuyahoga Cty. 1973).

⁵³ Remarks by William E. Swope, Atlanta Field Office, Antitrust Division, Department of Justice, prepared for delivery at Federal-State Conference on Antitrust, April 11, 1973, at 4. See also E. KINTNER, *AN ANTITRUST PRIMER* 30 (2d ed. 1973).

brought actions pursuant to section 4 of the Clayton Act⁵⁴ for alleged price-fixing violations involving a wide variety of business activities and commodities, including library editions of school-books, brass mill tube and pipe, concrete pipe, chlorine, antibiotics, plumbing fixtures, finish hardware, ready-mix concrete, automobiles, physician and prepaid health care services, chickens, and bread. Price-fixing actions brought under the Valentine Act have involved florists, shopping centers, engineers, architects, trade books and mass-market paperbacks, and automobile dealers.

The above-mentioned cases for the most part involved alleged "horizontal" price fixing, *i.e.* agreements by competitors at the same distribution level, whether reached directly with one another or indirectly through an association. Few cases have involved "vertical" price fixing or resale price maintenance, by which a party at one level of the distribution chain sets the price for those at a lower level of the chain. This type of price fixing is particularly pertinent to present antitrust enforcement because of the recent repeal of Ohio's so-called fair trade law.⁵⁵

B. Market Allocation

Another common device for eliminating competition is market allocation. This practice consists of dividing the available business according to a fixed percentage, a geographic territory, or by individual customer or type of customer. The result of such a restraint on competition frequently is that output is limited, costs rise, and business expansion is constricted.⁵⁶

If market allocation is carried out by competitors or those performing similar economic functions, it is considered a horizontal agreement and is *per se* illegal under the broad interpretations of sections 1 and 3 of the Sherman Act.⁵⁷ Vertical market allocations are agreements between parties who perform different economic functions—*e.g.*, a manufacturer and its dealers. The legal status of these arrangements is less clear. In *United States v. Arnold, Schwinn & Co.*, the Supreme Court held that vertical territorial and customer allocations are illegal *per se* if the manufacturer sells his product to his distributors;⁵⁸ however, if a *consignment* relationship exists be-

⁵⁴ 15 U.S.C. § 15 (Supp. IV, 1974).

⁵⁵ See text accompanying notes 129-39 *supra*.

⁵⁶ M. HANDLER, *supra* note 50, at 17.

⁵⁷ *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). See 11 J. VON KALINOWSKI, *supra* note 23, § 78.01 (1976).

⁵⁸ 388 U.S. 365 (1967). See 8 J. VON KALINOWSKI, *supra* note 23, § 62.01[2] (1976). Despite *Schwinn* a number of lower courts have continued to rely on *White Motor Co. v. United States*,

tween the manufacturer and dealers by which the manufacturer retains "all indicia of ownership, including title, dominion, and risk," the rule of reason test applies.⁵⁹ The Court has also held that an allocation of markets may be horizontal in substance though vertical in form.⁶⁰

The Valentine Act, like the Sherman Act, has no statutory provisions that specifically deal with market allocations. However, the general provisions prohibiting combinations restricting trade or commerce,⁶¹ preventing competition in the sale of merchandise, produce, or a commodity⁶² and outlawing agreements which restrict the manufacture or output of a commodity⁶³ would be sufficient to reach this practice.⁶⁴

Although there are few Ohio cases involving market allocations, the recent case of *State ex rel. Brown v. Andrew Palzes, Inc.*⁶⁵ involved a market allocation agreement between the operator of a shopping center and two women's apparel stores doing business in the center. The agreement was in the form of lease provisions granting one of the stores an exclusive right to sell a specified price line of women's apparel and prohibiting the other store from selling within that price line. The court, through a consent judgment, found that the agreement constituted a combination to create and carry out restrictions in trade or commerce in violation of the Valentine Act, and was thus void.⁶⁶

C. Tying Arrangements

The United States Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."⁶⁷ Tying arrangements violate both the specific pro-

372 U.S. 253 (1963), and have applied a rule of reason test. See 8 J. VON KALINOWSKI, *supra* note 23, § 62.04. However, in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 (1972), the Supreme Court made clear that it favors the per se approach to the courts' "limited utility in examining difficult economic problems." See 8 J. VON KALINOWSKI, *supra* note 23, § 62.02 (1976).

⁵⁹ 388 U.S. at 381.

⁶⁰ *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). See also *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

⁶¹ OHIO REV. CODE ANN. § 1331.01(B)(1) (Page 1962).

⁶² *Id.* § 1331.01(B)(3).

⁶³ *Id.* § 1331.02.

⁶⁴ Comment, *The Valentine Act*, 15 CASE W. RES. L. REV. 179, 192 (1963).

⁶⁵ 139 Ohio Misc. 155 (C.P. Cuyahoga Cty. 1973).

