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A PRACTITIONER'S GUIDE TO THE MARYLAND ANTITRUST ACT

WILLIAM L. REYNOLDS II* AND JAMES D. WRIGHT†

THE MARYLAND ANTITRUST ACT

Antitrust litigation, spurred by expansive theories of liability and by the promise of treble damages, has increased enormously during the past two decades. While most of the expansion has occurred under the federal antitrust statutes,¹ there has also been a significant increase in both the number and use of state antitrust laws. In 1972 the Maryland General Assembly enacted House Bill No. 1, which had been introduced by the Legislative Council, and Maryland joined the ranks of states which have adopted antitrust legislation.² Stating that its "purpose" is to "complement the body of federal law governing restraints of trade . . . in order to protect the public and foster fair and honest intrastate competition,"³ the Maryland Antitrust Act (the Act) proscribes four general types of conduct:

- (1) Any "contract, combination, or conspiracy" which "unreasonably restrain[s] trade or commerce";⁴
- (2) Any monopolization or attempt to monopolize "any part of the trade or commerce within the State";⁵
- (3) Several types of price discrimination;⁶ and
- (4) A tie-in or exclusive dealing agreement which may have an anticompetitive effect.⁷

This Act is the first comprehensive statutory scheme regulating anticompetitive business activity in Maryland. Although the Declara-

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1. See, e.g., 15 U.S.C. §§ 1, 2 (1973) (Sherman Act); 15 U.S.C. §§ 13, 13(a), 13(b), 21(a) (1973) (Robinson-Patman Act); 15 U.S.C. §§ 14, 18 (1973) (Clayton Act).

2. The Maryland Act is codified in MD. COM. LAW CODE ANN. §§ 11-201 to -213 (1975).

3. *Id.* § 11-202(a)(1).

4. *Id.* § 11-204(a)(1).

5. *Id.* § 11-204(a)(2).

6. *Id.* § 11-204(a)(3)-(5).

7. See *id.* § 11-204(a)(6).

tion of Rights to the Maryland Constitution declares that "monopolies are odious, contrary to the spirit of a free government . . . and ought not to be suffered,"⁸ and the common law prohibits some restraints of trade,⁹ neither has provided an adequate source of protection against the type of private behavior which now falls under the purview of the Act.¹⁰ Uncertainty as to the scope of the constitutional prohibition against monopolies¹¹ has limited its effectiveness as a tool for antitrust enforcement. Likewise, the common law restraint of trade doctrine has experienced only limited use by private plaintiffs.¹² In addition, while the federal antitrust laws have provided some protection against anti-competitive activity within the state, supplementary state legislation was desirable for a number of reasons. First, the federal enforcement agencies — the Department of Justice and the Federal Trade Commission — have neither the manpower nor the interest to police effectively what are essentially local business practices.¹³ By giving the Attorney General of Maryland broad power to monitor economic activity within the state, the Act closes a major gap in antitrust enforcement. Second, despite the wide scope of the federal antitrust laws, some activity may still be beyond their reach.¹⁴ In cases where federal jurisdiction may be questionable, the Act provides an alternative forum in which such

8. MD. CONST., Declaration of Rights, art. 41.

9. Compare *Grempler v. Multiple Listing Bureau*, 258 Md. 419, 266 A.2d 1 (1970) (exclusion from trade association not found to violate common law) with *Klingle's Pharmacy v. Sharpe & Dohme*, 104 Md. 218, 64 A. 1029 (1906) (group boycott violated common law). The common law relating to unfair competition also provided some protection. See, e.g., *Edmondson Village Theatre, Inc. v. Einbinder*, 208 Md. 38, 116 A.2d 377 (1955).

10. Recent state legislation has also provided some protection against particular anti-competitive behavior. See MD. ANN. CODE art. 56, §§ 157E(b)-(h) (1975) (regulating distribution of petroleum products in Maryland). Part of this statute was held unconstitutional in *Exxon Corp. v. Mandel*, Equity No. 22,069 (Cir. Ct. Anne Arundel County, Md.) (Jan. 27, 1976). That case is now under consideration by the Court of Appeals of Maryland.

11. The Court of Appeals recently expressed doubt "whether its ban extends to anything other than monopolies in the strict sense, that is, an exclusive right or privilege granted by the sovereign." *Grempler v. Multiple Listing Bureau*, 258 Md. 419, 424, 266 A.2d 1, 4 (1970). The court, however, left the question unresolved.

12. See note 9 *supra*.

13. But see *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) (gasoline price war in Smyrna, Georgia, prompting FTC investigation and complaint); *United States v. E.H. Koester Bakery Co.*, TRADE REG. REP. (CCH) (1972 Trade Cas.) ¶ 74,214 (D. Md. Nov. 27, 1972) (defendants charged with fixing bread prices in Baltimore; consent decree entered).

14. On the reach of federal antitrust law, see *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 96 S. Ct. 1848 (1976); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). See also Krotinger, *The "Essentially Local" Doctrine & Section 1 of the Sherman Act*, 15 CASE W. RES. L. REV. 66 (1963).

jurisdictional issues can be avoided. Third, the federal laws can only be enforced in the federal courts or before the Federal Trade Commission. For those who prefer bringing an action in state courts for tactical or other reasons, the Maryland Act provides that alternative.¹⁵

This article will outline the provisions of the Act, discuss some of the problems that it presents, and suggest some lines of analysis. Section I explains the substantive provisions of the Act. Section II examines its scope. Section III analyzes some constitutional problems that may arise in its application. Section IV discusses the remedies available to the successful antitrust plaintiff, and the concluding section focuses on some procedural ramifications inherent in a dual system of state and federal antitrust law.

I. SUBSTANCE

While the common law roots of antitrust date back hundreds of years, it was not until the close of the nineteenth century that public pressure grew strong enough to prompt Congress and a number of state legislatures to enact general antitrust legislation. By the end of World War I, however, most of the state statutes were moribund,¹⁶ and it has only been in the past ten or fifteen years that these state antitrust laws have been revived. During this renaissance, a number of states have either adopted broad-based antitrust legislation for the first time or extensively remodeled existing statutes, reducing to seven the number of states now lacking general antitrust legislation.¹⁷ There is also a Uniform State Antitrust Act.¹⁸ Several recently enacted state laws closely resemble the Maryland Act, and the way in which they are construed will help identify common problems of application and interpretation.¹⁹

15. For a discussion of the advantages and disadvantages of state antitrust laws, see J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* 228-34 (1964); French, *The Minnesota Antitrust Law*, 50 *MINN. L. REV.* 59, 77-80 (1965), and the authorities cited therein.

16. Rahl, *Towards a Worthwhile State Antitrust Policy*, 39 *TEX. L. REV.* 753 (1961). Dean Rahl questioned "whether it would have been unethical in recent years for lawyers in most states to tell their clients to ignore them." *Id.*

17. As of this writing only Alaska, Delaware, Nevada, Oregon, Pennsylvania, Rhode Island and Vermont lack monopoly or general restraint or trade statutes. See *TRADE REG. REP. (CCH) §§ 30,000 et seq.* (compilation of all state statutory provisions).

18. *TRADE REG. REP. (CCH) ¶ 30,101* (1974) (authored by the National Conference of Commissioners on Uniform State Laws).

19. Especially the Illinois, Minnesota, and New Jersey statutes. See *ILL. ANN. STAT. ch. 38, §§ 60-1 to -11* (1970 & Smith-Hurd Supp. 1976); *MINN. STATS. ANN. §§ 325, 8011-81* (West Supp. 1974); *N.J. STAT. ANN. §§ 56: 9-1 to 9-19* (West Supp. 1975). These statutes, in turn, are similar to the state act suggested by Dean Rahl, *supra* note 16, at 779-81. For a discussion of the Illinois act see Committee on Anti-

Knowledge of federal antitrust law is also essential to a full and clear understanding of the Maryland Act. Because the Act states that the General Assembly intended that its construction "be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters,"²⁰ federal case law will be an important aid in comprehending the otherwise vague terms of the Act.²¹ This principle of "harmonious construction"²² should help minimize the problem of applying two different sets of substantive rules to the same business activity. At the same time, the state courts, by retaining a measure of control over the development of the Act,²³ will be free to experiment with new approaches to antitrust problems in Maryland.²⁴

A. Restraint of Trade

1. *Horizontal Restraints*: The Maryland Act begins by condemning contracts, combinations or conspiracies that "unreasonably restrain

trust Law of the Chicago Bar Ass'n, *Commentary on the Illinois Antitrust Act*, reprinted in ILL. ANN. STAT. ch. 38, § 60 (Smith-Hurd 1970). A similar state act is suggested in Stern, *A Proposed Uniform State Antitrust Law: Text & Commentary on a Draft Statute*, 39 TEX. L. REV. 717 (1961).

