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THE MASSACHUSETTS ANTITRUST ACT— A GUIDE FOR THE PRIVATE PRACTITIONER

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I. INTRODUCTION

Business in the 1980's faces increased market pressures, continued conglomerate growth, and intensified government regulation. All presage increased utilization of the federal and state antitrust laws to challenge anticompetitive business behavior. To meet this need, the Commonwealth of Massachusetts recently enacted the Massachusetts Antitrust Act, incorporated in the statutes as chapter 93.¹ Patterned after the federal Sherman and Clayton Acts,² this statute substantially modernizes the Commonwealth's antitrust law by creating new substantive rights, procedural devices, and harsh penalties for improper business activities. To encourage private enforcement, it awards successful claimants up to three times their actual damages, equitable relief, costs, and reasonable attorneys' fees.

The general practitioner, whether representing the large corporation or the sole proprietor, will increasingly be required to counsel clients on the prohibitions of the antitrust laws. Such counseling would be incomplete without an awareness of the rights and proscriptions set forth in chapter 93 of the Massachusetts General Laws.

This paper introduces chapter 93 to the Massachusetts practitioner unfamiliar with this specialized legal field. Included will be a review of the Act's legislative history, a summary of each provision, a discussion of potential procedural and substantive difficul-

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1. 1978 Mass. Acts, ch. 459; approved July 17, 1978; Emergency declaration filed August 10, 1978, effective August 17, 1978 (codified at MASS. GEN. LAWS ANN. ch. 93, §§ 1-14A (West Cum. Supp. 1980)).

2. See notes 10-24 *infra*.

ties, and proposals for statutory reform. Applying the adage that an ounce of prevention is worth a pound of cure, counsel may well benefit from advance study of this new and far-reaching act.

II. HISTORICAL AND LEGISLATIVE BACKGROUND

A. *Resurgence of State Antitrust Activities*

The passage of a remodeled antitrust act coincided with the revitalization of state antitrust activity. Since 1970 alone, well over thirty states have enacted comprehensive antitrust legislation.³ This renaissance was encouraged by four concurrent events: (1) Growing public awareness that the federal government could not adequately police local and regional anticompetitive behavior;⁴ (2) congressional authorization for state attorneys general to bring antitrust actions in the federal courts, thereby increasing their involvement and interest in antitrust regulation;⁵ (3) the availability of federal "seed money" for the development of state antitrust divisions;⁶ and (4) state participation in several successful multi-party antitrust actions which resulted in large financial recoveries.⁷ These led to increased political and public support for a continuation of the state's role as antitrust prosecutor.

3. Such state laws are compiled in [1972] 4 TRADE REG. REP. (CCH) ¶ 30,000 at 35,011.

4. Together, the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission (FTC) employ fewer than 1,000 attorneys. These agencies have conceded that they can handle only a fraction of the country's antitrust matters. See Schellhardt, *Merger of Antitrust Division, FTC Unit Is Ordered for Study*, Wall St. J., Apr. 11, 1977, at 4, col. 2. Their inadequate staff and resources are further diminished by the inability of the federal statutes to reach many local and state anticompetitive practices.

5. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 1311-1314 (1976) & 18 U.S.C. 1505 (1976). See Fein, *Constitutional Issues Raised by the Parens Patriae Title of the Antitrust Improvements Act of 1976—An Appraisal*, 47 ANTITRUST L.J. 1205 (1979); Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679 (1977).

6. The Crime Control Act of 1976 § 309, 42 U.S.C. § 3739 (1976) authorizes the Antitrust Division of the Justice Department to award grants totalling up to \$10 million per year for three years as "seed money." Pursuant to this program, Massachusetts has received grants of over \$300,000 per year. Congress recently authorized an additional \$4 million "seed money" appropriation which was not originally sought by the Justice Department. See 943 ANTITRUST & TRADE REG. REP. (BNA), at D-3 (Dec. 13, 1979).

7. An example is the Tetracycline litigation, *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). Economists estimate that direct costs for all types of antitrust violations amount to well over \$40 billion per year. See 892 ANTITRUST & TRADE REG. REP. (BNA) Supp. 1, at 7 (Dec. 7, 1978).

State antitrust involvement has historical antecedents. Contrary to popular belief, the states preceded the federal government in antitrust enforcement.⁸ Before the enactment of federal legislation, more than twenty states had statutes proscribing "restraints of trade." Near the close of the nineteenth century, several states initiated legal actions against the corporate "trusts" then dominating the business landscape.⁹ Despite these efforts, however, the power of the robber barons expanded, intensifying public antagonism to their unscrupulous practices. This swelling of public sentiment led to congressional enactment of the Sherman Act in 1890, the first federal antitrust law.¹⁰ Although intended merely to supplement existing state antitrust efforts,¹¹ the Act virtually resulted in federal preemption.¹² By the start of World War I, the states had ceased their antitrust activities, allowing the federal regulators to prose-

8. See H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 155 (1955). By the time the federal Sherman Act was passed in 1890, 15 other states including Massachusetts had constitutional provisions protecting trade while others had adopted common law prohibitions of monopolies and trade restraints. See 892 *ANTITRUST & TRADE REG. REP.* (BNA) Supp. 1, at 12 (Dec. 7, 1978).

9. H. THORELLI, *supra* note 8, at 259-66.

10. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)).

11. The sponsor of the bill, Senator Sherman, described its purpose as "to supplement the enforcement of the established rules of the common and statute law by the courts of the several states. . . . It is to arm the Federal courts . . . that they may cooperate with the state courts" 21 *CONG. REC.* 2457 (1890). The House Judiciary Committee report on the bill further noted, "Whatever legislation Congress may enact on this subject . . . will prove of little value unless the states shall supplement it by auxiliary and proper legislation. . . ." H.R. REP. NO. 1705, 51st Cong., 1st Sess. 1 (1890).

12. Federal preemption of the antitrust field is a common defense in state actions. Preemption applies when Congress enacts federal legislation which expressly or by implication entirely displaces the substantive state law relied on by the claimant.

In the antitrust area, Congress has neither expressed this intent, *James v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), nor implied it, *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 155 (1942). See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131-33 (1978); *Shell Oil Co. v. Younger*, 587 F.2d 34 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

As the United States District Court for Connecticut recently noted: "Even state law that prohibits more than federal antitrust statutes is not necessarily in conflict with, and preempted by, federal law, since the toleration of certain conduct by federal law does not imply an affirmative policy in favor of that conduct." *State v. Levi Strauss & Co.*, 471 F. Supp. 363, 367 (D. Conn. 1979) (citing 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 208, at 58-59 (1978)). See *Commonwealth v. McHugh*, 326 Mass. 249, 93 N.E.2d 751 (1950). *But see Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), in which federal labor law was held to preempt state, but not federal antitrust law.

cute.¹³ Not until half a century later did they resume their role as antitrust protagonist.

B. *The Drafting Process of the Massachusetts Antitrust Act*

Prior Massachusetts antitrust law¹⁴ had three major weaknesses; it was substantively inadequate, procedurally cumbersome, and difficult to interpret.¹⁵ Judicial construction amplified these shortcomings. A prime example can be found in the holding by the Massachusetts Supreme Judicial Court that the original statute applied only to commodities and not to services or to intangible property.¹⁶ Accordingly, statutory reform was needed to counteract judicial retrenchment and to protect the unwary public.

The Massachusetts Antitrust Act is a compromise bill reflecting contributions by the attorney general,¹⁷ the business community, and consumer groups. The draftsmen were guided by the federal antitrust statutes,¹⁸ the model Uniform State Antitrust Act,¹⁹ and recently enacted state antitrust laws.²⁰ While they recognized

13. It is unclear why state efforts ceased at this time. One theory is that legislatures failed to appropriate funds for antitrust enforcement to encourage industries to locate in their states. See generally Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 697-98 (1974).

14. The former chapter 93 of the Massachusetts General Laws consisted of numerous piecemeal sections which had been enacted in sporadic fashion between 1901 and 1912.