⁶⁶ *Id.* at 161.

⁶⁷ *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

visions of section 3 of the Clayton Act,⁶⁸ and the broad standards of section 1 of the Sherman Act.⁶⁹ Historic distinctions in the standards of illegality applied under the two statutes have been nearly eliminated.⁷⁰

Tying arrangements under the federal laws have repeatedly been held to be illegal per se if the plaintiff can establish that the sale or lease⁷¹ of any product is conditioned on the purchase of a different product, that defendant has sufficient economic power with respect to the tying product appreciably to restrain free competition for sale of the tied product, and that a "not insubstantial" amount of interstate commerce is involved.⁷² These standards for establishing a per se violation have been much relaxed in recent years and a tie-in may be held to violate the Sherman Act even without such a showing, under a rule of reason analysis.⁷³

The United States Supreme Court has recognized that "tying agreements serve little purpose beyond the suppression of competition,"⁷⁴ and thus "fare harshly under the laws forbidding restraints of trade."⁷⁵ Continuing their consistent use of federal antitrust law decisions as persuasive precedent,⁷⁶ Ohio courts therefore can also be expected to treat tying arrangements harshly in applying the Valentine Act prohibitions.⁷⁷

An indication of the Ohio court's treatment of alleged tying arrangements may be forthcoming. An action under the Valentine Act which charges the owners and operators of a mobile home park and sales operation in Ohio with instituting an illegal tying arrangement is now pending.⁷⁸ The defendants in that case are alleged to have used their market power over a unique commodity, land, to force current and prospective tenants of their park to purchase new mobile home vehicles from them alone.

⁶⁸ 15 U.S.C. § 14 (Supp. IV, 1974) applies only to a sale or lease of "goods, wares, merchandise, machinery, supplies, or other commodities."

⁶⁹ *Id.* § 1.

⁷⁰ See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). For a detailed discussion of the issue, see 2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 793 (1973).

⁷¹ See *International Salt Co. v. United States*, 332 U.S. 392 (1947).

⁷² *Northern Pac. Ry. v. United States*, 356 U.S. 1, 11 (1958).

⁷³ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969).

⁷⁴ *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949).

⁷⁵ *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606 (1953); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

⁷⁶ See text accompanying notes 33-47 *supra*.

⁷⁷ OHIO REV. CODE ANN. § 1331.01(B)(1), (B)(3) (Page 1962).

⁷⁸ *State ex rel. Brown v. NAPCO*, Civil No. 74-0360 (C.P. Lake Cty., filed June 6, 1974).

D. *Boycotts and Refusals to Deal*

“[A] combination by two or more persons for the purpose of boycotting a third person is . . . a violation of [the Valentine] Act.”⁷⁹ Agreements between parties at different levels of a distribution chain (vertical refusals to deal) and agreements between parties or competitors at the same level of a distribution chain (group boycotts or horizontal refusals to deal) are generally considered to be per se violations of the federal and Ohio antitrust laws if there is an express agreement between two or more parties.⁸⁰

However, “a truly unilateral refusal to deal does not violate [section 1 of the Sherman Act] since it involves a single person acting alone. Nevertheless, the courts have sometimes been able to interpret a unilateral refusal to deal to constitute unlawful collaborative conduct.”⁸¹

A group of dentists was recently sued under the Valentine Act using a boycott theory. It was alleged that the group had combined to create and carry out a conspiracy to boycott the Ohio Department of Public Welfare by refusing to treat welfare patients.⁸² With the erosion of the doctrine in *United States v. Colgate & Co.*,⁸³ it should be easier to find illegal refusals to deal under the antitrust laws, and future litigation under this theory is likely.

E. *Other Violations*

Additional antitrust violations that are less often the subject of state enforcement actions⁸⁴ are not discussed herein. These violations include merger,⁸⁵ monopolization,⁸⁶ attempts to monopolize,⁸⁷ and exclusive dealing arrangements.⁸⁸

⁷⁹ *State v. Jacobs*, 10 Ohio Dec. 252, 254 (Police Ct. 1900). See also *Hellman v. Retail Furniture Salesmen's Ass'n*, 23 Ohio N.P. (n.s.) 177 (Super. Ct. 1919); *State ex rel. Cullitan v. Greater Cleveland Livery Owners Ass'n*, 35 Ohio Op. 68, 74 N.E.2d 104 (C.P. Cuyahoga Cty. 1947).

⁸⁰ 11 J. VON KALINOWSKI, *supra* note 23, § 76.01.

⁸¹ 8 *id.* § 61.02.

⁸² *State ex rel. Brown v. Alliance Dental Soc'y*, Civil No. 76-96 (C.P. Stark Cty., April 23, 1976) (consent judgment).

⁸³ 250 U.S. 300 (1919). See note 130 *infra*. The doctrine provided that a manufacturer could individually refuse to deal with parties not selling at a suggested price.

