A Proposed Uniform State Antitrust Law: Text and Commentary On a Draft Statute

RICHARD H. STERN*

I. INTRODUCTION

The resurgence of interest in state antitrust law as a vehicle for curbing local restraints of trade has been extraordinary, and it is to be anticipated that recognition of state responsibility in this area will increase still further in the future. State antitrust law enforcement is a necessity, despite the broad scope of the federal laws. First, there are important areas where state antitrust enforcement may be the only available remedy because of the purely intrastate nature of the practice or the failure of Congress to extend a particular facet of federal antitrust to the full constitutional limit. In other areas where jurisdiction is concurrent, the states may well be better equipped to treat restraints which, though affecting or in interstate commerce, are primarily of local impact: the Department of Justice necessarily must give priority in assigning its limited manpower to

† The responsibility for the views expressed herein is the author's and publication does not imply approval or disapproval by the Government.

* Trial Attorney, Antitrust Division, United States Department of Justice. The author wishes to express his appreciation to those governmental officers in various states, who have been engaged in securing the enactment of state antitrust laws substantially equivalent to that proposed and analyzed here, and to the members of the staff of the Antitrust Division; their unofficial suggestions and critical comments have been most helpful in refining the successive drafts of this statute and commentary.

†† Probably more state antitrust suits are pending in the courts now than at any other time since the enactment of the bulk of such state legislation, around the turn of the century. Part of the impetus to this activity may come from the new federal policy of liaison and cooperation with state enforcement authorities, announced at the March 10, 1960, Conference of State Attorneys General on Consumer Protection by then Acting Assistant Attorney General, Robert A. Bicks. See generally New York Times, March 11, 1960, p. 15, col. 6. See also Address by Attorney General William P. Rogers, National Conference on Consumer Protection, Washington, D. C., March 10, 1960.

2 In enacting the Sherman Law, Congress meant "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements," United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944); and to exercise "all the power it possessed," Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). See also United States v. Frankfort Distilleries, 324 U.S. 293, 297 (1945) ("no area of its constitutional power unoccupied"). See generally, on the scope of commerce clause, United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949); NLRB v. Fainblatt, 306 U.S. 601, 607 (1939).

practices affecting multi-state markets. And in situations where the Department does bring an action, adequate local relief can sometimes be secured only by state authorities acting under their own laws to correct local aspects of a more widespread combination.

Vigorous state antitrust law enforcement thus appears necessary to insure the protection of the local market places of the states. At the same time, it is a valuable complement to the federal antitrust program, with benefits to the national competitive climate that are felt beyond state borders. State antitrust enforcement might, however, create serious problems for the business community. The practical burdens created by divergent state antitrust systems are substantial and inevitable, first in terms of decision-making (or compliance), and second in terms of increased complexity of litigation. Whenever a multi-state business embarks on a significant commercial enterprise, antitrust problems may arise. When, for example, the legality of exclusive dealing contracts or of a franchise system of retail distribution may vary from state to state, and when further differences may exist between federal and state standards, industry is subjected to serious problems in determining what course of action to follow. When these problems ripen into litigation, the courts may discern still further complexities in the cause of action because of the multi-state contacts: choosing from the checkerboard of sources of substantive law and renvoi problem are among them. At the same time the courts and the bar are deprived of the advantage to be

6 "Every agreement concerning trade... restrains" the trade of parties or strangers to the agreement. Appalachian Coals, Inc. v. United States, 285 U.S. 344, 361 (1933); Board of Trade v. United States, 246 U.S. 231, 238 (1918). The real legal problem is whether the restraint is "unreasonable" (i.e., substantially detrimental to the general vigor of competition in the market). See Standard Oil Co. v. United States, 221 U.S. 1, 60, 63 (1911).
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gained from a common and more extensive body of common law precedents (or statutory interpretation). As a result both the governed and the Government may suffer the costs of a nation-wide patchwork of state antitrust law.

Although the practical burdens created by diverse antitrust patterns may be substantial, it is doubtful that they are legally cognizable as "burdens on commerce." The obvious interest which the state has in preventing restraints of trade and the traditional authority of the states in this area weigh heavily against such a conclusion. The power of the states to experiment with diverse legal systems is unquestioned. In any case, the "burden on commerce" argument has been rejected by the Supreme Court on the ground that since state antitrust law eliminates restraints or burdens on commerce, it therefore cannot be deemed to burden it. 

Nor is it probable that the Sherman Act would be held to preempt the application of multifarious state antitrust systems to interstate commerce. The legislative history indicates the contrary; during the debates Senator Sherman declared that his purpose was to supplement state law in order that federal authorities might cooperate with the states in curbing the trusts and monopolies which threatened all of the country. Moreover, the statutory scheme of the federal antitrust laws is not one of all-pervasive regulation which cannot function properly unless deemed to occupy the entire field. To be sure, when state economic regulations

9 See Standard Oil Co. v. Tennessee, 217 U.S. 413, 422 (1910) (Holmes, J.: "The mere fact that it may happen to remove an interference with commerce among the States . . . does not invalidate it.") Query: Does Justice Holmes' analysis really reach the issue? Compare Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). The author suggests that the conclusion in the text supra may not follow from the premise.
10 "This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is 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. . . ."

In the labor cases, the court has deferred to the congressional purpose in creating the NLRB, "a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience," San Diego Bldg.
conflict with the federal antitrust laws, they are invalidated under the supremacy clause. But it is doubtful that state laws banning restraints of trade, however disparate from one another or from the federal scheme, would be deemed to conflict with the federal antitrust laws.

