

ALTERNATIVE COURSES OF ACTION AVAILABLE TO PERSONS INJURED UNDER THE ANTITRUST LAWS

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I. INTRODUCTION

A commercial enterprise [hereinafter "victim"], which is hindered in its purchasing, manufacturing or marketing by what it considers to be antitrust violations by others, has a number of weapons at hand which it may utilize to combat the alleged violator [hereinafter "violator"]. The one that comes most readily to mind is a treble damage suit with its various ramifications. Such suits have grown in number and sophistication in recent years to the point that the antitrust bar could legitimately be classed as a "growth" profession.¹ However, direct action of that form is not the only alternative available to the victim. What action, if any, it decides to take will depend upon a number of considerations, including the seriousness of the alleged offense, the effect it has had or is likely to have on the victim's business, the difficulty of proving the offense and its impact, the financial and managerial resources which the victim is willing to devote to "collateral" activity of this sort, the resistance which it is apt to encounter from the violator, the number of skeletons in the victim's own closets, and a number of others. Many of these considerations are inherently practical—not legal.

The basic purpose of this article is to outline some of the alternative courses of action available to the victim of an antitrust violation. Extremely important to the selection of an alternative are the practical problems in pursuing it to a successful conclusion. These alternatives involve greatly disparate amounts of effort by the victim and probably will yield greatly different rewards. The limited scope of this article does not permit me to detail the important practical difference in the alternatives; however, it is hoped that some "feel" for these differences will be gained by the reader.

II. LITIGATION TO REDRESS ANTITRUST VIOLATIONS

A. *Basic Requirements of Action*

Basically any person who is injured in his business or property by rea-

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¹ Between 1890 and 1940 there were only 13 private actions in which the plaintiff recovered. By the middle 1960's, there were several thousand private treble damage actions pending. The Antitrust Section of the American Bar Association has also grown enormously since its inception in 1950. See Kirkpatrick, *Evaluation of the Claim, Preparation of the Suit, Discovery, and Privileges*, 38 ANTITRUST L.J. 4 (1968).

son of conduct forbidden by the antitrust laws may sue to redress the alleged wrong.² The private plaintiff must establish: (1) a violation of the antitrust laws; (2) a pecuniary injury to his business or property; and (3) a causal connection between the violation and the injury.³ The injury must not be "indirect," "secondary," "remote," or "derivative." Some courts have formulated the theory of direct injury in terms of requiring that the plaintiff be an "object" or "target" of the violation.⁴ Not only must the plaintiff prove these elements, but the complaint must also allege facts which will satisfy the requirements.⁵ If the plaintiff fails to allege such threshold prerequisites, he lacks "standing to sue," and a pretrial motion to dismiss or summary judgment is in order.⁶

A private party does not have a right of action under every statute which may be considered to be an "antitrust law" in the broadest sense. Private actions are available under the Sherman Act, the Clayton Act, parts of the Robinson-Patman Act, the Wilson Tariff Act, and possibly some other statutes.⁷ Such actions specifically cannot be brought under either § 3 of the Robinson-Patman Act or the Federal Trade Commission Act.⁸ Similarly, a private party has no right to bring an action for an alleged violation of a government decree.⁹

² 15 U.S.C. § 15 (1970).

³ *Schwabe Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 909 (2d Cir. 1962), *cert. denied*, 369 U.S. 865 (1962); Pollack, *The Injury and Causation Elements of Private Antitrust Action*, 21 ABA ANTITRUST SEC. 341, 342 (1962).

⁴ *Volasco Prod. Co. v. Lloyd A. Fry Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Elyria Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F.2d 356, 359 (6th Cir. 1961).

⁵ *Turner Glass Corp. v. Hartford-Empire Co.*, 173 F.2d 49, 51 (7th Cir. 1949), *cert. denied*, 338 U.S. 830 (1949); *Beegle v. Thomson*, 138 F.2d 875, 881 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944).

⁶ See *Schwartz v. Broadcast Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. 1959).

⁷ Clayton Act § 1, 15 U.S.C. § 12 (1970); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). Section 7 of the Clayton Act is an "antitrust law." A private action may be brought for treble damages arising from an acquisition alleged to be illegal under that section. See *Gottesman v. General Motors*, 414 F.2d 956 (2d Cir. 1969); *Champion Spark Plug Co. v. Ransburg Electro-Coating Corp.*, 1971 Trade Cas. ¶ 73,553 (N.D. Ohio); Note, *Treble Damages for Violations of Section 7 of the Clayton Act*, 38 U. CHI. L. REV. 404 (1971).