15. For example, former chapter 93, § 2, proscribed monopolistic practices in 14 lines, whereas the present act requires only three. See MASS. GEN. LAWS ANN. ch. 93, § 5 (West Cum. Supp. 1980).

16. *SDK Medical Computer Servs. Corp. v. Professional Operating Management Group, Inc.*, 371 Mass. 117, 354 N.E.2d 852 (1976). The Supreme Judicial Court's restrictive attitude is further apparent in *North Station Wine Co. v. United Liquors, Ltd.*, 323 Mass. 48, 80 N.E.2d 1 (1948). Plaintiff's claim that defendant was engaged in an illegal tying scheme was found immaterial. *Id.*

17. The Attorney General had been trying to obtain enactment of a new antitrust act since 1974. Failure to do so may have been attributable to the vigorous enforcement provisions of the proposed drafts.

18. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, 15 U.S.C. §§ 12-27, as amended by Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976).

19. Uniform State Antitrust Act, approved in 1973 by the National Conference of Commissioners on Uniform State Laws and by the ABA House of Delegates, reprinted in [1974] 4 TRADE REG. REP. (CCH) ¶ 30,101 at 35,151. The model act has not gained wide acceptance.

20. See, e.g., CONN. GEN. STAT. ANN., §§ 35-24 to -45 (West Cum. Supp. 1980); N.H. REV. STAT. ANN. §§ 356:1-14 (West Cum. Supp. 1979); N.J. REV. STAT. ANN. §§ 56:9-1 to :9-19 (West Cum. Supp. 1980); VA. CODE §§ 59.1-9.1 to -9.18 (Michie Cum. Supp. 1979). These state laws exhibit little uniformity. While varying substantially, they generally follow three patterns: (1) Employ broad language patterned on the Sherman Act; (2) more specifically proscribe "trusts and combinations," which seek

that a remodeled antitrust act would probably be enacted, there was little consensus on specific provisions. The senate's draft appeared to favor big business. The public interest lobby regarded it as weak, inadequate, and even dangerous since it imposed serious restrictions on the right to recover damages under chapter 93A for "unfair methods of competition."²¹ In return for eliminating these restrictions, they agreed to accept the draft's severely deficient jurisdictional and exemption sections. Based on this compromise, the revised bill received the strong support of legislative leaders, sailing through with little discussion²² before being speedily approved by the Governor.²³

III. THE PROVISIONS OF CHAPTER 93

A. Section 1: Title; Purpose; and Construction

Section 1 declares that chapter 93 is to be known as the Massachusetts Antitrust Act.²⁴ Its purpose is "to encourage free and open competition in the interests of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth." Significantly, the Act "shall be construed *in harmony* with judicial interpretations of comparable federal antitrust statutes insofar as practicable."²⁵ While this lan-

to fix prices, monopolize, or limit the quantity of goods; or (3) very specifically enumerate a list of prohibited practices.

21. Pursuant to chapter 93A, § 11, a businessperson may sue for "unfair methods of competition," which is the same standard as in § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1976). Section 5(a) has been held to reach incipient as well as actual antitrust violations. See *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); note 98 *infra*.

22. State Senator Jack Backman introduced several amendments to strengthen the legislation. On the basis of the compromises by public and private interests, they were withdrawn without formal vote. The legislative history reflects no other discussion of the bill. As is frequently the case in Massachusetts, this vacuum eschews guidance for the intended meaning of particular provisions. The reactions of the consumer and business groups to the Senate bill were expressed in several letters to the state's weekly legal publication. See Ravech, *Proposed Mass. Antitrust Act Creates Problems*, 6 MASS. LAW. WEEKLY 749, at 9 (June 5, 1978); Goldberg, *A Differing View of the Mass. Antitrust Act*, 6 MASS. LAW. WEEKLY 829, at 5 (June 26, 1978); Ravech, *Goldberg Letter is Not the Answer to Problems of Mass. Antitrust*, 6 MASS. LAW. WEEKLY 849 at 5 (July 3, 1978).

23. The compromise drafting process may explain chapter 93's frequent ambiguity. As with the federal statutes, clarification appears to have been intentionally left to the courts.

24. MASS. GEN. LAWS ANN. ch. 93, § 1 (West Cum. Supp. 1980).

25. *Id.* (emphasis added). Generally, the federal antitrust statutes are regarded as the Sherman and Clayton Acts, (Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976);

guage strictly limits judicial discretion, it also provides the Act with a ready-made history by reference to the voluminous body of federal antitrust case law. This corresponds to chapter 93A's *guidance* from federal decisions interpreting the substantive provision of the Federal Trade Commission (FTC) Act. Since chapter 93A specifies that Massachusetts courts are only to be *guided* by federal precedents, allowance is available for interpretive differences which consider the Commonwealth's unique perspective.

The legislative history of chapter 93 reflects the different construction standards of these two sister statutes. The senate draft of chapter 93 sought to conform chapter 93A to chapter 93's "in harmony" standard and to shift chapter 93A's basis from the FTC Act to the federal antitrust laws. As the latter are not so sweeping, this proposal would have seriously narrowed chapter 93A's reach. Since business conduct may be subject to review under both statutes, proponents contended that different and potentially inconsistent standards of legality should not be applied. Opponents countered that amending chapter 93A was unnecessary, contrary to the analogous federal scheme, and would seriously weaken the Act by narrowing its reach. In its final version, chapter 93 did not curtail the scope of chapter 93A.

B. Section 2: Definitions

The definitions adopted in section 2 generally reflect the compromise origins of chapter 93. For example, the term "trade or commerce," while including advertising and leasing, specifically excludes the conveyance, transfer, or use of real property.²⁶ Clearly

Clayton Act, § 1, 15 U.S.C. § 12 (1976)), but not the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1976). *Bott v. Holiday Universal, Inc.*, [1976-2] TRADE CAS. (CCH) ¶ 60,973 at 69,301 (D.D.C.). A recent case illustrating the scope of the "in harmony" standard is *State v. Lawn King, Inc.*, 169 N.J. Super. 346, 404 A.2d 1215 (App. Div. 1979), *aff'd*, 978 ANTITRUST & TRADE REG. REP. (BNA), at F-1 (Aug. 21, 1980). In this case, New Jersey's first criminal convictions under its remodeled antitrust statute were reversed. The basis for this reversal was that the trial court had not acted "in harmony" with federal law. In reviewing the vertical price fixing and tying claims, the court applied a *per se* standard instead of the "rule of reason." Interestingly, at the time of the lower court's ruling, the federal courts also used the *per se* test. The New Jersey Supreme Court affirmed, noting that it was proceeding with the "greatest caution" because of the criminal nature of the case. *Id.*

26. The banks' lobbying efforts may have been encouraged by the Supreme Judicial Court's failure to resolve the issue of chapter 93A's application to banks. See *Mechanics Nat'l Bank of Worcester v. Killein*, 79 Mass. Adv. Sh. 129, 384 N.E.2d 1231, 1237 (1979). However, since insurance companies, *Dodd v. Commercial Union Ins. Co.*, 373 Mass. 72 (1977), 365 N.E.2d 802 (1977), and public utilities, *Lowell Gas*

differing from both the statutory and judicial application of chapter 93A,²⁷ this limitation may be explained by intense lobbying from the banking community.

C. Section 3: Jurisdiction

Section 3 establishes the Act's jurisdictional²⁸ reach, emphasizing its "regional" nature. The Act applies only to activities that impact primarily within the Commonwealth. Procedurally, if a defendant establishes that it derives more than ten percent of its gross revenues from interstate commerce outside New England, the burden of establishing jurisdiction shifts to the complaining party.

Co. v. Attorney Gen. of Mass., 79 Mass. Adv. Sh. 49, 385 N.E.2d 240 (1979), have been held to be subject to chapter 93A, banks may also lie within the jurisdiction of chapter 93A.