It would appear, then, that whatever problems are created by divergent state antitrust systems will not be settled by the courts. The problem is essentially political and involves delicate questions of state and federal sovereignty. The solution called for, therefore, is political, i.e., legislative rather than judicial. For these reasons, it would appear that the most desired course would be one of uniformity of antitrust law—at least with respect to the substantive provisions. This would provide one reasonably predictable standard of legality for the business community to work with, and at the same time would avoid the legal and pragmatic shortcomings of relying on centralization. Since we are now only at the outset of an era of state antitrust enforcement activity, there would appear to be no serious state interest in preserving established, distinctive local practice.

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Trades Council v. Garmon, 359 U.S. 236, 242 (1959), the orderly functioning of which would be undermined if rival tribunals were tolerated. In antitrust, however, the Sherman and Clayton Acts are already enforced concurrently by the Department of Justice, Federal Trade Commission, and private litigants. As for Nelson, the subsequent decision in Uphaus v. Wyman, 360 U.S. 72 (1959), indicates that preemption in sedition law is restricted to state action against subversion of the federal government, and is inapplicable in the case of action aimed at protecting the state itself. The analogy between state protection of the integrity of its own commerce against conspiracies in restraint of trade and state self-protection against subversion has been pointed out by Earl Pollock, Address to Chicago Bar Association Symposium on State Antitrust Laws, April 25, 1961.

Among the standards adopted by the National Conference of Commissioners on Uniform State Laws for determining whether a subject matter is appropriate for uniform legislation by the several states are whether what is involved concerns commercial activities carried on by individuals or companies operating in a number of states, situations which are apt to have contacts with two or more states so that uniform legislation would avoid litigation to resolve difficult questions as to which state law applies, and matters of national concern which under our constitutional system are proper subjects for state legislation. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 265 (1959).

But see N.Y. Bar Ass'n, Section on Antitrust Law, Report of the Special Committee to Study the New York Antitrust Laws 8 (1957) (despite "verbosity, turgidity and complexity of the New York legislative language" and the undesirability of "placing businessmen in the dilemma of having to comply with conflicting standards," the discrepancies are not acute and substitution of new language might "produce more confusion than it would allay").
The remainder of this article is devoted to a proposed uniform state antitrust law, based on what are believed to be the most desirable features of the various codes.

II. PLAN OF THE STATUTE

In drafting the four major substantive provisions of the law, sections 1 through 4, considerable reliance has been placed on the approach used in sections 1 and 2 of the Sherman Act and in sections 3 and 7 of the Clayton Act. Almost the exact language of the Sherman Act provisions has been adopted and, although the specific wording of the Clayton Act was not employed, the exclusive dealing and merger provisions adopted are substantively equivalent to their federal counterparts in most material respects. An important consideration in this choice was the existence of a large body of case law interpreting these statutes, thereby furnishing the courts with an existing corpus of precedents and interpretations, and decreasing the uncertainty frequently attendant to new legislation. As Mr. Justice Frankfurter has said, “the gloss of history” has been laid over the Sherman Act. The substantive provisions of section 2 of the Clayton Act have not been codified into this draft statute, because it is believed that discrimination problems may more adequately be handled in terms of the broad scope of sections 1 and 2 of the act, which reach any predatory, monopolistic, or conspiratorial activity which injures the vigor of competition in the market places of the state.

It is intended that sections 1 through 5, setting out the substantive offenses and the definitions used, be adopted uniformly. These sections comprise Part I of the statute. Part II, including sections 6 through 9, deals with state enforcement and procedure; in this area uniformity is desirable, but not as imperative as in the case of the substantive provisions. Part III, sections 10 through 12, deals with private antitrust actions for damages and injunctive relief; uniformity here is extremely desirable, but again not as important as with regard to Part I.

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22 Part IV, including miscellaneous “boiler plate” provisions usually deemed appropriate in such an act—e.g., severability, short title, interpretation, service of process without the state, effective date—has been omitted from this article in the interest of brevity. Also omitted, for the same reason, is the appendix of pleading forms—some-
III. THE PROPOSED ACT

[NAME OF STATE] ANTITRUST LAW

An Act to Curb Monopolies and Outlaw Restraints of Trade.

Be it enacted by the Legislature of the State of [Name of State]:

[PART I: SUBSTANTIVE OFFENSES]

SECTION 1: Restraint of Trade.
Every contract, combination, or conspiracy in unreasonable restraint of trade is unlawful.

SECTION 2: Monopolization.
It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade.

SECTION 3: Exclusive dealing.
Any contract, agreement, or understanding that one party shall not engage in trade with a competitor of the other party is unlawful if the effect may be to lessen competition substantially in any line of commerce.

SECTION 4: Acquisitions.
It is unlawful for any person not a natural person to acquire an asset from any person if the effect may be to lessen competition substantially in any line of commerce.

SECTION 5: Definitions.
"Person" as used in this Act shall include natural persons, corporations, trusts, unincorporated associations, and partnerships. "Trade" and "commerce" shall include the purchase or sale of assets or services, and any activity directly or indirectly economically affecting the people of the State of [name of state]. "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

[PART II: STATE ENFORCEMENT AND PROCEDURE]

SECTION 6: Criminal penalties.
Any person who conspires to restrain trade unreasonably, or monopolizes, attempts to monopolize, or conspires to monopolize trade shall be guilty of a misdemeanor and be punished by fine not to exceed $50,000, or imprisonment not to exceed one year, or both. Whenever a corporation violates this section, the individual director, officers, or agents of said corporation who have authorized, ordered, or ratified the acts constituting such violations, shall be punishable in accordance with this section. Exclusive jurisdiction to enforce this section is invested in the Superior Courts [or insert name of state court of general jurisdiction] of this State. No action under this section shall be brought more than four years after the commission of the acts constituting in whole or in part the offense charged.

thing which is reasonably owed the bar of any jurisdiction proposing to enforce its antitrust laws. Finally, we have omitted reference to exemption from antitrust coverage —e.g., for labor unions, agricultural cooperatives, regulated industries. It is believed that a separate article would more appropriately be devoted to this subject.
SECTION 7: Equitable relief and charter forfeiture.