Some "antitrust statutes" specifically grant a private right of action comparable to that of the Clayton Act. The Panama Canal Act, 15 U.S.C. § 31 (1970), provides in part as follows:

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through the Panama Canal if such ship is owned, chartered, operated or controlled by any person or company which is doing business in violation of . . . the [Sherman Act]. Suit may be brought by any shipper. . . .

⁸ See *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958); *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, 306 F.2d 61, 62 (3d Cir. 1962); *Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043 (S.D.N.Y. 1971); *Carlson v. Coca-Cola Co.*, 318 F. Supp. 785 (N.D. Cal. 1970). In addition, if the action relates to a regulated industry, the various regulatory statutes relating to such industry should be carefully examined since they may grant a partial or total exemption, e.g., *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *Laveson v. TWA, Inc.*, 5 TRADE REG. REP. ¶ 74,290 (3d Cir. 1972).

⁹ *Paul M. Harrod Co. v. A. B. Dick Co.*, 194 F. Supp. 502 (N.D. Ohio 1961).

B. Forms of Action

The most prevalent form of private action is an action for damages under § 4 of the Clayton Act,¹⁰ although in particular cases it may be appropriate to bring an action for declaratory judgment. The latter will usually involve the construction of a license or other contract which arguably violates the antitrust laws.¹¹ Declaratory judgments are usually not brought if the alleged violation is predicated on a course of conduct or if a violation is clearly a per se violation.¹²

In recent years, due to the amendment of rule 23 of the Federal Rules of Civil Procedure, many actions are brought as class actions. Generally speaking, a member of a class may institute a suit as a representative of the class if he can establish the following: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class which predominate over questions affecting individual members; (3) the claims of the representative party are typical of the claims of the class; (4) the representative will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for adjudicating the controversy. Virtually all of these requirements have resulted in considerable litigation as to their scope. Since some aspects of the problem are treated in other articles in this symposium, I will only deal in this article with a bare outline of the problems.

The first requirement is one of numerosity. The potential number of claimants must neither be too large nor too small. If the claimants are few in number, it is practicable to join them all, and a class action is unnecessary. If the number is too large, the class is unmanageable and courts have dismissed class actions for that reason. Whether the class is too large or too small varies from case to case, and (not surprisingly)

¹⁰ 15 U.S.C. § 15 (1970). Some of the judgments and settlements under this section have been erroneous, e.g., *TWA, Inc. v. Hughes*, 308 F. Supp. 679 (S.D.N.Y. 1969); *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965); *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*, 1964 Trade Cas. ¶ 71,123 (E.D. Pa.).

¹¹ An action was brought to declare a 20 year contract valid under antitrust laws in *Tampa Elec. Co. v. Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *rev'd on other grounds*, 365, U.S. 320 (1961). See also *Intercontinental Container Transport Corp. v. New York Ship. Ass'n*, 426 F.2d 884 (2d Cir. 1970).

¹² In addition to the forms of action mentioned in the text, shareholders have brought a number of derivative suits to redress injuries to the corporation. Since the shareholder is suing on behalf of the corporation and not for his injury as a shareholder, the loss is "direct" and not "secondary." As a result, the plaintiff has met the requirement that there be a direct injury to business or property. E.g., *Rogers v. American Can Co.*, 305 F.2d 297 (3d Cir. 1962); *Gottesman v. General Motors Corp.*, 171 F. Supp. 661 (S.D.N.Y. 1959).

Shareholders have also brought derivative suits to enjoin a violation by the corporation, *Ash v. International Bus. Machs., Inc.*, 353 F.2d 491 (3d Cir. 1965), and also to hold directors liable for breach of fiduciary duty attributable to the antitrust violation, *Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944); *Graham v. Allis-Chalmers Mfg. Co.*, 41 Del. Ch. 78, 188 A.2d 125 (1963).

the cases dealing with this issue are not consistent. A class of 800 members has been disallowed as too small¹³ while a class of 15 members has been upheld.¹⁴ A class of 6,000,000 members has been held to be manageable in one case¹⁵ and a class of 1,500,000 members unmanageable in another.¹⁶ However, the trend seems to reflect a general increase in the minimum number of class members and a decrease in the maximum number.