20. MD. COM. LAW CODE ANN. § 11-202(a)(2) (1975). While the preamble mentions a number of federal statutes, including the Sherman and Clayton Acts, two significant pieces of federal antitrust legislation are missing: the Cellar-Kefauver Anti-Merger Act, 15 U.S.C. § 18 (1970), and the Robinson-Patman Price-Discrimination Act, 15 U.S.C. §§ 13, 13(a), 13(b) and 21(a) (1970). It is not surprising that the former is omitted because the Maryland Act does not contain a substantive antimerger provision. The failure to mention the Robinson-Patman Act is puzzling; the preamble refers to 15 U.S.C. § 13(c) (1970), which is an amendment to Robinson-Patman, and the Act contains its own version of the Robinson-Patman Act. See §§ 11-204(3)-(5). This discrepancy may not be particularly significant, however, because the preamble was not intended to be all-inclusive. See Revisor's Note to § 11-202.

21. For good single volume treatments of federal antitrust law see A. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* (1970 ed.); *THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* (1955), supplemented in *AMERICAN BAR ASS'N, ANTITRUST LAW DEVELOPMENTS* (1975); and C. KAYSER & D. TURNER, *ANTITRUST POLICY* (1959). An excellent casebook treatment is P. AREEDA, *ANTITRUST ANALYSIS* (1974 ed.). F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (1971) provides a useful compilation of economic thought on antitrust matters.

22. French, *supra* note 15, at 65. This doctrine was applied in *Clairol, Inc. v. Cosmetics Plus*, 130 N.J. Super. 81, 325 A.2d 505 (1974).

23. Federal precedent will not, of course, be binding on the Maryland courts. The Illinois act makes "harmonious construction" mandatory. See ILL. ANN. STAT. ch. 38, § 60-11 (Smith-Hurd 1970). But in *People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 338, 291 N.E.2d 648, 652 (1973), the Illinois Supreme Court rejected this mandate, on the ground that "the legislative branch . . . [wa]s without authority to state explicitly how the judiciary shall construe a statute."

24. The development of Maryland antitrust law will, of course, be subject to constitutional limitations. See notes 112 to 123 *infra*.

trade or commerce."²⁵ This provision's federal counterpart, section 1 of the Sherman Act, prohibits contracts, combinations or conspiracies in restraint of trade.²⁶ Section 1 has been invoked to prohibit a myriad of agreements.²⁷ Agreements among competitors — termed "horizontal" agreements — declared illegal under section 1, have involved price fixing (including minimum price,²⁸ maximum price,²⁹ and price "stabilization" agreements³⁰), boycotts or refusals to deal,³¹ and territorial allocations.³²

Allegations asserting improper cooperation among competitors are likely to be the most common claim under the Maryland Act.³³ Because of the similarity in language between section 1 of the Sherman Act and its Maryland counterpart, there should be little substantive difference in the application of these two laws by the courts.

2. *Vertical Restraints*: Section 1 of the Sherman Act has also been applied to so-called "vertical" agreements (agreements among those in the chain of distribution),³⁴ including maximum³⁵ and minimum³⁶ resale price maintenance, territorial³⁷ or customer restrictions,³⁸ and tie-ins.³⁹

25. MD. COM. LAW CODE ANN. § 11-204(a) (1) (1975).

26. 15 U.S.C. § 1 (Supp. IV, 1974) (amending 15 U.S.C. § 1 (1970)).

27. Although both the Maryland and Sherman Acts speak of a "contract, combination or conspiracy," the terminology has had little, if any, significance under federal law and the word "agreement" provides a useful shorthand for the statutory trilogy. Determining whether an agreement has taken place is one of the most sophisticated of all antitrust problems. See generally Day, *New Theories of Agreement and Combinations*, 42 ANTITRUST L.J. 287 (1973); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism & Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

28. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

29. *E.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

30. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

31. *E.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

32. *E.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972).

33. See Rahl, *supra* note 16, at 771 (1961); Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 409 (1970).

34. A good introductory treatment of this area is Symposium, *Developments in Distribution: Refusals to Deal*, 42 A.B.A. ANTITRUST L.J. 285 (1973). See also Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger & Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283-99 (1975).

35. *E.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968).

36. *E.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

37. *E.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

38. *E.g.*, *id.*

39. *E.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). For a discussion of tie-ins, see notes 78 to 84 and accompanying text *infra*.

Litigation in the area of vertical restraints has increased enormously in recent years, stimulated both by an expansion of theories of liability,⁴⁰ and by the remarkable growth of franchising as a common system of distribution. The advent of franchising on a wide scale has been paralleled by an increase in allegations by franchisees of illegal behavior on the part of their franchisors.⁴¹ It seems safe to predict that a sizable portion of litigation arising under the Maryland Act will involve such situations.⁴²

3. *The Per Se Rule*: One possible difference of significance between the federal and Maryland laws prohibiting agreements in restraint of trade relates to the existence of a per se rule in Maryland. The federal courts have long recognized the existence of different categories of conduct in testing the validity of trade restraints, applying a "rule of reason" in some situations and a "per se rule" in others. The Supreme Court and commentators have explained the per se rule in a number of different ways.⁴³ Perhaps the most widely quoted explanation of the rule is Justice Black's:

Although [Sherman Act § 1] is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken.⁴⁴

40. *E.g.*, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum resale price agreements between newspaper and its distributors held illegal per se).

41. See Bartlett, *Practical Problems in Terminating Distributors and Dealers*, 42 A.B.A. ANTITRUST L.J. 317-18 (1973). A leading case is *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

42. The Act also states that it shall not be construed to "repeal by implication" the State Fair Trade Act (permitting certain resale price maintenance agreements). MD. COM. LAW CODE ANN. § 11-202(b)(2)(ii) (1975). The Maryland Fair Trade Act has, however, been repealed, effective July 1, 1976. 1976 Md. Laws ch. 243.

43. See A. NEALE, *supra* note 21, at 27-29, 434-40; Van Cise, *The Future of Per Se in Antitrust*, 50 VA. L. REV. 1165, 1173 (1964).

44. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (citations omitted).

Properly applied, the per se rule serves a useful function; it simplifies trials and lightens the task of courts and enforcement agencies by banning the presentation of defenses to challenged conduct which the courts believe will be unpersuasive.⁴⁵ The rule also provides business with a "bright line" by which to help determine the legality of its conduct.⁴⁶

Nevertheless, application of the per se rule has not encountered universal approval. The use of the rule by the Supreme Court to ban certain vertical trade restraints, for example, has been widely criticized.⁴⁷ Imposition of the rule in other situations has also been attacked for interfering with what many consider legitimate business practices.⁴⁸ This criticism of decisions adopting the per se rule might persuade a state to exclude the per se rule from its antitrust law.⁴⁹

Such a result may, in fact, have been sought by the Maryland General Assembly. The preamble to the Act states that it is not to be construed as condemning acts which are "reasonable" in relation to the development and preservation of business or which are not injurious to the public interest.⁵⁰ Moreover, the substantive provision of the Act dealing with restraints of trade prohibits only activity which "unreasonably" restrains trade or commerce.⁵¹ This qualifying language may be

45. "By confining the evidence to facts and excluding the consideration of economic consequences, per se rules greatly simplify and speed up the process of prosecution." A. NEALE, *supra* note 21, at 436. Consideration of the difficulty of evaluating an economic defense has also played a role in the adoption of a per se rule. *See, e.g., United States v. Topco Assocs.*, 405 U.S. 596 (1972).

46. "Generally recognized as per se illegal . . . are arrangements to fix prices, boycotts, divisions of market, tying arrangements and monopolistic conduct which is intended to foreclose competitors from a substantial market." Van Cise, *supra* note 43, at 1167 (citations omitted). *See also Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

47. *E.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum resale price agreements held illegal per se). In dissent, Justice Harlan argued that holding the agreements in question illegal per se was to "substitute blindness for analysis." *Id.* at 157. *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

48. *See, e.g., Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (Parts 1 & 2), 74 YALE L.J. 775 (1965); 75 YALE L.J. 377 (1966).

49. Although the Illinois Act, for example, adopts the per se rule for some violations, it tests vertical restraints by the rule of reason. *See* ILL. ANN. STAT. ch. 38, § 60-3 (Smith-Hurd 1970), and the Chicago Bar Committee Comments accompanying that section. For a discussion of difficulties created by a state's rejection of the per se rule see Maroney, *Antitrust in the Empire State*, 19 SYRACUSE L. REV. 819, 857-64 (1968).

50. MD. COM. LAW CODE ANN. § 11-202(b)(2)(i) (1975).

51. MD. COM. LAW CODE ANN. § 11-204(a)(1) (1975). The force of this textual argument is undermined to some extent by section 11-204(a)(6) of the Act, which prohibits, *inter alia*, tying arrangements. Under federal law certain tying

especially significant in view of the omission of such a modifier in section 1 of the Sherman Act⁵² — it is only by judicial construction that the rule of reason has been applied in federal antitrust litigation.⁵³ Thus, the addition of the term “unreasonably” may indicate that the legislature preferred that the courts measure the effect on trade or commerce of all activity attacked under the Act on a case-by-case basis in light of its “reasonableness.”