The Superior Courts [or insert name of state court of general jurisdiction] of this State are granted exclusive jurisdiction to prevent and restrain violations of Section 1 through 4 of this Act and, in order to effectuate the purposes of this Act, they may, in appropriate cases, suspend or revoke the corporate charter or the right to do business in this State of any violator. When the party complained of shall have been duly notified that an action has been filed against him, the court shall proceed, as soon as possible, to the hearing and determination of the case; and pending trial the court may at any time make temporary restraining orders or prohibitions as shall be deemed just in the premises. In all equity cases brought by the State in which one or more of defendants are not natural persons, venue may be laid in any county where any defendant may be found or transacts business or in [insert name of county in which state capital is located] County.

SECTION 8: Enforcement.

Exclusive power to enforce Sections 6 and 7 of this Act is vested concurrently in the Attorney General or such person as he may designate and in the District Attorneys of the various counties. When any such action is brought by the District Attorney of a county, however, the Attorney General may assume full control of the litigation by giving appropriate notice to that District Attorney.

SECTION 9: Civil investigative demand.

(a) Whenever the Attorney General believes that any person may be in possession, custody, or control of any original or copy of any book, record, report, memorandum, paper communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate, which he believes to be relevant to the subject matter of an investigation of a possible antitrust violation, he may, prior or subsequent to the institution of a civil proceeding thereon, execute in writing and cause to be served upon such person a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying.

(b) Each such demand shall —

(1) State the statute and section or sections thereof alleged violation of which is under investigation, and the general subject matter of the investigation;

(2) Describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

(3) Prescribe a return date within which the documentary material is to be produced; and

(4) Identify the state employees or representatives to whom such documentary material is to be made available for inspection and copying.

(c) No such demand shall require the production of any documentary material which would be privileged from disclosure if demanded by a subpoena
duces tecum issued by a court of this state in aid of a grand jury investigation of such alleged violation.

(d) Any such demand may be served by any attorney employed by or other authorized employee of this state. Service of any such demand may be made by —

1. Delivering a duly executed copy thereof to the person to be served, or, if such person is not a natural person, to any officer of the person to be served; or
2. Delivering a duly executed copy thereof to any place of business in this state of the person to be served; or
3. Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at any place of business in this state, or, if said person has no place of business in this state, to his principal office or place of business.

(e) Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and any authorized employee or representative of the state. In lieu of having such material copied by an employee or representative of this state, the Attorney General may require the person served to furnish copies of the material, the reasonable expense of which shall be borne by the office of the Attorney General.

(f) When documentary material produced pursuant to a demand is no longer required for use in connection with the investigation for which it was demanded, or in any case or proceeding resulting therefrom, or at the end of eighteen months following the date when such material was produced, whichever is the sooner, the person served with such demand shall be relieved of the duty to hold such documentary material available for inspection and copying as required by sub-section (a): Provided, however, that any court in which a petition may be filed as set forth in sub-section (h) hereof may, upon good cause shown, extend such period of eighteen months, but no one of such extensions may exceed eighteen months in duration.

(g) The Attorney General or any other authorized employee of the state may use documentary material produced pursuant to a demand, or copies thereof, as he determines necessary in the performance of his official duties in connection with this act, including presentation of any case or proceeding under this act before any court or grand jury. In no other connection shall such material or copies be produced for inspection or copying by, nor shall the contents be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the state, without the consent of the person which produced such material, unless otherwise ordered by a Superior Court [or insert name of state court of general jurisdiction] for good cause shown. Material or copies shall be available for inspection and copying by the person who produced such material or any duly authorized representative of such person, under such reasonable terms and conditions as the Attorney General shall prescribe.
(h) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to sub-section (a), stating good cause, may be filed in the Superior Court [or insert name of state court of general jurisdiction] for [insert name of county in which state capital is located] County, or in such other county as the parties may agree. “Good cause” to modify or set aside a demand may be shown only, except in extraordinary circumstances, by failure of the Attorney General to comply with sub-sections (b) or (c) hereof. A petition, stating good cause, to require the Attorney General or any person to perform any duty imposed by the provisions of this section, and all other petitions in connection with a demand, may be filed in the Superior Court [or insert name of state court of general jurisdiction] for [insert name of county in which state capital is located] County, or in such other county as the parties may agree.

(i) A person upon whom a demand is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by an order of court issued under sub-section (h) hereof. Any person who, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand under this section, (1) removes from any place, (2) conceals, (3) withholds, or (4) destroys, mutilates, alters, or by any other means falsifies, any documentary material in the possession, custody, or control of any person which is the subject of any demand duly served upon any person, or who (5) otherwise wilfully disobeys any such demand, shall be guilty of an offense against the State, and shall be subject, upon conviction in any court of competent jurisdiction, to a fine not to exceed $5,000 or to imprisonment for a term of not more than five years, or both. Failure of the state to serve the demand properly pursuant to subsection (d) hereof shall be a defense to prosecution under this subsection, but invalidity of the demand under subsections (b) and (c) shall not be a defense, and such invalidity may be tested only in an action under subsection (h) to modify or set aside the demand.

(j) Nothing contained in this section shall impair the authority of the Attorney General or any authorized state attorney to (1) lay before any grand jury impanelled before any Superior Court [or insert name of state court of general jurisdiction] of this state any evidence concerning any alleged antitrust violation, (2) invoke the power of any such court to compel the production of any evidence before any such grand jury, (3) file a civil complaint or criminal information alleging an antitrust violation which is not described in the demand, or (4) institute any proceeding for the enforcement of any order or process issued in execution of such power, or for the punishment of any organization or individual for disobedience of any such order or process.

[PART III: PRIVATE ACTIONS]

Section 10: Private remedies.