Class actions have been denied for cases in which the claims of the plaintiff conflicted with the claims of other members of the class.¹⁷ Even in price fixing cases, class action status may be denied if the plaintiffs claim to represent two different levels of distribution. Basically, in a price fixing case, the purchaser who is in privity with the price fixer recovers for the overcharge. If the overcharge is passed on, only the subpurchaser may recover. The impact is upon one or the other, but not both. There undoubtedly will be an irreconcilable conflict as to recovery between the purchaser and subpurchaser, thus the plaintiff should not represent them both.¹⁸ Similarly, in an action charging price discrimination at the buyer's level, class action status has been denied if the plaintiff seeks to represent both favored and disfavored buyers.¹⁹

¹³ *Denver v. American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971) (126 members); *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17 (C.D. Cal. 1969); *Holly Springs Funeral Home, Inc. v. United Funeral Service, Inc.*, 303 F. Supp. 128 (N.D. Miss. 1969) (10-12 members). See also *Judy Van Allen v. Circle K Corp.*, 5 TRADE REG. REP. ¶ 74,185 (C.D. Cal. 1972); *Gaines v. Budget Rent-a-Car Corp.*, 5 TRADE REG. REP. ¶ 73,860 (N.D. Ill. 1972) (three or four members). *William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp.*, 49 F.R.D. 34 (E.D. Pa. 1969) (suggesting that a class of 460 may be too small to warrant class action status).

Plaintiff has a positive burden of showing that the number is so large that it is impracticable to join the members of the class in the suit. *Kinzler v. New York Stock Exchange*, 1971 Trade Cas. ¶ 73,622 (S.D.N.Y. 1971).

¹⁴ *Weingartner v. Union Oil Co. of Cal.*, 431 F.2d 26 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

¹⁵ *Eisen v. Carlisle & Jacqueline*, 1971 Trade Cas. ¶ 73,563 (S.D.N.Y.). But see *Philadelphia v. American Oil Co.*, 1971 Trade Cas. ¶ 73,625 (D.N.J.).

¹⁶ *Hackett v. General Host Corp.*, 1972 Trade Cas. ¶ 73,800 (3d Cir.).

¹⁷ "The plaintiff cannot maintain his action as a class suit when his interests are antagonistic to the interests of the persons he purports to represent." *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1117 (7th Cir. 1970). "Where the alleged class contends dual conflicting interests, a class action is inappropriate." *Traylor v. Marine Corp.*, 328 F. Supp. 382, 385 (E.D. Wis. 1971). See also *Holly Springs Funeral Home, Inc. v. United Funeral Service, Inc.*, 303 F. Supp. 128, 134 (N.D. Miss. 1969); *Horwitz v. Panhandle Eastern Pipe Line Co.*, 293 F. Supp. 1092 (W.D. Okla. 1968); *New York v. International Pipe & Ceramics Corp.*, 44 F.R.D. 584, 587 (S.D.N.Y. 1968).

¹⁸ See *Obron v. Union Camp Corp.*, 5 TRADE REG. REP. ¶ 73,909 (E.D. Mich. 1972); *Balmac Inc. v. American Metal Prods. Corp.*, 5 TRADE REG. REP. ¶ 74,235 (N.D. Calif. 1972); *Denver v. American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971).

¹⁹ Further, plaintiff's complaint also charges discrimination in favor of some first-run exhibitors as against others in the screening of pictures. Yet both groups—the alleged (but unidentified) favored exhibitors and the alleged (but also unidentified) mistreated exhibitors—are both members of the purported class. Indeed, one exhibitor might be asserted to be favored in the case of one picture or in one city and discriminated against as regards another picture or in another city. Under these circumstances plaintiff cannot adequately represent the entire class.

