

Summer 1981

## Renewed Commitment to State Antitrust Enforcement and a State Policy of Competition: The Missouri Experience, A

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### Recommended Citation

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# MISSOURI LAW REVIEW

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Volume 46

Summer 1981

Number 3

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## A RENEWED COMMITMENT TO STATE ANTITRUST ENFORCEMENT AND A STATE POLICY OF COMPETITION: THE MISSOURI EXPERIENCE

JOHN ASHCROFT\*†

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†The author acknowledges the research assistance of Mr. Ronald L. Blunt and Mr. Robert E. Dolan, Jr. in the preparation of this Article.

## I. INTRODUCTION

Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.<sup>1</sup>

Our free enterprise system is based on a principle of competition, a principle recognized in both federal and state antitrust laws. Enforcing these laws promotes the existence of a competitive business climate; a climate which not only rewards industry, but also affords consumers a greater variety of choices, better quality products and services, and lower prices.

One of the most significant recent developments in antitrust enforcement in the United States is the resurgence of state antitrust enforcement as a productive counterpart to federal antitrust efforts. Prior to enactment of the Sherman Act of 1890,<sup>2</sup> at least thirteen states had some type of antitrust statute.<sup>3</sup> The Sherman Act was intended to "supplement the enforcement of the established rules of the common and statute law by the courts of the several States . . ." <sup>4</sup> After its enactment, however, states virtually abandoned their individual antitrust enforcement efforts—a 1956 survey revealed that only five states had filed antitrust suits in the preceeding twenty years.<sup>5</sup> A variety of reasons has been offered to explain this change, *e.g.*, inadequate investigative capabilities, a lack of full-time prosecutorial personnel, weak sanctions, fear of driving away industry, and powerful opposition by business interests.<sup>6</sup>

In the last decade, however, the United States has witnessed a strong revival in state antitrust enforcement.<sup>7</sup> This renewed interest can be at-

1. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.).

2. 15 U.S.C. §§ 1-7 (1976).

3. The states were Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, and Texas. H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 155 n.195 (1955). Before 1890, however, these states made little effort to enforce their antitrust statutes. *See generally* Jones, *Historical Development of the Law of Business Competition*, 35 *YALE L.J.* 905 (1926).

Six of these states also had constitutional prohibitions against trusts and monopolies: Kentucky, North Carolina, North Dakota, South Dakota, Tennessee, and Texas. H. THORELLI, *supra*, at 155 n.196. Eight other states had similar constitutional prohibitions: Arkansas, Connecticut, Georgia, Indiana, Maryland, Montana, Washington, and Wyoming. *Id.* n.194.

4. 21 *CONG. REC.* 2457 (1890).

5. Wood, *Resurgence of State Antitrust Action: Prices and Public Awareness*, 9 *ANTITRUST L. & ECON. REV.*, No. 4, at 41 (1977).

6. Rubin, *Rethinking State Antitrust Enforcement*, 26 *U. FLA. L. REV.* 653, 697-98 (1974). *See generally* H. THORELLI, *supra* note 3, at 156.

7. *See* Miles, *Current Trends in State Antitrust Enforcement*, 47 *AN-*

tributed to a number of factors, two of which are worthy of special mention. First, the state is a major purchaser of goods in the private marketplace. Total state government expenditures in fiscal year 1978 were \$180 billion, eight percent of the gross national product.<sup>8</sup> Because the state is a major consumer, anticompetitive behavior, which artificially raises market prices, significantly increases the cost of state government. This gives the state a direct interest in and motivation for antitrust enforcement. Second, state attorneys general are realizing that federal enforcement authorities are less likely to intervene where the impact of an illegal restraint of trade is focused within a single state.<sup>9</sup> Federal enforcement agencies simply do not have the resources to attack all localized restraints.<sup>10</sup> Rather than attempting to increase federal resources, state involvement seems to be a more reasonable, if not imperative, solution.

Irrespective of the reasons for this revival of state activity, the need for effective state antitrust enforcement in conjunction with federal enforcement is no longer a matter of debate.<sup>11</sup> Only with active state participation will we create the competitive climate necessary for our free enterprise system.<sup>12</sup>

This Article will focus on four major areas relevant to the state's role in antitrust enforcement. The first part will be a discussion of recent Missouri and federal legislation that has provided the state Attorney General with

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TITRUST L.J. 1343, 1344 (1979). See generally Project, *Reviving State Antitrust Enforcement: The Problems with Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547 (1979); Rubin, *supra* note 6; Wood, *supra* note 5.

8. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 288 (1980).

9. See Fellmeth, *Antitrust Enforcement by Local Prosecutors: Impediments and Prospects*, 14 CAL. W.L. REV. 1, 5-6 (1978). See generally Flynn, *Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement*, 4 J. CORP. L. 479 (1979).

10. See Flynn, *supra* note 9, at 481.

[I]t has become apparent that federal enforcement resources are limited and must be devoted to cases of major economic or geographic significance. The urge to displace competition by private agreement takes place regularly in local markets under local circumstances beyond the resources, interest, and, on occasion, jurisdiction of federal enforcement agencies.

*Id.* See generally Fellmeth, *supra* note 9.

11. Rahl, *State Antitrust Symposium: Introduction and Perspective*, 4 J. CORP. L. 475, 476. See generally Flynn, *supra* note 9; Miles, *supra* note 7; Rubin, *supra* note 6; Wood, *supra* note 5. A 1978 survey revealed that during 1977 states with active antitrust enforcement agencies found 700 matters warranting thorough investigation. Project, *supra* note 7, at 570.

12. "Antitrust is far too important to be left to the federal government alone; the states very definitely have a role to play, a role which can be crucial to the growth and protection of the business and economic climate of the state." Almstedt & Tyler, *State Antitrust Laws: New Directions in Missouri*, 39 MO. L. REV. 489, 520 (1974). See generally Flynn, *supra* note 9; Miles, *supra* note 7

increased powers. Against this statutory backdrop, the remainder of the Article will be devoted to three areas where state antitrust enforcement units are focusing their attention and resources: first, state involvement as plaintiff in treble damages litigation and other actions under federal antitrust laws; second, criminal and civil enforcement actions under state antitrust laws, including *parens patriae* actions pursuant to section 4c of the Clayton Act;<sup>13</sup> and third, out-of-court activities designed to educate the public and to promote a strong policy of competition in the governmental community.

The State of Missouri Antitrust Division's activity in these areas since 1976 will be used for analogy and example.<sup>14</sup> This survey of Missouri antitrust enforcement is intended to illustrate the benefits to be derived from a strong policy of competition at the state level, as well as to identify the areas within which an active state antitrust enforcement unit can operate.

## II. RECENT ANTITRUST LEGISLATION

### A. *Missouri Enactments*

Several states began to revise and update their antitrust laws during the 1970s; the State of Missouri was no exception.<sup>15</sup> In 1974 the Missouri

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13. 15 U.S.C.A. § 15c (West Cum. Supp. 1981).

14. Established in 1974 as a separate division, the Antitrust Division of the Missouri Attorney General's Office has been an active part of that office since the author became Attorney General in 1976. The antitrust staff now consists of four full-time attorneys and one full-time paralegal. Future plans call for the merger of the Consumer Protection Division and the Antitrust Division to form the Trade Offense Division.

15. See ALASKA STAT. §§ 45.50.562-.596 (1980); ARIZ. REV. STAT. ANN. §§ 44-1401 to -1413 (Cum. Supp. 1980-1981); CAL. BUS. & PROF. CODE §§ 16700-16760 (West 1964 & Cum. Supp. 1981); CONN. GEN. STAT. ANN. §§ 35-24 to -45 (West Cum. Supp. 1981); HAWAII REV. STAT. §§ 480-1 to -37 (1976 & Supp. 1980); ILL. ANN. STAT. ch. 38, §§ 60-1 to -11 (Smith-Hurd 1977 & Cum. Supp. 1980-1981); IOWA CODE ANN. §§ 553.1-.17 (West Cum. Supp. 1980-1981); KAN. STAT. ANN. §§ 50-101 to -120 (1976); ME. REV. STAT. ANN. tit. 10, §§ 1101-1107 (1980); MD. COM. LAW CODE ANN. §§ 11-201 to -213 (1975 & Cum. Supp. 1980); MICH. COMP. LAWS ANN. §§ 445.701-.767 (1967 & Cum. Supp. 1980-1981); MINN. STAT. ANN. §§ 325D.49-.66 (West Cum. Supp. 1981); RSMO §§ 416.011-.161 (1978); MONT. REV. CODES ANN. §§ 51-501 to -506, -519 to -524 (Cum. Supp. 1977); NEB. REV. STAT. §§ 59-801 to -830 (1978); N.H. REV. STAT. ANN. §§ 356:1-.14 (1966 & Supp. 1977); N.J. STAT. ANN. §§ 56:9-1 to -19 (West Cum. Supp. 1980-1981); OHIO REV. CODE ANN. §§ 1331.01-.99 (Page 1979 & Supp. 1980); OR. REV. STAT. §§ 646.705-.836 (1977); S.D. CODIFIED LAWS ANN. §§ 37-1-3.1 to -22 (1977); UTAH CODE ANN. §§ 76-10-911 to -926 (1979); VA. CODE §§ 59.1-9.1 to .17 (Cum. Supp. 1980); WASH. REV. CODE ANN. §§ 19.86.010-.920 (1978); W. VA. CODE §§ 47-18-1 to -23 (1980); WIS. STAT. ANN. §§ 133.01-.19 (West Cum. Supp. 1980-1981).

For a discussion of these statutes, see Project, *supra* note 7, at 616-20.

General Assembly undertook the first complete overhaul of the state's antitrust laws in sixty-seven years;<sup>16</sup> the result was enactment of the Missouri Antitrust Law of 1974.<sup>17</sup>

The need for revision was created by several apparent inadequacies in Missouri's prior law. Prior to 1974, only articles of commerce were subject to the law, leaving the broad range of restraints of trade occurring in connection with services beyond the control of the state.<sup>18</sup> In addition, the earlier law did not prohibit unilateral monopolization or unilateral attempts to monopolize; it proscribed only those restraints of trade resulting from a contract, agreement, or combination.<sup>19</sup>

The enforcement and penalty provisions of the prior law were also inadequate. The state was limited to injunctive relief or the imposition of fines and imprisonment.<sup>20</sup> Because of the statutory limit, monetary fines proved to be of little deterrent value since the penalty seldom was equal to the financial gain of the antitrust violation.<sup>21</sup> Imprisonment was imposed rarely.<sup>22</sup>

16. Missouri's pre-1974 antitrust laws, RSMO §§ 416.010-.400 (1969), derived from thorough revisions enacted in 1907. 1907 Mo. Laws 377-84, §§ 8967-8977. For a discussion of the historical development of these laws, see Almstedt & Tyler, *supra* note 12, at 489-91.

17. RSMO §§ 416.011-.161 (1978). For an in-depth review of these provisions, see Almstedt & Tyler, *supra* note 12.

18. RSMO §§ 416.010-.040, .120 (1969). See, e.g., *State v. Green*, 344 Mo. 985, 988, 130 S.W.2d 475, 476-77 (1939) ("Laundries do not sell any articles which come within the terms of the statute. True, the operation of a laundry is a business. However, it sells a service and nothing more.").

19. RSMO §§ 416.010-.040 (1969). See, e.g., *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (En Banc 1909) (a single business which attempted to monopolize an area of trade in intrastate commerce was not subject to prosecution), *aff'd*, 224 U.S. 270 (1912). But see RSMO § 416.120 (1969) (unilateral unfair discrimination).

The conspiracy element of an antitrust action is often the most difficult element to prove. Without the "smoking gun" document specifically establishing a conspiracy, it is difficult to show that the defendants were acting collusively instead of independently. Where unilateral anticompetitive activity is prohibited, the burden of proof for the state is easier to maintain. In fact, the state has the added advantage of needing to prove only unilateral activity for a conviction even when conspiring multiple defendants are involved.

20. See RSMO §§ 416.050, .130, .150, .260 (1969).

21. The maximum fine for most violations under prior law was \$5,000. See *id.* §§ 426.050, .130. The exception was a conviction for unfair discrimination, which carried a maximum fine of \$10,000. *Id.* § 415.150. The revenues which a defendant could obtain from antitrust violations usually outweighed the maximum fines. See Almstedt & Tyler, *supra* note 12, at 506. See also notes 209-21 and accompanying text *infra*.

22. Imprisonment under the old Missouri provisions could not exceed one

Furthermore, the state was denied adequate investigative procedures for enforcement of the prior law. The Attorney General was required to seek a special hearing before a state supreme court judge to compel the testimony of witnesses and production of documents.<sup>23</sup> This procedure proved to be a serious impediment to the efficient and expeditious investigation required for successful antitrust enforcement.<sup>24</sup>

The 1974 revision of the state's antitrust laws addressed these and other inadequacies, repealing the old law and replacing it with Missouri Revised Statutes sections 416.011-.161.<sup>25</sup> The Missouri Antitrust Law is, in essence, a "little Sherman Act" and a "little section 3 Clayton Act." As in section 1 of the Sherman Act, the new law prohibits contracts, combinations, or conspiracies which restrain trade or commerce.<sup>26</sup> The 1974 Missouri law parallels section 2 of the Sherman Act by forbidding monopolization, attempts to monopolize, or conspiracies to monopolize.<sup>27</sup> The new Missouri counterpart to section 3 of the Clayton Act<sup>28</sup> forbids exclusive dealings and tying arrangements which may "substantially lessen competition or tend to create a monopoly in any line of trade or commerce."<sup>29</sup>

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prisonment sanctions, apparently because of the public's perception that anti-trust violations were not crimes of violence or of moral turpitude. See Almstedt & Tyler, *supra* note 12, at 491. See also note 216 and accompanying text *infra*.

23. RSMO § 416.310 (1969).

24. Successful investigation is often the key to successful enforcement of the antitrust laws. The investigative procedures of the prior law were burdensome and time-consuming. The expanded investigative procedures of the 1974 revision are among the most innovative aspects of the new law. See notes 36-56 and accompanying text *infra*.

25. (1978). See generally Almstedt & Tyler, *supra* note 12.

26. Compare RSMO § 416.031.1 (1978) with 15 U.S.C. § 1 (1976). "Trade or commerce" means any economic activity involving or relating to any commodity or service. RSMO § 416.021(4) (1978).

27. Compare RSMO § 416.031.2 (1978) with 15 U.S.C. § 2 (1976). The new Missouri statute prohibits unilateral monopolization or unilateral attempts to monopolize. Thus, the conspiracy element need not be proven for these violations. See note 19 *supra*.

28. 15 U.S.C. § 14 (1976).

29. RSMO § 416.031.3 (1978). The United States Supreme Court has applied a lower threshold standard under § 3 of the Clayton Act than that used under § 1 and § 2 of the Sherman Act. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *IBM Corp. v. United States*, 298 U.S. 131 (1936). This lower standard should be the same as that applied under RSMO § 416.031.3 (1978).

Most Clayton Act violations would be a violation of the Sherman Act, but the Clayton Act covers a broader area than the Sherman Act. It is intended to arrest, in its incipiency, conduct which might develop into a Sherman Act violation. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 432 (1977). The same conclusions logically apply to the new Missouri provisions.