27. MASS. GEN. LAWS ANN. ch. 93A, § 9(1) (West Cum. Supp. 1980); *Heller v. Silverbranch Constr. Corp.*, 78 Mass. Adv. Sh. 2850, 382 N.E.2d 1065 (1978); *Commonwealth v. De Cotis*, 366 Mass. 234, 316 N.E.2d 748 (1974).

28. Our federalist system can be seen as distributing jurisdiction along a continuum, with the states and federal government comprising the two opposite ends. Determinations of placement on this spectrum are subject to the constitutional principles embodied in the Commerce Clause, U.S. CONST. art. I, § 8, the Supremacy Clause, U.S. CONST. art. VI, and the fourteenth amendment's procedural due process requirements (e.g., minimum contacts must exist between the forum state and the defendant for the purposes of *in personam* jurisdiction. See *International Shoe v. Washington*, 326 U.S. 310 (1945)). This continuum can be divided into three headings: (1) Exclusive state jurisdiction, (2) exclusive federal jurisdiction, and (3) concurrent federal/state jurisdiction. The first applies to wholly intrastate activities and rests on the states' general police authority to regulate wholly local commerce. See *National Cotton Oil Co. v. Texas*, 197 U.S. 115 (1905). The second correspondingly applies to wholly interstate activities. The limits of both have been considerably narrowed by the judiciary's expanded definition of interstate and intrastate commerce. Consequently, the third heading comprising the middle range has been increasingly broadened. State jurisdiction now reaches interstate restraints with "significant local consequences" or a "local nexus." See Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 676 (1974); 892 ANTITRUST & TRADE REG. REP. (BNA), Supp. 1, at 11 (Dec. 7, 1978). Federal jurisdiction reaches basically intrastate restraints which "substantially affect interstate commerce." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 100 S. Ct. 502, 509 (1980).

State jurisdiction over anticompetitive practices therefore is subject to the following three limitations: (1) Significant local nexus; (2) no unreasonable burden on or discrimination against interstate commerce; and (3) no conflict with affirmative federal policy. Federal jurisdiction in turn covers activities which (1) occur within the flow of interstate commerce, or (2) substantially affect interstate commerce. Clearly there is a substantial area of overlap wherein both federal and state agencies are empowered to act. See, e.g., *Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971), *aff'd on other grounds*, 407 U.S. 258 (1972); *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

The statute thus focuses on two separate and conjunctive standards, the geographic location where the act occurred and its primary area of impact. Numerous questions are raised as to the construction and scope of these two tests. For example, the term "occur" is subject to several interpretations. If two competitors fixed prices of a commodity in California, with the commodity being manufactured in Wisconsin and sold in Massachusetts, did the illegal act occur in California, Wisconsin, or Massachusetts? Moreover, if it occurred in Massachusetts, must claimant also establish that sales occurred "primarily and predominantly"²⁹ within the Commonwealth by showing that more than fifty percent of claimant's business derived from Massachusetts? Similar issues also arise concerning the meaning of "competitive impact." Perhaps these words can be construed as requiring only a showing of a "substantial effect on intrastate commerce." This ambiguity, however, not only provides little guidance for the prospective litigant, but invites defensive delaying tactics pending more definitive judicial construction.

The "commerce" requirement is expected to raise substantial evidentiary difficulties for victims. Much time and effort might be expended in establishing the corollary elements of jurisdiction. As a result, claimants may find themselves embroiled in economic battles over the delineation of an activity's primary impact area³⁰ rather than in litigating the merits of the action.

If a claimant successfully overcomes the commerce impediment, the jurisdictional prerequisites still remain. This constitutes a negative hurdle, namely to establish that the challenged conduct has not been the subject of a formal investigation, proceeding or other assertion of federal jurisdiction by the FTC, the United States Department of Justice, or other federal agency.

This provision may immunize anticompetitive conduct reviewed summarily by a federal agency. This federal preemption ap-

29. MASS. GEN. LAWS ANN. ch. 93, § 3 (West Cum. Supp. 1980).

30. Section 3 is crucial to the Act's effectiveness. Yet, in addition to being ambiguous, it appears unnecessarily weak. Somewhat broader is chapter 93A, § 3, which exempts defendants who derive at least 20% of their gross revenue from transactions in interstate commerce *except* if the challenged transactions "occur primarily and substantially within the Commonwealth." An allegation that at least one such act has occurred in Massachusetts may satisfy chapter 93A jurisdiction over a large national company. *In re Yankee Milk, Inc.*, 372 Mass. 353, 362 N.E.2d 207 (1977). It is unlikely that a claimant can similarly satisfy the additional jurisdictional test of chapter 93 as to "local" impact.

pears unnecessarily broad. It may, for example, embrace patently offensive practices peremptorily investigated by a federal agency which then elected not to pursue the matter for any number of nonsubstantive reasons. These might include the reasoning that the perpetrating company was engaged primarily in intrastate, regional, or nationally insubstantial commerce; the agency's limited resources are to be focused on other types of restraints or relationships, for example, ones which are horizontal as opposed to vertical;³¹ or that the agency lacked the necessary remedial authority and therefore chose to defer to other regulators.

Considerable redrafting of section 3 might well be warranted to eliminate the overly restrictive jurisdictional barriers. Instead of attempting to exclude conduct in interstate commerce, the Commonwealth should extend its jurisdiction to constitutional limits.³² This would better achieve the Act's goal of encouraging and protecting fair and unfettered competition. Litigation thus would be freed from unnecessary restrictions, fostering those local cases which have been substantially ignored in federal enforcement by the Antitrust Division and the FTC.³³

D. Sections 4, 5, and 6: The Substantive Provisions

The substantive heart of the statute lies in sections 4, 5, and 6, which parallel the federal antitrust laws. Echoing section 1 of the Sherman Act,³⁴ section 4 declares: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the commonwealth shall be unlawful." Violations would occur where two or more separate entities agree to fix

31. Reportedly, several years ago the Justice Department made a policy decision to shift its antitrust efforts from vertical to horizontal conduct. However, the new head of the Antitrust Division, Sanford Litvack, recently stated that the Justice Department will give a new emphasis to vertical cases. The FTC which has been focusing on horizontal arrangements, may likewise be shifting its emphasis. 955 ANTI-TRUST & TRADE REG. REP. (BNA), at A-2 (Mar. 13, 1980).

32. In passing the Sherman Act, Congress intended "to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements." *United States v. South-Eastern Underwriter Ass'n*, 322 U.S. 533, 558 (1944). See also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

33. Other states have not adopted a restrictive approach to the coverage of their antitrust laws. Some have extended jurisdiction to the limits of long-arm statutes and the fourteenth amendment. See CONN. GEN. STAT. ANN. §§ 35-24 to -45 (West Cum. Supp. 1980); MINN. STAT. ANN. § 325.801-28 (West Cum. Supp. 1980) and N.H. REV. STAT. ANN. § 356:1-14 (West Cum. Supp. 1979).

34. 15 U.S.C. § 1 (1976).

prices³⁵ at the horizontal³⁶ or vertical level,³⁷ to divide the market between competitors,³⁸ to boycott competitors,³⁹ to tie the sale of a desired item with the purchase of another less desired item,⁴⁰ to restrain a distributor's territory,⁴¹ or to otherwise unreasonably restrain trade.⁴²

Modeled on section 2 of the Sherman Act,⁴³ section 5 states: "It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce in the commonwealth." Without requiring a combination of two or more persons, it prohibits unitary conduct by a firm acting alone which results in its obtaining monopoly power, that is, power to control prices or to exclude competition,⁴⁴ or raises the dangerous probability that it will achieve such power.⁴⁵

35. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Morrison v. Nissan Motor Co.*, 601 F.2d 139 (4th Cir. 1979).

36. *See United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

37. *See United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978).

38. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); *Engine Specialities, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979).

39. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941); *Cernuto v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Erehwon, Inc. v. Northeast Health Food Merchants*, 428 F. Supp. 551 (D. Mass. 1977). *But see Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978).