Class actions have also been denied when common questions do not predominate and individual questions do. Cases under the Robinson-Patman Act involving price discrimination at the buyer's level have been denied on this basis.²⁰ In such situations generally a determination whether there was an adverse effect on competition and other facts would be peculiar to each individual plaintiff. Similarly, class action status has been denied in cases alleging an illegal tie-in when the basis of the tie-in is coercion, which most frequently arises in suits by a franchisee against the franchisor. Whether or not the individual franchisee was coerced into buying unwanted products was said in one such case to be a fact peculiar to each franchisee.²¹

In addition, class action status may be denied if the attorney solicited representatives of the class. As specifically noted in the Manual for Complex and Multidistrict Litigation:

The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions . . . ; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice.²²

The courts have been increasingly concerned about the mounting evidence of rule 23 abuse.²³ One court has held that if only one class representative had been solicited, "prosecution of this suit as a class action would constitute an abuse of Rule 23" ²⁴ While the court refused to certify it as a class action, the case was allowed to proceed as any

William Goldman Theatres, Inc. v. Paramount Film Dist. Corp., 49 F.R.D. 35, 40 (E.D. Pa. 1969). See also *Bel Air Markets v. Foremost Dairies, Inc.*, 55 F.R.D. 538, 542 (N.D. Cal. 1972); *Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108, 111 (S.D.N.Y. 1956).

²⁰ *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791 (10th Cir. 1970); *Bel Air Markets v. Foremost Dairies, Inc.*, 55 F.R.D. 538, 542 (N.D. Cal. 1972); *Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108, 111 (S.D.N.Y. 1956); cf. *State Wholesale Grocers v. Great A & P Tea Co.*, 24 F.R.D. 510 (N.D. Ill. 1959).

²¹ *In re 7-Eleven Franchise Litigation*, 1972 Trade Cas. ¶ 74,156 (N.D. Cal.). See also *Abercrombie v. Lum's Inc.*, 1972 Trade Cas. ¶ 74,118 (S.D. Fla.); *Lah v. Shell Oil Co.*, 50 F.R.D. 198 (S.D. Ohio 1970).

²² MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION § 24.1 (CCH 1970).

²³ "The permissive use of the class action permitted by Rule 23 of the Rules of Civil Procedure was never intended as a device to enable client solicitation, nor should it be permitted to be used for that purpose." *Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108, 111 (S.D.N.Y. 1956).

²⁴ *Carlisle v. LTV Electrosystems*, 54 F.R.D. 237, 240 (N.D. Tex. 1972).

other case. In *Halverson v. Convenient Food Mart, Inc.*,²⁵ plaintiff's counsel communicated with potential class members and sought their concurrence to a class suit. He did not solicit them as class representatives nor under circumstances for which he would obtain a fee from them. The district court dismissed the entire action, but the court of appeals reversed. The appellate court appeared to be influenced by the fact that the district court dismissed the case and the fact that counsel was not to obtain a fee from those persons he had solicited.

C. Forms of Relief

The action may take the form of a damage action in which case the plaintiff is entitled to recover triple damages, his costs and attorneys' fees under § 4 of the Clayton Act. The plaintiff may also elect to sue for injunctive relief.²⁶ A few permanent injunctions have been issued in private antitrust cases,²⁷ including actions to enjoin alleged violations of § 7 of the Clayton Act.²⁸ There is also authority that divestiture is an appropriate form of relief in private cases,²⁹ although it apparently has only been granted once.

III. ACTION TO ENFORCE THE ANTITRUST LAWS IN LITIGATION BROUGHT BY OTHERS

A. Litigation Brought Against the Victim

The victim may not desire to bring a suit in order to redress this

²⁵ 458 F.2d 927 (7th Cir. 1972).

²⁶ Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . .

15 U.S.C. § 26 (1970). See *Gomberg v. Midvale Co.*, 157 F. Supp. 132 (E.D. Pa. 1955). Plaintiff may also seek and be granted a preliminary injunction; however in such cases the plaintiff must meet the usual requirements for obtaining such relief, such as proof of irreparable injury. See *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *N.W. Controls Inc. v. Outboard Marine Corp.*, 317 F. Supp. 698 (D. Del. 1970).

²⁷ *Volasco Prod. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 667 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965) (Robinson-Patman Act); *Adelman v. Paramount Pictures, Inc.*, 296 F.2d 308 (5th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962) (conspiracy of monopoly); *Basle Theaters v. Warner Bros. Pictures Dist. Corp.*, 168 F. Supp. 553 (W.D. Pa. 1958) (conspiracy); *Advance Bus. Systems & Supply Co. v. SCM*, 1970 Trade Cas. ¶ 73,045 (D. Md. 1968).

²⁸ *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958); *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 1972 Trade Cas. ¶ 74,094 (D. Hawaii). See also *Richerti v. Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970) (an unsuccessful suit to enjoin an acquisition of plaintiff's supplier).