There are, however, countervailing considerations. In particular, the statutory reference to “unreasonable” restraints of trade can also be viewed as merely restating the general test of reasonableness used by the federal courts in all antitrust cases. Under the approach of the federal courts,⁵⁴ a per se rule is applied to a practice when its “pernicious effect on competition and lack of any redeeming virtue” lead it to be “conclusively presumed to be *unreasonable* and therefore illegal without elaborate inquiry as to the precise harm . . . or the business excuse for [its] use.”⁵⁵

Thus, while the Maryland Act condemns only “unreasonable” activity, some business practices, such as horizontal price fixing among competitors, may be found by a court to be so inherently anticompetitive as to be unreasonable per se; once the basic facts of the practice have been established, no further inquiry into the effect or purpose of the practice is necessary. It would therefore be proper for a Maryland court to adopt the per se rule following its own determination that a particular practice was so unreasonable that it should be labeled illegal per se. Although other resolutions of the per se problem are possible, such a construction would supply the Act with the benefits associated with per se categorization, as well as satisfying — at least to the extent the Maryland and federal classifications coincide — the expressed legislative desire for “harmonious construction.”

agreements are illegal per se. See note 81 *infra*. Section 11-204(a)(6), which tracks closely the language of section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), does not contain the term “unreasonable.” It is difficult to believe that the legislature wanted to apply a more rigorous test to tying arrangements than, for example, to horizontal price fixing.

52. 15 U.S.C. § 1 (1970).

53. The rule of reason was read into the Sherman Act by Chief Justice White in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

54. See A. NEALS, *supra* note 21, at 27 (“The significance of judicial rulings that certain restrictions are illegal per se is evidentiary.”); L. SULLIVAN, *HANDBOOK ON THE LAW OF ANTITRUST* § 72 (1977).

55. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (emphasis added).

B. Monopolization and Merger

1. *Monopolization*: Although the monopoly provision of the Act⁵⁶ is nearly identical to section 2 of the Sherman Act,⁵⁷ harmonious construction in this area may prove difficult. Under the test established by the Supreme Court in *United States v. Grinnell Corporation*,⁵⁸ two elements must be proven to establish a section 2 offense: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident."⁵⁹ Both parts of this test may present problems under the Maryland Act. In order to possess "monopoly power," a defendant must be shown to have "the power to exclude competition or control prices" in the "market."⁶⁰ Thus, it is necessary to examine the "relevant market" — both product and geographic — in which the defendant operates.⁶¹ Although in many situations the proper geographic market will extend beyond the boundaries of Maryland, it is not clear whether the Maryland Act would reach monopolization that extends beyond Maryland. On the one hand, the Act prohibits the monopolization of "trade or commerce within the State."⁶² On the other hand, the preamble to the Act declares that "determination of the relevant market . . . may not be limited by the boundaries of the State [of Maryland]."⁶³ These statements can be reconciled, however, on the ground that a defendant's monopolization of a larger market — the Mid-Atlantic states, for example — also constitutes monopolization of trade or commerce "within the State." If the geographic market is substantially larger than Maryland, however, use of the Act might conflict with federal law and might even cause an unconstitutional interference with interstate commerce.⁶⁴ Careful use of the monopolization provision would avoid these prob-

56. MD. COM. LAW CODE ANN. § 11-204(a)(2) (1975). This article will not touch on the problems posed by "attempts to monopolize," illegal under both Maryland and federal law. As to the latter, see Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 375 (1974).

57. 15 U.S.C. § 2 (1973).

58. 384 U.S. 563 (1966).

59. 384 U.S. at 570-71.

60. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

61. *See id.* For example, a firm with 90 percent of the sales of a product for which there are no close substitutes is thought to have monopoly power. *See United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

62. MD. COM. LAW CODE ANN. § 11-204(a)(2) (1975).

63. *Id.* at § 11-202(a)(3).

64. *See text accompanying notes 116 to 122 infra.*

lems by leaving the rare problem of large multistate monopolies to federal law in order to focus state scrutiny on those local activities most likely to escape notice by the federal enforcement agencies.

Although the second part of the *Grinnell* test speaks of the "willful acquisition of . . . monopoly power,"⁶⁵ it does not require a showing of a subjective intent to monopolize; as one commentator has explained "the offense is either to exploit monopoly power, or to build or maintain it by collusion or exclusionary devices"⁶⁶ Again, the Maryland Act may be interpreted differently from the federal statutes, for the Maryland Act requires that the defendant have the "purpose of excluding competition or of controlling, fixing, or maintaining prices."⁶⁷ While the effect of this language is not clear, it suggests that there must be a showing that the defendant sought to achieve the effects of excluding competition or controlling prices before liability can be imposed. Such a showing would be required, presumably, in order to ensure that liability is not imposed because of the mere existence of monopoly power on the part of the defendant. In practice, the requirement of such a showing is not likely to be overly burdensome since the "purpose of excluding competition" may be properly inferred, for example, from the acquisition of monopoly power by exclusionary means. That purpose should not be inferred, however, when the monopoly power has been acquired through "business acumen" or by "accident." Such an interpretation would help harmonize state and federal law in this area.

2. *Mergers*: One of the major goals of section 2 of the Sherman Act is preventing a less competitive market structure, a purpose also served by section 7 of the Clayton Act.⁶⁸ Originally enacted in 1914, and strengthened by the Cellar-Kefauver Act of 1950,⁶⁹ section 7 prohibits mergers that "may substantially lessen competition or tend to create a monopoly."⁷⁰ Although the Maryland Act does not include

65. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (emphasis added). A good short discussion of the *Grinnell* test is Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972). See also A. NEALE, note 21 *supra*, at 120-25.

66. A. NEALE, note 21 *supra*, at 445.

67. MD. COM. LAW CODE ANN. § 11-204(2) (1975) (emphasis added).

68. 15 U.S.C. § 18 (1973).

69. *Id.* The original section 7 did not prohibit an asset acquisition of a competitor. The Cellar-Kefauver Act was designed, *inter alia*, to close that loophole.

70. *Id.* The quoted language has been applied with a vengeance. In *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), for instance, the Supreme Court invalidated under section 7 a merger between two grocery chains who between them controlled only 7.5% of the grocery sales in the Los Angeles market.

a parallel provision,⁷¹ a merger could still be challenged under the Act's general restraint of trade provision.⁷² Experience in other states, however, suggests that the Maryland Act will have limited utility in regulating the merger area.⁷³

C. Other Vertical Restrictions

The remaining substantive provisions of the Act follow certain sections of the Clayton Act, dealing primarily with the relationship between buyer and seller. Section 11-204(a)(3)-(5) is modeled on the Robinson-Patman Price Discrimination Act,⁷⁴ which was generally designed to prevent unfair price discrimination. Perhaps no federal antitrust statute has engendered as much controversy and uncertainty as has the Robinson-Patman Act.⁷⁵ Since its enactment the Robinson-Patman Act has been engulfed in controversy, criticism, and just plain bad decision-making.⁷⁶ Because enactment of a local version merely

71. The Cellar-Kefauver Act is not among the federal statutes listed in § 11-202(a)(2) of the Act that are to "guide" Maryland courts. However, the Clayton Act, which contains the original section 7, is included. MD. COM. LAW CODE ANN. § 11-202(a)(2)(ii) (1975).

72. MD. COM. LAW CODE ANN. § 11-204(a)(1) (1975). In addition, a merger might be challenged under section 11-204(a)(2) of the Act as an illegal monopolization, or as an illegal attempt to monopolize.

73. Many state statutes lack specific merger provisions. See S. OPPEHEIM & G. WESTON, FEDERAL ANTITRUST LAW 443 (3d ed. 1968). The Maryland General Assembly has recently enacted a statute designed to regulate certain aspects of mergers through the state security laws. See MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to 908 (Cum. Supp. 1976).

74. 15 U.S.C. §§ 13, 13(a), 13(b), and 21(a) (1973). There are some differences between the Maryland and federal versions. For example, employee discounts are specifically exempted by § 11-204(b)(3) of the Maryland Act, but not from the federal version. In addition, some of the key provisions of the Robinson-Patman Act dealing with brokerage fees and buyer inducement of price concessions are missing from the Maryland statute.

75. The standard works on the Act are C. EDWARDS, THE PRICE DISCRIMINATION LAW (1959); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962).