⁸⁴ See 2 J. VON KALINOWSKI, *supra* note 23, chs. 15-17.

⁸⁵ *Id.* ch. 17.

⁸⁶ *Id.* ch. 9.

⁸⁷ *Id.*

⁸⁸ *Id.* ch. 12.

III. REMEDIES AVAILABLE UNDER THE ANTITRUST LAWS

Any party injured in its "business or property" may bring a civil action under the Ohio and the federal antitrust laws.⁸⁹ Double damages may be recovered under the Ohio laws and treble damages under the federal laws.⁹⁰ Public bodies such as the State of Ohio and its political subdivisions, as well as private entities, may recover damages as injured parties.⁹¹ Private plaintiffs may seek injunctive relief in addition to a damage recovery.⁹² Civil forfeitures for Valentine Act violations may be recovered through prosecution by the attorney general or a prosecuting attorney of any county where the defendant resides or does business.⁹³

The attorney general and the prosecuting attorney of the appropriate county are also granted the authority to criminally prosecute for violations of the Valentine Act. These criminal violations are punishable by fines, imprisonment, or both.⁹⁴ State and local governmental authorities have no power to enforce the federal antitrust laws through criminal prosecutions.

IV. CRIMINAL ENFORCEMENT

A. *History of Criminal Enforcement of the Valentine Act*

Even though the Valentine Act has provided criminal penalties⁹⁵

⁸⁹ OHIO REV. CODE ANN. § 1331.08 (Page 1962); 15 U.S.C. § 15 (Supp. IV, 1974).

⁹⁰ *Id.* Whether an action is brought under the federal or state antitrust laws depends mainly on the existence of interstate commerce, as required under the Sherman or Clayton Acts. 15 U.S.C. §§ 1, 12 (Supp. IV, 1974).

⁹¹ A political subdivision may bring its own actions just like any other injured party by using its own legal counsel. It may also, by agreement, be represented by the Attorney General. OHIO REV. CODE ANN. § 109.81 (Page 1969). Another alternative is to join in a class action of injured parties as provided for by OHIO R. CIV. P. 23 and FED. R. CIV. P. 23. In the interest of judicial economy, the state attorney general is considered to be the best representative of a class of political entities. *State v. Associated Milk Producers, Inc.*, 351 F. Supp. 436, 440 (N.D. Ill. 1972). See generally 1 J. MOORE, FEDERAL PRACTICE, pt. 2, ¶ 1.44 (2d ed. 1975).

⁹² OHIO REV. CODE ANN. § 1331.11 (Page 1962).

⁹³ *Id.* § 1331.03.

⁹⁴ *Id.* § 1331.99. See note 95 *infra*.

⁹⁵ The most severe penalties are imposed for violations of §§ 1331.02 and 1331.05, which have been made felonies of the fourth degree. Sub. H.B. 1358, 111th Ohio Gen. Ass'y (effective Oct. 1, 1976), amending OHIO REV. CODE ANN. § 1331.99(A) (Page 1962). Such felonies are subject to imprisonment of from six months to five years and a fine of not more than \$2,500. OHIO REV. CODE ANN. § 2929.11 (Page 1975). Section 1331.05 prohibits combinations to control the price or supply, or to prevent competition in the sale of various food products, and specifically provides that each day's violation is a separate offense. Section 1331.02 prohibits all forms of trusts like the infamous Standard Oil trust, and prohibits compliance with a foreign blacklist or boycott. Sub. H.B. 1358, amending OHIO REV. CODE ANN. § 1331.02 (Page 1962).

All other antitrust violations fall within the scope of § 1331.04. The all-encompassing language of this section declares that any violation of the Valentine Act is a prohibited conspir-

since its passage in 1898, only twelve criminal prosecutions are reported, all prior to 1910.⁹⁶ Prosecutions occurred in eleven different counties⁹⁷ and involved a wide variety of industries.⁹⁸ The reported decisions that indicate the penalties imposed show that defendants were fined as little as \$50 plus costs⁹⁹ and as much as \$5,000 per defendant,¹⁰⁰ with sentences of imprisonment ranging up to one year.¹⁰¹ Price fixing and boycotts were included as prosecution targets, though most opinions did not set forth in detail the factual basis for the charge. Since this flurry of prosecutions prior to 1910, however, criminal enforcement of antitrust principles in Ohio has been left to the federal government.

B. *Criminal Antitrust Prosecution at the Federal Level*

Criminal prosecution is much heralded as the ultimate weapon in the federal antitrust enforcement arsenal, standing as the great deterrent to any businessman contemplating an antitrust infraction.

acy against trade and makes clear that liability attaches to participants irrespective of capacity. Violation is a misdemeanor of the first degree, and each day's violation of § 1331.04 is a separate offense. Sub. H.B. 1358, *amending* OHIO REV. CODE ANN. § 1331.99(B) (Page 1962). Such offenses result in imprisonment of not more than six months and a fine of not more than \$1,000. OHIO REV. CODE ANN. § 2929.21 (Page 1975).