²⁹ *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 1972 Trade Cas. ¶ 74,094 (D. Hawaii); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 400 (S.D.N.Y. 1957). *But see* *American Commercial Barge Line Co. v. Eastern Gas & Fuel Associates*, 204 F. Supp. 451 (S.D. Ohio 1962); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*. 49 MINN. L. REV. 267 (1964).

wrong, but instead may elect to "lay back." If the violator takes the initiative, the victim may then counter-attack under the antitrust laws. This type of situation most frequently arises when there is a contractual relationship between the parties which imposes an unwarranted burden on the victim. In such event, the victim may simply repudiate the contract and, in effect, declare it null and void.³⁰ If the violator seeks to enforce the contract or otherwise seeks to enforce a violation of the antitrust laws by litigation, the defendant may interpose the antitrust violation as a defense. For instance, in *Associated Press v. Taft-Ingalls Corp.*,³¹ Associated Press furnished Taft-Ingalls four newswire services under a two-year contract. Taft-Ingalls believed that the contract constituted an illegal tie-in and repudiated the contract during its term. Associated Press sued for damages which, in effect, were the profits it would have realized if Taft-Ingalls had continued to take the service during the remainder of the term of the contract. The court held that Taft-Ingalls' action was improper since to award damages under these circumstances would have been the equivalent of enforcing a contract which violated the antitrust laws. One caveat is in order. If plaintiff has completed performance of the contract and delivered the goods required by the contract or performed the services required by the contract, the defendant cannot refuse to pay.³² As the Supreme Court succinctly put it in *Kelly v. Kosuga*, "the courts are to be guided by the overriding general principle 'of preventing people from getting other people's property for nothing when they purport to be buying it.'"³³

More frequently, the alleged antitrust violation of the plaintiff is unrelated or virtually unrelated to the action which plaintiff has brought against the defendant. While defendant may not defend on the ground of the antitrust violation, the question arises whether a counterclaim for triple damages may be asserted against the plaintiff in such action. The majority of cases have held that this cannot be done in an action for the price of goods, the most recent of which is *Ford Motor Co. v. Strickland*,³⁴ a diversity action brought by a manufacturer against the distributor

³⁰ *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546 (7th Cir. 1970); *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 768-69 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965); *Farben-fabriken Bayer A.G. v. Sterling Drug, Inc.*, 307 F.2d 210 (3d Cir. 1962); *Kentucky Rural Elec. Coop. Corp. v. Moloney Elec. Co.*, 282 F.2d 481 (6th Cir. 1960), *cert. denied*, 365 U.S. 812 (1960); *Western Geophysical Co. v. Bolt Associates, Inc.*, 305 F. Supp. 1248 (D. Conn. 1969).

³¹ 340 F.2d 753 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965).

³² *Kelly v. Kosuga*, 358 U.S. 516 (1959); *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir. 1951) *reh'g denied*, 190 F.2d 73 (5th Cir. 1951).

³³ 358 U.S. 516, 520 (1959).

³⁴ *Ford Motor Co. v. Strickland*, 302 F. Supp. 154 (S.D. Ga. 1969); *accord*, *Tenna Corp. v. Rego Radio & Electronics Corp.*, 270 F. Supp. 31 (E.D.N.Y. 1967) (defendant's motion to bring in additional defendant on antitrust counterclaim denied on the ground that an antitrust violation is not a defense to an action for goods sold and delivered). *See also* *Baltimore &*

on an open account for equipment sold to the distributor. The distributor counterclaimed for treble damages, but plaintiff's motion to dismiss the counterclaim was granted. The court stated that "a defendant cannot file a counterclaim under the antitrust laws to an action by plaintiff to recover the price of goods sold, but must institute [a] separate suit for treble damages."³⁵ Several cases reach the opposite result,³⁶ and it is submitted that they represent the better view. Rule 13(b) of the Federal Rules of Civil Procedure relating to permissive counterclaims provides that "a pleading may state as a counterclaim *any claim* against an imposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." To require the defendant to bring a separate action simply results in there being two suits instead of one. As a matter of practice, this type of counterclaim seems to be filed frequently without objection being raised.³⁷