76. E.g., A. NEALE, *supra* note 21, at 262:

There is a real danger that an account of the case law under the Robinson-Patman Act will be met with frank disbelief. The idea that a manufacturer may break the law by granting a wholesaler's discount to a wholesaler who also runs retail shops, or by selling goods direct to retailers at a price higher than one of his wholesalers may be charging, or by beating an offer made to an important customer by a rival manufacturer or even by matching that offer unless he is satisfied that his rival can justify his low price by cost savings — all this may simply seem incredible; and not least because the ostensible purpose of the antitrust policy is to preserve a system of free competitive bargaining.

exacerbates such problems it is recommended that this portion of the Act be repealed.⁷⁷

The Act's final substantive section⁷⁸ is based on section 3 of the Clayton Act,⁷⁹ which prohibits certain exclusive dealing or tying arrangements.⁸⁰ Under federal antitrust law tying arrangements are subject to a modified per se rule.⁸¹ Because exclusive dealing arrangements often operate to reduce costs associated with risk and uncertainty, they have been subject to a less rigorous test.⁸² The Maryland Act follows closely the language of Clayton section 3 so Maryland case law should parallel the existing federal analysis.⁸³ A uniform approach has been made more difficult because of a mislabeling by the Legislature in section 11-204(b) of the Act that makes certain defenses available in tie-in and exclusive dealing cases that are not available in similar cases brought under the comparable federal laws.⁸⁴ These defenses are normally associated with the Robinson-Patman Act; it is therefore difficult to conceive of a factual situation in which they would be relevant to a case involving tie-ins or exclusive dealing arrangements.

II. SCOPE

The Maryland Act, like the federal antitrust laws, regulates a wide variety of activity. All of the substantive provisions, with one minor exception,⁸⁵ apply where either "commodities or services," or

77. See Rahl, *supra* note 16, at 773. In fact there is at present a movement afoot in Congress to either repeal or substantially modify the Robinson-Patman Act itself.

78. MD. COM. LAW CODE ANN. § 11-204(a) (6) (1975).

79. 15 U.S.C. § 14 (1973).

80. A tying arrangement exists when a seller or lessor requires a customer to purchase or lease a product that he may or may not need in order to get another product that he wants. See generally Wheeler, *Some Observations on Tie-ins, The Single-Product Defense, Exclusive Dealing and Regulated Industries*, 60 CAL. L. REV. 1557 (1972).

81. See, e.g., *International Salt Co. v. United States*, 332 U.S. 392 (1947) (lessees of patented salt dispensing machines required to buy salt from the lessor).

82. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

83. There is one difference worth mentioning. Section 3 of the Clayton Act only applies by its terms to the sale of "goods, wares, merchandise, machinery, supplies or other commodities," and does not cover agreements involving services, which consequently can only be condemned under Section 1 of the Sherman Act. See 35 MD. L. REV. 725 n.5 (1976) (citing cases). Section 11-204(a)(6), however, covers both commodities and services. Thus, there will be no need to resort to the Act's general restraint of trade provision to challenge service tie-ins.

84. MD. COM. LAW CODE ANN. § 11-204(b) (Cum. Supp. 1975). Subsection (b) was amended in 1975 to correct an even more serious labeling error. See Supplemental Revisor's Note (Cum. Supp. 1975).

85. MD. COM. LAW CODE ANN. § 11-204(a)(5) (1975) applies only to a "commodity bought for resale." This section is discussed in note 112 *infra*.

"trade or commerce" are involved. Because "trade or commerce" is defined as "includ[ing] all economic activity within the State which involves or relates to any commodity or service,"⁸⁶ the Act's potential coverage of economic activity in Maryland is very broad.

A. Exemptions: The Act contains a long list of express exemptions limiting its coverage.⁸⁷ One group of exemptions involves activities regulated by either state or federal agencies, presumably because they do not require additional regulation under the Act.⁸⁸ The Act properly exempts only those activities subject to the jurisdiction or supervision of the regulatory agency, thus helping to avoid the frequent clashes between regulatory agency and antitrust enforcement that have plagued federal law. Included in this group of exemptions are "public service" companies,⁸⁹ various insurance activities,⁹⁰ any "person" subject to the jurisdiction of either the Metropolitan or Washington Metropolitan Transit Authority,⁹¹ regulated state or national banks⁹² or savings and loan institutions.⁹³ Also exempt, presumably under this theory of concurrent regulation, are designated activities of certain securities dealers and "registered Securities Exchange[s]."⁹⁴ In addition, a general exemption is given to any board of trade that has been designated a "contract market" under federal law.⁹⁵

A second set of exemptions, drawn from the Clayton Act,⁹⁶ shields the "lawful objectives" of first, a labor organization or its members, or "a collective bargaining agreement between a labor organization as defined in [the National Labor Relations Act] and an employer or group of employers which contain those [lawful] objectives";⁹⁷ and,

86. MD. COM. LAW CODE ANN. § 11-201(h) (1975) (emphasis added).

87. The Maryland exemptions are similar to those contained in the Illinois Act, ILL. ANN. STAT. ch. 38, § 60-5 (Smith-Hurd 1970). The New Jersey antitrust statute contains comparable provisions. N.J. STAT. ANN. § 56: 9-5 (West Supp. 1975).

88. A similar rationale underlies many of the federal exemptions. See P. AREEDA, ANTITRUST ANALYSIS 102-14 (1974). A good overview of present federal turmoil in this field is Handler, *Regulation Versus Competition*, 44 U. CINN. L. REV. 191 (1975).

89. MD. COM. LAW CODE ANN. § 11-203(3) (1975).

90. *Id.* § 11-203(4).

91. *Id.* § 11-203(8). The demise of the Metropolitan Transit Authority should have no practical effect on the scope of this exemption. See MD. ANN. CODE art. 41, § 207(d) (Cum. Supp. 1975).

92. MD. COM. LAW CODE ANN. § 11-203(9) (1975).

93. *Id.* § 11-203(10).

94. *Id.* § 11-203(6).

95. *Id.* § 11-203(7).

96. 15 U.S.C. § 17 (1970).

97. MD. COM. LAW CODE ANN. § 11-203(1) (1975). Use of the National Labor Relations Act definition, 29 U.S.C. § 152(5) (1970), may create difficulty by impliedly excluding from this exemption, for example, governmental collective bargaining agreements. It is likely that the labor exemption will be construed to extend to all other-

second, an agricultural or horticultural cooperative organization or its members.⁹⁸ Finally, the Act exempts a "political subdivision of the state in furnishing services or commodities,"⁹⁹ nonprofit organizations "established *exclusively* for religious or charitable purposes,"¹⁰⁰ and several groups of designated professionals¹⁰¹ in "*recommending* schedules of suggested fees . . . for use solely as guidelines in determining charges for professional and technical services"¹⁰²

wise lawful collective bargaining agreements. A short introduction to federal law in this area is Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904, 914-20 (1976).

98. MD. COM. LAW CODE ANN. § 11-203(2) (1975).

99. *Id.* § 11-203(12). A related federal exemption is the "state action" doctrine. See generally Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976). See also Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976); City of LaFayette v. Louisiana Power and Light Co., 532 F.2d 431 (5th Cir. 1976). In the latter case the Fifth Circuit noted that a municipality is not "automatically beyond the reach of the federal antitrust laws." *Id.* at 436.

100. MD. COM. LAW CODE ANN. § 11-203(5) (1975) (emphasis added).

101. The designated group is composed of: attorneys, doctors, architects, engineers, land surveyors, and real estate brokers licensed by the state. *Id.* § 11-203(11).

102. *Id.* In Goldfarb v. Virginia State Bar, 421 U.S. 773, 781 (1975), the Supreme Court held that mandatory minimum fee schedules were illegal under the Sherman Act, but it did not reach the "different question" of the validity of a "purely advisory fee schedule issued to provide guidelines."

Curiously, suggested fee schedules are the only group activity of professionals expressly exempted from the Act. It seems most unlikely, however, that this omission has any significance. The Act, therefore, should not necessarily be read to forbid the present "ethical" bans on advertising by lawyers and physicians, which might otherwise be styled trade restraints. See generally Comment, *Applying the Sherman Act to Restrictive Practices of the Legal Profession*, 34 MD. L. REV. 571, 584-88 (1974).

The American Bar Association has been sued by the Department of Justice in an effort to force the Association to modify its model Code of Professional Responsibility to delete the restrictions on advertising by lawyers. This litigation is described in *Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws*, 62 A.B.A.J. 979 (1976). Bates v. Arizona State Bar, *prob. juris. noted*, 97 S. Ct. 53 (1976), also raises issues with respect to the legality of restricting advertising by professionals.

In Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975), Chief Justice Burger commented: "In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." Compare Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 113-14, 311 A.2d 242, 248 (1973) (holding unconstitutional Maryland legislation banning advertisement of prescription drug prices): "Thus, pharmacists may be distinguished from the other 'professions' discussed above, [e.g., dentistry, medicine] in that price advertising of retail drugs causes no unfavorable reflection on the professional aspect of pharmacy by deceiving the public about the type of services available." In its recent decision in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976), the Supreme Court suggested that it may be permissible for a state to regulate commercial advertising by professionals such as physicians and lawyers. *Id.* at 1831 n.25.