Any person injured in his business or property by a violation of sections 1, 2, 3 or 4 of this Act, or because he refuses to accede to a proposal for an arrange-
ment which, if consummated, would be in violation of sections 1, 2, 3 or 4 of this Act, may bring a civil action in the Superior Court [or insert name of state court of general jurisdiction] of the county in which defendant does business or may be found, to enjoin further violations, to recover treble damages for his injuries, and to recover the cost of the suit including a reasonable fee for the services of his attorney. In computing damages under this section the Court may consider reasonable expectation interests. For the purposes of this section “person injured” shall include the State of [name of state], its agencies, its counties, its municipalities, and its other political subdivisions, but no attorneys fees shall be awarded in such actions to the State, its agencies, its counties, its municipalities, or its other political subdivisions.

SECTION 11: Limitation of private damages actions.

Any action to enforce a claim for treble damages under Section 10 shall be forever barred unless commenced within four years after the cause of action accrues. Whenever any action under section 6 or 7 of this Act is brought by the State of [name of state], the running of the foregoing statute of limitations, with respect to every private right of action for damages under section 10, which is based in whole or in part on any matter complained of in said sections 6 or 7 action shall be suspended during the pendency thereof.

SECTION 12: Evidentiary effect of judgment in favor of State.

The final judgment or decree rendered in any action brought by the State of [name of state] under sections 6 or 7, to the effect that defendant has violated sections 1, 2, 3 or 4, shall be prima facie evidence against such defendant in any action brought by any party against such defendant under section 10 of this Act, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. This section shall not apply to consent judgments or decrees nor to judgments entered under a plea of nolo contendere, when such judgments are entered both before any testimony has been taken and without any finding of illegality by the Court. This section shall in no way be construed to impair any collateral estoppel to which the State is otherwise entitled.

IV. Commentary

Part I: Substantive Offenses

SECTION 1: Restraints of Trade

Language. This section is essentially equivalent to section 1 of the Sherman Act: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal...”23

The language of section 1 has been altered from that of Sherman Act section 1 in several minor respects. First, the word “unreasonable” has been inserted before “restraint” because the courts have read this limitation into the statute since the landmark case, Standard Oil Co. v. United

Second, the phrase "in the form of trust or otherwise" has been omitted in the interest of brevity.25

Scope of statute. The section is intended to be applicable to unreasonable restraints of trade in the most broad jurisdictional sense. Hence, "trade" is defined in subsequent section 5 as to exhaust the full scope of the police power of the state.26 "Trade" includes the purchase and sale of goods and services alike, the making of leases or bailments, and any other form of commercial or financial activity—in short, any activity which may have economic impact on the people of the state. According to the case law, the inherent police powers of the state provide constitutional authority for legislation covering the full scope of activities affecting the people of a state, wherever such activities are initiated.27 Thus a conspiracy, wherever formed and carried out, to fix the price at which goods destined for a state,28 or the price at which goods coming from a state,29 are to be bought or sold may be reached by section 1—so long as sufficient local impact is felt that jurisdiction exists in the state whose law is to be applied.30 Moreover, it has been recognized that state activity in this sphere is not federally preempted by the Sherman Act or invalidated under the commerce clause.31

Standard of "reasonableness." Not every contract, combination, or

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24 221 U.S. 1 (1911).
25 The "trust" combination, so dangerous to the public welfare in 1890 that special mention of it was then deemed appropriate, at this date no longer deserves special emphasis or singling out. The outright merger or acquisition, for example, is a far more common method of combination today than is the trust.
26 See United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297-98 (1945); Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932).
other joint activity which, to some degree, restrains trade is declared unlawful by section 1. Since, as the Supreme Court has recognized, every contract necessarily restrains the trade of both the parties and strangers to the contract to some extent, a "rule of reason" must be invoked to determine the legality of a questioned restrictive practice. This "rule of reason" removes from the ban of the statute those restraints which do not have any significant anticompetitive tendency. More specifically, restraints of trade are deemed unlawful only if: (1) they have an actual and significant adverse effect on the market; (2) they have a potential significant adverse effect on the market, for example, by erecting barriers to the entry of new competition or by throttling innovation; or (3) the intent, whether specific or implied from the character of the practice or its tendency, of those who adopt the restrictive practice is to impair significantly the vigor of competition.

Although, as a general rule, the courts must essay some measure of economic analysis to determine whether a challenged activity offends section 1 by injuring or tending to injure competition in the market place, there are certain practices which, because of their necessarily "pernicious effect on competition and lack of redeeming virtue," justify the courts in concluding "that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary ... to do wrong to the general public and to limit the right of individuals." Among these practices that the courts have declared to be conclusively presumed illegal—i.e., have declared "illegal per se"—are (1) efforts to control the market by direct

32 See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 361 (1933); Board of Trade v. United States, 246 U.S. 231, 238 (1918).
33 See Standard Oil Co. v. United States, 221 U.S. 1 (1911).
34 "Significant" as used here means "not insubstantial" or "beyond de minimis"; i.e., the anticompetitive impact must be sufficient to merit legal cognizance, even though not necessarily "formidable."
35 It should be recognized that "effect" on the market is not identical with amount of commerce "affected." Generally, a fairly substantial amount of commerce must be affected by a restrictive practice for any significant market effect to be felt. Thus, in some cases practices may affect a share of the market beyond de minimis without impairing the vigor of competition in that market. See Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); United States v. Columbia Steel Co., 334 U.S. 495 (1948).
36 While this effect is most commonly measured in terms of increased price or deteriorated quality, these categories do not exhaust the methods of measuring market impact. Fashion Originators Guild of America v. FTC, 312 U.S. 457, 466 (1941).
36a Effects in this category are those which are likely to be translated in time into the previous category, whereupon they would become measurable, e.g., in terms of increased prices or deteriorated quality. Compare the "incipiency" standard, infra note 79.
38 Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
39 Because price-fixing conspiracies are illegal per se, it is no defense to such a charge that the price-level fixed is not unreasonably high, that the conspirators' efforts were unsuccessful, or that the prior state of competition was "ruinous." United States v.
agreement on price level, by limitation of production, or by allocation of customers or markets, and (2) efforts to exclude competitors from the market by predatory conduct, such as by boycott.