The new Missouri law gives the Attorney General greater enforcement powers at the state level. These powers were effected by first, creating stiffer penalties and providing procedures for more efficient criminal prosecutions;<sup>30</sup> second, granting the Attorney General broad, civil investigative demand (CID) powers;<sup>31</sup> and third, establishing an antitrust revolving fund.<sup>32</sup>

The new law makes it a misdemeanor to violate any provision of subsections 1 or 2 of section 416.031, *i.e.*, the "little Sherman Act."<sup>33</sup> Reflecting the penalty provisions of the Sherman Act, section 416.051 increased the maximum criminal fine from the prior law's \$5,000 to \$50,000,<sup>34</sup> allowing imposition of fines more likely to be commensurate with the crime and, thus, of greater deterrent value. The new law also provides for imprisonment for a term not to exceed one year.<sup>35</sup> All of these sanctions take on added importance when considered with provisions of the new law specifically authorizing the Attorney General to investigate all suspected state criminal antitrust violations, commence and prosecute all violations, and participate in any grand jury investigation of suspected criminal violations of the state antitrust laws.<sup>36</sup> These provisions make it more likely that prosecution for violations will ensue and that these sanctions will be imposed. The 1974 law also provides for the issuance of a civil contempt citation against any person found in contempt of a court order enforcing the

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30. RSMO § 416.051 (1978).

31. *Id.* § 416.091.

32. *Id.* § 416.081.

33. *Id.* § 416.051.1. Criminal penalties are prescribed only for violations of these subsections because the law is fairly definite and the illegal activity relatively easy to detect. At the federal level, the Justice Department also has a policy of criminally prosecuting only violations which amount to *per se* violations. *See generally* Almstedt & Tyler, *supra* note 12, at 506; Project, *supra* note 7, at 639.

34. RSMO § 416.051.1 (1978). Missouri's maximum criminal fine of \$50,000 applies to both individuals and corporations.

The Sherman Act was amended in 1974 to increase the maximum criminal fine to \$100,000 for individuals and \$1 million for corporations. Act of Dec. 21, 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (amending 15 U.S.C. §§ 1-2 (1970)).

35. RSMO § 416.051.1 (1978). The maximum imprisonment allowable is the same as under the prior law. *See* note 22 *supra*. The maximum term for imprisonment under the Sherman Act is three years. 15 U.S.C. §§ 1-2 (1976).

36. RSMO § 416.051.2 (1978). This section authorizes the Attorney General to participate in any grand jury investigation of a suspected violation of the Missouri Antitrust Law, even though the use of the grand jury is not referred to specifically by the language of the statute. It was the intent of the legislature in the third sentence of the statute to empower the Attorney General with the same authority as a county prosecuting attorney. *See* II HOUSE J., 77th Gen. Assem., 2d Reg. Sess. 1363 (1974). *See also* Almstedt & Tyler, *supra* note 12, at 507 n.116. Under Missouri law, a county prosecuting attorney has the right to appear and participate in grand jury proceedings. RSMO §§ 540.130, 140 (1978).



substantive provisions of that law; the civil contempt fine can be as much as \$20,000.<sup>37</sup> Not to be ignored are the other significant civil remedies available under the new statute, which include treble damages actions by the state and other persons,<sup>38</sup> injunctive relief,<sup>39</sup> and divestiture.<sup>40</sup>

Precomplaint civil investigative powers quite often are the key to successful state antitrust enforcement.<sup>41</sup> Under the 1974 law, the Attorney General receives broad investigative authority through the use of the civil investigative demand (CID).<sup>42</sup> The enactment is modeled after the CID provisions of the Antitrust Civil Process Act of 1962<sup>43</sup> whereby the United States Attorney General, whenever he has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to a civil antitrust investigation, may, prior to the institution of a civil or criminal proceeding, issue in writing and cause to be served on that person a CID requiring such person to produce the material for examination.<sup>44</sup> Federal CIDs have been upheld almost

37. *Id.* § 416.051.3.

38. *Id.* § 416.121.1(1).

39. *Id.* §§ 416.061.2, .071.1, .121.1(2).

40. *Id.* § 416.071.2.

41. This point was recognized in the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 343-44 (1955), quoted in Rubin & Malet, *State Initiatives in Antitrust Investigation*, 4 J. CORP. L. 513, 530 n.93 (1979):

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

42. RSMO § 416.091.1 (1978) provides:

Whenever the attorney general has reason to believe that a person under investigation may be in possession, custody, or control of any books, documents, records, writings or tangible things, hereinafter referred to as "documentary material," relevant to a civil investigation of a violation of section 416.031, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for examination.

At least 28 other states have enacted a similar form of antitrust precomplaint discovery mechanism. See Project, *supra* note 7, at 670-75.

43. 15 U.S.C.A. §§ 1311-1314 (West Supp. Pamphlet 1981).

44. *Id.* § 1312. Initially, this CID power was narrowly confined to the documents of corporations that were suspected of antitrust violations. See Rashid, *New Trends in Antitrust Investigations*, 37 ANTITRUST L.J. 188, 192

without exception since 1949 when the United States Supreme Court, in *United States v. Morton Salt Co.*,<sup>45</sup> equated the investigative power of an administrative agency with that of a grand jury, *i.e.*, the Justice Department can investigate merely on suspicion that the antitrust laws have been violated.<sup>46</sup> The only significant difference between the federal and Missouri CIDs is the absence of a provision in the Missouri Antitrust Law comparable to that added to the federal law by Title I of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,<sup>47</sup> allowing the CID to be made on "any person."<sup>48</sup> The Missouri law limits the use of the CID to "targets" of the investigation.<sup>49</sup>

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(1968). In 1976 amendments were added by Title I of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 to expand the CID provisions to cover any information relevant to a civil antitrust investigation in the possession of any person. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, §§ 101-106, 90 Stat. 1383 (1976) (amending 15 U.S.C. §§ 1311-1314 (1970)).

45. 338 U.S. 632 (1950).

46. In *Morton Salt*, Justice Jackson, writing for the majority, stated:

The only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. . . . [The power of an administrative agency is] analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

*Id.* at 642-43.

The constitutionality of the CID provisions of the Antitrust Civil Process Act has been challenged unsuccessfully on fourth amendment grounds. *See Hyster Co. v. United States*, 338 F.2d 183 (9th Cir. 1964); *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam*, 325 F.2d 1018 (8th Cir. 1964). Challenges based on statutory construction also have been unsuccessful. *Petition of Gold Bond Stamp Co.*, 221 F. Supp. at 397 (court rejected any construction of the Antitrust Civil Process Act which would not fulfill the broad purposes to allow Attorney General to ascertain whether the antitrust laws have been violated and to enable him to fashion a proper complaint).

Challenges at the state level to CID provisions also have been rejected. *See, e.g., In re Yankee Milk, Inc.*, 362 N.E.2d 207 (Mass. 1977) (rejected a challenge based on the burden of compliance); *People v. Anaconda Wire & Cable Co.*, 19 A.D.2d 867, 244 N.Y.S.2d 139 (1963) (rejected a challenge based on a requirement that the state must prove the likelihood that the antitrust violation exists). *See also Mobil Oil Corp. v. Killian*, 30 Conn. Supp. 87, 301 A.2d 562 (Super. Ct. 1973); *In re Southern Bell Tele. & Tele.*, 30 N.C. App. 585, 227 S.W.2d 645 (1973).

47. 15 U.S.C.A. §§ 1311-1314 (West Supp. Pamphlet 1981).

48. *Id.* See note 44 *supra*.

49. RSMO § 416.091.1 (1978). See note 42 *supra*.

The 1974 Missouri law includes several requirements for use of the CID that specify what the demand must contain and what it cannot contain,<sup>50</sup> the manner in which the CID is to be served,<sup>51</sup> and where the materials are to be produced.<sup>52</sup> In addition, certain safeguards are imposed to prevent abuse of the CID power. The statute provides that a member of the Attorney General's staff must take possession of the materials, act as custodian of the documents, and not show such materials to any person who is not a member of the Attorney General's staff without consent from the person who produced the materials.<sup>53</sup> There also are provisions for affording the person on whom a demand is served a procedure for opposing the production of documents.<sup>54</sup> Finally, the new law allows the Attorney General to petition the trial court for an order of enforcement to compel compliance with the CID; any disobedience of such an order is punishable as contempt.<sup>55</sup>

The CID provision of the Missouri Antitrust Law is an extremely important and powerful tool in the enforcement of a strong policy of competition in the State of Missouri. Generally, it is the state's practice initially to request voluntary disclosure from witnesses and prospective defendants and to issue CIDs only in the event that more information is needed. The record regarding the use of CIDs by the state demonstrates that the power has been exercised in good faith.<sup>56</sup> Demands generally are limited in scope and clearly pertinent to suspected illegal behavior. When possible, in cases involving a substantial number of documents, the state has been willing to review the documents while they remain in the hands of the original custodian to avoid serious business interruption.

Inadequate funding historically has been a major reason for the lack of effective antitrust enforcement at the state level.<sup>57</sup> The Missouri Antitrust Law offers a partial response to this problem with the creation of an "antitrust revolving fund."<sup>58</sup> The antitrust revolving fund is based on legislative authorization to finance antitrust enforcement with the monies recovered by the state in previous antitrust litigation. The new Missouri statute provides that all costs and expenses incurred by or under the office of the At-

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50. RSMO § 416.091.2-.3 (1978).

51. *Id.* § 416.091.4-.5.

52. *Id.* § 416.091.7.

53. *Id.* § 415.091.6, .8.

54. *Id.* § 416.091.14-.16.

55. *Id.* § 416.091.13, .16.

56. There have been no successful challenges to Missouri's CID power since enactment of the Missouri Antitrust Law of 1974. For a discussion of state usage of CID provisions, see Miles, *supra* note 7, at 1347.

57. See Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEX. L. REV. 753, 764 (1961). See also Almstedt & Tyler, *supra* note 12, at 512; Miles, *supra* note 7, at 1352.

58. RSMO § 416.081 (1978).

torney General in investigation, prosecution, or enforcement of the state and federal antitrust laws may be paid from the fund.<sup>59</sup> Fourteen states have antitrust revolving funds;<sup>60</sup> total state appropriations for these funds in fiscal year 1979 exceeded \$1 million.<sup>61</sup> Antitrust revolving funds generally are meant to be self-sufficient. It is important, however, that annual legislative appropriations from a general fund be made to assist in criminal and injunctive enforcement which does not bring the state significant monetary recoveries and to help fund the enforcement unit in years of small recoveries.<sup>62</sup>

### B. Federal Enactments

Recent federal legislation perhaps has done more to revive interest in state antitrust enforcement than any other single factor. In 1974 Congress passed legislation which amended the Sherman Act by increasing the

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59. *Id.* § 416.081.2 provides: "Such money, after appropriation pursuant to law, shall be available for the payment of all costs and expenses incurred by the attorney general in investigation, prosecution or enforcement of the provisions of . . . [this Act] or federal laws relating to antitrust, trade regulation, restraint of trade or price fixing activities."

Under the Missouri scheme, the Antitrust Revolving Fund consists, in part, of money transferred by the General Assembly from the general revenue fund. In addition, 10% of all recoveries obtained by the Attorney General through state antitrust litigation, whether by settlement or by judgment, shall be paid into the Fund. Furthermore, all moneys recovered as court costs are credited to the Antitrust Revolving Fund. *Id.* § 416.081.1, .3. The moneys are paid out of the Fund by the State Treasurer on warrants issued by the State Auditor, as certified by the State Comptroller, after verified vouchers are submitted by the Attorney General. *See generally* Almstedt & Tyler, *supra* note 12, at 511-12.

60. ARIZ. REV. STAT. ANN. § 44-1531.01 (West Cum. Supp. 1980-1981); CAL. GOV'T CODE § 12526 (West 1980); CONN. GEN. STAT. ANN. § 35-32a (West Cum. Supp. 1981); FLA. STAT. ANN. § 1653 (West Supp. 1981); KAN. STAT. ANN. § 75-715 (1977); MASS. GEN. LAWS ANN. ch. 93, § 14 (West Cum. Supp. 1981); RSMO § 416.081 (1978); NEV. REV. STAT. § 598A.260 (1976); N.J. STAT. ANN. § 56:9-19 (West Cum. Supp. 1980-1981); OHIO REV. CODE ANN. § 109.82 (Page 1978); OR. REV. STAT. §§ 180.095-.097 (1979); UTAH CODE ANN. § 76-10-922 (1979); WASH. REV. CODE ANN. §§ 43.10.210-.220 (West Cum. Supp. 1981); W. VA. CODE § 47-18-19 (1980).

61. Only four of these states appropriated funds for fiscal year 1979: Arizona (\$55,394); Florida (\$829,172); Missouri (\$52,836); Oregon (\$156,680). NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ANTITRUST REVOLVING FUNDS (1979).

62. Some state antitrust revolving funds are meant to establish self-sufficient antitrust divisions of attorneys general offices. The "ten percent" figure in Missouri, however, is at best a partial solution to the funding problem. Additional annual appropriations by the General Assembly are necessary to ensure the viability of Missouri's antitrust enforcement efforts. *See generally* Miles, *supra*

criminal penalty for violation of the Act from a misdemeanor to a felony, increasing maximum criminal fines from \$50,000 to \$1 million for corporations and \$100,000 for other persons, and increasing maximum criminal imprisonment from one year to three years.<sup>63</sup> State antitrust enforcement agencies can use these increased penalties to deter violations encompassed by the Sherman Act. One year later, Congress enacted the Consumer Goods Pricing Act of 1975,<sup>64</sup> which repealed federal authorization of state laws allowing "fair trade" vertical price-fixing agreements. This enables the state to attack anticompetitive behavior that previously could be protected.<sup>65</sup> In addition to these important changes, two other recent congressional enactments remain the most significant for state antitrust purposes—the Crime Control Act of 1976<sup>66</sup> and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>67</sup>

For most states, the Crime Control Act has been the biggest stimulant that state antitrust enforcement has ever received. The Act created a \$30 million, three-year federal funding program for state antitrust enforcement agencies.<sup>68</sup> The purpose of the program was to provide funds for the

63. Act of Dec. 21, 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (amending 15 U.S.C. §§ 1-2 (1970)).

64. Pub. L. No. 94-145, §§ 2-4, 89 Stat. 801 (amending 15 U.S.C. § 45(a) (1970)).

65. The Miller-Tydings Act of 1937 and the McGuire Act of 1952 permitted states to allow manufacturers to set minimum resale prices for their products by the states enacting "fair trade laws." This provided an exemption for activity that had otherwise been found to be an antitrust violation. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (minimum resale price is per se illegal). See also *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). Compare *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) with *United States v. General Elec. Co.*, 272 U.S. 476 (1926). Through enactment of the Consumer Goods Pricing Act of 1975, Congress repealed from the federal antitrust laws all language authorizing states to enact fair trade laws.

During consideration of the bill in Congress, Rep. Barbara Jordon stated that the existence of fair trade laws meant "at least \$2 billion additional cost to consumers." 724 ANTITRUST & TRADE REG. REP. (BNA) A-6 (July 29, 1975). Senator Edward Brooke quoted from a 1970 Justice Department study indicating that fair trade laws increased retail prices as much as 37% on many items. Senator Brooke also cited testimony of the California Attorney General where it was stated that California consumers lost \$6.5 billion annually because of fair trade laws. 742 ANTITRUST & TRADE REG. REP. (BNA) A-1 (Dec. 9, 1975). See generally Engman, *Case for Repealing "Fair Trade,"* 7 ANTITRUST L. & ECON. REV., No. 4, at 79 (1975).