In addition to activities expressly exempted from coverage, it is likely that the courts will create additional limitations on coverage, as the federal courts have done in applying federal law. Support for such limitations can be drawn from federal and state statutory and decisional law and from the purposes of the Act itself. An example of such a limitation is provided by the question whether the Act should be applied to regulate noncommercial activities. A consumer boycott of unsafe toys might be categorized as a restraint of trade since it "involves or relates to any commodity or service," and thus falls within the Act's definition of "trade or commerce."¹⁰³ It is unlikely, however, that a court, applying a statute whose stated "purpose" is to "protect the public and foster fair and honest intrastate competition,"¹⁰⁴ would consider that purpose to be furthered by the prohibition — or even the threat of prohibition¹⁰⁵ — of a true consumer boycott.¹⁰⁶ In contrast, regulation of ostensibly noncommercial conduct that is nevertheless related to profit-making activity by its sponsors,¹⁰⁷ such as a multiple listing service organized and controlled by a group of real estate brokers,¹⁰⁸ would be consistent with that expressed purpose.

103. MD. COM. LAW CODE ANN. § 11-201(h) (1975). The section adds a meaningless requirement that "economic activity" be involved. *Id.*

104. *Id.* § 11-202(a).

105. See 84 HARV. L. REV. 1912, 1917 (1971):

[S]ubjecting all combinations [whose activities are not undertaken for profit] could chill . . . desirable activity. A group may decide not to organize because of the possible trouble and expense of defending a lawsuit, the threat of liability for a treble damage award, and the chance that all will go for nought if the activity is enjoined.

106. This would be true at least to the extent that the restraint attempted to benefit consumers. For good discussions of this difficult topic, see Bird, *Sherman Act Limitations on Non-Commercial Refusals to Deal*, 1970 DUKE L.J. 247; Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962); 84 HARV. L. REV. 1912 (1971). See also *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 n.7 (1959): "[T]he [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives."

107. The Act comes close to making this test explicit in defining a "service" as an act "performed . . . for the purpose of financial gain." MD. COM. LAW CODE ANN. § 11-201(g) (1975). While this restriction is not included in the definition of "commodity," see, *id.*, § 11-201(c), it is difficult to discern a rational basis for distinguishing between commodities and services with respect to noncommercial activities. Thus, the omission of the profit restriction in the commodity definition should not be taken to preclude the result suggested in the text.

108. See *Grempler v. Multiple Listing Bureau*, 258 Md. 419, 266 A.2d 1 (1970); *Oates v. Eastern Bergen County Multiple Listing Services, Inc.*, 113 N.J. Super. 371, 273 A.2d 795 (Super. Ct. 1971). Similarly, industry efforts at self-regulation could be reached under the Maryland Act. See generally Note, *Antitrust Problems of Trade Association Product Safety Standardization*, 55 IOWA L. REV. 439 (1969).

B. Real Property: It is not clear whether transactions involving real property are subject to the Act since they do not fit neatly within the statutory definition of either a "commodity" or a "service." A decision excluding such transactions from coverage would significantly limit the scope and effect of the Act. While the original draft of the Act included "any kind of real or personal property" in its definition of "commodity,"¹⁰⁹ the reference to real property was deleted from the version enacted by the General Assembly which limited the definition of "commodity" to "goods, wares, merchandise, machinery, supplies, or any other articles in trade or commerce."¹¹⁰ Although common usage makes it difficult to fit transactions relating to real property within that definition as "merchandise" or "articles," they may fall within the statutory definition of a "service," defined as "any activity performed in whole or in part for the purpose of financial gain, and includes any sale, rental, leasing, or licensing for use."¹¹¹ Since this definition covers a variety of business transactions, it may be broad enough to include those involving real property, even though such transactions are not normally considered "services." Thus, while the activities of real estate brokers and lessors fit more neatly within the common concept of "service," it is possible to view even the sale of condominiums by a developer as an "activity performed . . . for financial gain." The inclusion of these activities within the definition of "service" would ensure that all significant business transactions within the state come within the Act as either a "commodity" or a "service."¹¹² This ex-

109. House Bill No. 1 (first reading). The antitrust statutes of Illinois, ILL. ANN. STAT. ch. 38, § 60-4 (Smith-Hurd 1970), Minnesota, MINN. STAT. ANN. § 325.8012 (West Supp. 1974), and New Jersey, N.J. STAT. ANN. § 56:9-2(c) (West Supp. 1975), all define "commodity" in this way, as does Dean Rahl's draft statute. See Rahl, *supra* note 16, at 775.

110. MD. COM. LAW CODE ANN. § 11-201(c) (1975). The deletion of express coverage of real property will not necessarily be accorded substantial weight in interpreting the statute. Cf. *Harden v. Mass Transit Admin.*, 277 Md. 399, 354 A.2d 817 (1976) (failure of legislature to enact proposed statutes specifically exempting MTA from coverage of "no-fault" statute did not preclude court from finding such exemption implicit in the statutory scheme creating the MTA). The present definition of "commodity" is very similar to the coverage of section 3 of the Clayton Act, 15 U.S.C. § 14 (1973).

111. MD. COM. LAW CODE ANN. § 11-201(g) (1975).

112. It is difficult to understand why the Act breaks down trade or commerce into "commodities" and "services." Although a number of state antitrust statutes make this same distinction, see note 109 *supra*, it does little to illuminate the scope of the Act except to make clear that both kinds of transactions are covered. Only one substantive provision, section 11-204(a)(5), applies to the sale of a "commodity" and not a "service." Because section 11-204(a)(5), like sections 11-204(a)(3) and (4), is derived from a portion of the Robinson-Patman Act, 15 U.S.C. § 13 (1973), which by its terms applies only to transactions in "commodit[ies]," it is possible that in

tensive coverage would permit review by state officials of activity that may be too localized or insignificant to concern federal enforcement agencies.¹¹³ Again, this reading would advance the legislative goal that the Act "complement the body of federal law . . . in order to protect the public and foster fair and honest intrastate competition."¹¹⁴

III. CONSTITUTIONAL PROBLEMS

While a state unquestionably has the power to enact antitrust legislation in the exercise of its police power, such a statute may conflict with the Federal Constitution in several ways.¹¹⁵ First, if Congress has reserved to itself an area of regulation — or if Congress has been designated by the Constitution as the exclusive legislator in a particular field — a state is without power to enact laws in that area. However, "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has so ordained."¹¹⁶ While there is general agreement that the federal antitrust statutes have not preempted the entire field of antitrust regulation,¹¹⁷ specific federal statutes may have preempted state regulation in a more limited fashion. The Federal Communications Act,¹¹⁸ for example, provides that approval by the Federal Communications Commission of a consolidation of telegraph carriers denies effect to "any law . . . making [such] consolidations unlawful",¹¹⁹ a state antitrust law could not attempt, therefore, to invalidate such a consolidation. In addition, the

the redrafting process the term "service" was included in sections 11-204(a) (3) and (4), but inadvertently omitted from section 11-204(a) (5).

113. The federal antitrust statutes have occasionally been applied to problems involving realty. *E.g.*, *Northern Pac. Ry. v. United States*, 256 U.S. 1 (1959) (lease of land conditioned on use by lessee of lessor's railroad).

114. MD. COM. LAW CODE ANN. § 11-202(a) (2) (1975).

115. *See generally* J. FLYNN, *supra* note 15, at 24-200.

116. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

117. *See, e.g.*, *Washington v. Sterling Theatres Co.*, 64 Wash. 2d 761, 394 P.2d 226 (1964). *See generally* J. FLYNN, *supra* note 16, at 109-200. Senator Sherman himself stated that the purpose of his act was "to arm the Federal courts within the limits of their Constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." 21 CONG. REC. 2457 (1890).

118. 47 U.S.C. §§ 153-609 (1970).

119. 47 U.S.C. § 222(c) (1) (1970). Congress of course may decide to permit state regulation in an area where it has acted. *See, e.g.*, the McCarran-Ferguson Act, 15 U.S.C. § 1011-15 (1970) (permitting states to regulate insurance companies). *See generally* J. FLYNN, *supra* note 15, at 38.

state regulation imposed may conflict with the strong interests of the federal system in preserving a free and orderly flow of interstate commerce. Because most state antitrust acts, including Maryland's, assert jurisdiction over activities in interstate commerce, there are latent constitutional questions in every state antitrust case.

In determining whether state regulation unduly burdens interstate commerce, the Supreme Court has balanced the needs and interest of the state in regulating the activity against the possible harm to national interests resulting from inconsistent and overlapping regulation by the several states.¹²⁰ If a state's antitrust legislation is essentially duplicative of the federal statutes and the nature of the challenged activity is primarily local in nature, serious constitutional problems are unlikely to arise.¹²¹ For example, a suit challenging a price-fixing conspiracy among a group of local merchants would probably encounter few, if any, constitutional difficulties. If, however, the state attempts to control activity which would be unduly burdened by inconsistent state regulation, a different result might be reached.

Thus, of the few successful constitutional challenges to the use of state antitrust laws on interstate commerce grounds, two — *Flood v. Kuhn*¹²² and *Wisconsin v. Milwaukee Braves, Inc.*¹²³ — involved attempts to use state law to regulate professional baseball, a sport that clearly operates on a national level. If those state attempts had succeeded, professional baseball, and indeed all professional sports, might have been blanketed by a veritable "crazy quilt of state law,"¹²⁴ a result that could, in the event that a more vital economic activity were

120. See *Southern Pac. Ry. v. Arizona*, 325 U.S. 761, 767 (1945), where Chief Justice Stone observed, "reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved."