40. *See United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*, 429 U.S. 610 (1977); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Anderson Foreign Motors, Inc. v. New England Toyota Distrib., Inc.*, 475 F. Supp. 973 (D. Mass. 1979).

41. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

42. *Engine Specialities, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

43. 15 U.S.C. § 2 (1976).

44. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. E.I. Dupont DeNemours & Co.*, 351 U.S. 377 (1956); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Transamerica Computer Co. v. IBM Corp.*, 481 F. Supp. 965 (N.D. Cal. 1979).

45. *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Agrashell, Inc. v. Hammons Prods. Co.*, 479 F.2d 269 (8th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973).

Section 6, based on section 3 of the Clayton Act,⁴⁶ forbids exclusive supply and similar arrangements. In "tying" arrangements, prohibited by this section and by section 4 of the Massachusetts Act, a seller illegally conditions the sale of one product, the tying product, on the buyer's purchase of a second product, the tied product.⁴⁷ An exclusive dealing arrangement involves an unreasonable commitment by a buyer to deal with one specific seller to the detriment of competing sellers.⁴⁸ Section 6 differs from the general proscriptions of section 4 in two ways: it applies only to the sale or lease of tangible commodities; and it prohibits acts whose effect may be either to substantially lessen competition or to tend to create a monopoly. Section 3 of the Clayton Act was intended to arrest in its incipiency conduct which in time might develop into a violation of section 1 or section 2 of the Sherman Act.⁴⁹ The same distinction underlies the state provision.

This discussion of sections 4, 5, and 6 of the Massachusetts Act merely touches on the scope and meaning of these sections. There are almost one hundred years of interpretive federal court decisions construing the simple statutory language of the federal antitrust laws.⁵⁰ To understand the substantive heart of chapter 93, practitioners must familiarize themselves with the large body of federal antitrust case law.⁵¹

46. 15 U.S.C. § 14 (1976).

47. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-609 (1953).

48. *Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196 (7th Cir.) *cert. denied*, 100 S. Ct. 231 (1979); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

49. *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966). Professor Sullivan of the University of California Law School suggests the courts have apparently reduced the Sherman threshold to the Clayton level, and therefore there is no meaning to this fine distinction. L. SULLIVAN, *ANTITRUST* 440 (1977).

50. Antitrust source materials include: Commerce Clearing House (CCH) Trade Regulation Reporter, a five-volume looseleaf service for the antitrust field; ABA, *Antitrust Law Developments* with second supplement (1st ed. 1975), a one-volume summary; L. SULLIVAN, *supra* note 49, a hornbook; Bureau of National Affairs (BNA), *Antitrust & Trade Regulation Reports*, (ATRR), a weekly newsletter on current developments in the antitrust and trade regulation area; J. VON KALINOWSKI, *BUSINESS ORGANIZATIONS ANTITRUST AND TRADE REGULATION* (Matthew Bender, 1980), a 15-volume treatise, and P. AREEDA & D. TURNER, *ANTITRUST LAW* (1978) a three-volume treatise.

51. The federal antitrust laws do not always mean what they appear to say. For example, in referring to sections 4 and 16 of the Clayton Act, Prof. Sullivan notes that: "[N]either has been read literally. The scope of each of these provisions has been narrowed through standing requirements invented and elaborated upon by the courts." L. SULLIVAN, *supra* note 49, at 770. For example, the Sherman Act's refer-

E. Section 7: Exemptions

Section 7 exempts three broad categories of conduct. Conduct is not included if: (1) Exempt from the federal antitrust statutes⁵² or the FTC Act,⁵³ (2) subject to federal or state regulation or supervision; or (3) authorized or approved by federal, state, or local law.⁵⁴ If applied literally, this section would threaten to eviscerate

ence in § 1 to "Every contract, combination . . ." has been defined to mean only contracts or combinations which *unreasonably* restrain competition. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958); Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911). In addition, the Clayton Act's remedy provision has confined standing to persons sustaining "antitrust" injuries, that is, injuries of the kind the antitrust laws were intended to prevent. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). Certain unique principles have also been judicially created, the most significant being the *per se* and "rule of reason" tests. The former holds that conduct can be found illegal without elaborate inquiry as to the harm it has caused or the business excuse for its use, if it is so pernicious in its effect on competition as to have no redeeming virtue. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). Examples of *per se* illegal conduct include horizontal price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); vertical price fixing, Albrecht v. Herald Co., 390 U.S. 145 (1968); market allocation, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); certain types of tying arrangements, Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958), International Salt Co. v. United States, 332 U.S. 392 (1947); and group boycotts, Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941). In contrast, the "rule of reason" requires an elaborate inquiry into anticompetitive effects. Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911); Eiberger v. Sony Corp., 622 F.2d 1068 (2d Cir. 1980). In summary, while antitrust law incorporates many common law principles, it also has developed its own unique doctrines. Many of these doctrines may be adopted by the Massachusetts judiciary.

52. The McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015 (1976), exempts the "business of insurance" from the antitrust laws. See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979). Recent conflicting circuit decisions indicate that the construction of this limited exemption is not uniform. Liberty Glass Co. v. Allstate Ins. Co., 607 F.2d 135 (5th Cir. 1979); Bartholomew v. Virginia Chiropractors Ass'n, 612 F.2d 812 (4th Cir. 1979).

53. Clayton Act § 6, 15 U.S.C. § 17 (1976); Capper-Volstead Agricultural Producers' Associations Act § 1, 7 U.S.C. §§ 291-292 (1976). See National Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978); Maryland & Virginia Milk Prod. Ass'n v. United States, 362 U.S. 458 (1960). Congress is considering exempting agricultural cooperatives from the FTC Act. This apparently would doom several current FTC investigations, including those, for example, concerning Sunkist and Ocean Spray. S. 265, 96th Cong., 2d Sess. (1980).

54. By comparison, other states have limited exemptions. Connecticut, for example, exempts acts mandated by other Connecticut or federal laws. CONN. GEN. STAT. ANN. 35-24 to -45 (West Cum. Supp. 1980). Several states have taken the approach of excluding specific industries. New Jersey, for example, exempts utilities, insurance companies, banks, and security dealers. See N.J. REV. STAT. ANN. 56:9-5 (West Cum. Supp. 1980). Massachusetts expands on both these approaches by excluding actions of any industry if approved by a state agency.

the statute. For example, chapter 93 would not reach joint ratesetting where permitted by state regulations. This holds true even if these regulations were proposed by the regulated industry, perfunctorily reviewed by the enforcing agency, and adopted without any consideration of their antitrust effects.

Under present federal standards such pro forma approval would not exempt such conduct from Sherman Act scrutiny. The state action exemption first announced in *Parker v. Brown*⁵⁵ has been severely restricted during the past five years. In *Bates v. State Bar of Arizona*,⁵⁶ the United States Supreme Court identified four factors which support a finding of state action immunity. Immunity will be found when there is a clearly defined state policy, formulation to advance valid state interests, implementation by state action compelling the questioned practice, and active supervision by the state. State acquiescence alone is not sufficient.⁵⁷

55. 317 U.S. 341 (1943). In *Parker*, the Supreme Court upheld the validity of a California raisin price maintenance program challenged as violative of the Commerce Clause and, at the Court's own urging, of the Sherman Act. While holding exempt from the Sherman Act a state-mandated program for marketing agricultural products, the Supreme Court in *Parker* also commented that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ." *Id.* at 351.

56. 433 U.S. 350 (1977). The Supreme Court recently addressed the issue of state-action immunity in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 100 S. Ct. 937 (1980). After analyzing *Parker* and its progeny, Justice Powell, writing for the majority, wrote:

These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

Id. at 943. The opinion continues, outlining the factors which persuaded the Court to strike down California's statutory scheme for regulating wine prices:

The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."

Id. at 943-44 (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943)) (footnote omitted).

57. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). *See also* Fischer, Spuhl,

Moreover, this rule applies to actions of municipal subdivisions,⁵⁸ as well as to state entities. Massachusetts courts may be expected to follow a similarly restrictive approach. This would serve to promote the legislative purpose of free and open competition in the interests of the general welfare and economy.⁵⁹

F. *Section 8: Investigations by the Attorney General*

Modeled on the Justice Department's Antitrust Civil Process Act,⁶⁰ section 8 defines the attorney general's investigative powers. Prior to the commencement of any legal action, whenever the attorney general has "reasonable cause to believe"⁶¹ that a violation has been, is, or will be engaged in, he may issue compulsory process, such as civil investigative demands, to require document production, interrogatory answers, and oral testimony. Unlike the corresponding federal act, however, civil investigative demands can be served only on targets and not on third party witnesses.⁶² The person served is entitled to petition the superior court for an appropriate protective order.

Documents obtained in the course of an investigation are to be kept confidential. In contrast with federal procedures,⁶³ they are

Herzwurm & Assoc., Inc. v. Forrest T. Jones & Co., 586 S.W.2d 310 (Mo. Sup. Ct. 1979).

58. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

59. This would require narrowing § 7's sweeping language to immunize only those state-action activities actively regulated or legislatively mandated.

The Supreme Judicial Court has narrowly construed chapter 93A's corresponding provision. In a recent chapter 93A case, the court wrote:

We reject the argument that an act or practice which is authorized by statute can never be an unfair or deceptive act or practice. . . . The fact that particular conduct is permitted by statute or by common law principles should be considered, but it is not conclusive on the question of unfairness.

Schubach v. Household Fin. Corp., 78 Mass. Adv. Sh. 1153, 376 N.E.2d 140, 142 (1978). See also *Lowell Gas Co. v. Attorney Gen. of Mass.*, 79 Mass. Adv. Sh. 49, 385 N.E.2d 240 (1979), in which the court held that chapter 93A applied to a public utility's unfair conduct even though it had been approved by a state regulatory agency.

60. 15 U.S.C. §§ 1311-1314 (1976), as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), which empowers federal officials to make pre-complaint demands for relevant materials.

61. The Supreme Court has agreed to decide whether federal courts have jurisdiction to determine if the FTC has complied with its statutory mandate that, prior to issuing a complaint, it "exercises the act of deciding" if it has the requisite "reason to believe" that there has been a violation of the FTC Act. *FTC v. Standard Oil Co. of Cal.*, 596 F.2d 1381 (9th Cir. 1979), cert. granted, 100 S. Ct. 1077 (1980).

62. A target's compliance with a civil investigative demand will not be excused on statutory exemption grounds. *In re Application of Ajello v. Moffie*, 944 ANTI-TRUST & TRADE REG. REP. (BNA), at D-1 (Conn. Sup. Ct. 1979).

63. Freedom of Information Act, 5 U.S.C. § 552 (1976). Standards for access to

not subject to disclosure under the Massachusetts Freedom of Information Act⁶⁴ except to government officials for antitrust enforcement purposes only.⁶⁵ When a case is closed, these documents are to be returned to the person who provided them. The effect of this protection is twofold. While encouraging voluntary compliance with civil investigative demands,⁶⁶ these provisions correspondingly discourage subsequent bootstrap litigation founded on information contained in government acquired documents.

While section 8 substantially increases the attorney general's investigative authority, it must be read in context with the Act's other provisions.⁶⁷ Considering chapter 93's major jurisdictional hurdles, the attorney general may elect to use chapter 93's investigative procedures but then file a complaint in United States District Court alleging federal antitrust violations.⁶⁸ By following this strategy, he utilizes the strengths of both the federal and state schemes. Moreover, under the doctrine of pendent jurisdiction, he may incorporate in the federal complaint related chapter 93 and chapter 93A claims.⁶⁹

grand jury testimony in a Justice Department action are discussed in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 221 (1979).

64. MASS. GEN. LAWS ANN. ch. 66, § 10 (West Cum. Supp. 1980).

65. The Attorney General may disclose "confidential" information to federal officials. These officials must give reasonable assurances that they will not release the documents to other persons. This limited exception furthers the strong policy favoring state and federal law enforcement cooperation. *See, e.g., Martin Marietta Corp. v. FTC*, 475 F. Supp. 338 (D.D.C. 1979) (holding that a state agency may have access to the transcript of a deposition taken by the FTC); *Interco, Inc. v. FTC*, 478 F. Supp. 103 (D.D.C. 1979) (holding that the FTC may disclose to state attorneys general documents constituting trade secrets or customer lists); *United States v. Campbell Hardware, Inc.*, 470 F. Supp. 430 (D. Mass. 1979). Section 4 of the Clayton Act requires the U.S. Attorney General to notify state attorneys general of Justice Department actions which may warrant comparable state antitrust proceedings, and to share certain related files and materials with these state officers. The policy favoring ongoing federal-state cooperation underlies chapter 93A's requirement that notice first be given to the FTC of certain proposed state actions.

66. Targets are more likely to comply voluntarily with a civil investigative demand request if third parties will not be afforded access to the produced documents.

67. During the drafting stage, the Attorney General appeared to accept the Act's weaker sections (e.g., §§ 3 & 7) in exchange for passage of §§ 8 and 14. *See* text accompanying notes 17-23 *supra*.

68. The Multidistrict Litigation Act, 28 U.S.C. § 1407 (1976), may assist the Attorney General during the discovery phase since it authorizes the federal courts to transfer cases involving common questions of fact or law to a single district for coordinated and consolidated pre-trial proceedings provided the transfer promotes the convenience of the parties and the just and efficient conduct of the proceedings.

69. *See* *UMW v. Gibbs*, 383 U.S. 715 (1966); C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3566 (Supp. 1979). The *Gibbs* case outlined a two-step approach. First, the court must determine if it has the

G. Section 9: *Parens Patriae Suits*

Modeled on the federal *parens patriae* act,⁷⁰ section 9 authorizes the attorney general to bring *parens patriae* suits for section 4 violations.⁷¹ In these actions the attorney general may bring civil actions on behalf of the state's citizens who have been injured by the anticompetitive practice. *Parens patriae* suits are analogous to consumer class actions, in that each person may have sustained only minimal monetary damage but the aggregate amount may be quite substantial. *Parens patriae* suits, however, are not encumbered by the attendant procedural impediments of class action

power to exercise pendent jurisdiction. It must find that: (1) There is a substantial federal claim; (2) the state and federal claims derive from a common nucleus of operative facts; and (3) the claims are the kind that a plaintiff would ordinarily be expected to try together. Having answered each affirmatively, the court then decides if it ought to exercise this power.

In *Kaminski v. Shawmut Credit Union*, 416 F. Supp. 1119 (D. Mass. 1976), a federal Truth in Lending Act suit, the United States District Court accepted pendent jurisdiction over related chapter 93A claims.

70. The Clayton Act § 4, 15 U.S.C. §§ 1311-1314 (1976), as amended by Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), authorizes state attorneys general to sue in federal court on behalf of state citizens injured by Sherman Act violations. See H. Brown, *Practice Comment*, MASS. GEN. LAWS ANN. ch. 93 (West Cum. Supp. 1980). See also Fein, *supra* note 5; Scher, *supra* note 5.

This federal statute represents the Congressional response to two judicial rulings. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), was an action brought by the state's Attorney General for injury to Hawaii's general economy. *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973), similarly sought relief for the state's citizens. Both *parens patriae* actions were founded on common law principles. Both failed by not stating a proper cause of action. The courts intimated that such a novel type of suit must rest on legislative authorization. Shortly thereafter, Congress amended the Clayton Act to provide this authority.