Price-fixing was recognized as illegal per se at common law. Moreover, almost every state in the Union has now passed specific legislation outlawing price-fixing. In those states where price-fixing is not expressly prohibited, it is generally held illegal under broad antitrust statutes which, like the Sherman Act, condemn all conspiracies in unreasonable restraint of trade without defining specific violations. Conspiracies to limit production are recognized to be in the same category with price-fixing. Allocation of markets is still another substitute for price-fixing: instead of agreeing on common price schedules, the conspirators split up the market and let each conspirator do as he pleases in


41 See DEP'T OF JUSTICE, STATE ANTITRUST LAW REFERENCE HANDBOOK, map facing p. 12, (1960).


Although some state antitrust laws specifically mention price-fixing and limitation of production, it is believed that a broad and general prohibition which is not restricted by reference to enumerated violations will more conveniently serve the legislative needs of the state. Chief Justice Hughes stated, in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933): "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape."

43 The leading Supreme Court case on the point, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), which involved purchase of "distress" gasoline by the major oil refiners from independents, who would otherwise have sold it on the open market thus lowering price levels. The effect of the scheme was to put a floor under gasoline prices. The Court declared that "raising, depressing, fixing, pegging, or stabilizing the price of a commodity... is illegal per se." Id. at 223. Antitrust law, state or federal, "places all such schemes beyond the pale and protects... our economy against any degree of interference" with the free play of market forces. Id. at 221.

Among state antitrust cases prohibiting schemes for the limitation of production are: Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391 (1888); Arctic Ice Co. v. Franklin Elec. & Ice Co., 145 Ky. 32, 339 S.W. 1080 (1911); Clark v. Needham, 125 Mich. 84, 38 N.W. 1097 (1900); Hastings Indus. Co. v. Baxter, 125 Mo. App. 494, 109 S.W. 1075 (1907); State v. Nebraska Distilling Co., 29 Neb. 700, 46 N.W. 155 (1890); Emery v. Ohio Candle Co., 47 Ohio St. 320, 48 N.E. 660 (1890); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159 (1871).
his sector. Allocation schemes may also be non-geographic: thus the conspirators may agree not to poach on one another's customers, or they may divide up different fields of use of a commodity among themselves, or allocate functionally related markets.

Like price-fixing conspiracies, concerted efforts to drive a competitor from the market have long been disfavored by the law. The prevailing view, expressed by the Supreme Court in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, is that such practices are illegal per se, and cannot be justified by legitimacy of the conspirators' motives or defended by reference to their lack of success in achieving their goals. The boycotting group is in reality an extra-governmental agency which prescribes rules for the regulation and restraint of commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the ... legislature.' Not every refusal to deal, however, is declared unlawful by this statute. To be sure, a horizontal combination among competitors to exclude an outside competitor from the market constitutes a boycott and is a crime. But the freedom of

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44 Such practices have been held to violate the general common law doctrine against restraint of trade. See, e.g., *American Laundry Co. v. E. & W. Dry-Cleaning Co.*, 199 Ala. 154, 74 So. 58 (1917); *Chicago Gas Light & Coke Co. v. Peoples Gas Light & Coke Co.*, 121 Ill. 530, 13 N.E. 169 (1887); *Charlestown Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 50 S.E. 876 (1905). For an example of application of a general antitrust statute in prohibition of restraint of trade against such practices, see *State v. Jackson Cotton Oil Co.*, 95 Miss. 6, 48 So. 300 (1909). The leading federal case is Judge (later Chief Justice) Taft's opinion in *Addyston Pipe & Steel Co. v. United States*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).


46 In *American Laundry Co. v. W. & W. Dry-Cleaning Co.*, 199 Ala. 154, 74 So. 53 (1917), wet-laundry and dry-cleaning were allocated to different firms. In *Ricou v. Crosland*, 81 Fla. 574, 88 So. 380 (1921), certain seafood middlemen appear to have allocated different species of fish among one another; thus, one was to buy all mullet at Miami, another all Key West mackerel.


49 *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 465 (1941). As the Supreme Court of Vermont has put it, the individual should not be "exposed to the operation of some secret code of law, in the framing of which he had no voice. . . ." *State v. Stewart*, 59 Vt. 273, 286, 9 Atl. 559, 567 (1887).

50 See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). And it is immaterial whether the boycott is threatened or consummated, or whether the boycott is primary (i.e., the conspirators agree among themselves not to deal with the victim of the boycott), see, e.g., *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N.E. 823 (1909), or secondary (i.e., the agreement is not to deal with any third parties, e.g., customers or
the individual businessman to select his customers and unilaterally to refuse to deal with anyone with whom he chooses not to do business is recognized by the courts.\textsuperscript{51}

\textit{Remedies and relief.} Section 1 declares unreasonably restrictive practices "unlawful," but it does not specify any remedy or penalty. These are dealt with by the subsequent sections 6, 7, and 10. The unlawfulness of a restrictive contract may also be raised as a defense to an action for damages or an injunction based on breach of the contract,\textsuperscript{52} or used as the basis of a declaratory judgment that the contract is unenforceable.\textsuperscript{52a} The relief usually sought by the state in a section 1 type of civil proceeding is an injunction against the practice which is challenged as unreasonably restrictive.

\textbf{SECTION 2: MONOPOLIZATION}

\textbf{Language:} This section is based on section 2 of the Sherman Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor..." The phraseology adopted in section 2 of the proposed statute differs from the federal provisions in no material respect other than the elimination of the interstate commerce requirements.