66. Pub. L. No. 94-503, § 116, 90 Stat. 2415 (amending 42 U.S.C. § 3739 (1976)).

67. Pub. L. No. 94-435, § 301, 90 Stat. 1394-95 (amending 15 U.S.C. §§ 15c-15f (1976)).

68. *Missouri Consumer Rec. 23674-75* (1976) (remarks of Sen. Morgan).

development in each state of a viable, self-sustaining, in-house antitrust enforcement program.<sup>69</sup> To date, \$21 million has been awarded to forty-five states, the District of Columbia, and Puerto Rico; the State of Missouri has received \$489,050.<sup>70</sup>

This "seed money" has funded the creation of an antitrust unit in the attorney general's offices in twenty-five states that previously had none.<sup>71</sup> Overall, the grant program has added 267 persons to state antitrust offices, including ninety-nine full-time attorneys.<sup>72</sup> These federal funds have helped the State of Missouri staff its Antitrust Division with four full-time attorneys and one paralegal.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 has provided for cooperation between state enforcement units and federal enforcement units by allowing the state attorneys general access to information concerning violations under federal investigation. This Act adds section 4F to the Clayton Act.<sup>73</sup> The new section provides for two types of disclosures to state attorneys general—mandatory disclosures and disclosures made on request. The mandatory disclosure provision, subsection (a), states that whenever the United States Attorney General has brought an action under the antitrust laws and has reason to believe that a

69. *Id.* Senator Morgan remarked:

[T]his amendment will improve that situation, and it will do so in a manner agreeable to all those of us who believe strongly in principles of States' rights. The States are ideally situated to protect the rights of the consumer, the small businessman, and the honest businessman of any size. By means of this amendment, we will give the States the funds to make a beginning.

*Id.* at 23672. A spokesman for the National Association of Attorneys General concluded:

These federal funds are seeds being planted in the fields of the 50 states where antitrust will spring forth and grow to maturity. Our free enterprise system will be made a bit more free and price fixers will have a graver risk of being caught. Antitrust violations which injure small businessmen and consumers in a small locality are much more likely to be protected with the explosive growth in antitrust enforcement resulting from the planting of these seeds.

830 ANTITRUST & TRADE REG. REP. (BNA) D-2 (Sept. 15, 1977).

70. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ANTITRUST REVOLVING FUNDS 1-3 (March 1978). Release of the remaining \$9 million is in dispute. The Justice Department's position is that the intent of Congress to establish a three-year seed money program has been satisfied and that the states can now sustain their antitrust programs with state appropriations alone. 895 ANTITRUST & TRADE REG. REP. (BNA) D-3 (Jan. 4, 1979).

71. 830 ANTITRUST & TRADE REG. REP. (BNA) D-2 (Sept. 15, 1977).

72. Project, *supra* note 7, at 592.

73. 15 U.S.C. § 15f (1976).

state attorney general would be entitled to bring an action based on substantially the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to the state attorney general.<sup>74</sup> The provision concerning disclosures made on request, subsection (b), provides that the United States Attorney General shall, on request by a state attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant to an actual or potential cause of action under the antitrust laws.<sup>75</sup>

Despite the mandatory nature of subsection (a), the Justice Department's Antitrust Division has made sparing use of the provision.<sup>76</sup> Subsection (b) has been invoked several times by the states.<sup>77</sup> The Justice Department has drafted guidelines for both types of disclosures to meet the purpose of the statute, while at the same time ensuring against broad and premature disclosures of information.<sup>78</sup> The legislative history of the statute has been interpreted by the Justice Department as suggesting that certain materials, such as those produced in response to a CID, are precluded from disclosure.<sup>79</sup>

74. 15 U.S.C. § 15f(a) (1976). The disclosure provisions of § 15f apply only where there exists an actual or potential cause of action under the Clayton Act.

75. 15 U.S.C. § 15f(b) (1976).

76. Project, *supra* note 7, at 596. See also 892 ANTITRUST & TRADE REG. REP. (BNA) D-7 (Dec. 7, 1978).

77. Project, *supra* note 7, at 596.

78. See 892 ANTITRUST & TRADE REG. REP. (BNA) D-7 (Dec. 7, 1978). Assistant Attorney General John H. Shenefield, then head of the Antitrust Division of the United States Justice Department, stated:

It is our view that Section 4F(a) of the [Clayton] Act contemplates more than routine notice to the states of federal antitrust actions. Instead, it requires the Antitrust Division to make a judgment on the appropriateness of notification along certain lines. Among the factors we will consider will be: the factual circumstances of the alleged violation, the posture of the state as a potential damage claimant under existing law, and, generally, the likely effect of the alleged violation on cognizable state interests.

Section 4F(b) is also a valuable aid. . . . Our goal is to support the overall effectiveness of antitrust enforcement, whether through state or federal actions, and the idea behind our guidelines is to strike the required balance between disclosure and confidentiality that best achieves this.

*Id.*

79. Project, *supra* note 7, at 596. See also 822 ANTITRUST & TRADE REG. REP. (BNA) D-2 (July 14, 1977). For the legislative history of 15 U.S.C. § 15f (1976), see H.R. REP. NO. 94-499, 94th Cong., 2d Sess. 17, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2586.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 adds yet another apparently powerful legislative weapon to the arsenal of state antitrust enforcement agencies—*parens patriae* actions.<sup>80</sup> The *parens patriae* provisions authorize state attorneys general to secure monetary relief on behalf of natural persons residing in the state who have been injured by violations of the antitrust laws.<sup>81</sup> The purpose of the *parens patriae* legislation was to create an effective recourse for injured consumers of low-cost items.<sup>82</sup>

Previously, consumers of low-cost items were thought to be without an effective antitrust remedy.<sup>83</sup> In such cases, the cost of initiating and con-

80. 15 U.S.C.A. § 15c (West Cum. Supp. 1981).

81. *Id.* This section codifies the common law established in Georgia v. Pennsylvania R.R., 324 U.S. 439 (1944), where the United States Supreme Court recognized the authority of the state to sue as *parens patriae* for violations of the antitrust laws if seeking injunctive relief. The Court said:

[The state] as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

*Id.* at 451. The need for legislative revision judicially was acknowledged in California v. Frito-Lay, Inc., 474 F.2d 774, 777 (9th Cir. 1973), cert. denied, 412 U.S. 908 (1973), where the court ruled that the Clayton Act did not authorize recovery of damages in *parens patriae* actions, but nonetheless invited legislative action to change the situation. The court said, "[I]f the state is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation . . ." *Id.*

82. H.R. REP. NO. 94-499, 94th Cong., 2d Sess. 4, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2573-74. The House Committee on the Judiciary reported:

Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws. Nonetheless, Federal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers. This lack of an effective consumer remedy sometimes results in the unjust enrichment of antitrust violators and undermines the deterrent effect of the treble damage action. . . . [The Hart-Scott-Rodino Antitrust Improvements Act of 1976] fills this gap by providing the consumer an advocate in the enforcement process—his State attorney general.

*Id.* See generally Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976); Hill, *The Present and Future Status of Parens Patriae Litigation from the Plaintiff's Viewpoint*, 47 ANTITRUST L.J. 1375 (1979); Comment, *Parens Patriae Antitrust Actions for Treble Damages*, 14 HARV. J. LEGIS. 328 (1977).

83. See Project, *supra* note 7, at 598.



ducting a private antitrust suit generally far outweighed the potential recovery to a single consumer, *i.e.*, while the total monetary damage resulting from an illegal restraint of trade oftentimes is large, the damage to each individual consumer often is comparatively small.<sup>84</sup> Consumers had found little relief by way of class actions under the Federal Rules of Civil Procedure due to the burdensome requirements of Rule 23.<sup>85</sup>

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84. H.R. REP. NO. 94-499, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2575-76. The House Committee on the Judiciary reported:

Under § 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action. In most instances, however, an individual law suit by an injured consumer is, as a practical matter, out of the question. If, for example, a price-fixing conspiracy results in an overcharge of a dollar on a relatively low priced consumer item, and 50 million such items are sold, the aggregate impact of the conspiracy upon consumers and the illegal profits of the price-fixers are not insignificant—at least \$50 million. Yet no single consumer could practically be expected to bring suit. He would have no investigative resources—or incentive—to discover the conspiracy; should he become aware of the overcharge, he will almost certainly have no proof that he purchased the item at a particular time, place and price; he will quite obviously have neither the incentive nor the resources to engage in protracted and extremely costly litigation to recover his tiny individual stake.

*Id.* Successful *parens patriae* actions by the State of Missouri have involved, for the most part, the retail sale of gasoline. For a discussion of some of these cases, see notes 238-45 and accompanying text *infra*.

85. FED. R. CIV. P. 23. The rule establishes four prerequisites to the formation of a class: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Id.* 23(a).

Rule 23 also imposes requirements of notice and manageability. Many courts have found that large consumer classes predicated on small individual claims present insurmountable problems of manageability in the conduct of the litigation, especially with respect to proper notice. *See, e.g.*, Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970). In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the United States Supreme Court interpreted Rule 23 as requiring class action plaintiffs to provide individual prelitigation notice to all identifiable members of the class regardless of the cost of providing such notice. The plaintiff in *Eisen* had claimed personal damages of only \$70 while seeking to represent a class of as many as 6 million persons who allegedly were injured as a result of the same violations of the antitrust and securities laws. It was estimated that the cost of giving individual notice to all identifiable members of the class would approximate \$315,000. The Court, in ruling that the prohibitive cost did not excuse the need for plaintiff to give notice, effectively eliminated the Rule 23 class action as a

Under *parens patriae*, the state can sue on behalf of those consumers for whom individual suits would not be economical. The Act provides that monetary recovery in a *parens patriae* action is to be distributed to the injured consumers in such a manner as the district court may authorize or be deemed a civil penalty by the court and deposited with the state as general revenue.<sup>86</sup> Both distribution methods are subject to the requirement that each injured consumer must be afforded a reasonable opportunity to secure his appropriate portion of the net monetary recovery.<sup>87</sup> It is also important to note that if injured persons wish to exclude themselves from the *parens patriae* action, they may do so and thereby avoid the res judicata effect of the action.<sup>88</sup>

One of the most innovative aspects of the *parens patriae* legislation is its provision on computation of damages. Under the Act, the state may prove and assess damages in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by other reasonable systems of estimating aggregate damages as the court may permit.<sup>89</sup> The state does not have to prove separately the individual claim of, or amount of damage to, each injured person on whose behalf the suit was brought;<sup>90</sup> this would be a practicably impossible task.

Attempts have been made to declare the *parens patriae* legislation unconstitutional. Attacks generally have focused on the argument that no article III case or controversy exists since the state, as the plaintiff, was not injured, or on the argument that article II prohibits the state from pursu-

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feasible means for recovery by a large class of individuals where each sustains relatively minor damages. See generally Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971); *Symposium on Antitrust Class Actions*, 41 ANTITRUST L.J. 229 (1972).

86. 15 U.S.C. § 15e (1976).

87. *Id.* See Hill, *supra* note 82, at 1379. Recovery under these actions can be significant. To illustrate, the State of Colorado brought a *parens patriae* action six months after passage of a new antitrust statute. The action was against seven retail petroleum outlets in a small community of approximately 4,000 residents. Even though the state was limited to seeking damages for the six-month time period that the statute had been effective, the recovery in the case returned approximately \$75 per household to each claimant in the area.

88. 15 U.S.C.A. § 15c(b)(2) (West Cum. Supp. 1981). This section provides protection for the potential claimant's interest in prosecuting his own action. Any person can exclude his claim from the *parens patriae* action by filing notice of intent to do so within 60 days after the original notice of the suit has been given. Failure to file such a notice of intent within the time allowed will result in a potential claimant being bound by the result of the *parens patriae* case.

89. 15 U.S.C. § 15d (1976).

90. *Id.* See H.R. REP. NO. 94-499, 94th Cong., 2d Sess. 16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2585-86.

ing a federally created civil penalty. Both arguments have been rejected by the courts.<sup>91</sup>

Despite the apparent attractiveness of the *parens patriae* action for state attorneys general, the power has been little used.<sup>92</sup> One reason for this sparse use is the dampening effect of *Illinois Brick Co. v. Illinois*,<sup>93</sup> in which the United States Supreme Court held that indirect purchasers have no right to recover damages for illegal price-fixing arrangements.<sup>94</sup> In *Illinois Brick*, the defendant company, acting under a horizontal price-fixing agreement, sold bricks to various contractors; the contractors subsequently used the bricks in buildings constructed for the state. The State of Illinois sued the Illinois Brick Company alleging that the state was injured within the meaning of section 4 of the Clayton Act because of the illegal overcharges resulting from the price fix which were passed on to the state by way of the contractors. This allegation was based on an offensive use of the "pass-on" theory.<sup>95</sup> A defensive use of the pass-on theory already had

91. See, e.g., *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation MDL 150*, [1978] 1 Trade Cas. (CCH) 73,495 (C.D. Cal.) (rejected the argument that no case and controversy existed, making the *parens patriae* action an encroachment on the President's article II power to enforce the nation's laws); *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54 (D. Md. 1978) (rejected the argument that there exists no article III case or controversy because the state itself was not injured). See generally Hill, *supra* note 82, at 1376; Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679 (1977).

92. In the year following passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, only four *parens patriae* actions were recorded: Colorado v. Valley Petroleum Co., No. 77-352 (D. Colo., filed Aug. 22, 1977) (charging seven oil companies with fixing prices of retail gasoline); Maryland v. Jack Foley Realty, Inc., No. 77-618 (D. Md., filed April 22, 1977) (charging Maryland real estate brokers with price fixing); Ohio v. Klosterman's French Baking Co., No. 75-338 (S.D. Ohio, filed May 23, 1977) (charging the defendant-bakeries with price fixing); Arizona v. Standard Oil, No. 76-3247 (C.D. Cal., filed Feb. 7, 1977) (charging twelve oil companies with conspiracy to create an artificial scarcity of crude oil and refined products).

93. 431 U.S. 720 (1977).

94. *Id.* at 728.

95. "Passing-on" occurs when a businessperson who has been overcharged for an item adjusts his own price upward to reflect that overcharge. An offensive use of the pass-on theory would permit plaintiffs who have not purchased directly from an antitrust violator to recover for the illegal overcharge passed on to them by middlepersons. A defensive use of the pass-on theory would permit the defendant-violator to stop a direct purchaser from recovering when the direct purchaser had passed on the illegal overcharges to indirect purchasers of the defendant; it is alleged that the direct purchaser has not actually been injured. See McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe*, 33 U. PITT. L. REV. 177 (1971); Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883 (1975).

been denied in the Court's earlier opinion of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*<sup>96</sup> Reasoning from *Hanover Shoe*, the Court denied recovery to the State of Illinois.<sup>97</sup>

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96. 392 U.S. 481, 488 (1968). In *Hanover Shoe*, a shoe manufacturer sued United Shoe Machinery Corp. under § 4 of the Clayton Act alleging that United Shoe's policy of leasing, rather than selling, shoemaking machinery violated § 2 of the Sherman Act. United Shoe asserted as a defense that the plaintiff had suffered no legally cognizable injury, arguing that any economic damage had been passed on by plaintiff to its purchasers by increased shoe prices. The Court rejected the pass-on defense and held that a direct purchaser is entitled to recovery, even if damages have been passed on by overcharges. *Id.* at 494.