121. See generally J. FLYNN, *supra* note 15, at 80-93; Rahl, *supra* note 16, at 756-58; French, *supra* note 15, at 60-63; Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961). But see *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 110 N.W.2d 348 (1961) (Minnesota antitrust statute held inapplicable to contract entered into outside Minnesota, but performed in that state).

122. 407 U.S. 258 (1972). In that case, professional baseball's "reserve clause" was held not to violate the Sherman Act. Plaintiff's claims were asserted under both state and federal antitrust statutes; jurisdiction was obtained over the state claim on the basis of diversity of citizenship.

123. 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966) (action against National League owners who permitted the Braves to move to Atlanta).

124. *Central Delivery Serv. v. Burch*, 355 F. Supp. 954, 960 (D. Md. 1973) (Thomsen, J.). If the current interest in state antitrust regulation continues, intervention by the Congress or the federal courts may become necessary to avoid this result. Cf. *Barnett, Problems of Compliance — Conflicts in State and Federal Antitrust Enforcement*, 29 A.B.A. Sect. on Antitrust Law 285 (1965).

affected, seriously impair the needs of the national economy. Nevertheless, the commerce clause should not prevent vigorous state anti-trust enforcement in areas where state interests are strong and the need for a "uniform national rule"¹²⁵ is weak.

Another source of potential constitutional problems is raised by the application of the Act to areas that may affect an individual's personal rights. Procedural due process problems may arise, for example, from application of the Act's criminal or civil sanctions. In addition, rights arising under the first and fourteenth amendments may limit the use of antitrust laws to proscribe conduct if such proscription would prevent the exercise of a constitutionally protected right, such as the right to engage in litigation or to seek legislative action.¹²⁶

In sum, while the Maryland Act does not present any explicit conflict with the United States Constitution, there may be problems in application. It is to be expected that courts and prosecutors will be careful to interpret and enforce the Act in a manner that will avoid these constitutional stumbling blocks.

IV. REMEDIES

The Maryland Act provides successful litigants a full panoply of remedies — civil and criminal, private and governmental; and, as in its substantive provisions, the Act has been modeled on the federal statutes.

A. Criminal Sanctions

Under the Maryland Act a willful violation of the restraint of trade or monopolization provisions is a misdemeanor.¹²⁷ Unfortunately, the Act does not define a "willful" violation; however, because the Act uses the term only once, in a section dealing with criminal sanctions, proof of a subjective intent on the part of the defendant to violate the Act or, at least, a proper inference of such intent should be a part of a successful criminal prosecution.¹²⁸ Because the penalties under the Act

125. See *California v. Zook*, 336 U.S. 725, 735 (1949).

126. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See also *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 514 (1972): "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."

127. MD. COM. LAW CODE ANN. § 11-212 (1975). Because an alleged violator must be jointly prosecuted by the Attorney General and the local state's attorney, *id.*, § 11-207(b), the latter might conceivably veto any prosecution by refusing to join the Attorney General.

128. This has been the federal practice. See TASK FORCE REPORT: THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CRIME, AND ITS IMPACT, AN ASSESSMENT 110 (1967).

can be severe,¹²⁹ it seems unlikely that the General Assembly contemplated imposition of harsh penalties on business persons who may have unwittingly violated the Act. A narrow reading of the term "willful" might also forestall a due process challenge to a prosecution based on the vagueness of the Maryland Act. Although due process attacks on antitrust prosecution predicated on such vagueness have generally failed,¹³⁰ this lack of success has been largely attributable to the cautious limitation of criminal prosecutions to clearly illegal activities.¹³¹ Criminal actions based on more novel theories of liability may raise serious due process questions.¹³²

Barring this vagueness problem, the State of Maryland should be able to successfully prosecute willful violators of the law.¹³³ Those convicted face the possibility of stiff penalties: up to six months imprisonment and/or a fine of \$500,000.¹³⁴ The wisdom of making these penalties available for all antitrust violations is questionable.¹³⁵ Since many types of antitrust violations can be characterized as acts *malum prohibitum* rather than as acts *malum in se*, it may be unjust to impose a rigorous penalty for acts that are not generally viewed as inherently immoral.¹³⁶ The discretion given judges in the sentencing process further exacerbates this problem. While fines and jail sentences are probably necessary for effective deterrence of antitrust violations, the legislature may wish to reconsider the severity of the sanctions.¹³⁷

129. The sanctions reach a maximum of a \$500,000 fine and/or six months imprisonment. MD. COM. LAW CODE ANN. § 11-212 (1975).

130. See J. FLYNN, *supra* note 15, at 44-48.

131. In every federal criminal antitrust action brought before 1969 in which a defendant received a prison sentence, the offense involved violence, union misconduct or price fixing. Posner, *supra* note 33, at 389.

132. Questions of lack of fair warning might also arise if section 11-202(2)(vi), which states that construction of the Act is to be guided by the interpretation given by the federal courts to various federal statutes including any "similar act passed in the future," is used to impose criminal liability for violating such "future" legislation.

133. The Attorney General of Maryland recently accepted a guilty plea in a criminal case involving a tie-in scheme. *State v. Airocar, Inc.*, Crim. No. 18-898 (Cir. Ct. of Anne Arundel County, filed Sept. 1976). The Attorney General is prohibited, however, from prosecuting anyone under federal indictment for "substantially the same subject matter." MD. COM. LAW CODE ANN. § 11-207(e)(1) (1975).

134. *Id.* § 11-212.

135. See Flynn, *Criminal Sanctions Under State & Federal Antitrust Laws*, 45 TEX. L. REV. 1301, 1315-23 (1967).

136. It has been suggested that for this reason criminal penalties should only be imposed in those cases involving conduct which can be "unambiguously denominated bad." C. KAYSER & D. TURNER, *supra* note 21, at 256.

137. One change might be to "scale" the punishment, perhaps by making the fine a percentage of the defendant's net assets or after-tax profits.

B. Civil Actions

1. *Governmental*: The Attorney General of Maryland¹³⁸ may also bring civil actions against suspected violators of the antitrust laws. The Attorney General, in determining whether to initiate action, has the aid of a potentially powerful investigative device in the "civil investigative demand" (CID), which allows him to compel the production of a document by any person — whether or not a potential defendant — that he believes to be relevant to the investigation.¹³⁹ The Act provides several safeguards for anyone served with a CID: a timely petition may be filed to modify or set it aside;¹⁴⁰ the CID may not "[c]ontain any requirement which would be unreasonable or improper" if part of a summons duces tecum;¹⁴¹ and the material produced pursuant to the demand must be kept confidential unless a court orders otherwise "for good cause shown."¹⁴² In the event a person served fails to comply with the CID, the Attorney General may petition for a court order to enforce his demand.¹⁴³

If the Attorney General believes that his investigation warrants further action he may seek a written "assurance" that the questioned practices will be "discontinued."¹⁴⁴ This procedure is appropriate for

138. The General Assembly wisely refrained from creating a local version of the Federal Trade Commission, thereby avoiding the problems created by two government agencies trying to enforce the same statute.

139. MD. COM. LAW CODE ANN. § 11-205(a) (1975). The statutory language expressly limits the CID to civil actions. An analogous power is granted under federal law, see 15 U.S.C. §§ 1311-14 (1974).

140. MD. COM. LAW CODE ANN. § 11-205(g)(1) (1975). Apparently this provision only applies to state residents because the petition must be filed "in the court of the county where the petitioner resides or has his principal place of business." *Id.* § 11-205(g)(3).

141. *Id.* § 11-205(c)(1). Limited protection is also given material which may contain trade secrets. See *id.* § 11-205(f)(3).

142. *Id.* § 11-205(f)(1). Unfortunately, the General Assembly failed to specify what constitutes "good cause." Does a request by a private plaintiff constitute "good cause"? What is the relationship with the Public Information Act, MD. ANN. CODE art. 76A, §§ 1-5 (1975)? More importantly, may the Attorney General share the information obtained by a CID with other enforcement agencies? Given the encouragement to the Attorney General in section 11-208 of the Act to "cooperate" with federal and state officials, it would seem that he might properly do so. On the other hand, if the information passed on was later used in a criminal proceeding it would circumvent the limitation of CIDs to civil investigations.