A further criminal penalty is imposed for violations of § 1331.15, which prohibits geographic price discrimination by dealers of milk products. These violations are misdemeanors of the second degree. Sub. H.B. 1358, *amending* OHIO REV. CODE ANN. § 1331.99(C) (Page 1962). The penalty for this grade of offense is up to ninety days in prison and a fine of not more than \$750. OHIO REV. CODE ANN. § 2929.21 (Page 1975).

⁹⁶ *State v. General Fire Extinguisher Co.*, 9 Ohio N.P. (n.s.) 438 (C.P. Summit Cty. 1910); *Hammond v. State*, 78 Ohio St. 15, 84 N.E. 416 (1908); *Arnsman v. State*, 11 Ohio C.C.R. (n.s.) 113 (Cir. Ct. 1908); *Lemmon v. State*, 77 Ohio St. 427, 83 N.E. 608 (1908); *State v. Bovee*, 6 Ohio N.P. (n.s.) 337 (C.P. Lorain Cty. 1907); *State v. Ice Delivery Co.*, 5 Ohio N.P. (n.s.) 89 (C.P. Hamilton Cty. 1907); *Hughes v. State*, 9 Ohio C.C.R. (n.s.) 369 (Cir. Ct. 1907), *aff'd without reported opinion*, 77 Ohio St. 640 (1908); *State v. Crystal Ice Co.*, 5 N.P. (n.s.) 149 (C.P. Franklin Cty. 1906); *State v. Standard Oil Co.*, 51 Ohio L. Bull. 563 (P. Ct. 1906); *State ex rel. Taylor v. Ross*, 4 Ohio N.P. (n.s.) 377 (C.P. Ashtabula Cty. 1906); *State v. Gage*, 72 Ohio St. 210, 73 N.E. 1063 (1905); *State v. Jacobs*, 7 Ohio N.P. 261 (Police Ct. 1900).

⁹⁷ Allen, Ashtabula, Cuyahoga, Delaware, Erie, Franklin, Hamilton, Hancock, Lorain, Lucas, and Summit.

⁹⁸ Ice (three separate prosecutions), ice cream, insurance (two separate prosecutions), coal, lumber, petroleum, and fire extinguishers.

⁹⁹ *State v. Jacobs*, 7 Ohio N.P. 261 (Police Ct. 1900).

¹⁰⁰ *State v. Hygeia Ice Co.*, 16 Ohio Dec. 735 (C.P. Lucas Cty. 1906). One half of the sentence was later suspended by the common pleas court.

¹⁰¹ *Lemmon v. State*, 77 Ohio St. 427, 83 N.E. 608 (1908). The supreme court held that imprisonment pursuant to the Valentine Act must not be in the workhouse.

But while there had been 394 defendants sentenced to prison as of 1965 for violation of federal antitrust provisions,¹⁰² and nearly two million dollars in fines were meted out in the electrical equipment conspiracy cases,¹⁰³ it is far too simplistic to assume from these figures that the use of criminal sanctions has had the desired deterrent effect. During the first eighty-four years of the Sherman Act, only forty-one individuals were actually incarcerated for antitrust violations not associated with labor or violence.¹⁰⁴ While the fines in the electrical equipment cases totaled nearly two million dollars, the value of the goods involved exceeded one billion dollars.¹⁰⁵ Thus the extent to which criminal sanctions for violation of the antitrust laws were viewed as genuine and therefore conduct-shaping threats to American businessmen is subject to much debate. What does seem clear, however, is that the days of paper sanctions are drawing to a close.

In 1974 Congress acted to "remedy one of the most glaring inequities in our entire criminal justice system."¹⁰⁶ It made a conspiracy restraining trade in violation of the Sherman Act a felony, punishable by imprisonment of up to three years and maximum fines of one million dollars for a corporation and one hundred thousand dollars for an individual.¹⁰⁷ This unmistakable expression of Congressional intent would mean little without a commitment to criminal prosecution by the Justice Department and a resolve by the judiciary

¹⁰² Wright, *Jail Sentences in Antitrust Cases*, 37 F.R.D. 183 (1965).

¹⁰³ Flynn, *Criminal Sanctions under State and Federal Antitrust Laws*, 45 TEXAS L. REV. 1301, 1308 n.45 (1967).

¹⁰⁴ Address by Assistant Attorney General Thomas E. Kauper, Pittsburgh Antitrust Institute, November 19, 1974.