71. In enacting the *Parens Patriae* Act, the Congressional objective was to deter antitrust violations while providing a practical and effective remedy for persons injured by Sherman Act violations. Obtaining legal redress for these violations was often frustrated by evidentiary, procedural, and financial obstacles created by court decisions, especially those restricting consumer class actions. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) (holding that, except in unusual circumstances, the burden of identifying, not notifying, class members in a FED. R. CIV. P. 23(b)(3) class action rests with the plaintiff); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (limiting price fixing standards to direct purchasers); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (imposing stringent notice standards). *But see Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), in which consumers were held to have standing as injury to their pocketbook satisfied the required statutory element of injury to "property." On remand, the District Court of Minnesota held that the consumer who purchased the price-fixed hearing aid could sue the manufacturer as well as the retail seller as both were conspirators in the resale price maintenance scheme. Consequently, the consumer was not an "indirect purchaser." *Reiter v. Sonotone Corp.*, 486 F. Supp. 115 (D. Minn. 1980).

suits.⁷² Individuals may elect to exclude themselves from the benefits of this litigation, thereby preserving their right to file separate actions. Accordingly, final judgment will not have res judicata effect upon those individuals.

The attorney general may sue for injuries to the Commonwealth caused by violations of sections 4, 5, and 6. Actual damages may be trebled if malicious intent⁷³ to injure the state is shown. In addition, the Act facilitates the calculation of damages. In price-fixing cases it permits damages to be proved and assessed in the aggregate by use of statistical or sampling methods. This eliminates the evidentiary obstacle of proving the identity and amount of injury suffered by individual victims. Moneys recovered are distributed as determined by the court. Civil penalties of up to \$25,000 may also be sought by the attorney general. Money recovered in this manner is deposited as a civil penalty in the Antitrust Enforcement Fund.⁷⁴

H. Section 10: Remedies

As with the Sherman Act, chapter 93 provides for criminal sanctions. Violations are misdemeanors if they are knowing breaches of sections 4 or 5, and are engaged in with specific intent to injure any person. In a criminal antitrust action, therefore, the claimant may be required to establish defendant's state of mind or intent.⁷⁵ Once established, violations are remedied in two ways.

72. See FED. R. CIV. P. 23. This avoids the manageability and evidentiary problems associated with proving injury to identifiable individuals. Often this requirement proved to be impractical, if not impossible.

73. This standard would appear to seriously impair the Act's deterrent intent.

74. To date, only a few *parens patriae* actions have been filed by state attorneys general in either state or federal courts. There are a number of reasons for this restraint. These include lack of clarification on the scope of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and constitutional issues concerning the act itself. To date, such constitutional challenges have been unsuccessful. See *Fein, supra* note 5.

75. In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the Supreme Court held that in criminal price-fixing cases:

[A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. . . . We are unwilling to construe the Sherman Act as mandating a regime of strict liability for criminal offenses.

Id. at 435-36. This intent element may be satisfied by a showing that the conduct was undertaken with the specific purpose of producing anticompetitive effects or with knowledge of its probable consequences. The *Gypsum* rule should not affect the usual price-fixing case (*e.g.*, agreements to fix price increases or bid rigging). See

First, fines of \$100,000 for a corporation or \$25,000 for individuals may be imposed. Second, jail sentences of one year may be ordered.⁷⁶

I. *Section 11: Effect of Judgments*

Section 11 provides that a final judgment in an action brought by the attorney general may be used as *prima facie* evidence in subsequent third party actions against the same defendant, provided the issues are the same. This mirrors the rule employed in federal antitrust actions.

Litigants also may introduce final judgments for offensive as well as defensive collateral estoppel purposes. This is permitted when there is no mutuality of parties, provided the opposing party has had a full and fair opportunity to litigate the claims. Therefore, rather than creating a mere presumption in one's favor, this procedure precludes relitigation of the same issues.⁷⁷

J. *Section 12: Private Right of Action*

Section 12 is the key provision for private claimants. Modelled on section 4 of the Clayton Act, it authorizes "[a]ny person who shall be injured in his business or property by reason of a violation

United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 727, 728 (1980); United States v. Society of Independent Gasoline Mktrs., 945 ANTITRUST & TRADE REG. REP. (BNA), at A-17 (4th Cir. 1979); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 79, 80 (1980). For a discussion of the Justice Department's criteria in selecting antitrust cases for criminal prosecution see Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405 (1978). In addition, some states have enacted novel remedy provisions. For example, New Jersey provides for discretionary charter revocation and precludes a convicted individual from owning or managing a business. N.J. REV. STAT. §§ 56:9-7, 59:9-11(b) (1971).

76. In comparison, a Sherman Act violation is a felony. In addition to a jail sentence of up to three years, fines may be imposed of \$1,000,000 for corporations and \$100,000 for individuals. The Antitrust Procedure and Penalties Act of 1974, § 3, Pub. L. No. 93-528, 88 Stat. 1706 (amending 14 U.S.C. § 1 (1976)).

77. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the United States Supreme Court endorsed the offensive use of collateral estoppel. This means that in a subsequent action the defendant may be estopped from relitigating the same issues raised in the prior suit if there had been a full and fair opportunity to litigate the matters, even though mutuality of parties is not present. The California Supreme Court declined to review a decision, *R.E. Spriggs Co. v. Adolph Coors Co.*, 94 Cal. App. 3d 419, 156 Cal. Rptr. 738 (1979), *cert. denied*, 100 S. Ct. 1024 (1980), that applied offensive collateral estoppel to prior rulings by a state court and a federal administrative agency, the FTC. Congress has recently enacted a law, Pub. L. No. 93-349, to assure that collateral estoppel may be applied in antitrust litigation, except as to administrative agency decisions.

of the provisions of this chapter” to bring a suit for actual damages plus costs and reasonable attorneys’ fees.⁷⁸

There is a considerable body of federal law interpreting this specific language. To have standing, a plaintiff must satisfy each element, namely that (1) he is a “person”⁷⁹ (2) who has suffered antitrust type injury⁸⁰ (3) to his business or property⁸¹ (4) which was proximately caused (5) by the illegal anticompetitive act. Once liability has been established, the claimant must prove the fact of damage or impact.⁸² There is greater flexibility in proving the amount of damages flowing from the antitrust injury than in proving that one was injured by the anticompetitive act. While mere speculation or guesswork is not permitted, “a just and reasonable estimate of the damages based on relevant data” will be allowed.⁸³

Despite the lack of impediments to proving actual damages, chapter 93 appears to discourage ancillary remedies such as treble damages and attorneys’ fees. If claimant establishes malicious intent, treble damages may be awarded as well as costs and reasonable attorneys’ fees.⁸⁴ By comparison, the federal antitrust laws man-

78. 15 U.S.C. § 15 (1976). The judiciary has recognized private antitrust suits to be the “bulwark of antitrust enforcement.” *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). They represent about 95% of all antitrust cases. A report based on litigation in the Southern District of New York, recently issued by the ABA, indicates that the typical private antitrust case involves vertical market relationships, concerns financially smaller companies which are suing larger defendants, will be dismissed or settled voluntarily 80% of the time, and lasts an average of 19 months. The “primary practices violations” found were, first, vertical dealer terminations or boycotts; second, major vertical price fixing and market allocation; and third, exclusive dealing and tying arrangements. REPORT OF ABA SECTION OF ANTITRUST LAW, 946 ANTITRUST & TRADE REG. REP. (BNA), at A-1 (Jan. 10, 1980).

79. *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978).

80. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

81. See note 71 *supra*.

82. There are essentially three different types of damages that a plaintiff may establish: (1) Lost profits; (2) actual losses; and (3) goodwill or going concern value. *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969).

83. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

84. In a chapter 93A § 11 case, a successful plaintiff normally should recover reasonable expert witness fees in addition to other costs and reasonable attorneys’ fees. Moreover, in determining the amount to be awarded for reasonable attorneys’ fees, the court should consider “the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.” *Linthicum v. Archambault*, 79 Mass. Adv. Sh. 2661, 398 N.E.2d 482 (1979). See also Judge Freedman’s opinion in *HEW Corp. v. Tandy Corp.*, 480 F. Supp. 758 (D. Mass. 1979). But see *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688,

date automatic trebling.⁸⁵

Injunctive relief may also be obtained,⁸⁶ although there is no corresponding authorization for attorneys' fees. In contrast, a recent amendment to the Clayton Act authorized the award of attorneys' fees in federal actions.⁸⁷

Procedurally, a *parens patriae* action stays a private suit brought under this chapter or chapter 93A if it involves the same defendant and at least some of the same issues. Jurisdiction lies in superior court and as a pendent claim in federal district court. Venue lies in the county where the defendant resides or has its principal place of business, or the county where the violation occurred.