97. The result of *Illinois Brick* is that generally the pass-on theory cannot be used offensively or defensively. The Court found that the principle basis for the decision in *Hanover Shoe* was that allowing a defensive use of the pass-on theory would result in complexity and uncertainty because of the need to analyze pricing decisions. The Court concluded that the same problems would occur if the pass-on theory was used offensively. The Court said, "[T]he attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings . . ." 431 U.S. at 732.

The Court also feared that both direct and indirect purchasers would recover treble damages for the full amount of the original illegal overcharge if an offensive use of the pass-on theory was used, but a defensive use was not possible. The Court stated:

Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount.

*Id.* at 730. Having decided that *Hanover Shoe* should not be overruled, the possibility of a double recovery if an offensive pass-on theory were allowed led to a rejection of the offensive use. *Id.*

The Court referred to two specific exceptions to its holding—situations where an indirect purchaser might bring a treble damages action. The first is the "cost-plus contract" exception, initially enunciated in *Hanover Shoe*. In *Hanover Shoe*, the Court cited as an example where a pass-on defense might be permitted, the situation where "an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." 392 U.S. at 494. In *Illinois Brick*, the Court specifically adopted the cost-plus contract exception stating that "the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser." 431 U.S. at 732 n.12. Second, the Court referred to an ownership or control exception, implying that where a defendant-supplier owns or controls the intermediary in a vertical chain of distribution, an indirect purchaser may recover from the supplier. The Court simply stated, "Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Id.* at 736 n.16. The Court's use of the disjunctive "or" suggests that control alone

*Illinois Brick* has serious consequences for the use of the *parens patriae* action. Most consumers are indirect purchasers.<sup>98</sup> If *Illinois Brick* is read broadly, use of the *parens patriae* power would be limited to the small number of cases where the consumers are direct purchasers, the only cases where the consumer would have a cause of action for the state to pursue.<sup>99</sup> Some commentators have argued that *Illinois Brick* should have no application to the *parens patriae* power of state attorneys general.<sup>100</sup> The majority in *Illinois Brick*, however, seemed to indicate otherwise. The Court said, "Congress made clear . . . that . . . [the *parens patriae*] legislation did

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would be sufficient to invoke this exception. See generally Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309 (1978).

98. Anticompetitive activity often occurs at the manufacturing level in the chain of distribution. The consumer rarely deals directly with the manufacturer, but purchases from a retailer, *i.e.*, consumers are indirect purchasers of the manufacturer. It should be noted, however, that the term "indirect purchasers" is by no means limited to consumers. It refers to any purchaser who is removed one or more steps from the violator in the chain of distribution. See generally Note, *supra* note 97.

99. The *parens patriae* provisions, 15 U.S.C. §§ 15c-15h (1976), as amended by Act of Sept. 12, 1980, Pub. L. No. 96-349, 94 Stat. 1157, allow state attorneys general to enforce only the existing rights of consumers and do not create a new cause of action. See *Illinois Brick*, 431 U.S. at 734 n.14. In many cases, consumers would be indirect purchasers and would not have a cause of action for damages under the *Illinois Brick* doctrine. Thus, the state could not bring a *parens patriae* action on their behalf. See Project, *supra* note 7, at 602.

It is possible, however, that the doctrine of *Illinois Brick* will be narrowed significantly by subsequent judicial interpretation. One possibility is that the doctrine will be limited to horizontal restraints of trade as found in *Illinois Brick*. Furthermore, the doctrine could be limited to only the type of horizontal price fixing found in *Illinois Brick*. See Note, *supra* note 97, at 331.

The argument that *Illinois Brick* will be narrowed judicially seems to have been given credibility by the recent decision in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). In *Reiter*, the Court, in an opinion written by Chief Justice Burger, held that a consumer who pays a higher price for goods purchased for personal use as a result of antitrust violations sustains an injury to "property" within the meaning of § 4 of the Clayton Act. The argument that the language "business or property" in § 4 required an injury to both a business interest and a property interest was rejected. The plaintiff in *Reiter* was an indirect purchaser. On remand, the district court held that the plaintiff could recover damages, reasoning that by its remand the Court must have intended to limit *Illinois Brick* to cases where there were horizontal restraints, *i.e.*, *Illinois Brick* should not apply to a vertical price-fixing case as found in *Reiter*. *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 120 (D. Minn. 1980). For a discussion of *Reiter*, see notes 187-200 and accompanying text *infra*.

100. See, *e.g.*, Hill, *supra* note 82, at 1376-77; Note, *supra* note 97, at 325.

not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4.”<sup>101</sup>

The Court did invite Congress, if it disagreed with the decision, to provide clear directives to the contrary.<sup>102</sup> Congress began that process in May 1978, when the Senate Judiciary Committee, stating that “[t]he loss of private damage actions on behalf of indirect purchasers has an intolerable impact upon antitrust enforcement . . . ,”<sup>103</sup> passed to the floor of the Senate an anti-*Illinois Brick* statute designed to obviate the effect of the 1978 decision.<sup>104</sup> The National Association of Attorneys General, Missouri, and other states have been lobbying actively for its passage. Nevertheless, the fate of such legislation no longer seems promising. Relief for the *parens patriae* action may be limited to the possibility of a narrow judicial interpretation of *Illinois Brick* by its authors.<sup>105</sup>

101. 431 U.S. at 734 n.14.

102. The Court issued its directive by saying:

We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of “private attorneys general” to enforce the antitrust laws under § 4, . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

*Id.* at 746 (citation omitted).

103. S. REP. NO. 934, 95th Cong., 2d Sess. 3 (1978).

104. *Id.* at 36. The proposed legislation read:

Sec. 3. The Clayton Act is amended by inserting immediately after section 4H the following new section:

Sec. 4I.

- (1) In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery.
- (2) In any action under section 4 of the Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, that the plaintiff has passed on to others, who are themselves entitled to recover under section 4, 4A, or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.

105. See note 99 *supra*. For a discussion of the exceptions to *Illinois Brick*, see note 97 *supra*.

Regardless of the outcome of the *Illinois Brick* legislation, *parens patriae* still serves a purpose in state antitrust enforcement. It is a power that has been and will continue to be utilized by the State of Missouri.

One bright note for the future of *parens patriae* is the failure of the National Association of Realtors to convince various state legislatures to take the *parens*

### III. STATE INVOLVEMENT AS PLAINTIFF IN TREBLE DAMAGES LITIGATION AND OTHER ACTIONS UNDER FEDERAL ANTITRUST LAWS

A major trend in state antitrust enforcement today is state involvement as plaintiff in treble damages actions under the federal antitrust laws.<sup>106</sup> Increased activity on the part of the states in treble damages litigation is largely a result of state governments becoming major purchasers of commodities. As previously stated, in fiscal year 1978 total state government expenditures were \$180 billion, eight percent of the gross national product.<sup>107</sup> A 1977 study revealed the frequency of antitrust litigation involving purchases made by state governments: out of 307 cases initiated by state antitrust enforcement agencies during the period studied, 101, thirty-three percent, involved the state in its procurement capacity.<sup>108</sup>

#### A. *Multidistrict Treble Damages Litigation*

Multidistrict litigation has proved to be the most rewarding vehicle used by states to recover losses incurred in their procurement capacities. The Multidistrict Litigation Act of 1968<sup>109</sup> provides that civil actions involving one or more common questions of fact may be transferred to a single federal district court for coordinated or consolidated pretrial proceedings.<sup>110</sup> Transfer may be initiated by any party to the action with an application to the Judicial Panel on Multidistrict Litigation or by the Panel itself.<sup>111</sup> The usual procedure is for a state to seek consolidation

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*patriae* power away from their attorneys general pursuant to § 4h of the Clayton Act. See 15 U.S.C. § 15h (1976). Such efforts were undertaken in Colorado, New Mexico, South Carolina, and Texas. Each of these efforts was unsuccessful. 811 ANTITRUST & TRADE REG. REP. (BNA) D-7 (April 28, 1977). In 1977 the Missouri Association of Realtors initiated a lobbying effort for such legislation in Missouri. After a meeting with the Attorney General's Office, however, the Association determined that such legislation "would not be in the best interest of Missouri." 844 ANTITRUST & TRADE REG. REP. (BNA) D-1 (Dec. 22, 1977).

106. See Miles, *supra* note 7, at 1348; Project, *supra* note 7, at 580. See generally Rubin, *supra* note 6.

107. COUNCIL OF STATE GOVERNMENTS, *supra* note 8.

108. Project, *supra* note 7, at 579.

109. 28 U.S.C. § 1407 (1976).

110. *Id.* See Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211 (1977); Herndon, *Section 1407 and Antitrust Multidistrict Litigation—The First Decade*, 47 ANTITRUST L.J. 1161 (1979); Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41 (1971); Peterson & McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737 (1970).

111. Transfers will be granted on a determination that the "transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a) (1976). This procedure significantly benefits both plaintiffs and defendants in that all save the cost of litigating each individual suit, *i.e.*, plaintiffs share the cost of bringing the suit and defendants only have to defend the suit once.

where suit has been initiated first by the federal government. There are some instances, however, where the states have taken the lead and the federal government has followed.<sup>112</sup>

One reason for the widespread use of multidistrict litigation among state antitrust enforcement units is the significant sums that commonly are awarded in the combined effort.<sup>113</sup> Another reason is the comparative low cost and convenience of participating in multidistrict litigation. These factors enable small state antitrust agencies to participate in complex and expensive cases.<sup>114</sup>

The decision of *Illinois Brick* is confronted again, imposing obstacles to the effective use of multidistrict litigation. State governments frequently relate to violating manufacturers as indirect purchasers because they buy from wholesalers or retailers instead of directly from the manufacturers.<sup>115</sup> As earlier stated, read most broadly, *Illinois Brick* bars indirect purchasers from recovering monetary damages under the Clayton Act.<sup>116</sup>

The consequences of *Illinois Brick* can be severe for governments injured when acting in their procurement capacity. Shortly after the decision, Assistant United States Attorney General John H. Shenefield spoke to the Senate Antitrust Subcommittee, concluding that the *Illinois Brick* ruling could cost the federal government close to \$205 million that it might otherwise have recovered in just three federal suits pending at the time.<sup>117</sup> The states were expected to lose initially as much as \$500 million in potential recoveries.<sup>118</sup> In 1977 Senators Strom Thurmond and Paul Laxalt sought and received information from nineteen different states which indicated that out of 203 actions involving the states' governmental procurement interests over a period of ten years, states were indirect purchasers in 119 cases, fifty-eight percent of the time.<sup>119</sup> The states were direct purchasers in only fifty-three actions, twenty-six percent of the time.<sup>120</sup> In thirty-one actions, fifteen percent, the states were acting as both direct and indirect purchasers.<sup>121</sup> In the time period studied by Senators Thurmond and Laxalt, the State of Missouri was an indirect purchaser in eight

112. See, e.g., *In re Government Auto Fleet Sales Antitrust Litigation* MDL 65, 352 F. Supp. 966 (J.P.M.D.L. 1972).

113. The example cited most frequently is the tetracycline litigation that resulted in a settlement of \$100 million. See *West Virginia v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

114. See Project, *supra* note 7, at 581.

115. See note 98 *supra*.

116. See notes 93-105 and accompanying text *supra*.

117. 824 ANTITRUST & TRADE REG. REP. (BNA) A-10 (July 28, 1977).

118. See S. REP. NO. 934, 95th Cong., 2d Sess. 7 (1978).

119. Project, *supra* note 7, at 584-86.

120. *Id.*

121. *Id.*



out of ten procurement actions.<sup>122</sup> The results of the survey revealed that in nearly seventy-five percent of the governmental procurement actions during the previous ten years, the states would have been barred from obtaining recovery under a broad reading of *Illinois Brick*.<sup>123</sup>

*Illinois Brick* aside, multidistrict litigation continues to be an excellent vehicle for state antitrust enforcement units to obtain large recoveries while eliminating the illegal restraints of trade that occur in governmental procurements. Five recent multidistrict actions in which the State of Missouri joined with other states as plaintiffs to recover damages for losses suffered in their procurement capacity illustrate these benefits.

*In re Chicken Antitrust Litigation*<sup>124</sup> was a multidistrict action consisting of thirty-three separate civil actions for treble damages and injunctive relief filed against the National Broiler Marketing Association (NBMA) and forty-three processors and growers of chickens. The thirty-three civil suits, including a class action filed by the State of Missouri on behalf of its governmental agencies, were transferred to the United States District Court for the Northern District of Georgia for consolidation. It commonly was alleged that since October 1970, the defendants had violated the federal antitrust laws by engaging in a combination and conspiracy to raise, stabilize, and maintain the prices of broiler chickens at noncompetitive, artificially high levels and to artificially limit the production of broiler chickens.

*In re Chicken Antitrust Litigation* grew out of a civil antitrust action brought by the federal government in 1973 against the NBMA, where it was alleged that its members and others had combined to fix broiler chicken prices and to restrict broiler chicken production.<sup>125</sup> The United States District Court for the Northern District of Georgia dismissed the federal government's complaint on the ground that NBMA's members were farmers as defined in the Capper-Volstead Act<sup>126</sup> and were, therefore, immune from the antitrust laws under that Act.<sup>127</sup> The federal

122. *Id.*

123. *Id.*

124. MDL 237, No. 74-2454A (N.D. Ga. 1978) (settlement agreement).

125. *United States v. National Broiler Marketing Ass'n*, [1975] 2 Trade Cas. (CCH) 67,219 (N.D. Ga.), *rev'd*, 550 F.2d 1380 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978).

126. 7 U.S.C. § 291 (1976).

127. The Capper-Volstead Act provides, in part:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, . . . in interstate and foreign commerce . . . Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . .

government appealed this decision to the United States Court of Appeals for the Fifth Circuit.<sup>128</sup> The State of Missouri joined with fifteen other states in submitting a brief as *amicus curiae*. The court of appeals reversed the decision of the district court and held that the NBMA members were not farmers as defined by the Capper-Volstead Act and, thus, were not immune from antitrust prosecution.<sup>129</sup> The United States Supreme Court affirmed the opinion of the court of appeals.<sup>130</sup>

As a result of their loss to the federal government on appeal, the defendants decided to settle with the several plaintiffs in the civil multidistrict litigation. The settlement, reached in 1978, was for approximately \$35 million, with the state government-plaintiffs receiving approximately \$3,290,000; the State of Missouri recovered \$75,000.<sup>131</sup>

*In re Sugar Industry Antitrust Litigation*<sup>132</sup> was a multidistrict action consisting of more than 100 civil actions, including actions by the State of Missouri and several other states, transferred for consolidation to the United States District Court for the Northern District of California. The litigation began for Missouri in January 1977, when Missouri's Antitrust Division brought a class action on behalf of the state and various local governmental entities within the state against certain companies engaged in the sale of refined sugar.<sup>133</sup> It was alleged that the defendants conspired to violate the antitrust laws by engaging in concerted action to fix the prices at which refined sugar was to be sold to the governmental entities.