B. *Litigation Brought by the Government*

Basically, a private party may not intervene or participate in an anti-trust suit brought by the government even though the private party may be directly affected by the outcome of that litigation.³⁸ If the government litigation has proceeded to the consent decree stage, the Department of Justice's present policy is to leave the consent decree unfiled for 30 days before it becomes final. The ostensible purpose of this procedure is to allow private parties who may be affected by the decree to comment on it.³⁹ To a certain extent, this procedure allows the private party to influ-

O.R.R. v. New York, N.H. & H.R.R., 196 F. Supp. 724, 748 (S.D.N.Y. 1961); Barnsdall Refining Corp. v. Birnamwood Oil Co., 32 F. Supp. 314 (E.D. Wis. 1940); Independent Oil Co. v. Barrett, 79 F. Supp. 831 (D.D.C. 1939).

³⁵ 302 F. Supp. 154.

³⁶ Brown Paper Mill Co. v. Agar Mfg. Corp., 1 F.R.D. 579 (S.D.N.Y. 1941); *accord*, Channel Marketing, Inc. v. Telepro Indus., Inc., 45 F.R.D. 370 (S.D.N.Y. 1968). In *Hardrives Co. v. East Coast Asphalt Corp.*, 166 So.2d 810 (Fla. App. 1964), the court held that the Florida rules of civil procedure permitted the defendant to assert a counterclaim alleging a violation of a Florida antitrust statute in a suit for the purchase price of asphalt, even though it held that such a claim did not constitute a defense to the action.

³⁷ *E.g.*, Oxford Indus. Inc. v. Graymar Co., 1972 Trade Cas. ¶ 74,175 (D. Md. 1971). An antitrust claim cannot be brought in the state court. An antitrust counterclaim therefore cannot be brought in the state court or, if brought, removed from that court to a federal court. See *Washington v. American League of Professional Baseball Clubs*, 5 TRADE REG. REP. ¶ 73,933 (9th Cir. 1972). A creditor who learns that he will be met by an antitrust counterclaim if he sues on the debt should consider filing his suit in the state court.

³⁸ *New York v. United States*, 390 U.S. 715 (1968); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 439 (C.D. Cal. 1967). A contrary result was reached in two cases. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the intervener successfully upset a decree to which both the government and the defendant had assented. In *United States v. Darling-Delaware Inc.*, 1972 Trade Cas. ¶ 73,818 (S.D.N.Y. 1971), plaintiffs in a triple damage suit appeared as *amicus curiae* and opposed the acceptance of *nolo contendere* pleas and in the alternative requested an order impounding the grand jury documents. The court impounded the documents.

³⁹ 28 C.F.R. § 50.1(b) (1972).

ence the outcome of the litigation. However, it is debatable how effective the procedure has been as far as the private parties have been concerned. In some cases, private parties have also been allowed to participate as *amicus curiae* at the arraignment or plea in criminal antitrust cases, but this is usually limited to public bodies.⁴⁰

IV. COMPLAINTS TO THE ENFORCEMENT AGENCIES

The victim of an antitrust violation may always complain to the Department of Justice or the Federal Trade Commission.⁴¹ Representatives of the Department of Justice have informally stated that many, if not the majority, of investigations instituted by the Department arise from such complaints.⁴² No particular form is required for the complaint. The Federal Trade Commission apparently receives at least several thousand complaints a year, and while the size of its staff and its resources do not permit it to take action on any great number of these complaints, one member of the staff has indicated that something on the order of ten percent of the complaints lead to formal action.⁴³ Again no particular form or procedure is required to lodge a complaint.⁴⁴ If well-founded, this type of action seems to be effective.

V. SELF HELP—DEFENSIVE ACTION IN THE MARKET

Rather than take any of the action referred to above, the victim may simply desire to retaliate in the marketplace. There are a number of circumstances in which this can be done, with varying risks. As indicated above, a party to an illegal contract probably may repudiate the contract and incur a minimum risk of being held liable on obligations which have not yet accrued.⁴⁵ Similarly, a distributor, franchisee, or other merchant who has limited bargaining strength may often accept an agreement which violates the antitrust laws with a minimum risk. He may even retain