143. MD. COM. LAW CODE ANN. § 11-205(h).

144. *Id.* § 11-206(1). An assurance apparently cannot be used in instances where violations are merely threatened, for it can be obtained only from "any person engaged

those cases where the alleged violation is either inadvertent or borderline and the "defendant" is willing to forego use of the practice if his voluntary forbearance cannot be used against him later. The Act provides, therefore, that the assurances "may not be considered . . . as an admission of a violation."¹⁴⁵ If the defendant fails to comply with the assurance, however, it becomes "prima facie evidence of a violation."¹⁴⁶ The Attorney General may also settle a case by entering into a consent decree after a complaint has been filed.¹⁴⁷ These forms of settlement are useful because they permit the Attorney General to stop anticompetitive activities without expending resources on expensive and lengthy litigation.¹⁴⁸

If the Attorney General proceeds to trial in a civil action, a wide range of equitable relief is available.¹⁴⁹ He may also request damages on behalf of the state and its political subdivisions.¹⁵⁰ A damage award, however, must be based on "actual damages"¹⁵¹ to a "person"¹⁵² whose

in the act or practice." *Id.* (emphasis supplied). *But cf.* *Cities Service Co. v. Burch*, 29 Md. App. 430, 349 A.2d 279 (1975) (consent decree may be entered even though there is no finding of a violation).

The Department of Justice has discontinued the analogous federal "pre-filing procedure," 737 ATRR A-1 (November 4, 1975), citing delay as the main reason for doing so. Nevertheless, it may still be worth trying at the local level.

145. MD. COM. LAW CODE ANN. § 11-206(c).

146. This apparently means that the Attorney General, at least, can use the failure to comply as "prima facie evidence of a violation" in a later action seeking application of sanctions against the violator.

147. The Act contains no express authorization for the Attorney General to obtain a consent decree by way of settlement. This is unusual since consent decrees have long been a fixture in federal antitrust enforcement. *See P. AREEDA, supra* note 21, at 57-62. Their use under the Act, however, should pose no problems, for consent judgments are in general use in Maryland, Md. R.P., Rule 601 (1971), and there is reference to a "civil consent judgment or decree" in section 11-210(b) of the Act. Certainly it is safe to say that a consent decree could be entered into under the Act by the Attorney General, as Judge Davidson noted in *Cities Service Oil Co. v. Burch*, 29 Md. App. 430, 349 A.2d 279 (1975).

148. Despite some uncertainty in the language of the Act, the Court of Special Appeals has held that a consent decree may be entered "without a finding of a violation of the Act." *Cities Service Co. v. Burch*, 29 Md. App. 430, 349 A.2d 279 (1975).

Federal law now requires that the Justice Department file a "competitive impact statement" before a consent decree can be approved, 15 U.S.C. § 16(b) (Supp. V, 1975), and the court must determine that the settlement is in "the public interest" before entering the decree. 15 U.S.C. § 16(e) (Supp. V, 1975). For a discussion of the mischief created by these requirements, see Handler, *Antitrust — Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211, 239-44 (1975).

149. MD. COM. LAW CODE ANN. § 11-209(a) (3) (1975).

150. MD. COM. LAW CODE ANN. § 11-209(b) (5) (1975). The Attorney General may also sue for damages under federal law. *Id.*

151. *Id.* § 11-209(b) (4).

152. *Id.* § 11-209(b) (1). "Person" is defined to include "[t]he United States, the State, and any political subdivision organized under the authority of the State . . ." *Id.*

business or property has been injured or threatened.¹⁵³ Thus, Maryland courts will probably follow the Supreme Court's interpretation of similar language in the Clayton Act¹⁵⁴ and refuse to allow the state to sue for damages in *parens patriae*.¹⁵⁵

2. *Private*: The Maryland Act, like its federal parent, should prove attractive to private plaintiffs. The Act provides that a private person who has been "injured" in his "business or property," or merely "threatened with injury,"¹⁵⁶ may institute a civil action seeking equitable relief or treble damages, plus costs and attorney's fees.¹⁵⁷ While these provisions are standard antitrust remedies, the wisdom of imposing such Draconian remedies upon small businesses is questionable.¹⁵⁸

The Act offers private plaintiffs other advantages. The most important of these is the *prima facie* evidence rule, permitting a private plaintiff to introduce any "judgment or decree rendered in a criminal proceeding or civil action brought by the Attorney General . . . with respect to all matters where the judgment or decree would be an estoppel between the parties to it"¹⁵⁹ as "*prima facie* evidence" of a violation in a subsequent action against that defendant.¹⁶⁰ The *prima facie* evidence

153. § 11-209(b)(2). The United States is also permitted to bring suit under the Maryland Act for treble damages. While perhaps not very important, it is interesting to note that the United States, when suing as an injured party under federal antitrust law, is entitled to recover only single damages. 15 U.S.C. § 15(a) (1970).

154. 15 U.S.C. § 15 (1970).

155. *Hawaii v. Standard Oil Co.*, 405 U.S. 215 (1972). *But cf.* *Burch v. Goodyear Tire and Rubber Co.*, 45 U.S.L.W. 2085 (D. Md., July 29, 1976) (Maryland Attorney General can sue in *parens patriae* for injunctive relief). *See generally* Handler, *supra* note 148, at 248-56. Congress has recently enacted legislation that would permit *parens patriae* litigation in certain cases under federal law. Antitrust Improvements Act of 1976. Pub. L. No. 94-435, § 2, 90 Stat. 1383 (1976).

156. MD. COM. LAW CODE ANN. § 11-209(b)(2) (1975).

157. *Id.* § 11-209(b)(2)-(4).

158. The Uniform State Antitrust Act only permits treble damage awards in cases of "flagrant" violations. Approved Draft, Uniform State Antitrust Act § 8(6) (1973). The Illinois statute similarly limits the availability of treble damage awards. *See* ILL. ANN. STAT. ch. 38, § 7(2) (Smith-Hurd 1970).

159. MD. COM. LAW CODE ANN. § 11-210(a) (1975).

160. *Id.* Proof of failure to comply with an assurance of discontinuance entered into before the filing of a complaint also constitutes "*prima facie* evidence of a violation." *Id.* § 11-206(c) (1975). It is not clear, however, whether third parties can make use of the *prima facie* evidence rule in this situation. While the use of the term "*prima facie* evidence" in both section 11-206(c) and section 11-210(a) suggests that it may be available to third parties, there is no specific provision in section 11-206 for such use. Further, an assurance of discontinuance is similar to a consent decree; failure to comply with a consent decree does not trigger the *prima facie* rule. In any event, the *prima facie* rule will be available to third parties if the Attorney General obtains a final judgment based on a violation of an assurance of discontinuance.

rule is borrowed from federal law,¹⁶¹ where it has helped reduce the expense and length of private litigation. Since the prima facie rule does not apply to the settlement of a federal case by a consent decree,¹⁶² the threat of its application after adverse judgment gives the federal government leverage in forcing settlements by defendants who are eager to avoid its impact. Similarly, the Maryland Act makes the prima facie rule unavailable if litigation has been settled by a "civil consent judgment or decree entered before any testimony is taken."¹⁶³

A plaintiff has four years measured from the time the cause of action "accrues" in which to bring suit.¹⁶⁴ In the case of a "continuing violation" accrual begins "at the time of the latest violation,"¹⁶⁵ apparently exposing a defendant to liability for events that occurred many years in the past. This position not only goes beyond federal law,¹⁶⁶ but also conflicts with the policy underlying statutes of limitations: that after a reasonable period of time parties subject to possible liability should be relieved of continued exposure.¹⁶⁷ While this policy can be satisfied if the limitations provision of the Act were viewed as providing a separate four-year limitations period beginning with each separate violation in a continuing series it is difficult to reconcile such a reading with the language of the statute.

In one respect, however, the limitations provisions of the Act are more restrictive than their federal counterpart. Federal antitrust law provides for the tolling of the statute of limitations while a government

161. 15 U.S.C. § 16(a) (1970). See generally Comment, *The Use of Government Judgment in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. CHI. L. REV. 338 (1976).

162. 15 U.S.C. § 16(a) (1973).

163. MD. COM. LAW CODE ANN. § 11-210(b) (1975). It can be argued that any final judgment in a criminal proceeding brings the prima facie evidence rule into play because the exception quoted in the text speaks only of "civil judgments or decrees." A guilty plea would, therefore, have prima facie effect, as is the case in federal antitrust law. *General Elec. Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964). The effect of a nolo contendere plea is more uncertain because such a plea is not viewed as an admission of the charged conduct. *McCall v. State*, 9 Md. App. 191, 263 A.2d 19 (1970). Thus, it may be contended that a nolo plea should not be given prima facie effect. Again, this is the position taken by the federal courts. *City of Burbank v. General Elec. Co.*, 329 F.2d 285 (9th Cir. 1964). See generally Handler, *supra* note 148, at 244-48.

164. MD. COM. LAW CODE ANN. § 11-209(c) (1) (1975).

165. *Id.* § 11-209(c) (2). What constitutes a "continuing violation" is not clear because the term is never defined.

166. See generally Wheeler & Jones, *The Statute of Limitations for Antitrust Damages Actions: Four Years or Forty?*, 41 U. CHI. L. REV. 72 (1973).

167. M. HANDLER, *TRADE REGULATION: CASES AND MATERIALS* 426 (1975). See also Wheeler & Jones, *supra* note 166, at 86-90.

antitrust suit is pending.¹⁶⁸ A prospective plaintiff is thus able to await the outcome of the government's case before bringing his own action, thereby helping to avoid duplicative litigation. The Maryland Act, however, does not contain a similar tolling provision.