Following consolidation, the defendants challenged the right of Missouri's Attorney General to represent the class in the suit—a common challenge by defendants in multidistrict actions. The district court ruled that the State of Missouri, acting through the Attorney General, could represent a statewide class of governmental entity-purchasers of refined sugar.<sup>134</sup> In 1977 a settlement was reached in the litigation for \$1,015,000; the State of Missouri recovered \$99,977.50.<sup>135</sup>

*Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341 (1975).

128. *United States v. National Broiler Marketing Ass'n*, 550 F.2d 1380 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978).

129. 550 F.2d at 1390.

130. 436 U.S. 816 (1978).

131. *In re Chicken Antitrust Litigation MDL 237, No. 74-2454A* (N.D., Ga. 1978) (settlement agreement). See MISSOURI ATTORNEY GENERAL'S OFFICE, ANTITRUST DIVISION, SUMMARY OF ACTIVITIES (1980) (on file at Missouri Attorney General's Office) [hereinafter cited as SUMMARY OF ACTIVITIES].

132. MDL 301, No. 76-141 (N.D. Cal. 1979) (settlement agreement).

133. *Missouri v. Great Western Sugar Co.*, No. 77-192 (W.D. Mo. 1977) (transferred to S.D. Cal.).

134. *In re Sugar Indus. Antitrust Litigation MDL 301, No. 76-141* (N.D. Cal. 1979) (settlement agreement).

135. *Id.* See SUMMARY OF ACTIVITIES, *supra* note 131.

The State of Missouri recovered its largest sum of money through the multidistrict action of *In re Master Key Antitrust Litigation*.<sup>136</sup> The case had its origins in a 1969 suit filed by the Antitrust Division of the Justice Department against the four major manufacturers of master key systems in the United States.<sup>137</sup> It was alleged that the four defendants and other conspirators had engaged in an unlawful combination and conspiracy consisting of agreements among distributors of each manufacturer not to sell master key systems outside the territories allocated to them by the manufacturers, not to compete with other distributors of the manufacturer for which one acted, and not to bid on master key systems when the original system was sold by another distributor of the manufacturer for which one acted.

Subsequent to the Justice Department's filing of the suit, numerous states, including Missouri, filed class actions on behalf of their respective political subdivisions against the same four manufacturers of master key systems. These civil suits were transferred for consolidation to the United States District Court for the District of Connecticut. The defendants ultimately reached a settlement with the state-plaintiffs in 1979; the State of Missouri recovered \$296,098.62.<sup>138</sup>

*In re Armored Car Antitrust Litigation*<sup>139</sup> began with indictments brought by the Justice Department in 1977 against Wells Fargo, Inc. and Brink's, Inc., armored car service companies, and six of their executives. The indictments were based on charges that from 1968 to 1974, Wells Fargo and Brink's conspired to restrain trade by dividing the armored car service market between them and by submitting collusive, non-competitive, rigged bids and price quotations.<sup>140</sup>

While the indictments against Wells Fargo and Brink's were pending, numerous civil class actions were filed by various states, including Missouri, seeking to recover illegal overcharges arising out of the alleged restraints of trade. Many of these actions were transferred to the United States District Court for the Northern District of Georgia to form *In re Armored Car Antitrust Litigation*.

In the federal criminal action, the defendant companies eventually entered no-contest pleas.<sup>141</sup> Brink's was ordered to pay a fine of \$625,000 and Wells Fargo a fine of \$375,000.<sup>142</sup> In addition, the court accepted no-

136. MDL 45, No. 75-7386 (D. Conn. 1979) (settlement agreement).

137. *United States v. Emhart Corp.*, [1970] Trade Cas. (CCH) 88,098 (D. Conn.).

138. *In re Master Key Antitrust Litigation* MDL 45, No. 75-7386 (D. Conn. 1979) (settlement agreement). See SUMMARY OF ACTIVITIES, *supra* note 131.

139. MDL 318, No. 78-139A (N.D. Ga. 1978) (settlement agreement).

140. See *United States v. Brink's, Inc.*, [1978] 1 Trade Cas. (CCH) 73,900 (N.D. Ga.).

141. *United States v. Brink's, Inc.*, No. 77-207A (N.D. Ga. 1978).

142. *Id.*

contest pleas from the president of Wells Fargo and a vice-president of Brink's.<sup>143</sup> Both individuals were fined \$20,000; each was placed on probation for one year.<sup>144</sup> Subsequent to the criminal proceedings, the district court approved a settlement to the civil multidistrict litigation in the sum of \$11,800,000; in 1979 the State of Missouri received \$9,400.<sup>145</sup>

Still pending is the multidistrict litigation of *In re Cement and Concrete Antitrust Litigation*.<sup>146</sup> In September 1978, the State of Missouri filed a class action suit against Portland Cement Associates and fourteen cement companies.<sup>147</sup> It was alleged that the defendants conspired to reduce and eliminate competition in the sale of cement, to increase the price of cement, and to establish a system of pricing which would result in uniform mill delivery prices. In addition, it was alleged that the defendants had conspired to allocate customers and territories, to restrict the territories within which purchasers of cement could utilize the cement they purchased, and to establish agreed-on categories of customers to whom the cement would be sold.

The State of Missouri sought and obtained transfer of its civil suit to the United States District Court for the Western District of Arizona for consolidation with several other civil actions filed against the defendants. The court allowed consolidation in spite of arguments that the Missouri case was more factually limited in scope than the other transferred civil actions. To date, there has been a settlement with one of the fourteen defendant companies for \$1,750,000; the amount of recovery for the State of Missouri from this settlement is currently undetermined.<sup>148</sup>

#### B. *Individual Actions Under Federal Law*

It is quite clear that the multidistrict litigation procedure has produced great incentives for state antitrust enforcement. In the four cited cases where final settlement has been reached, the State of Missouri has recovered over \$490,000 in damages.<sup>149</sup> The trend in most states is to focus on large multidistrict litigations to the exclusion of many other types of actions.<sup>150</sup> Missouri, however, has a policy of placing equal emphasis on in-

143. *Id.*

144. *Id.*

145. *In re Armored Car Antitrust Litigation* MDL 318, No. 78-139A (N.D. Ga. 1978) (settlement agreement). See SUMMARY OF ACTIVITIES, *supra* note 131.

146. MDL 296, No. 76-448A (D. Ariz.) (pending).

147. *Missouri v. Portland Cement Ass'n*, No. 78-4192 (W.D. Mo. 1978) (transferred to D. Ariz.).

148. *In re Cement & Concrete Antitrust Litigation* MDL 296, No. 76-448A (D. Ariz.) (pending). See SUMMARY OF ACTIVITIES, *supra* note 131.

149. See text accompanying notes 131, 135, 138 & 145 *supra*. It should be noted, however, that the state can incur substantial costs in multidistrict actions. While the cost of actual litigation is shared by the plaintiffs, there are additional costs for travel and other matters.

150. See generally Miles, *supra* note 7.

dividual enforcement actions to better protect the overall competitive environment of the state. Examples of such actions involving federal law are *Missouri v. National Organization for Women, Inc.*<sup>151</sup> and *Reiter v. Sonotone Corp.*<sup>152</sup>

The State of Missouri commenced an action for injunctive relief against the National Organization for Women (NOW) on February 28, 1978, in the United States District Court for the Western District of Missouri.<sup>153</sup> The state alleged that NOW was engaging with others in an unreasonable restraint of trade in the nature of a secondary boycott, in violation of the Sherman Act, the Missouri Antitrust Law, and principles of Missouri tort law which prohibit intentional infliction of economic harm.

In 1972 the proposed Equal Rights Amendment (ERA)<sup>154</sup> was submitted to the legislatures of the states for ratification. At the commencement of this action, only thirty-five state legislatures had ratified the amendment, three short of the three-fourths of the states required by the Constitution. The State of Missouri had not voted for ratification.<sup>155</sup> In February 1977, NOW initiated a program of urging other organizations not to hold conventions in states which had not ratified the ERA.<sup>156</sup> The impact of this convention boycott was such that Missouri motels and restaurants catering to the convention trade and, consequently, the Missouri economy as a whole, did suffer revenue losses.<sup>157</sup>

In its complaint, the state alleged injury to itself and, as *parens patriae*, to Missouri citizens.<sup>158</sup> District Judge Elmo Hunter found the evidence sufficient to justify a finding that NOW had entered into a com-

151. 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980).

152. 442 U.S. 330 (1979).

153. *Missouri v. National Org. for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980).

154. The proposed twenty-seventh amendment to the United States Constitution reads as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

620 F.2d at 1302 n.1 (quoting text of Equal Rights Amendment).

155. Thirteen other states had not ratified the ERA at the time: Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. Transcript on Appeal, Vol. V, at 26, *Missouri v. National Org. for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. 1979).

156. 467 F. Supp. at 292.

157. *Id.* at 300.

158. *Id.* at 291.

bination to implement a convention boycott of states which had not ratified the ERA.<sup>159</sup> The district judge also concluded that the State of Missouri had standing as *parens patriae* to pursue the case on the merits and seek injunctive relief under the antitrust laws.<sup>160</sup> Turning to the merits of the case, the district judge declined to hold that the convention boycott was in violation of the Sherman Act, the Missouri Antitrust Law, or principles of Missouri tort law because of the boycott's political and noncommercial nature. Judge Hunter stated that the convention boycott "takes place in what is essentially a political context. . . . The participants are not moved by any anticompetitive purpose; they are not in a competitive relationship."<sup>161</sup> In addition, the judge expressed concern about the serious questions relating to the first amendment right of petition if the Sherman Act was applied to NOW's boycott campaign.<sup>162</sup>

The judgment of the district court was affirmed by the United States Court of Appeals for the Eighth Circuit.<sup>163</sup> The majority relied on the legislative history of the Sherman Act and guidance from the United States Supreme Court with respect to that legislative history,<sup>164</sup> in deciding that Congress did not intend the Sherman Act to apply to a politically motivated economic boycott participated in and organized by non-competitors of those who suffered as a result of the boycott.<sup>165</sup>

The majority relied heavily on the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*.<sup>166</sup> In *Noerr*, the Supreme Court relied on the first amendment right to petition the government in declining to apply the antitrust laws to situations covering

159. *Id.* at 296.

160. *Id.* at 301.

161. *Id.* at 304.

162. *Id.* at 304-05.

163. *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, *cert. denied*, 101 S. Ct. 122 (1980).

164. In examining the legislative history of the Sherman Act, the court of appeals reasoned that Congress clearly intended to preserve free and fair competition. The court found that it was not clear, however, whether Congress intended to protect free and fair competition from political or social activities that have the same effect on competition as the commercial activities of a trust. The court found no indication in the legislative history of an intent to do so. After examining a lengthy exchange between Senators Sherman and George, the court concluded that "the indication is that it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill, not noncompetitors motivated socially or politically in connection with legislation." *Id.* at 1309.

*See generally* 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

165. 620 F.2d at 1309.

166. 365 U.S. 127 (1961).

*legitimate attempts* to influence the legislative or executive process.<sup>167</sup> Despite the several factual distinctions,<sup>168</sup> the court of appeals felt that the considerations in *Noerr* made it clear that NOW's efforts to influence the legislature's action on the ERA were beyond the scope and intent of the Sherman Act.<sup>169</sup>

The State of Missouri petitioned the United States Supreme Court for a writ of certiorari, but the Court declined to hear the case.<sup>170</sup> The reasons for seeking certiorari were several. To begin with, *NOW* was the first appellate decision to include, within the first amendment right to petition the government, protection for infliction of economic harm to private businesses and citizens to obtain governmental action. Without analysis, the court of appeals enunciated a new principle of constitutional law: an economic boycott can be an exercise of the right to petition the government.<sup>171</sup>

In addition, the court of appeals majority severely strained the rule of *Noerr* in applying it to NOW's boycott activities. The doctrine enunciated by the Supreme Court in *Noerr* in effect established that one has a right to petition the government for enactment of legislation or executive actions that have an anticompetitive effect.<sup>172</sup> Under the *Noerr* rule, the government is the actor causing the restraint of trade. NOW's activities were clearly different; NOW was using anticompetitive methods to petition the government to pass legislation—NOW was the actor causing the restraint of trade, not the government.

The conclusion in *Noerr* is not surprising. *Parker v. Brown*,<sup>173</sup> an earlier Supreme Court decision, held that the Sherman Act does not prohibit the anticompetitive actions of state governments. Thus, immunity was given certain state action from antitrust prosecutions.<sup>174</sup> The state ac-

167. *Id.* at 136-38.

168. See notes 172-75 and accompanying text *infra*.

169. 365 F.2d at 1309.

170. *Missouri v. National Org. for Women, Inc.*, 101 S. Ct. 122 (1980).

171. "[A]n infringement upon the people's right to petition the government by a boycott should also not be lightly attributed to Congress." 620 F.2d at 1310. "[T]he right to petition is of such importance that it is not an improper interference even when exercised by way of a boycott." *Id.* at 1317.

172. 365 U.S. at 136. "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.*

173. 317 U.S. 341 (1943).

174. *Id.* at 351. In *Parker*, the Court concluded that nothing in the language or legislative history of the Sherman Act suggested that the Act was intended to prevent a state or its officers or agents from conducting official business directed by the state legislature. The *Parker* state action exemption applies to the legislature and to anyone who is compelled to comply with legislative directives,

tion defense, however, is not available to private parties who are utilizing economically harmful means to achieve passage of legislation. The dissent in *NOW* correctly indicated that *Noerr* "simply does not imply the conclusion that the first amendment immunizes politically motivated boycotts against antitrust attack."<sup>175</sup>

Another compelling reason for seeking certiorari was that the *NOW* decision created a potentially disastrous exemption from the antitrust laws. The court of appeals had sanctioned the use of economic injury to third parties as a means to coerce legislatures into passing legislation that they would not pass otherwise. The decision arguably has replaced a system of government in which "legislatures . . . are collectively responsible to the popular will,"<sup>176</sup> with a system in which the legislature would be most sensitive to those interest groups able to inflict the greatest economic suffering on citizens of the state. In other words, *NOW*, realizing it had failed to persuade the legislature on the merits, attempted to obtain ratification of the ERA by economic pressure, and the court sanctioned such an approach to government.<sup>177</sup>

The significance of the court's endorsement of economic sanctions as an additional and powerful weapon in the arsenal of various special interest groups has not been ignored by such interest groups. Recently, the United States District Court for the Middle District of Pennsylvania, in *Crown Central Petroleum Corp. v. Waldman*,<sup>178</sup> approved, as protected first amendment expression, a concerted shutdown of retail gasoline operators who were attempting, by that action, to raise prices for the retail sale of gasoline by coercing the Department of Energy to modify existing petroleum price regulations.<sup>179</sup> The purpose of the shutdown was clear—infliction of sufficient suffering on the public so that the Depart-

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even when such compliance results in restraints of trade. *See generally* Fox, *The Supreme Court and the Confusion Surrounding the State Action Doctrine*, 48 ANTITRUST L.J. 1571 (1980); Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 43 U. CIN. L. REV. 61 (1974).

The *Parker* state action exemption has been narrowed, however, by subsequent decisions. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (plurality); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). *See also* L. SULLIVAN, *supra* note 29, at 731-37. *See generally* Shores, *The State Action Doctrine After Goldfarb and Cantor*, 63 IOWA L. REV. 367 (1977).

175. 620 F.2d at 1324 (Gibson, J., dissenting).

176. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

177. A *NOW* spokesperson stated, "We can convince with economic pressure where we have failed with moral persuasion." Plaintiff's Exhibit No. 35, Missouri v. National Org. for Women, Inc., 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980).

178. 486 F. Supp. 759 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980).

179. *Id.* at 768.



ment would be forced to acquiesce to the conspirators' demands in order to relieve the public's pain.<sup>180</sup>

The import of *NOW* has not, however, been accepted by some courts. *NOW* was rejected unequivocally by the United States District Court for the District of Delaware in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*.<sup>181</sup> The district court explicitly recognized that *NOW* created an unreasonably broad exception to the antitrust laws.<sup>182</sup> It remains to be seen whether the United States Court of Appeals for the Third Circuit will follow the district court in *Crown Central Petroleum* or the district court in *Osborn*.

Some of the most significant antitrust litigation that the State of Missouri has been involved in arguably would result in different outcomes following *NOW*. In *Missouri v. Petroleum Retailers Organization*,<sup>183</sup> the state prevented a shutdown by gas station retailers who were attempting to pressure the Department of Energy into regulation changes, just as the defendants attempted to do in *Crown Central Petroleum*.<sup>184</sup> In a series of cases beginning with *State v. Stephens*,<sup>185</sup> the state enjoined the blockading of barge and pipeline petroleum terminals by various truckers who were attempting to coerce congressional changes in trucking tariffs.<sup>186</sup> All of these cases involved politically motivated restraints of trade, *i.e.*, the defendants were attempting to coerce legislative action by imposing economic pressure on the public. Arguably, *NOW* could prevent the state from stopping such action.

Perhaps in *Osborn* or *Crown Central Petroleum*, or a similar case which is less sensitive politically than *NOW*, the United States Supreme Court will reject the *NOW* decision. Now that the federal courts clearly have split on the antitrust consequences of a politically motivated economic boycott, it is imperative that the Court give a ruling.

180. *Id.* at 762.

181. 499 F. Supp. 553 (D. Del. 1980).

182. *Id.* at 558 n.8. The district judge stated:

The conclusion which I reach is inconsistent with that reached by the Eighth Circuit in *State of Missouri v. National Organization for Women, Inc.*, . . . . As I read the majority opinion in that case, an antitrust immunity would be available or not depending upon whether the motivation in seeking government action is "political" or "economic." I believe such a rule to be both incapable of application and inconsistent with the First Amendment case law.

*Id.* (citation omitted).

183. No. 77-4107 (W.D. Mo. 1979) (settlement agreement).

184. See notes 238-39 and accompanying text *infra*.

185. No. 379-330 (Cir. Ct., Scott Cty., Mo., July 5, 1979). See also *State v. Gabel*, No. 425-088 (Cir. Ct., St. L. Cty., Mo., July 16, 1979); *State v. Smith*, No. 679-26 (Cir. Ct., Cape Gir. Cty., Mo., July 5, 1979).

186. See notes 240-47 and accompanying text *infra*.

One other example of the State of Missouri's willingness to participate in cases, under federal antitrust laws, that present novel issues of importance is *Reiter v. Sonotone Corp.*<sup>187</sup> Kathleen Reiter, on behalf of herself and all other persons in the United States who purchased hearing aids manufactured by five corporations, brought a class action in the United States District Court for the District of Minnesota. Reiter was seeking treble damages under section 4 of the Clayton Act, alleging that because of the corporations' violations of the antitrust laws, including vertical and horizontal price fixing, she and all members of the class she represented were forced to pay illegally fixed higher prices for hearing aids and related services purchased from the corporations' retail dealers.

Section 4 of the Clayton Act authorizes treble damages actions by "[a]ny person who shall be injured in his *business or property* by reason of anything forbidden in the antitrust laws . . . ."<sup>188</sup> The question presented to the court was whether a consumer who purchases a product or service for a nonbusiness (personal) use at a higher price because of an antitrust violation suffers injury to his or her "business or property" within the meaning of section 4 of the Clayton Act.<sup>189</sup> The district court held that under section 4, a retail purchaser is injured in "property" if the purchaser can show that antitrust violations caused an increase in the price paid for the article purchased and that an injury to property is sufficient to satisfy section 4.<sup>190</sup> The United States Court of Appeals for the Eighth Circuit reversed, ruling that retail purchasers also must allege a commercial or business injury to meet the "business or property" standard.<sup>191</sup>

Reiter filed a petition for certiorari that was granted by the United States Supreme Court in January 1979.<sup>192</sup> The importance of the case to the consumers of Missouri was obvious. The State of Missouri vigorously worked with the State of Minnesota, where the case arose, and prepared a brief as *amicus curiae*, which was joined by forty-seven other states.<sup>193</sup> Missouri and Minnesota argued in the brief that the language of section 4 allows "any" person to recover, not just businesspersons, purchasers, sellers, competitors, or persons who show a commercial injury.<sup>194</sup> Also, it was argued that an injury to "property" includes personal monetary loss,

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187. 435 F. Supp. 933 (D. Minn.), *rev'd*, 579 F.2d 1077 (8th Cir. 1977), *rev'd*, 442 U.S. 330 (1979).

188. 15 U.S.C.A. § 15 (West Cum. Supp. 1981) (emphasis added).

189. 435 F. Supp. at 934.

190. *Id.* at 935.

191. 579 F.2d at 1077.

192. *Reiter v. Sonotone Corp.*, 439 U.S. 1065 (1979).

193. The only state not to join the *amicus curiae* brief was Georgia.

194. The states argued that the "[Clayton] Act is comprehensive in its terms and coverage, protecting all who are made victims of forbidden practices by whomever they may be perpetrated." Brief for *Amicus Curiae*, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

relying on Justice Holmes' opinion in *Chattanooga Foundry & Pipe Works v. City of Atlanta*,<sup>195</sup> where he stated that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property."<sup>196</sup> Furthermore, the *amicus curiae* brief set out recent United States Supreme Court decisions which recognized the standing of non-business consumers in antitrust litigation.<sup>197</sup>

Based on these and other arguments, the Supreme Court, in an opinion written by Chief Justice Burger, reversed the court of appeals decision and held that consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "property" within the meaning of section 4 of the Clayton Act.<sup>198</sup> The Court emphasized the disjunctive "or" in section 4 and held that a "property" injury alone satisfied the statute.<sup>199</sup> *Reiter* represented a great victory for consumers in all states and for the *parens patriae* power of the state attorneys general to recover on behalf of those citizens.<sup>200</sup>

#### IV. STATE ENFORCEMENT ACTIONS UNDER STATE ANTITRUST LAWS

##### A. Criminal Actions

The use of criminal prosecutions at the state level is one of the more recent and important trends in state antitrust enforcement. Congress reaffirmed its commitment to criminal sanctions in 1974 by increasing the punishment for a violation of the Sherman Act from a misdemeanor to a felony, by increasing the maximum penalties for individuals to three years imprisonment and a \$100,000 fine, and by increasing the maximum penalty for corporations to a fine of \$1 million.<sup>201</sup> Today, thirty-seven

195. 203 U.S. 390 (1906).

196. *Id.* at 396.

197. *See, e.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (Court allowed retail purchasers of private homes to challenge a minimum fee schedule established by the state bar); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) (Court allowed the state to recover as "consumers in the marketplace" for "payment of money wrongfully induced"). *See also* *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

198. 442 U.S. at 344.

199. *Id.* at 339.

200. For a discussion of the state's *parens patriae* power, see notes 80-91 and accompanying text *supra*. One should note the implications of *Reiter* on the *Illinois Brick* doctrine, a doctrine which seemed to weaken substantially the *parens patriae* power. *See* notes 93-105 and accompanying text *supra*.

201. 15 U.S.C. § 1 (1976). *See* note 63 and accompanying text *supra*.

states, including Missouri, have criminal antitrust statutes.<sup>202</sup> Four states follow the Sherman Act for individual criminal fines,<sup>203</sup> while one state, Maryland, has exceeded that amount, subjecting individuals to a \$500,000 fine.<sup>204</sup> The rest of the states fall below the Sherman Act monetary penalties.<sup>205</sup> Missouri has a maximum criminal fine of

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202. ALA. CODE §§ 8-10-1 to -3 (1975); ALASKA STAT. §§ 45.50.562-.596 (1980); CAL. BUS. & PROF. CODE §§ 16700-16760 (West 1964 & Cum. Supp. 1981); COLO. REV. STAT. §§ 6-4-101 to -108 (1973 & Cum. Supp. 1981); FLA. STAT. ANN. §§ 542.15-.36 (West Cum. Supp. 1981); GA. CODE ANN. § 2-1049 (1977); HAWAII REV. STAT. §§ 480-1 to -37 (1976 & Supp. 1980); IDAHO CODE §§ 48-101 to -119 (1977); ILL. ANN. STAT. ch. 38, §§ 60-1 to -11 (Smith-Hurd 1977 & Cum. Supp. 1980-1981); IND. CODE ANN. §§ 24-1-1-1 to -2-12 (Burns 1974 & Cum. Supp. 1980); IOWA CODE ANN. §§ 553.1-.17 (West Cum. Supp. 1980-1981); KAN. STAT. ANN. §§ 50-101 to -120 (1976); LA. REV. STAT. ANN. §§ 51:121-.152 (West 1965 & Cum. Supp. 1981); ME. REV. STAT. ANN. tit. 10, §§ 1101-1107 (1980); MD. COM. LAW CODE ANN. §§ 11-201 to -213 (1975 & Cum. Supp. 1980); MASS. GEN. LAWS ANN. ch. 93, §§ 1-14 (West Cum. Supp. 1981); MICH. COMP. LAWS ANN. §§ 445.701-.767 (1967 & Cum. Supp. 1980-1981); MINN. STAT. ANN. §§ 325D.49-.66 (Cum. Supp. 1981); RSMO §§ 416.011-.161 (1978); MONT. REV. CODES ANN. §§ 51-501 to -506, -519 to -524 (Cum. Supp. 1977); NEB. REV. STAT. §§ 59-801 to -830 (1978); NEV. REV. STAT. §§ 598A.010-.280 (1975); N.H. REV. STAT. ANN. §§ 356:1-.14 (1966 & Supp. 1975); N.J. STAT. ANN. §§ 56:9-1 to -19 (West Cum. Supp. 1980-1981); N.M. STAT. ANN. §§ 57-1-1 to -6 (1978); N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 1968 & Cum. Supp. 1980-1981); N.C. GEN. STAT. §§ 75-1 to -16 (1975); N.D. CENT. CODE §§ 51-08-01 to -13 (1974 & Supp. 1979); OHIO REV. CODE ANN. §§ 1331.01-.99 (Page 1979 & Supp. 1980); OKLA. STAT. ANN. tit. 79, §§ 1-7, 21-36 (1976); OR. REV. STAT. §§ 646.705-.836, .990 (1977); S.C. CODE §§ 39-3-10 to -360 (1976); S.D. CODIFIED LAWS ANN. §§ 37-1-3.1 to -22 (1977); TENN. CODE ANN. §§ 69-101 to -108 (1976); TEX. BUS. & COM. CODE ANN. tit. 2, §§ 15.01-.40 (Vernon 1968 & Cum. Supp. 1980-1981); UTAH CODE ANN. §§ 76-10-911 to -926 (Supp. 1979); WIS. STAT. ANN. §§ 133.01-.19 (West Cum. Supp. 1980-1981).

See generally Inman, *The Uniform State Antitrust Act: A Review and Commentary*, 14 AM. BUS. L.J. 171 (1976); Project, *supra* note 7.

203. CAL. BUS. & PROF. CODE § 16755 (West 1964); HAWAII REV. STAT. § 480-16 (1976); NEV. REV. STAT. § 598A.280 (1973); N.Y. GEN. BUS. LAW § 341 (McKinney 1968 & Cum. Supp. 1980-1981).

204. MD. COM. LAW CODE ANN. § 11-212 (1975).

205. Alabama (\$2,000 maximum); Alaska (\$20,000 maximum); Colorado (\$5,000 maximum); Florida (\$5,000 maximum); Idaho (\$5,000 maximum); Illinois (\$50,000 maximum); Indiana (\$5,000 maximum); Iowa (\$1,000 maximum); Kansas (\$1,000 maximum); Louisiana (\$5,000 maximum); Maine (\$2,500 maximum); Massachusetts (\$25,000 maximum); Michigan (\$1,000 maximum); Minnesota (\$50,000); Mississippi (\$10,000 maximum); Montana (\$25,000 maximum); Nebraska (\$5,000 maximum); New Hampshire (\$1,000 maximum); New Jersey (\$50,000); New Mexico (\$1,000 maximum); North Dakota (\$1,000 maximum); Ohio (\$1,000 maximum); Oklahoma (\$10,000 maximum); Oregon (\$1,000 maximum); South Carolina (\$5,000); South Dakota

\$50,000.<sup>206</sup> Thirty-three states authorize incarceration of individuals who violate state antitrust laws.<sup>207</sup> Missouri allows for imprisonment of up to one year.<sup>208</sup>

Imprisonment of the individual antitrust offender is justified primarily by its anticipated deterrent effect. The businessperson operates in a system where he must maximize profits. Therefore, some operators in the marketplace objectively will compare the estimated gains of competitive activity with those of anticompetitive activity. The estimated gains of anticompetitive behavior are determined by approximating the excess revenues to be derived through the anticompetitive activity and discounting that excess by the risk of prosecution and fines.<sup>209</sup> In many instances, the maximum fine is not as great as the expected excess revenues resulting from anticompetitive activity. This may be especially true in our present economy, which is experiencing both inflation and recession. Many businesspersons find their costs increasing steadily while the demand for their product is decreasing steadily. If the market operates freely, prices should decrease as the demand decreases; yet such conditions could cause severe losses for the businessperson who must meet the increased cost of production. Thus, efforts to stabilize or raise prices become much more likely.<sup>210</sup> For these reasons, the added threat of imprisonment is necessary

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(\$2,000 maximum); Tennessee (\$5,000 maximum); Utah (\$1,000 maximum); Wisconsin (\$50,000 maximum). See statutes cited note 202 *supra*.

206. RSMO § 416.051.1 (1978).

207. Alaska (one year maximum); California (three years maximum); Colorado (one year maximum); Florida (five years maximum); Georgia (five years maximum); Hawaii (three years maximum); Idaho (one year maximum); Indiana (ten years maximum); Iowa (one year maximum); Kansas (six months maximum); Louisiana (three years maximum); Maine (five years maximum); Maryland (six months maximum); Massachusetts (one year maximum); Michigan (two years maximum); Mississippi (five years maximum); Missouri (one year maximum); Montana (one year maximum); Nebraska (one year maximum); Nevada (six years maximum); New Hampshire (one year maximum); New Jersey (three years maximum); New Mexico (one year maximum); New York (four years maximum); North Carolina (no maximum); North Dakota (one year maximum); Ohio (six months maximum); Oklahoma (ten years maximum); Oregon (one year maximum); South Dakota (two years maximum); Tennessee (ten years maximum); Texas (ten years maximum); Utah (one year maximum); Wisconsin (five years maximum). See statutes cited note 202 *supra*.

208. RSMO § 416.051.1 (1978). For a discussion of the Missouri criminal provisions, see notes 33-37 and accompanying text *supra*.

209. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 445-46 (1978) ("The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks."). See also K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 63-77 (1976).

210. See, e.g., *In re Cement & Concrete Antitrust Litigation* MDL 296, No.

to deter antitrust violations.<sup>211</sup> The deprivation of liberty, the discomfort and danger of prison, and the humiliation of the criminal process and criminal labeling are particularly unattractive to people in the business community.<sup>212</sup> If potential imprisonment is only for a short period of time, however, then the anticipated revenues to be gained from anticompetitive behavior might outweigh even the cost of a jail term. To illustrate, a former executive of a company convicted of price fixing stated his cost-benefit analysis this way: "When you're doing \$30 million a year and stand to gain \$3 million by fixing prices, a \$30,000 fine doesn't mean much. . . . Face it, most of us would be willing to spend thirty days in jail to make a few extra million dollars. Maybe if I were facing a year or more, I would think twice."<sup>213</sup>

Despite the apparent deterrent effect of imprisonment, history has shown that it is a rarely used remedy. One report concludes that from 1890 to 1970 only nineteen individuals, exclusive of trade union leaders, went to jail for antitrust violations.<sup>214</sup> Clearly, among white collar crimes as a whole, antitrust violations rank distressfully low in the severity and frequency of sentences.<sup>215</sup>

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76-448A (D. Ariz.) (pending) (discussed in notes 146-48 and accompanying text *supra*).

211. See also Rahl, *supra* note 57, at 780.

212. See generally Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301 (1967); Whiting, *Criminal Antitrust Liability of Corporate Representatives*, 48 GEO. L.J. 530 (1960).

213. Project, *supra* note 7, at 640 n.930.

214. *Id.* at 638 n.918. But see Smith, *The Incredible Electrical Conspiracy: Part I*, FORTUNE MAGAZINE, April 1961, at 132; Smith, *The Incredible Electrical Conspiracy: Part II*, FORTUNE MAGAZINE, May 1961, at 161. The author states that 394 individuals received jail sentences ranging from four hours to one year during the period from 1909 to 1964; most of these sentences, however, were suspended.

215. We are no longer surprised to read that a corporation has been fined \$13 million for polluting a Virginia river, a state legislator in Illinois sentenced to three years in prison for accepting bribes, a doctor in New York sentenced to five years in jail and fined more than \$100,000 for Medicaid fraud, a businessman from Los Angeles sentenced to five years in prison for taking part in a scheme to defraud the Small Business Administration, a stock manipulator in New York sentenced to ten years in prison and two bank executives in Memphis sentenced to five years in prison for fraud and misappropriation of bank funds . . . .

[T]he severity of antitrust sentences has lagged far behind those of other white collar criminals. In fiscal 1976, those convicted of securities fraud were sentenced to an average of 45.7 months in prison. Transportation of forged securities brought an average of 45.4 months imprisonment and bank embezzle-

One reason for the scarce use of criminal imprisonment seems to lie in the public's perception that antitrust violations are not violent crimes or crimes of moral turpitude.<sup>216</sup> Nevertheless, in terms of aggregate economic effects, the consequences of antitrust violations are far more serious than many types of crimes. Consequently, the trend is for the Justice Department and state antitrust enforcement agencies to seek imprisonment more frequently as a penalty for antitrust violations.<sup>217</sup> Imprisonment is still reserved, however, for the more egregious types of violations, normally the per se antitrust violations, where the law is clear and where an illegal purpose is easily proven.<sup>218</sup>

Fines are imposed much more frequently than imprisonment in criminal antitrust cases.<sup>219</sup> As with imprisonment, one of the primary purposes of the criminal fine is to deter anticompetitive activity by taking away the benefits to be derived from such activity. As the risk of financial penalty increases, there is less chance the expected excess revenues of anticompetitive activity will outweigh the revenues from competitive activity.<sup>220</sup> Of course, for this to be effective the courts must be able to impose fines that equal or exceed the expected gains from anticompetitive behavior. Such gains can sometimes be considerable and, as stated previously, the maximum fine allowed by law may not be sufficient to outweigh the benefits.<sup>221</sup>

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ment an average of 22.6 months. Defendants convicted of income tax fraud, a relatively common offense, were sentenced to an average of 15.4 months imprisonment.

In comparison the 75 defendants convicted in fiscal 1976 of pure antitrust violations—where there was no violence—received a total of two and one half months. The average is meaningless and not worth computing. In fact, a higher percentage of persons convicted of violating the migratory bird laws were sentenced to prison, for longer terms, than those who violated the antitrust laws.

Address by D. Baker, To Make the Penalty Fit the Crime: How to Sentence Antitrust Felons, Tenth New England Antitrust Conference 3-6 (Nov. 20, 1976), reprinted in Project, *supra* note 7, at 639 n.920.

216. See Flynn, *supra* note 212, at 1318.

217. See generally Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978); Fellmeth, *supra* note 9.

218. See Project, *supra* note 7, at 636. See generally Baker, *supra* note 217.

219. See generally Flynn, *supra* note 212; Whiting, *supra* note 212.

220. See K. ELZINGA & W. BREIT, *supra* note 209, at 118. See also notes 209 & 210 and accompanying text *supra*.

221. It should be noted, however, that each successive stage of a criminal conspiracy is subject to a separate penalty and consequently the aggregate fine may exceed the statutory limit. Furthermore, criminal penalties are not the only potential deterrents to anticompetitive activity. Both federal and state law provide for recovery of treble damages; this can be a considerable amount. See notes 124-48 and accompanying text *supra*.

Regardless of the length of jail sentences and the severity of criminal fines, the deterrent effect is possible only if there is a viable threat of prosecution and conviction. Antitrust enforcement authorities must communicate their willingness to enforce the antitrust laws vigorously. The State of Missouri has joined the ranks of those states that are known as active antitrust enforcement authorities with respect to criminal prosecutions.<sup>222</sup>

A significant factor allowing Missouri to pursue criminal prosecutions actively is the Missouri Antitrust Law provision granting the Attorney General similar powers to those of a state prosecutor regarding the use of grand juries.<sup>223</sup> The effective use of grand jury proceedings by the State of Missouri has resulted in numerous indictments for antitrust violations in recent years.<sup>224</sup>

*State v. Dugan*<sup>225</sup> was initiated in April 1979, after a Buchanan County grand jury issued indictments against Kenneth Dugan, an employee and agent of the Dugan-Lowe Oil Company, and the Dugan-Lowe Oil Company. The indictments charged the defendants with engaging in a continuing combination and conspiracy in unreasonable restraint of trade in violation of the Missouri Antitrust Law. The conspiracy, occurring between February 1977 and January 1979, concerned fixing the pump price of gasoline at stations owned and operated by Dugan-Lowe Oil Com-

222. As of 1977, one author listed Wisconsin as the leader in state criminal antitrust enforcement. Other states listed were California, Colorado, Illinois, Iowa, Minnesota, New Jersey, New Mexico, New York, and Oregon. Project, *supra* note 7, at 633.

223. RSMO § 416.051.2 (1978). See Almstedt & Tyler, *supra* note 12, at 507.

224. The State of Missouri also has been successful with the use of the criminal information. For example, in *State v. ESB, Inc.*, No. 78-1771 (Cir. Ct., Jackson Cty., Mo. 1978), Missouri filed a criminal information alleging that two companies, ESB, Inc. and Burns & Griffin, Inc., had entered into a horizontal price-fixing and territorial division arrangement in the sale of emergency lighting equipment. Specifically, it was alleged that the two companies agreed to either obtain the participation of Comet Industries, Inc. in the horizontal price-fixing combination and division of territories or to terminate Comet as a distributor of ESB's equipment in Missouri. Comet refused to join in the alleged conspiracy and as a result was terminated as a master distributor of ESB's products. The litigation resulted in a consent judgment whereby ESB, Inc. and Burns & Griffin, Inc. agreed to abide by the state antitrust laws in the marketing and distribution of lighting equipment. Because of the costs incurred by the state in the investigation and prosecution of the action, the defendants paid a total of \$24,897.56 to the state. See SUMMARY OF ACTIVITIES, *supra* note 131.

Nevertheless, even though the criminal information can be used effectively, the grand jury process and indictment method is preferred. The grand jury provides a valuable vehicle for discovery in the early stages of the litigation.

225. No. 379-53 (Cir. Ct., Buchanan Cty., Mo. 1979) (settlement agreement).



pany and stations owned by various unindicted conspirators. In addition to the indictments, the State of Missouri filed a civil *parens patriae* action against Kenneth Dugan, Dugan-Lowe Oil Company, and the other conspirators.<sup>226</sup> After discovery and negotiations, the Antitrust Division was able to reach an agreement with the defendants in both the criminal action and the civil *parens patriae* action. The agreement resulted in both Kenneth Dugan and Dugan-Lowe Oil Company entering guilty pleas in the criminal prosecution, Kenneth Dugan paying a criminal fine of \$5,000, and Dugan-Lowe Oil Company paying a criminal fine of \$10,000.<sup>227</sup> In the civil *parens patriae* action, a settlement was reached whereby Kenneth Dugan and Dugan-Lowe Oil Company paid \$45,000 in damages.<sup>228</sup>

A good example of Missouri's leading role among states seeking criminal sanctions is *State v. Central Petroleum Distributors, Inc.*<sup>229</sup> In this 1979 case, the State of Missouri indicted ten oil companies and eight individuals on charges of fixing the pump price of gasoline in violation of the Missouri Antitrust Law. The indictments alleged that beginning as early as October 1975 and continuing until as late as October 1979, the defendants fixed the pump price of gasoline in Joplin, Missouri, at stations they owned, leased, and operated. The defendant-companies were charged with communicating through their employees, in person and by telephone, with each other and with certain unindicted conspirators to discuss, coordinate, or agree on the pump price at which gasoline would be sold in Joplin. It was alleged that as a result of the conspiracy, many gasoline purchasers in the Joplin area were deprived of free and open competition in the sale of gasoline and had paid higher prices for gasoline than they would have paid in the absence of the restraint.

At the time of this writing, the president of one defendant-company has pleaded guilty; criminal fines totaling \$41,000 were paid to the state by various defendant-individuals and defendant-companies; civil fines totaling \$223,000 have been paid to the state. The action is still pending against some defendants.<sup>230</sup>

On July 3, 1980, a St. Louis County grand jury returned indictments against three retailers marketing gasoline in Missouri, their trade association, and eleven of their corporate officials in the case of *State v. Bonafide*

226. *Missouri v. Dugan-Lowe Oil Co.*, No. 79-6055 (W.D. Mo. 1979) (settlement agreement).

227. *State v. Dugan*, No. 379-53 (Cir. Ct., Buchanan Cty., Mo. 1979) (settlement agreement). See SUMMARY OF ACTIVITIES, *supra* note 131.

228. *Missouri v. Dugan-Lowe Oil Co.*, No. 79-6055 (W.D. Mo. 1979) (settlement agreement). See SUMMARY OF ACTIVITIES, *supra* note 131.

229. No. 179-80-116M (Cir. Ct., Jasper Cty., Mo. 1979).

230. *Id.* The civil fines resulted from a companion *parens patriae* action filed by the State of Missouri against 22 separate defendants. *Missouri v. Central Petroleum Distribs., Inc.*, No. 80-5019 (W.D. Mo. 1980).

*Oil Co., Inc.*<sup>231</sup> Charges were similar to those made in *Central Petroleum*. A guilty plea has been entered by one defendant; other charges still are awaiting trial court action.<sup>232</sup>

The enforcement of state antitrust laws through successful criminal prosecution is to many the most salient characteristic of the Missouri Antitrust Division. Criminal sanctions represent a great deterrent to potential violators of the antitrust laws if it is known that violators will be identified successfully and prosecuted vigorously. Clearly, the Missouri Antitrust Division has shown an intention to prosecute criminal antitrust violations; that commitment will remain in the coming years.

### B. Civil Actions

Civil actions represent a necessary counterpart to criminal prosecutions. The Missouri Antitrust Law has provisions for injunctive relief, consent decrees, and treble damages in civil actions,<sup>233</sup> while federal legislation arms the Attorney General with the *parens patriae* enforcement tool through section 4c of the Clayton Act.<sup>234</sup> Quite often, criminal prosecutions are accompanied by a civil *parens patriae* action, as seen, for example, in *State v. Dugan*.<sup>235</sup> Of course, *parens patriae* cases unaccompanied by criminal charges also have been initiated.

The *parens patriae* action is an important addition to the traditional civil remedies, serving as a further deterrent to activity that was previously approachable by the state only by way of injunction. In the classic *parens patriae* case, the possibility of a *parens patriae* action provides an incentive for a corporation to eliminate an illegal restraint of trade before detection rather than persisting until enjoined.<sup>236</sup> A few recent cases are illustrative of the Missouri Antitrust Division's use of the *parens patriae* action<sup>237</sup> and other civil remedies and actions to enforce the state's antitrust laws.

On May 5, 1979, the Missouri Antitrust Division filed a complaint in the United States District Court for the Western District of Missouri in the case of *Missouri v. Petroleum Retailers Organization*.<sup>238</sup> Missouri

231. No. 81-0250 (E.D. Mo. 1980).

232. *Id.* It is the history of such conspiracy cases that, after one defendant "breaks," the rest are not far behind. See, e.g., *Central Petroleum Distribs.*, discussed in notes 229 & 230 and accompanying text *supra*. Extremely helpful in this regard is the provision in Missouri's Antitrust Law which affords transactional immunity to witnesses compelled to testify over their fifth amendment privilege in grand jury proceedings. See RSMO § 416.111 (1978).

233. RSMO §§ 416.061.2, .071.1, .121.1(2) (1978) (injunctive relief); *id.* § 416.061.4 (consent judgments or decrees); *id.* § 416.121.1(1) (treble damages).

234. See notes 80-105 and accompanying text *supra*.

235. See notes 225-28 and accompanying text *supra*.

236. See Hill, *supra* note 82, at 1380.

237. See also *Missouri v. Dugan-Lowe Oil Co.*, No. 79-6055 (W.D. Mo. 1979) (settlement agreement); notes 225-28 and accompanying text *supra*.

238. No. 77-4107 (W.D. Mo. 1979) (settlement agreement).

brought the action in its *parens patriae* capacity and sought injunctive relief. The complaint charged the Petroleum Retailers Organization and several gas station retailers with conspiracy to close down retail service stations in Missouri for a four-day period during May 1979. The proposed shutdown was an attempt by PRO station owners to be part of a nationwide concerted refusal to sell gasoline designed to inconvenience the public so seriously that the Department of Energy would raise the ceiling price for gasoline sales. After several meetings, the state and the defendants reached a settlement whereby the defendants agreed not to engage in a concerted shutdown and agreed to notify the Attorney General's office in the event that consideration of a concerted shutdown was contemplated in the future.<sup>239</sup>

*State v. Stephens*<sup>240</sup> was an action by the State of Missouri to enjoin the blockading of barge and pipeline petroleum terminals. Independent truckers in Missouri sought to coerce a change in governmental regulations—maximum trucking tariffs—by their blockades of barge and pipeline terminals in the summer of 1979. The blockade was intended to cause fuel shortages so injurious to the public that the federal government would feel compelled to grant relief by accepting the truckers' demands. On July 5, 1979, the circuit court entered a permanent injunction prohibiting the concerted action to impede access to the pipeline terminal at Scott City, Missouri.<sup>241</sup>

*State v. Smith*<sup>242</sup> was a companion case to *Stephens* where the State of Missouri obtained a permanent injunction prohibiting similar concerted action to block or otherwise impede access to oil pipelines and barge terminals in Cape Girardeau, Missouri.<sup>243</sup> *State v. Gabel*<sup>244</sup> was a similar action resulting in a temporary injunction in June 1979, prohibiting concerted action to block or otherwise impede access to service stations and fuel pumps throughout the State of Missouri; the injunction also prohibited the service stations from refusing to sell gasoline.<sup>245</sup> It should be noted that under the ruling of the United States Court of Appeals for the Eighth Circuit in *Missouri v. National Organization for Women, Inc.*,<sup>246</sup>

239. *Id.* See SUMMARY OF ACTIVITIES, *supra* note 131.