⁴⁰ *United States v. Darling-Delaware Inc.*, 1972 Trade Cas. ¶ 73,818 (S.D.N.Y. 1971); *United States v. American Bakeries Co.*, 284 F. Supp. 864 (W.D. Mich. 1968); *United States v. American Radiator & Standard Sanitary Corp.*, 45 F.R.D. 477 (W.D. Pa. 1968); cf. *United States v. Aluminum Co. of America*, 41 F.R.D. 342 (E.D. Mo. 1967); *United States v. Harper & Row Publishers, Inc.*, 1967 Trade Cas. ¶ 72,256 (N.D. Ill.). See also *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

⁴¹ The government later may be compelled to disclose information as to informers. See *Roviaro v. United States*, 353 U.S. 53 (1957); *Westinghouse Elec. Corp. v. Burlington*, 351 F.2d 762 (D.C. Cir. 1965); *United States v. Aluminum Ltd.*, 268 F. Supp. 758 (D.N.J. 1966); *United States v. First Nat'l Bank & Trust Co.*, 1961 Trade Cas. ¶ 70,074 (E.D. Ky.).

⁴² Steinhouse, *The Antitrust Investigation*, 29 OHIO ST. L.J. 330 (1968); Williams, *Investigations by the Department of Justice*, 29 ABA ANTITRUST SEC. 50 (1965).

⁴³ Williams, *Investigations by the Federal Trade Commission*, 29 ABA ANTITRUST SEC. 71 (1965).

⁴⁴ *FTC Procedures and Rules of Practice, Part 2—Nonadjudicative Procedures*, 3 TRADE REG. REP. ¶ 9807 (1972).

⁴⁵ See note 30 *supra*.

the right to sue the other party to the agreement at a later date for violation of the antitrust laws.⁴⁶ For instance, a manufacturer may need to practice an invention in order to stay in business. A patent license may be offered to him only with the condition that he buy products required in practicing the invention from the patentee—at a price in excess of what he can buy them for in the open market. Under these circumstances he may have to enter into the license agreement in order to survive.⁴⁷ Even though he knowingly becomes a party to an illegal agreement, the risk he incurs of being held in violation of the antitrust laws is minimal, and he probably creates a cause of action against the patentee on his own behalf.⁴⁷ The manufacturer, in addition, has a further alternative. In this circumstance the patentee is misusing his patent, thus the other manufacturer probably may practice the invention without a license. If he is then sued by the patentee, he could defend on the basis that the patent has been misused and that the patentee may not maintain an action for infringement during the period of the misuse.⁴⁸ This alternative obviously involves greater risk than would obtaining the license. In another context, if a competitor is discriminating on prices to the detriment of a manufacturer, the manufacturer probably may meet those prices⁴⁹ and retain its market position in that manner.

While self help may be useful in some situations, its utility has definite limits. In the first place, a manufacturer may not join an illegal conspiracy simply because its competitors are so involved.⁵⁰ In addition, there are some circumstances in which there is no effective right of self help. For instance, a franchisee whose valuable franchise has been terminated for an illegal reason may have no effective remedy in the marketplace.

VI. CONCLUSIONS

A manufacturer or other merchant who is aggrieved by violation of the antitrust laws has a number of alternatives available to him as to the manner in which he may attempt to redress the wrong. These include various forms of litigation, a limited ability to intervene in suits brought by others, complaints to the various agencies, and defensive action in the marketplace, among others. The type of action to be selected by the victim depends upon the nature of the violation and its effect on his business.

⁴⁶ *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

⁴⁷ Discretion probably dictates that he first write the patentee or prospective licensee and request that the offending provision be omitted from the license.

⁴⁸ *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944); *Kobey Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952), *cert. denied*, 344 U.S. 837 (1952).

⁴⁹ *National Dairy Prod. Corp. v. FTC*, 395 F.2d 517 (7th Cir. 1968), *cert. denied*, 393 U.S. 977 (1968); *Di-Wal, Inc. v. Fibreboard Corp.*, 1970 Trade Cas. ¶ 73,155 (N.D. Cal.); *LaRue, Meeting Competition and Other Defenses Under the Robinson-Patman Act*, 25 BUS. LAW. 1037 (1970).

⁵⁰ *See United States v. General Motors Corp.*, 384 U.S. 127 (1966).

However, the considerations go much further, including particularly the very practical problems created by engaging in long and protracted litigation with a strong adversary. The selection of the proper type of action involves a balancing of the considerations and presents a tremendous opportunity for counsel to exercise his ingenuity so as to chart a course which will redress the wrong without submerging the client in a morass of litigation and expense.