Unlike chapter 93A, there is no section liberalizing class action requirements. Antitrust class action complaints, therefore, must satisfy the stringent demands of rule 23 of the Massachusetts Rules of Civil Procedure.⁸⁸ Since rule 23 mirrors the federal class action rule, antitrust class actions under chapter 93 are likely to encounter the same manageability, notice, and common question impediments experienced by antitrust class actions⁸⁹ initiated under the federal rule.

322 N.E.2d 768, 777 n.16 (1975), in which the Supreme Judicial Court indicated that in its view the Massachusetts version of FED. R. CIV. P. 23(d) "seems to permit the flexibility in notification of class members which, before the *Eisen* case [417 U.S. 156 (1974)] was decided, many commentators had urged be allowed under the federal rule."

85. Clayton Act § 4, 15 U.S.C. § 15 (1976). See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

86. Section 16 imposes a lower threshold of standing than § 4 since the plaintiff need only show threatened loss or damage rather than injury to business or property. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Injunctive relief is authorized by the Clayton Act § 16, 15 U.S.C. § 26 (1976). In general, the federal courts have available a broad range of equitable remedies. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 171 (1948); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

87. 14 U.S.C. § 26 (1976), as amended by Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976). Responding to the Supreme Court's ruling that attorneys' fees cannot be awarded unless specifically authorized by statute, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), Congress amended the Clayton Act to allow attorneys' fees in injunction actions. Interpreting this amendment as a procedural change, the courts have applied it retroactively. *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), cert. denied, 434 U.S. 823 (1977). Attorneys' fees in an antitrust suit for preliminary injunctive relief were recently awarded in *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F. Supp. 203 (S.D.N.Y.), aff'd, 597 F.2d 814 (2d Cir. 1979).

88. MASS. R. CIV. P. RULE 23(a).

89. *Bernstein & Berger, Recent Developments in Private Antitrust Class Actions*, 24 N.Y. L. REV. 819 (1979).

K. *Section 13: Statute of Limitations*

Conforming to federal antitrust laws and chapter 93A,⁹⁰ the statute of limitations⁹¹ is four years from the time the cause of action accrued.⁹² In harmony with federal precedents, Massachusetts courts are likely to construe continuing violations as accruing at the time of the most recent illegal act.⁹³ As a result of this provision, in appropriate factual situations a private plaintiff may recover treble damages for the past four years. This multiplying effect can be quite substantial. For example, if criminal damages equal \$10,000, the dollar recovery, if trebled, may be as much as \$120,000, exclusive of reasonable attorneys' fees and costs.

The running of this statute is suspended during the pendency of an action by the state and for one year thereafter. The toll, however, apparently is restricted to four years.

L. *Section 14: Antitrust Enforcement Fund*

Section 14 establishes an "Antitrust Enforcement Fund." Deposited in this Fund is money received by the state as a result of the attorney general's antitrust enforcement efforts. It is to be used solely to finance similar future litigation. A maximum depository of one million dollars is established, with any excess to benefit the general fund.

The creation of this Fund assures that, despite the vicissitudes

90. The federal four-year statute of limitations has been held not to preempt the state from enacting a longer statute of limitations and damage period. *Ohio ex rel. Brown v. Klosterman French Baking Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,361 at 71,271 (S.D. Ohio 1976).

91. The two main purposes of a statute of limitations are to assure fairness to the party sued by putting him on notice and to relieve courts of the burden of trying state claims when a plaintiff has slept on his rights. *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424 (1965).

92. 15 U.S.C. § 15 (1976); MASS. GEN. LAWS ANN. ch. 260, § 5A (West Cum. Supp. 1980).

93. Mindful of the remedial and deterrent purpose of private antitrust enforcement, the federal courts have taken a pragmatic approach to statute of limitation issues. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978). For example, it is tolled by fraudulent concealment. Also, when there is a continuing violation the cause of action accrues when an anticompetitive act injures the plaintiff, even though there may be later injuries resulting from the same act. In most types of civil cases, Massachusetts courts have been less permissive. For example, in a medical malpractice action the two-year statute of limitation was held to run from the time the physician left the surgical instrument in the patient rather than when it was discovered. *Pasquale v. Chandler*, 350 Mass. 450, 215 N.E.2d 319 (1966).

of politics, the attorney general will have adequate resources to pursue "big" cases, plan long-term policies, initiate major projects, and develop a staff of antitrust specialists.

While providing these and other enumerated benefits, the Fund nevertheless may present a conflict of interest. At some point the attorney general may be faced with a choice between accepting a settlement that substantially replenishes this bank account or pursuing a judicially determined result.

M. *Section 14A: Relation to Chapter 93A*

Section 14A states that chapter 93 affects chapter 93A only to the extent explicitly provided in that statute. As previously discussed, this interdependent relationship is the result of a major compromise reached by business and consumer groups. Its legal consequences are significant. Chapter 93A is broader in its scope than chapter 93. It not only reaches full-fledged anticompetitive conduct, but also conduct which violates the spirit, if not the technical letter, of the antitrust laws.⁹⁴ A claimant, therefore, may successfully litigate a chapter 93A unfair method of competition claim while at the same time fail to prove a chapter 93 claim. Since neither statute has been definitively interpreted, claimants at present may elect to sue for violations of both in one action.⁹⁵

N. *Notable Omissions*

Chapter 93 does not address two subjects which have been the focus of considerable federal antitrust activity: Price discrimination and mergers. The Federal Robinson-Patman Act proscribes discriminatory pricing practices between different purchasers of commodities of like grade, quality, and quantity where competition is lessened.⁹⁶ Mergers which substantially lessen competition are pro-

94. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 324 (1966); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-70 (1965).

95. The Attorney General has followed this procedure. See *In re Levi Strauss & Co.*, 901 ANTITRUST & TRADE REG. REP. (BNA), at D-1 (Suffolk Super. Ct. 1979).

96. The Clayton Act § 2, as amended by the Robinson-Patman Act, ch. 592, § 1, 15 U.S.C. § 13 (1976). This statute has recently been described as "a compromise between conflicting, perhaps irreconcilable, policy objectives, the maintenance of price competition for the benefit of the consumer and protection of smaller business firms from competition. Subsequent uncertain and inconsistent interpretations of almost every provision of the Act have reflected its schizoid origins." *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979). Several affirmative defenses may be raised, such as meeting competition or cost justification.

hibited by section 7 of the Clayton Act.⁹⁷ Both practices may also violate section 5 of the FTC Act.⁹⁸

The legislative history indicates that the substantial omissions in chapter 93 are intentional. The business community opposed the inclusion of analogous provisions in chapter 93. The attorney general also did not support their addition. His position was founded on the belief, propounded by many economists, that price discrimination is procompetitive and that merger prosecution is too complex and expensive an undertaking for a fledgling enforcement division. Other states have not reached the same conclusions.⁹⁹ Nevertheless, despite being omitted from chapter 93, price discrimination and anticompetitive mergers may be challenged as "unfair methods of competition" in violation of chapter 93A.¹⁰⁰

IV. CONCLUSION

The past decade has witnessed the revival of state interest in antitrust enforcement. Spurred by consumer support, federal finan-

See United States v. United States Gypsum Co., 438 U.S. 422 (1978); Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979).

97. 15 U.S.C. § 7 (1976); United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (horizontal mergers); Standard Oil Co. v. United States, 337 U.S. 293 (1949) (vertical mergers); United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) and United States v. Penn-Olin Chem. Co., 278 U.S. 158 (1964) (conglomerate mergers). These suits generally involve complex analyses defining the relevant geographic and market lines.