¹⁰⁵ Flynn, *supra* note 103, at 1308 n.45. The fines imposed against General Electric of \$437,500, for example, represented less than 0.1% of the company's total income and slightly more than 0.2% of its net profit in 1960. Testimony of former Assistant Attorney General Lee Loevinger, *Hearings on Legislation to Strengthen Penalties Under the Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 12 (1961). Troubled by the fact that corporations had come to view antitrust penalties as merely minor costs of doing business, Loevinger stated:

It is hardly surprising then that some business concerns apparently consider antitrust violations simply a business risk, with corporate profits to be reaped from illegal conduct far outweighing the slight financial burden of the fines which may be imposed if their conduct is discovered. Raising the maximum fines so that their imposition may have a discernible effect on the offender's balance sheet might make those responsible for a company's affairs more careful in their direction of corporate policies.

The largest fine levied against an individual defendant was \$12,500. Flynn, *supra* note 103, at 1308 n.45. This is not an overwhelming burden for a corporate executive, even if such a sum is not reimbursed by his employer.

¹⁰⁶ BNA ANTITRUST & TRADE REG. REP. No. 685, A-3 (Oct. 22, 1974). Senator Gaylord Nelson indicated that an individual convicted of unauthorized "joyriding" could receive a more severe penalty than a corporate executive who conspired to violate the antitrust laws.

¹⁰⁷ The Antitrust Procedures and Penalties Act, 15 U.S.C. § 3 (Supp. V, 1975).

to use the sanctions provided; but it appears that all three now share a common viewpoint and are acting to transform little used principles into significant determinants of business conduct. Of the forty-one individuals incarcerated for antitrust violations between 1890 and 1974, twenty-two were jailed since 1970.¹⁰⁸ Many courts have now come to view price fixers as criminals and to recognize that "what is at stake . . . is the survival of . . . the free enterprise system."¹⁰⁹

At the same time the Justice Department seems to be acting on its declared policy of increased criminal prosecutions.¹¹⁰ Between fiscal 1972 and 1974 the number of criminal cases brought by the Department more than doubled, from fifteen to thirty-three, and the number of individuals indicted climbed even more dramatically, from twenty-four to eighty-four.¹¹¹ Assistant Attorney General Kauper expressed his views that "[h]ard-core price-fixing is nothing more nor less than stealing from a large number of people simultaneously. I do not understand why a person who steals from millions should receive a significantly lesser penalty than a person who steals from one."¹¹²

C. *Future Criminal Enforcement in Ohio*

Increased federal criminal prosecutions and more severe potential and actual penalties for violation of the federal antitrust laws, combined with the upsurge in civil enforcement of Ohio's antitrust laws,¹¹³ lead to the expectation of renewed use of the criminal sanctions of the Valentine Act. It may therefore be most useful to explore the factors which have determined federal antitrust criminal priorities in the past.

The Attorney General's National Committee to Study the Antitrust Laws explained that the "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade."¹¹⁴ The Antitrust Division of the Justice Department similarly maintains that:

¹⁰⁸ Kauper, *supra* note 104.

¹⁰⁹ Judge Ganey imposing sentence in the Electrical Equipment Cases, *quoted in Note, Antitrust Criminal Sanctions*, 3 COLUM. J.L. & SOC. PROB. 146, 147 (1967). *See also* Interview with Judge Charles B. Renfrew, BNA ANTITRUST & TRADE REG. REP. No. 689, AA-1, AA-7 (Nov. 19, 1974).

¹¹⁰ *See* Address by Deputy Assistant Attorney General Keith I. Clearwaters before the Antitrust Law Section, New York State Bar Association, January 22, 1975.

¹¹¹ *Id.*

¹¹² Kauper, *supra* note 104.

¹¹³ *See* text accompanying notes 1-11, 102-112 *supra*.

¹¹⁴ REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955).

[v]agueness in the legal definitions of the prohibited acts might raise problems of fairness, or even constitutionality in proceeding criminally The solution . . . has been to lay down a firm rule that criminal prosecutions will be recommended . . . only against willful violations of the law, and that one or two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established—describing per se offenses—willfulness will be presumed Second, if the acts of the defendants show intentional violations—if through circumstantial evidence or direct testimony it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct—willfulness will be presumed.¹¹⁵

The need for complementary state antitrust enforcement agencies is by now widely accepted,¹¹⁶ and the standards developed by the federal enforcement system can be readily adopted by Ohio in its determination of whom to prosecute.

V. PROJECTIONS OF FUTURE ANTITRUST ENFORCEMENT ACTIVITIES

In addition to actions enforcing the state and federal antitrust laws in the traditional areas of abuse as previously described, a number of areas exist for future enforcement in Ohio.

A. *After Goldfarb*

The Supreme Court in its decision in *Goldfarb v. Virginia State Bar*,¹¹⁷ held that fee schedules imposed by state and local bar associations violate the antitrust laws. The *Goldfarb* decision specifically

¹¹⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 109 (1967). Based upon such considerations, the Assistant Attorney General in charge of the Antitrust Division in 1955 described the types of offenses generally prosecuted criminally: "(1) price-fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) a less easily defined category of cases which might generally be described as involving proving use of predatory practices (boycotts, for example) to accomplish the objective of the combination or conspiracy; (4) the fact that a defendant has previously been convicted of or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 350 (1955). See also A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 401-403 (1970).