240. No. 379-330 (Cir. Ct., Scott Cty., Mo., July 5, 1979).

241. *Id.*

242. No. 679-26 (Cir. Ct., Cape Gir. Cty., Mo., July 5, 1979).

243. *Id.*

244. No. 425088 (Cir. Ct., St. L. Cty., Mo., July 16, 1979).

245. *Id.* The issuance of these injunctions can be melodramatic. In the above three cases, the author was required to proceed to the respective gasoline terminals at night and personally serve the injunctions on the truck operators. During this time period, it was also not uncommon for violence to accompany the antitrust activity.

246. 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980). See notes 153-80 and accompanying text *supra*.

the State of Missouri arguably may have been barred from acting against the restraints seen in *PRO, Stephens, Smith, and Gabel* because of the alleged underlying political motivation for the defendants' activities.<sup>247</sup>

A consent judgment where five lessors of coin-operated vending and amusement machines in the St. Louis area agreed not to allocate customers or potential customers was the culmination of civil litigation in *State v. Wonder Novelty Co.*<sup>248</sup> The State of Missouri filed a petition for injunctive relief in 1979 charging five defendants with agreeing not to solicit customers of other defendants and various other conspirators. It was alleged further that defendants agreed not to compete for customers of other defendants or conspirators on the basis of commission rates or services. Defendants were charged with using common solicitors and with utilizing location agreements which ran for two-to-five year periods and which were renewed automatically, tending to restrict unreasonably the ability of owners of locations to switch coin-machine operators. In addition, the defendants were charged with making "courtesy calls" to other defendants when a dissatisfied customer contacted a "new lessor." In such cases, the new lessor would inform the current lessor of that customer's dissatisfaction. It was also charged that the new lessor then would refuse to provide service unless the current lessor acquiesced and removed his machines.

The impact of such a conspiracy would be to deprive persons wishing to lease coin-operated machines in the St. Louis area of free and open competition in the leasing market. Furthermore, the conspiracy would restrain persons leasing coin-operated machines from changing lessors. The quality of service to persons leasing coin-operated machines and ultimately to consumers would also be diminished.

The terms of the consent judgment entered into with the Attorney General's Office provided that the defendants would not divide, allocate, or apportion any customers or potential customers, would individually solicit customers, and would lease or service any coin-operated machines to or for any consumer.<sup>249</sup> These restrictions were to remain in effect for five years and were not to apply to lawful covenants not to compete or valid restrictive covenants ancillary to employment.<sup>250</sup> In addition, the defendants agreed to pay the State of Missouri \$25,000 in settlement of the action.<sup>251</sup>

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247. See notes 181-86 and accompanying text *supra*.

248. No. 430472 (Cir. Ct., St. L. Cty., Mo., Nov. 1, 1979).

249. *Id.*

250. *Id.*

251. *Id.* See SUMMARY OF ACTIVITIES, *supra* note 131. It should be noted that the Missouri Antitrust Division actively enforces the terms of all court orders obtained against alleged antitrust violators. For example, the state recently obtained a contempt order against a Kansas City Barbers Union official for having violated an October 1976 consent judgment resulting from *State v. Local No. 37*,

Still pending at the time of this writing is *State v. Memorial Heritage, Inc.*,<sup>252</sup> in which the state has alleged that the defendant's cemetery rules and regulations violate the Missouri Antitrust Law by imposing an illegal tying arrangement between the purchase of interment spaces in the defendant's cemeteries (the tying product) and the purchase of marker installation services (the tied product) in those cemeteries. The defendant owns or operates three cemeteries in the Kansas City, Missouri area and requires that all grave markers placed in those cemeteries be installed by the defendant. The Missouri Antitrust Division feels that the outcome of this case will have sweeping significance in that the alleged violation is currently a widespread practice in the State of Missouri.<sup>253</sup>

Of course, not all civil investigations initiated by the Missouri Antitrust Division actually have to be litigated for the enforcement purpose to be achieved. For example, in December 1977, the Antitrust Division prepared to file antitrust charges against the Henges Division of Guarantee Electrical Company and Environmental Interiors. The charges were to refer to construction projects where unreasonable restraints of trade allegedly were occurring regarding ceiling subcontracting work being

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No. 28817 (Cir. Ct., Cole Cty., Mo., Oct. 21, 1976). The consent judgment, which was to be effective until October 1986, prohibited eight locals and their officers from agreeing to fix the prices for various barber services and the hours during which establishments offering barber services could be open for business. The state alleged that the union official had tried to discourage a nonunion Kansas City barber from offering haircuts on certain days for \$1. The state successfully obtained the contempt order and the official was assessed a civil fine of \$500. See SUMMARY OF ACTIVITIES, *supra* note 131.

252. No. 78-3992 (Cir. Ct., Jackson Cty., Mo.) (pending).

253. Tying arrangements have long been held to be per se violations of the Sherman Act and Clayton Act. See, e.g., *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pac. R.R. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *IBM Corp. v. United States*, 298 U.S. 131 (1936); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). "A tie exists when a seller, having a product which buyers want (the 'tying product'), refuses to sell it alone and insists that any buyer who wants it must also purchase another product (the 'tied product')." L. SULLIVAN, *supra* note 29, at 431.

Case law has refined the tying per se violation and requires the violator to have market power in the tying product and that the tie result in an appreciable restraint on competition in the market for the tied product. It is required further that the restraint affect a "not insubstantial" amount of commerce in the tied product. 356 U.S. at 6. In addition, the courts have required that the tied product and the tying product be two distinct commodities or services. See, e.g., *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). This is the central issue in *State v. Memorial Heritage, Inc.* See generally Abrams, *Tying Arrangements and Exclusive Dealing Contracts*, 53 CHI. B. REC. 75 (1971).

done for certain school districts. Following negotiations, several contracting firms and three Missouri school districts entered into an agreement for a complete release of all antitrust claims arising from the ceiling work in return for payment by Henges and Environmental Interiors of \$15,000 to the school districts.<sup>254</sup>

V. OUT-OF-COURT ACTIVITIES BY STATES DESIGNED TO  
EDUCATE THE PUBLIC AND TO ADVOCATE A STRONG POLICY  
OF COMPETITION IN THE GOVERNMENTAL COMMUNITY

Because active antitrust enforcement efforts are a recent phenomenon in most states, educational programs are essential. Three specific reasons can be articulated for establishing extensive antitrust educational programs at the state level.<sup>255</sup> First, the antitrust laws are frequently complex and confusing. Since a violation of the antitrust laws carries with it the possibility of criminal sanctions, attempts should be made to educate the business community as to the intricacies of the law before subjecting them to such penalties. Second, some attorneys for small businesses are unacquainted with the more complex principles involved in antitrust litigation. Educational programs will assist them in advising their small business clients. Third, there are fewer violations when the public is aware of the law. With an educated public, the business community more likely will avoid illegal practices, knowing that such behavior likely will be identified and prosecuted. Similarly, businesses will be in a better position to discern whether their competitors are acting in a manner that violates the antitrust laws.

The Missouri Antitrust Division has published and distributed a pamphlet on antitrust enforcement in Missouri. The pamphlet is designed to be an educational tool.<sup>256</sup> This pamphlet is intended to acquaint Missouri businesspersons and consumers with some of the basic provisions of the antitrust laws, to alert them to several common anticompetitive practices, and to advise them where to bring antitrust questions and complaints. The pamphlet describes the policy of competition and the system of antitrust enforcement at both the federal and state levels. In addition, eight examples of illegal activities are given, covering such areas as price fixing, divisions of markets or customers, limitations of production, agreements by competitors not to do business with others, price fixing in the chain of distribution, territorial or customer restrictions in the chain of distribution, tying arrangements, and monopolization. A toll-free Attorney General's phone number is set out in the pamphlet to encourage citizens to

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254. 906 ANTITRUST & TRADE REG. REP. (BNA) D-1 (March 22, 1979). See SUMMARY OF ACTIVITIES, *supra* note 131.

255. See Miles, *supra* note 7, at 1351.

256. J. ASHCROFT, ANTITRUST ENFORCEMENT IN MISSOURI (1977) (available on request at Missouri Attorney General's Office).

call the Attorney General's Office if they have an antitrust complaint or if they want further information about antitrust enforcement.<sup>257</sup>

Despite the obvious benefits of educating the citizens of Missouri concerning the antitrust laws, the function of advocating a policy of competition among governmental agencies may be even more important.<sup>258</sup> Several studies of federal regulations suggest that the ultimate cost to consumers for unnecessary anticompetitive regulations can be quite substantial. The 1979 Report of the National Commission for the Review of Antitrust Law and Procedures estimated the cost of air transportation regulations at about \$2 billion a year<sup>259</sup> and the cost of trucking regulations at nearly \$1 billion a year.<sup>260</sup> The ocean shipping regulations have caused rates to be as much as an estimated forty-five percent higher than they would be under competitive conditions.<sup>261</sup> The Report also notes that with the Securities Act Amendments of 1975<sup>262</sup> ending the system of fixing brokerage commission rates in stock transactions, by 1977, institutional brokerage rates dropped more than that forty-five percent and individual rates by more than fifteen percent.<sup>263</sup> As a result, the consumer savings on commission rates in 1976 were estimated at \$700 million.<sup>264</sup>

The United States Supreme Court has recognized the need for advocating a competitive policy for governmental agencies in the recent decision of *City of Lafayette v. Louisiana Power & Light*.<sup>265</sup> The Court noted that in 1972 there were 62,437 different units of local government with potential to make economic choices without regard to their anticompetitive effects, thereby opening a "serious chink in the armor of antitrust protection."<sup>266</sup>

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257. The toll-free number is 1-800-392-8222. This number also can be used for other matters such as consumer fraud complaints.

258. See Flynn, *supra* note 9, at 505.

The long-run consumer benefits of active state attorney general antitrust participation in all forms of state and local regulation may well prove of greater economic significance to consumers than either state or *parens patriae* treble damage activity under federal law . . . [or] the prosecution of local conspiracies in restraints of trade under the state antitrust law.

*Id.*

259. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 177, 181-82 (1979).

260. *Id.*

261. *Id.*

262. Pub. L. No. 94-29, 89 Stat. 97 (amending 15 U.S.C. § 78a (1969)).

263. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 184 (1979).

264. *Id.*

265. 435 U.S. 389 (1978).

266. *Id.* at 408.

State antitrust enforcement agencies should follow the developments at the federal level where the Justice Department has been a strong advocate for restoring a policy of competition to governmental decision-making.<sup>267</sup> One approach suggested for state enforcement agencies is to lobby for legislation comparable to existing federal legislation which requires government purchasing agents to report all identical bids received to the Justice Department so that the Department can investigate the possibility of illegal cooperation among bidders.<sup>268</sup>

The State of Missouri has been one of the leading states in advocating a policy of competition to governmental entities. For example, in conjunction with the University of Missouri-Columbia, the Missouri Antitrust Division has undertaken a bid-monitoring program modeled after the federal program, using the computer facilities of the University to analyze public bids in an attempt to detect any patterns which would suggest collusive activity.<sup>269</sup>

Another example of advocacy activity by the Missouri Antitrust Division is the Professional Licensing Board Seminar conducted by the Division in 1979 for all state licensing boards in Missouri. At the seminar, licensing statutes and regulations were evaluated from an antitrust perspective; changes were recommended where needed to bring statutes and regulations into conformity with the antitrust laws.<sup>270</sup>

The Missouri Antitrust Division has also investigated several governmental entities in Missouri and has been able to reach satisfactory agreements with many regarding anticompetitive regulations without resorting to the courts. One such example is the agreement reached on May 25, 1979, between the Attorney General's Office and the City of St. Louis.<sup>271</sup> The agreement was reached after an investigation disclosed that city regulations for the awarding of show dates for the city's Convention and Exhibits Center were highly anticompetitive. The regulations provided that a promoter, having an exhibition on various set dates in one year, would hold those dates in perpetuity to the exclusion of all potentially competing promoters. The city informally agreed to discontinue this practice and to adopt a procedure that the Antitrust Division and the city drafted, which would comply with the antitrust laws. In return for the city's compliance, the Missouri Antitrust Division agreed not to initiate

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267. See Miles, *supra* note 7, at 1350.

268. See 41 U.S.C. § 252(d) (1976); Exec. Order No. 10,936, 26 FED. REG. 3555 (1961).

269. See SUMMARY OF ACTIVITIES, *supra* note 131.

270. The Missouri Antitrust Division has held several such seminars in order to help public and private purchasing agents identify antitrust violations and develop purchasing procedures which will discourage noncompetitive practices by suppliers. See SUMMARY OF ACTIVITIES, *supra* note 131.

271. 917 ANTITRUST & TRADE REG. REP. (BNA) D-1 (June 7, 1979).



any action against the city arising from antitrust violations respecting the Convention Center's activities prior to the date of the agreement.<sup>272</sup>

Another example of elimination of anticompetitive activity of a governmental entity without formal litigation involved the City of Excelsior Springs, Missouri. This situation, however, was not resolved with as cooperative an approach as seen with the City of St. Louis in the Convention Center case. Since 1940, Excelsior Springs had operated a municipally owned Pepsi-Cola bottling plant. The city sold Pepsi-Cola and other soft drinks it bottled in a seven-county area pursuant to a franchise granted to Excelsior Springs by the Pepsi-Cola Company. The city's Pepsi-Cola operation had an unfair competitive advantage over other soft drink franchises operating in the same area because of the preferential tax treatment it received as a governmental entity. The Missouri Antitrust Division prepared an information in the nature of *quo warranto* to challenge the authority of the city to run such an enterprise. Prior to the filing of the information, the City of Excelsior Springs divested itself of its Pepsi-Cola bottling plant.<sup>273</sup>

## VI. CONCLUSION

As a result of significant increases in power and funding through state and federal legislation, the State of Missouri has joined with several other states in a revival of state antitrust enforcement. The Missouri Antitrust Division has been a leader in each major area of state involvement that has emerged in the past decade and will continue to pursue vigorously antitrust enforcement at the state level in order to ensure a competitive climate for the benefit of Missouri consumers and businesses.

It is hoped that the Missouri experience in recent state antitrust enforcement stands as a promising example of the effectiveness with which a state antitrust enforcement unit can act. Clearly, federal authorities do not have the resources to single-handedly protect the marketplace from antitrust violators. Only with effective state involvement to complement federal enforcement will it be possible to create the competitive climate so necessary to our free enterprise system.

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272. *Id.*

273. *See* SUMMARY OF ACTIVITIES, *supra* note 131.