98. *See* Beatrice Foods Co., 67 F.T.C. 473 (1965), *modified by consent*, [1967] TRADE CAS. (CCH) ¶ 72,124 (9th Cir. 1967), *cert. denied*, 412 U.S. 928 (1973) (holding a violation of § 7 of the Clayton Act to be a violation of § 5 of the Federal Trade Commission Act). Pursuant to Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the FTC has issued premerger notification regulations, 16 C.F.R. § 800.1-9 (1980). These apply to a wide variety of merger transactions and are designed to give the FTC and Justice Department adequate lead time to examine the proposed merger's anticompetitive effect.

Section 5 has been construed to reach practices violating the spirit if not the letter of the Robinson-Patman Act. *R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964), *modifying and aff'g*, 60 F.T.C. 1249 (1962); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962), *modifying and aff'g*, 57 F.T.C. 382 (1960).

99. A number of states have not only enacted these provisions but have also filed suits to enforce them. Recently California settled a pioneering state anti-merger complaint. The defendant bowling alley operator agreed to divest itself of an acquired bowling alley and pay a \$2,500 civil penalty. *California v. Timberlanes of Redding, Inc.*, 938 ANTITRUST & TRADE REG. REP. (BNA), at D-1 (Cal. S. Ct. 1979). For a summary of state merger actions *see* [1979] 1 TRADE REG. REP. (CCH) ¶ 4460, at 6873.

100. As such practices violate § 5 of the FTC Act, they also may be held to violate Massachusetts' corresponding "little" FTC Act, MASS. GEN. LAWS ANN. ch. 93A (West Cum. Supp. 1980).

cial assistance, and strengthened legislation, the states have increasingly pursued an active and at times innovative role as anti-trust prosecutors.

Massachusetts has joined this movement. By enacting chapter 93 the Commonwealth expressed its commitment to protect free and unfettered competition in the business community. New procedural devices, rights, and remedies were created to assist this effort. Despite these improvements chapter 93 remains less than satisfactory as an antitrust tool. Substantial revisions are necessary if this Act is to serve as a meaningful deterrent to violators of the antitrust laws.

The future portends continued if not increased state effort in this area. Increased state activity means increased involvement by lawyers representing local as well as national businesses. Antitrust counseling, therefore, is likely to become a common adjunct to corporate lawyering.

It remains to be seen, however, to what extent chapter 93, as presently drafted, will be used offensively as a source of rights for business and consumer plaintiffs. The Act imposes serious procedural hurdles that add significantly to an already high threshold for bringing complex antitrust litigation.

Chapter 93's provisions also appear to favor large national companies, the most likely defendants in antitrust litigation. Not only are the Act's jurisdictional and exemption sections unnecessarily cumbersome, they also are drafted to favor large defendants. The Act's definition section furthers this effect by excluding entire categories of commercial conduct. Section 8's confidentiality protections remove a common means for private plaintiffs to acquire evidence of wrongdoing by much larger companies. Without such access they may be required to pursue lengthy, protracted, and often futile discovery efforts. Clearly, large national companies are more financially prepared to win this war of procedural procrastination. Substantively, the Act excludes anticompetitive mergers and price discrimination; both types of conduct are more likely to be engaged in by big business. Furthermore, the injured parties in such actions are usually much smaller enterprises. Thus procedural and substantive impediments may deter plaintiffs with valid actions from bringing their claims and thus reinforce improper business activities.

Damages, the key to successful private antitrust enforcement,

is another area where litigation difficulties may arise. Unlike the federal antitrust laws, which automatically treble a successful plaintiff's injuries, the Massachusetts Antitrust Act provides only for recovery of actual damages. A plaintiff must prove the subjective and slippery element of malicious intent to be awarded more than single damages. Because the Act is a criminal statute, this *mens rea* type burden is likely to be considerable. The incentive to bring an antitrust suit is further diminished by the Act's failure to authorize the granting of reasonable attorneys' fees in injunction actions. Since many small business antitrust suits are brought pursuant to a contingent fee arrangement, this failure may chill the willingness of counsel to represent distributors, franchisees, and other small companies faced, for example, with termination. As has been noted, the federal antitrust laws were amended to rectify this unwarranted exclusion. Chapter 93 further discourages private suits by consumers and small businesses against large companies by its lack of a class action section comparable to the provision in chapter 93A.

All these factors militate against private enforcement efforts. The major issue thus becomes what, if any, benefits chapter 93 offers to injured plaintiffs. The answer to this query is far from clear. It may be speculated that chapter 93 may result in the recovery of supplemental damages when incorporated as a pendent action in a federal antitrust suit. When joined with chapter 93A in a state action, it may also afford a greater degree of certainty of the potential outcome as there is considerable judicial case law defining illegal conduct under the federal antitrust laws.

As in most federal private antitrust actions, chapter 93 cases are likely to involve issues of price fixing, group boycotts, and other *per se* violations. Cases alleging *per se* conduct are much more appealing to the plaintiff antitrust practitioner than cases challenging conduct that is subject to analysis under the rule of reason. The former can be short and lucrative for plaintiff's attorney while the latter envisions extensive discovery and trial with attendant doubtful results.

As in the federal area, private antitrust suits may be expected to follow in the wake of successful government actions. The Act's provision that rulings in such government actions may be offered as *prima facie* evidence of misconduct considerably reduces the bur-

den on private plaintiffs in subsequent litigation against the same defendant. Offensive collateral estoppel offers even greater procedural benefits.

The Massachusetts Antitrust Act could be strengthened significantly by legislative redrafting. Sections 3 and 7 should be rewritten to eliminate the Act's evident and unjustified loopholes. They presently allow companies engaged in anticompetitive conduct to escape the statute's prohibitions, thereby contravening the Act's intent. Section 3 might be drafted to reach all violations which have significant local consequences. Section 7 might immunize only anticompetitive conduct mandated by and actively supervised by a federal or state agency, or preempted or in conflict with federal law. The remedies section should also be strengthened.¹⁰¹ Damages should be trebled in a mandatory fashion. Violations should be made felonies. Consideration should also be given to other more innovative penalties such as corporate charter revocation.¹⁰² Other procedural and substantive provisions should be added to permit prosecution of anticompetitive mergers, suits by indirect purchasers, and class action relief.¹⁰³

The concept of federalism encourages each state to grapple with national problems and to develop its own innovative solutions. A number of states have responded to this opportunity by enacting strong, comprehensive antitrust laws. Massachusetts has long been in the forefront of the movement to enact public interest legislation. It should resume this leadership position by adopting a sound, fair, and effective state antitrust law. The increasing economic pressures on business likely to prevail during the 1980's will require a strong state and private effort to protect Massachusetts citizens from the evils of anticompetitive business conduct. Since

101. The state may enact different and stronger remedy provisions without creating an unconstitutional conflict with federal law. See *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363 (D. Conn. 1979).

102. These remedies might include permanently barring a company from doing business in the state, *Texas v. The Scott & Fetzer Co.*, 933 ANTITRUST & TRADE REG. REP. (BNA), at D-5 (Tex. Dist. Ct. 1979), or requiring restitution to consumers injured by price-fixing, *Colorado v. Torbuc Corp.*, 941 ANTITRUST & TRADE REG. REP. (BNA), at D-1 (Colo. Dist. Ct. 1979).

103. See *The Cartwright Act*, CAL. BUS. & PROF. CODE § 16750(a) (Deering 1976), as amended by Stats. 1978, ch. 536, § 1. See also *California & Hawaiian Sugar Co. v. California*, 588 F.2d 1270 (9th Cir. 1978), cert. denied, 441 U.S. 932 (1979), in which the Ninth Circuit held that although no claim under federal law existed after application of *Illinois Brick*, there may still be a claim under California law.

chapter 93 does not presently contain the legal weapons,¹⁰⁴ the legislature should promptly act by amending the statute to incorporate these legal tools.

104. As the Supreme Court recently reaffirmed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 100 S. Ct. 937 (1980): "Antitrust laws in general, and the Sherman Act in particular, 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." *Id.* at 946 (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).