One possible obstacle to a successful private action may be the language in the preamble to the Act which states that the General Assembly intended that the Act not be used to prohibit activity that is "reasonable in relation to the development and preservation of business or which [is] not injurious to the public interest."¹⁶⁹ A private plaintiff might be severely handicapped if he were required to show injury to the public as well as himself in order to maintain his cause of action. Such a restriction is, however, unlikely to be imposed for two reasons. First, the "public injury" language is part of a clause that also recognizes the state's interest in developing and preserving business, an end served by encouraging private actions. Second, the substantive provision authorizing private causes of action only requires proof of an injury or threat of injury to the plaintiff's "business or property"; no mention is made of a need to show an injury to the public at large.¹⁷⁰

V. PROCEDURAL ISSUES

Antitrust litigation is notorious for its length and complexity. Uncertain substantive law, difficult factual settings, and the high rewards available to successful plaintiffs enhance the importance of procedural maneuvering. The battle of the courtroom or settlement table is often heavily influenced by the result of procedural scimmages. One of the most obvious procedural conflicts will arise when a plaintiff joins federal and state antitrust claims in one action.¹⁷¹ An attempted joinder of such claims in state court is unlikely to succeed, however, in light of the Supreme Court's decision in *General Investment Co. v. Lake Shore & Michigan Southern Railway Co.*,¹⁷² which held that state courts lacked the power to grant equitable relief under the federal antitrust laws because those statutes explicitly state that equitable relief can be sought only in federal court.¹⁷³ The *General Investment*

168. 15 U.S.C. § 15(b) (1973).

169. MD. COM. LAW CODE ANN. § 11-202(b)(2)(i) (1975).

170. Such a requirement was once part of federal law, but it was finally eliminated in *Radiant Burners v. People's Gas, Light & Coke Co.*, 364 U.S. 656 (1961).

171. See MD. COM. LAW CODE ANN. § 11-209(b)(2) (1975).

172. 260 U.S. 261 (1922). This doctrine was originally stated in *Bluenstock Bros. Advertising v. Curtis Publishing Co.*, 252 U.S. 36 (1920).

173. 260 U.S. at 287. This holding is something of an anomaly in that state courts generally have concurrent jurisdiction with federal courts to enforce federally created rights, at least where Congress has not made federal jurisdiction exclusive. P. BATOR,

doctrine was subsequently expanded to the extent that state courts now have no original jurisdiction over any federal antitrust actions — equitable or legal.¹⁷⁴ On the other hand, where a plaintiff joins state and federal claims in a federal court, the federal court will probably retain jurisdiction over the state claim, either on the basis of diversity of citizenship¹⁷⁵ or pendent jurisdiction.¹⁷⁶

In the event both federal and state forums are available to the plaintiff, the choice between the two is not likely to turn on procedural differences since there are few significant differences between the Maryland and Federal Rules of Procedure.¹⁷⁷ Because of the more stringent notice requirements imposed by the federal courts with respect to class actions,¹⁷⁸ however, the state courts might become a haven for anti-

P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 434-38 (2d ed. 1973); C. WRIGHT, *THE LAW OF FEDERAL COURTS* 171-74 (2d ed. 1970). The federal jurisdictional statute dealing with antitrust matters, 28 U.S.C. § 1337 (1970), does not use the term "exclusive," but only gives federal district courts "original" jurisdiction over antitrust matters; it is at least arguable, therefore, that the *General Investment* case was decided incorrectly.

174. *Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972). For an interesting example of a state court permitting a defense based on the federal antitrust laws to be raised in an action grounded on state contract law, see *Cunningham v. A.S. Abell Co.*, 264 Md. 649, 288 A.2d 157 (1972).

175. 28 U.S.C. § 1331 (1970).

176. See generally C. WRIGHT, *supra* note 173, at 62-65. The strain on federal-state relations created when a federal court decides unresolved issues of state law should be minimized by the provision in the Maryland Act mandating "harmonious construction." See notes 20-24 and accompanying text *supra*. If an antitrust plaintiff fails in state court, he is likely to have little success in a subsequent federal action if his claim is based on substantially the same facts as the original state action, even though he sues under different statutory provisions. *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964).

An interesting question might arise if a plaintiff seeks treble damages for the same violation under both federal and state law. While actual damages may, presumably, be recovered only once, both federal and state law permit recovery of extra, two-fold damages as a type of penalty. A court would probably not permit damages to be parlayed in this fashion on the theory that the treble damage award represents the limit of authorization for "punitive" measures.

177. One possible difference is that while an unlimited number of interrogatories may be served on an opposing party under the Federal Rules, Maryland Rule 417(a)(2) imposes a limit on the number that can be served without court approval. Given the complex factual problems inherent in antitrust litigation, this may prove to be a significant difference.

178. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Maryland has not yet made such notice requirements mandatory, although the Maryland Court of Special Appeals in *Johnson v. Chrysler Credit Corp.*, 26 Md. App. 122, 337 A.2d 210 (1975), did, in dicta, adopt much of the holding in *Eisen*. Md. R.P. 209(c) (1971) allows a court the discretion in class actions to impose notice requirements if it feels they are necessary to protect class members.

trust class actions.¹⁷⁹ Such a development might jeopardize the present status of class actions in Maryland and cause restrictions to be imposed similar to those that have been adopted at the federal level.

CONCLUSION

From Justice Oliver Wendell Holmes, who wrote that "the Sherman Act is a humbug based on economic ignorance and incompetence,"¹⁸⁰ to John Kenneth Galbraith, who said that "the antitrust laws, if they worked as their proponents hope, will only make matters worse,"¹⁸¹ eminent jurists and economists have questioned the premises of our antitrust policy. Nevertheless, antitrust is certainly here to stay and state antitrust legislation can benefit the citizens of the state. In particular, the Maryland Act allows the Attorney General the opportunity to monitor anticompetitive business conduct that is primarily local in scope and therefore likely to escape scrutiny by federal enforcement officials. Additionally, the Act provides a state forum for private antitrust plaintiffs who are unable or unwilling to bring an action under federal law. Unfortunately, the Act, as it emerged from the General Assembly, was not well drafted and the ambiguity of some of the language engenders needless uncertainty and confusion. The General Assembly may wish to correct these defects.

The Act has as yet seen little use. In its first four years no private actions have been brought under it, and the Attorney General's office¹⁸² has used the Act only sparingly.¹⁸³ Antitrust litigation is laborious and expensive, and effective use of the Act by the Attorney General will require a substantial financial commitment.¹⁸⁴ If adequate funding is

179. Cf. *Clark v. Atlantic Richfield Co.*, 674 ANTITRUST & TRADE REG. REP. (BNA) A-35 Cir. Ct. of Wayne City, Mich., July 15, 1974 (certifying class action, after *Eisen*, brought by single registered car owners seeking one hundred million dollars in damages).

180. 1 HOLMES-POLLOCK LETTERS 163 (1941) (letter of April 23, 1910).

181. J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 216 (1973).

182. There are three Assistant Attorneys General working primarily on antitrust matters. Their responsibilities include litigation under federal antitrust laws as well as under the state act. As of December 1, 1976, The Attorney General's office has recovered \$1,072,825.40 in litigation brought under the federal laws.

183. The only reported decision is *Cities Service Oil Co. v. Burch*, 29 Md. App. 430, 349 A.2d 279 (1975), involving a consent decree entered into with a tire distributor. The only criminal proceeding to date is *State v. Airocar, Inc.*, Crim. No. 18-898 (Cir. Ct. Anne Arundel County, filed Sept. 1976), which resulted in a guilty plea to two counts of operating an illegal tie-in arrangement. The Attorney General's Office obtained a Final Judgment and Consent Decree in *Burch v. Berk*, Equity No. 21-599 (Cir. Ct. Anne Arundel County, filed Aug. 30, 1973) and an Assurance of Discontinuance from *Barbers' Local Union 223 et al.* (approved April, 1974).

184. Several states have attempted to overcome the financial problem by returning a percentage of damages recovered in state antitrust litigation to the Attorney

not forthcoming, the Act will simply add needless complexity to business life in the state. If the necessary financial investment is made, however, and the courts and the Attorney General bear in mind that the purpose of the Act is to promote competition within the state, the Maryland antitrust experience can be a good one.¹⁸⁵

General's Office to fund further enforcement. *E.g.*, CAL. BUS. & PROF. CODE, § 16750 (West Supp. 1975); OHIO REV. CODE ANN. § 13.109.82 (Anderson 1967).

185. An additional benefit of the Act might arise if familiarity with antitrust law encourages Maryland courts to apply antitrust principles in more traditional case settings. A fertile field for this approach is that of restrictive covenants in shopping center leases, sale of businesses, or employment agreements. *See generally* Goldshmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193 (1973); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201 (1973). As these authorities demonstrate, restrictive covenants can be challenged under the antitrust laws. In fact, Professor Posner found this area to be the most fertile source of private state antitrust litigation. Posner, *supra* note 33, at 409, Table 33.