\textit{Monopoly and monopolization:} Monopoly, the ultimate in restraint of suppliers, who continue to deal with the victim of the primary boycott), see Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co., 3 Misc. 582, 24 N.Y. Supp. 647 (1893); Martell v. White, 185 Mass. 235, 69 N.E. 1085 (1904); Ertz v. Produce Exch., 79 Minn. 140, 81 N.W. 737 (1900); Delz v. Winfree, 80 Tex. 100, 11 S.W. 111 (1891); Bourwell v. Marr, 71 Vt. 1, 42 Atl. 607 (1899). Boycotts are often made criminally punishable by specific statutes. See, e.g., ALA. CODE tit. 14, § 54 (1940); IDAHO CODE ANN. § 48-104 (1947); IND. ANN. STAT. § 23-112 (1950); Mo. REV. STAT. § 416.030 (1949); S. C. CODE §§ 66-64 (1952); TEX. PEN. CODE art. 1637 (Vernon 1948).

\textsuperscript{51} See United States v. Colgate & Co., 250 U.S. 300 (1919), as limited by United States v. Parke, Davis & Co., 362 U.S. 29 (1960). Such freedom is not recognized, however, for those who enjoy a virtual monopoly however lawfully obtained, see Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952), nor for those who seek to monopolize the market, Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927). It would appear that use of refusal to deal, to coerce exclusive dealing which would be in violation of the antitrust laws, is also illegal. See DEP't OF JUSTICE, STATE ANTITRUST LAW REFERENCE HANDBOOK 20 (1960); cf. United States v. Parke, Davis & Co., supra. Section 10 of this statute, analyzed infra pp. 747-51, contains a specific provision creating a remedy against such coercive use of refusal to deal.

\textsuperscript{52} See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); Addyston Pipe & Steel Co. v. United States, 85 Fed. 271, 279, 286 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).


trade,\(^{54}\) has been defined by the United States Supreme Court as the power of a business concern to set market price or exclude competitors from the market.\(^{55}\) Unlike conspiracies to restrain trade, where the success or lack of success of the scheme is legally immaterial, monopoly exists only when competition is actually eliminated or the restraint of trade is consummated. Monopoly by itself, however, is not necessarily considered illegal. Where a monopoly has been acquired by statutory grant, through superior business efficiency,\(^{56}\) or even by chance, \(^{57}\) something beyond mere possession of power must be shown to justify a civil or criminal action against the possessor of that power. Indeed, in any anti-monopoly case, however the monopoly has been attained, in order to prevail the plaintiff must show an element of deliberateness in addition to the existence of monopoly power. Such deliberateness may be established by (1) a history of predatory behavior,\(^{58}\) (2) the absorption of competitors by mergers, \(^{59}\) or (3) a showing that the accused monopolist took steps to preserve his power and prevent entry of new competition.\(^{60}\) When such elements are compounded with monopoly, then the offense of monopolization may be established.

\(^{54}\) See United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945) (L. Hand, J.) ("[I]t would be absurd to condemn such contracts [price-fixing] unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies."). See also People v. American Ice Co., 120 N.Y. Supp. 443 (Sup. Ct. 1909); Eli Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939).


\(^{57}\) See United States v. Griffith, 334 U.S. 100, 106 (1948) (only theatre in town); American Tobacco Co. v. United States, 328 U.S. 781, 786 (1946) (original entrant into new field).


Monopolization may be incomplete and unsuccessful—and yet be proscribed, for attempted monopolization is also illegal. Like monopolization, attempted monopolization does not require that a plurality of persons be involved. Unlike monopolization, it does not require the existence of power over price or power to exclude competitors; specific intent to secure such power is enough. Generally speaking, the standard of proof for this offense is intermediate between that of conspiracy in restraint of trade and that of monopolization.

**Standard of legality:** Like restraint of trade, monopoly power must exist in some relevant market or area of competition. This may be identified geographically or in terms of the distribution characteristics of the products or services involved. The Attorney General’s National Antitrust Committee has thus characterized the concept of market: “For purposes of economic analysis, the ‘market’ is the sphere of competitive rivalry within which the crucial transfer of buyers’ patronage from one supplier of goods or services [to another] can take place freely.”

In a state antitrust case, the relevant market might comprise, for example, all drug stores in a city, all feed stores in a county or perhaps in the whole state or even a multi-state area, all drive-in theaters in and around a town, all variety stores in down-town areas of all the cities of the state, or all garages in a city which specialize in fender repairs.

Once the relevant market has been determined it becomes possible to measure the defendant’s power over the trade in that market. The power over price or the power to exclude competitors which the law condemns need not be absolute. A significant degree of power over price, for example, may violate the law, even if others may also have such power. And the more readily the economic characteristics of a particular market afford a dominant company effective control because, for instance, of the difficulties of entry into the industry, then the relatively smaller the percentage of the market is that may be adequate to confer monopoly power. It should be emphasized that what the law seeks to eliminate is the re-

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62 But see United States v. Columbia Steel Co., 334 U.S. 495, 531–32 (1948) (dictum: attempt to monopolize may violate § 2 but not § 1). Roughly speaking, both conspiracy in restraint of trade and attempted monopolization may be considered lesser included offenses under monopolization, since each of the former is in the nature of a preliminary step toward the latter. See supra note 54.


66 ATT’Y GEN. NAT’L COMM. ANTITRUST REP. 322 (1955). See, more generally, the discussion of relevant market, infra, as to Section 3, pp. 734–39.
tention of power to control the market, irrespective of the actual exercise
of such power and that it is not, therefore, necessary to establish “abuse”
of monopoly power to make out a violation, nor necessary to show “com-
plete monoplisization.”

Remedies and relief: As in the case of section 1, the customary civil re-
lief sought by the state in a monopolization case is an injunction against
the illegal practice. Dissolution of the monopoly may sometimes be
deemed the only relief adequate to dispel the harmful effects of the viola-
tion. While such relief may be highly appropriate for an intrastate mo-
nopoly, the propriety of dissolution as a relief measure against out-of-
state monopolists may be questioned. In such circumstances it would
appear that ouster of the violator from the state would be more ap-
propriate.