¹¹⁶ See Swope, *supra* note 53. See also NEW YORK STATE BAR ASSOCIATION, SECTION ON ANTITRUST LAW, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS 632 (1957); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1472 (1961).

¹¹⁷ 421 U.S. 773 (1975).

noted that "learned professions" are not exempt from the antitrust laws,¹¹⁸ and thereby set the stage for attack on a number of restrictive activities carried out by the learned professions.¹¹⁹

Although *Goldfarb* has eliminated any across-the-board exemption for these professions, the decision was not meant to make all activities which are per se violations in other contexts illegal in a professional context.¹²⁰ If a particular restriction relates to commercial rather than professional aspects, however, it is more likely to be held illegal.¹²¹ Thus, for example, any restriction relating to price competition is inherently suspect, as it is in a nonprofessional context. Other requirements of a profession, however, such as graduation from an accredited school, may be reasonable because of the importance of having qualified practitioners. Even these requirements are questionable, however, if it appears that they are intended to control the number of members in the profession rather than to maintain the quality of the profession. When less restrictive means exist for carrying out the purpose of a profession's rule or regulation, the more restrictive rules are open to attack. Even before the *Goldfarb* decision, the Ohio Attorney General's Office¹²² and the federal enforcement agencies¹²³ were instituting antitrust actions involving the professions.

¹¹⁸ *Id.* at 787.

¹¹⁹ See Rigler, *Professional Codes of Conduct After Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185 (1975).

¹²⁰ 421 U.S. at 787 n.17.

¹²¹ *Id.* at 787-88.

¹²² In *State ex rel. Brown v. Cleveland Bd. of Realtors*, Civil No. 75-941583 (C.P. Cuyahoga Cty., Oct. 2, 1975), the State of Ohio attacked education restrictions on persons entering the realty profession. A consent decree was entered. A consent judgment was also entered in *State ex rel. Brown v. Architects Soc'y*, Civil No. 74CV-04-1693 (C.P. Franklin Cty., April 25, 1975). The judgment required that both members of the society and current and potential customers of architectural services be informed that fee schedules were not valid and that price could be a factor in competitive bidding. Still pending is *State ex rel. Brown v. State Bd. of Registration for Prof. Eng'rs & Surveyors*, Civil No. 75CV-01-302 (C.P. Franklin Cty., filed Jan. 22, 1975) in which the State of Ohio has alleged that the engineering board has gone beyond its authority in adopting a rule prohibiting competitive bidding by engineers and surveyors. In *State v. Ohio Medical Indemnity, Inc.*, Civil No. 76096 (S.D. Ohio, filed July 9, 1975) (still pending) price fixing, monopolization and illegal vertical joint ventures in the provision of physician services and medical insurance are alleged. See also *State ex rel. Brown v. Alliance Dental Soc'y*, Civil No. 79-96 (C.P. Stark Cty., April 23, 1976).

¹²³ A small sampling of the federal activities is here presented. A consent decree barring a trade association from prohibiting competitive bidding by means of its conduct standards was entered in *United States v. American Inst. of Architects*, 1972 Trade Cas. ¶ 73,981 (D.D.C. 1972), as modified by exchange of correspondence, 1972 Trade Cas. ¶ 74,074 (D.D.C. 1972). In *United States v. National Soc'y of Prof. Eng'rs*, Civil No. 2412-12 (D.D.C., filed Dec. 5, 1972) it was alleged that the ban on competitive bidding by the National Society of Professional Engineers constituted price fixing. The district court has re-entered a judgment requiring the Society to amend its Code of Ethics to eliminate prohibitions on competitive bidding following

The Court in *Goldfarb* also held that the defendants' activities were not sheltered from antitrust attack by the state action exemption under the doctrine of *Parker v. Brown*,¹²⁴ since the state had not become so active in the initiation and regulation of activities of the bar association to indicate an intent to preclude competition. While it remains to be seen how much involvement is necessary before a state can be said to be compelling certain activities, it would appear certain that the state must at least have approved of the activities of its agency.¹²⁵ The degree of inquiry necessary to warrant a conclusion of approval is a question that remains open, and an issue which will undoubtedly be the subject of litigation in future cases involving activities by legislatively-created agencies.

B. Government Regulation of Industries

Few aspects of our economy are not regulated, directly or indirectly, by an agency, commission, board or committee. Although regulation is intended to be for the public welfare, regulatory schemes often produce anticompetitive results. In some instances there has been a considered determination that competition is not in the public interest when weighed against other factors.¹²⁶ In many other cases, however, regulation may have anticompetitive effects only because the regulatory scheme was instituted without full consideration of the impact on the marketplace.