SECTION 3: EXCLUSIVE DEALING

Language: This section is based on section 3 of the Clayton Act. The


See, e.g., United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard
Oil Co. v. United States, 221 U.S. 1 (1911).

Application of this drastic remedy against out-of-state corporations might well
exceed the jurisdiction of the courts of the state, as well as amount to a burden on com-
merce. It is not clear that an equity court may issue a mandatory injunction of this
type, requiring out-of-state changes in the corporation’s status. According to the REsTATE-
MENT (SECOND), CONFLICT OF LAWS § 94 (Tent. Draft No. 4, 1957)—“A state can
order a person, who is subject to its jurisdiction, to do an act in another state.” In the
antitrust field, this view is supported by two cases ordering defendants to commit
Ohio 1954), aff’d, 352 U.S. 903 (1956); United States v. Imperial Chem. Indus., Ltd.,
Shoe Co. v. Washington, 326 U.S. 310 (1945), suggests that the proper approach re-
quires a balancing of the interests of the state asserting jurisdiction against the serious-
ness of the out-of-state effects of sustaining jurisdiction. Certainly, grave comity prob-
lems exist. The willingness, for example, of Michigan to give full faith and credit to a
Texas decree ordering General Motors to divest itself of Chevrolet Division may be
questioned.

As to the commerce clause aspect of this question, despite the tolerance toward state
antitrust law exemplified in the authorities cited note 10 supra, the more prudent course
would appear to be avoidance of posing constitutional questions to the courts. See
burdens and impediments to interstate commerce”), 509 (due process) (4th Cir. 1955);
cf. L. D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 779 (9th Cir. 1959).
While these two cases, like International Shoe Co. v. Washington, supra, involve jurisdic-
tion over the person for the purpose of entertaining the action, rather than relief,
it is believed that the same policy considerations apply.

See section 7, infra pp. 746–46. Some question may be raised, because of the com-
merce clause, even as to the power of a state to oust a firm from interstate commerce
with the state. The Standard Oil Trust suffered this fate, but more recent cases cast


“It shall be unlawful for any person engaged in commerce, in the course of such
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language of the proposed statute, however, has been considerably shortened (1) in the interest of simplicity and (2) in order to eliminate two loopholes in Clayton Act, section 3. By its terms, the Clayton Act prohibition is limited to "goods, wares, merchandise, machinery, supplies, or other commodities," and, therefore, contracts concerning non-commodities, such as land, services, financing, or choses in action, are not within the scope of the statute.\(^7\) Moreover, the federal statute comes into play only with respect to conditions imposed upon the buyer, and contracts restricting sellers are immune to Clayton Act, section 3.\(^7\) For these reasons, a more general form of expression has been used in drafting this statute, in order to embrace all exclusive arrangements, whether, for example, by full or partial requirements or output contracts, or by tie-ins. Examples of exclusive contracts within the purview of section 3, if their effect may be to lessen competition substantially, are: a contract between a gasoline distributor and a service station providing that the station buy 80 per cent of its gasoline requirements from the distributor, a contract between an ice-cream plant and a dairy for the dairy's entire output of milk not sold for consumption as fluid milk, a contract between a local TV station and a film broker which gives the station the Marilyn Monroe pictures it wants on the condition that it buy also some Abbott and Costello movies it did not want, a franchise for the distribution of outboard motors under which the franchisee agrees to sell no competitive brands and the manufacturer agrees to allow no one else to sell his brand in the same county with the franchisee, a license for a theater to show a film on condition that it not be screened as a double feature with any competing producer's film.

The phrase "contract, agreement, or understanding" parallels the Clayton Act terminology and emphasizes the broad reach of the pro-

commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."


\(^7\) Handler, Antitrust in Perspective 44–45 (1957); cf. 81 Cong. Rec. 2340 (1937) (informal opinion of FTC on applicability to output contract of analogous provision of § 2 of act).
vision. Exclusive dealing contracts or understandings may be inferred from special discounts for exclusivity, or from a course of action, such as refusals to deal with those seeking non-exclusive agreements. And prohibited exclusive agreements will be discerned even where they are effectuated more indirectly, through agency contracts, contracts for fixed quantities, or informal understandings backed up by threat of refusal to deal with violators of the understanding.

Scope: As is the case with section 1, the intention is to make section 3 cover any contracts, agreements, or understandings which economically affect the state, to use the full scope of the police power of the state.

Standard of legality: Exclusive dealing is not illegal per se, either under the general prohibition of section 1, or the more specific rule of section 3. Exclusive dealing is unlawful under section 1 if it has, or will probably have, the effect of unduly restraining competition, or it is adopted in order to achieve this purpose. It is unlawful under section 3 if the effect may be to lessen competition substantially. The practical distinction between these standards may well prove not to be substantial. It would

75 See DEP'T OF JUSTICE, STATE ANTITRUST LAW REFERENCE HANDBOOK 20 (1960); Kessler & Stern, Competition, Contract, and Vertical Integration, 69 YALE L.J. 1, 37-42, 79-84 (1959). See also United States v. Paramount Pictures, Inc., 334 U.S. 131, 151 (1948) ("A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety").

Nor need the agreement or understanding be enforceable by formal or effective informal sanction. Certainly the former is precluded, since courts will not enforce anticompetitive agreements. See 750-51 infra. As for informal sanctions, such as threat not to renew a dealer, where the threatened refusal to deal will be justified on some extraneous pretext, these too may be absent and a forbidden understanding still made out. "Gentlemen's agreements" for exclusivity may as substantially lessen competition as more explicit restraints. See generally United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

76 Clayton Act § 3, supra note 70, does not appear to exhaust the full scope of Congress' power, since it has an "in commerce" limitation. See FTC v. Bunte Bros., 312 U.S. 349 (1941).