Occupational regulation is a prime area for closer examina-

remand by the Supreme Court to consider the case in light of *Goldfarb*. Final judgment has been stayed pending disposition on appeal. The Department of Justice has investigated the pharmacy profession for possible antitrust violations involving restrictions on advertising imposed by the American Pharmaceutical Association Code of Ethics. See *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*, 96 S. Ct. 1817 (1976); *American Pharmaceutical Ass'n v. United States Dep't of Justice*, 467 F.2d 1290 (6th Cir. 1972). In *United States v. Alameda County Vet. Med. Ass'n*, Civil No. 75-1076-N (S.D. Cal. filed Nov. 14, 1975) (still pending), the complaint alleges price fixing in providing veterinary services through fee schedules and other mechanisms. The Federal Trade Commission has announced plans to investigate restrictions on advertising in the medical profession (*F.T.C. News Summary*, December 26, 1975), and real estate brokerage industry restrictions on a number of activities (*F.T.C. News Summary*, January 2, 1976).

¹²⁴ 317 U.S. 341 (1943).

¹²⁵ *Id.* at 352. One very recent Supreme Court case held that even such approval will not suffice in some cases. *Cantor v. Detroit Edison Co.*, 96 S. Ct. 2110 (1976). The mere existence of state participation or acts of public officials will not itself create immunity from the antitrust laws. *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 934 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Woods Explor. & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1294 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

¹²⁶ For example, certain aspects of the public utilities industries have been specifically exempted from the antitrust laws. See, e.g., OHIO REV. CODE ANN. § 4931.19 (Page 1954).

tion.¹²⁷ Most regulation of occupations involves the creation of a board,¹²⁸ with the authority to license the practice of the occupation and to promulgate regulations in accord with the statute. The vague parameters of this authority cause much anticompetitive regulation. In view of the benefits to be derived from competition, legislators and regulators should expect closer scrutiny of statutes and agency implemented rules that have an anticompetitive impact, especially when there is no overriding benefit to be gained by eliminating competition from an industry.

C. *After Repeal of the Fair Trade Laws*

Price fixing is a per se violation of the antitrust laws.¹²⁹ Resale price maintenance, whereby parties at one level of the distribution chain determine the minimum prices to be set at some lower level of the distribution chain, is one such price-fixing mechanism which is generally considered illegal under the antitrust laws.¹³⁰ Until very recently, however, certain resale price maintenance arrangements were exempted from the antitrust laws because of the Miller-Tydings Act,¹³¹ the McGuire Act,¹³² and the state fair trade laws.¹³³ Fair trade laws permitted suppliers of brand name or trademarked goods, sold in "free and open" competition with goods of the same general type, to prohibit buyers (usually retailers) from reselling at a price below a set minimum level.¹³⁴ The Miller-Tydings and McGuire Acts

¹²⁷ Over 50 occupations are regulated in Ohio. OHIO REV. CODE ANN. tit. 47 (Page 1954), *as amended*, (Page Supp. 1975); § 3301.07(D) (Page 1972); § 3375.47 (Page 1972); § 3905.01 (Page 1971); §§ 4151.14-.24 and 4151.29-.35 (Page 1973).

¹²⁸ The boards are generally made up of members of the occupation, which in itself can create anticompetitive problems. For example, a member of an occupation has a vested economic interest in restricting the number of new entrants into the occupation. If the regulations are mandated by legislation, however, there is the problem of the state action exemption under the *Parker* doctrine.

¹²⁹ *United States v. Socony-Vacuum Oil Co.*, 370 U.S. 150 (1940).

¹³⁰ *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960); *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D. N.Y. 1942), *aff'd*, 321 U.S. 707, 724 (1944); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). As provided under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), manufacturers can individually refuse to deal with parties not selling at a suggested price. This doctrine, commonly known as the "Colgate Doctrine," has been seriously eroded. See *Parke, Davis, Bausch & Lomb*, and *Beech-Nut*, *supra*.

¹³¹ 15 U.S.C. § 1 (Supp. IV, 1974), *amending* § 1 of the Sherman Act, ch. 647, 26 Stat. 209 (1890).

¹³² 15 U.S.C. § 45 (1970), *amending* § 5 of the Federal Trade Commission Act, ch. 745, 66 Stat. 631 (1952).

¹³³ Ohio's fair trade laws are found at OHIO REV. CODE ANN. §§ 1333.05-10 & 1333.27-.34 (Page 1962).

¹³⁴ See 7 J. VON KALINOWSKI, *supra* note 23, § 52.011[1]; 9 *id.* § 67.02[2][d].

exempted this type of resale price maintenance from the federal anti-trust laws if state law authorized the exemption.¹³⁵

Ohio's fair trade laws were repealed effective December 30, 1975,¹³⁶ and Congress has since repealed the federal antitrust exemptions which made the fair trade laws immune from attack.¹³⁷ Because of the repeal of the fair trade laws, distributors attempting to impose resale prices on others in the chain of distribution should anticipate that their actions will be considered illegal price fixing under the antitrust laws. Boycotts of and refusals to deal with retailers because they do not sell at suggested prices are no longer legal means of resale price maintenance. Even where actual express or implied agreements do not exist, illegal price fixing can be found when enforcement systems, including blacklists and licenses, are used to force distributors to sell at fixed prices.¹³⁸ Threats to discontinue sales to retailers who do not sell at set prices and subsequent reinstatement of a sales relationship with retailers who provide assurance of their intent to sell at the set prices can also be a violation of the antitrust laws.¹³⁹

Before repeal of the fair trade laws, a number of items were "fair traded," including stereos, televisions, appliances, mattresses, jewelry, prescription drugs, tools, bicycles, and hosiery. Any appearance of parallel pricing of these or other items may be considered highly suspect, and raise the question of an illegal scheme to maintain resale prices.

D. *Parens Patriae Actions*

In 1972 the United States Supreme Court held that a state may not recover damages for injury to its general economy under the antitrust laws.¹⁴⁰ In 1973 the Ninth Circuit Court of Appeals dismissed California's attempt to sue in a representative capacity for damages suffered by individual consumers of snack foods subject to a price-fixing conspiracy, despite the contention that denial of the state's authority effectively foreclosed any recovery of the illegal

¹³⁵ *Id.* § 52.01[2]. The federal laws do not allow resale price maintenance arrangements between competitors. *Id.* § 62.02[2][a]. For a general discussion of the purpose of the fair trade exemption, see Comment, *Fair Trade: The Ideal and Reality*, 27 OHIO ST. L.J. 144 (1966).

¹³⁶ H.B. 324 repealed OHIO REV. CODE ANN. §§ 1333.05-.10 and 1333.27-.34 (Page 1962). See generally 4 TRADE REG. REP. ¶¶ 33,820, 38,805 (1976).

¹³⁷ Act of Dec. 12, 1975, Pub. L. No. 94-145, 89 Stat. 801 (effective March 11, 1976).

¹³⁸ *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

¹³⁹ *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). See generally Seplaki, *The Legonomics of Vertical Restrictive Conduct in Antitrust: Unfair Trading By Resale Price Maintenance*, 21 LOYOLA L. REV. 671, 676-80 (1975).

¹⁴⁰ *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

overcharges incurred by many consumers.¹⁴¹ Despite large aggregate amounts of damage, when everyday consumer purchases are involved (e.g., potato chips, milk, bread, gasoline), individual damage claims are so small and proof of purchases and damages so difficult that anti-trust damage actions, even class actions, do not provide practical relief. In response to such court rulings, Congress has enacted legislation to enable states to bring suit as *parens patriae* to recover damages for injuries to their citizens.¹⁴²

This new *parens patriae* standing will permit state attorneys general to recover treble damages for injuries caused to natural persons (other than business entities) residing within their states as a result of a Sherman Act violation. In price-fixing cases, damages may be proved in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by other reasonable means, without the necessity of proving the individual damages or claims of the persons on whose behalf the suit is brought. Despite many amendments prior to passage, this Act promises substantial benefits to consumers both in the recovery of ill-gotten gains and by increased deterrent effect.¹⁴³

VI. CONCLUSION

The Antitrust Section of the Ohio Attorney General's Office has an enforcement capability which provides comprehensive means for dealing with restraints of trade. This state effort, along with the antitrust programs of the United States Department of Justice and the Federal Trade Commission, is essential to the attainment of the socially desirable and economically sound objective of the antitrust laws—the preservation of free and fair competition.

Yet the state and federal governments' antitrust enforcement efforts alone cannot achieve this objective. In order to preserve a competitive marketplace, it is essential that members of the private bar and the business community be aware of the antitrust laws and recognize that enforcement of these laws allows consumers at every level of the distribution chain to obtain the best products and services

¹⁴¹ *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973). For a discussion of *parens patriae* see Malna & Belchman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U. L. REV. 193 (1970); Comment, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROB. 411 (1970); Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970).

¹⁴² The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301 (September 30, 1976).

¹⁴³ For review of the tortuous journey through Congress of *parens patriae* legislation, see (BNA) ANTITRUST & TRADE REG. REP. No. 781, A-1 to A-2, D-1 to D-22 (Sept. 21, 1976).

at competitive prices, enables businessmen to compete without being subjected to predatory conduct, and allows potential competitors to enter markets without interference from illegal restraints of trade. Through observance of the antitrust laws by the business community and the combined enforcement efforts of government agencies and the private bar, we can encourage and protect competition and preserve the free enterprise system.