77a The distinction is important, however, when the exclusive arrangement falls into a per se category under § 1, since that eliminates the necessity for market analysis. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). An example of a practice involving a § 1 boycott conspiracy and a § 3 arrangement or understanding is given in Loevinger, Treble Damage Litigation and the Small Businessman, 16 A.B.A. ANTITRUST SECTION PROCEEDINGS 106, 108 (1960); the association of record dealers in a city decided that a newcomer to the market should be eliminated, as a superfluous dealer, and they advised the national distributors to stop selling to the newcomer (presumably, as the condition of continuing to enjoy the custom of the association members); when the distributors acceded to the demand, an antitrust suit was brought by the newcomer. The boycott here is, of course, a § 1 violation; the sales
appear, however, that a somewhat weaker standard of proof, sometimes called the "incipiency" test, satisfies the latter standard. The test of tendency to substantial lessening of competition within this section is met when it is reasonable to infer that actual or potential competitors are foreclosed from effective access to the market, i.e., when the exclusive contracts, whether made by defendants alone, or (if, as is more common, he is one of several firms which together dominate the market) made by the major firms in the industry, cover sufficiently large a percentage of the market and leave so small a percentage free to competition that the effect is "to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market."

Relevant Market. Determination of the relevant market must be made by the court to determine the foregoing competitive impact under section to association members made under the demand that the seller not deal with the newcomer are contracts in restraint of trade under § 1 and exclusive arrangements under § 3 of the draft act. See also Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

79 See Pillsbury Mills, Inc., 50 F.T.C. 555, 567 (1953) ("a lower standard of proof of the same kind of facts... evidence... less impressive than where the Sherman Act is invoked"); Levi, Mergers, COMP. ON ANTITRUST LAWS AND ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 69, 78 (1955). The "incipiency" test does not, of course, shift the burden of proof to defendant or eliminate the necessity for substantial, reliable evidence.
80 By loss of "effective" access, more is meant than mere loss of business by or injury by one competitor to another. "Effective" access looks to the vigor of overall competition in the relevant market—to the importance of the sum of injuries to all competitors.
82a Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961): to determine substantiality, it is necessary to compare "the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market" and "a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." Dollar volume, by itself, is not the test. Id. at 329, 334. See also Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5 (1949).
83 Standard Oil Co. v. United States, 337 U.S. 293, 309 (1949). See also Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328 (1961) ("the opportunities for other traders to enter into or remain in that market must be significantly limited"). This percentage will necessarily vary from case to case, under section 3 as it does in general under section 1, depending on factors such as the ease of entry into the market and the fewness of major competitors in the industry. Market percentage is but a first approximation to economic impact, and the relative effect of percentage command of the market varies with the individual market setting in which this factor is placed. See United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 619 (1953). See note 88 infra, for discussion of the relationship between product interchangeability and the importance of the percentage command of the market.
3 as it must under sections 1 and 2.84 In section 3 (as in subsequent section 4) the relevant market is mentioned expressly—“line of commerce”—but in sections 1 and 2 the concept of market is subsumed under “trade.” Although it was believed, when drafting this section, that the phrase “line of commerce” was surplusage and the use of the word “competition” adequately indicated that the competition involved in this section must occur in the context of some relevant market, enough doubt existed that the expression was retained in order to avoid the suggestion that this legislation sought to depart from the legal test established under the Clayton Act.

In defining the area of effective competition, in order to determine what effect a challenged practice had, a number of verbal tests have been applied. In United States v. E. I. du Pont de Nemours & Co. [Cellophane],85 the Court referred to the composition of the market as those “products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.”86 In United States v. E. I. du Pont de Nemours & Co. [GM],87 the Court found the market composed of products which “have sufficient peculiar characteristics and uses” to make them distinguishable from similar products. Irrespective of the verbal formula used, however, the factual determination of area in which competitive effect is felt must be made.87a There may be no one, determinate “market,” and a process of approximation and compromise is often necessary to settle on “the” relevant market for the case. Experience shows, however, that the courts have been able to

84 Thus the Court declared, in United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957), that defining “the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition’ [citing Standard Oil Co. v. United States, 337 U.S. 293, 299 n.6 (1949)].” The Court went on to state, “Substantiality can be determined only in terms of the market affected.” Ibid. See also Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (“the area of effective competition in the known line of commerce must be charted by careful selection”). It should be noted however, that relevant market is immaterial in a section 1 per se case.


86 See also id., at 395: “[N]o more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that ‘part of trade or commerce,’ monopolization of which may be illegal.” In addition to the product-interchangeability from the consumer standpoint, considered as a factor in the Cellophane case and in Times-Picayune Pub. Co. v. United States, 346 U.S. 594 (1953), the courts have looked to the ability of other firms to switch their productive facilities into the relevant market in question. See United States v. Columbia Steel Co., 334 U.S. 495 (1948).


87a See United States v. Columbia Pictures Corp., TRADE REG. REP. (1960 Trade Cas.) § 69766, at 77,007–008 (S.D.N.Y. June 29, 1960): “The tests enunciated . . . are but different verbalizations of the same criterion. They require the same accumulation and scrutiny of facts and application of judgment.”
evolve workable standards which prove adequate to the needs of litigation.

This factual determination of the market, it should be noted, is not dependent on the standard of legality,\textsuperscript{88} which may differ to some degree among sections 1, 2, and 3. Definition of the market precedes the determination of whether the impact in that market "unreasonably restrains trade," "monopolizes trade," or "may substantially lessen competition."\textsuperscript{89} Whatever differences there are between the statutory tests come into play but once, at the stage when impact is determined, and thus there is no "double use of incipiency" or "incipient incipiency" under this law.\textsuperscript{90}

\textbf{Remedies.} The remedies, which are purely civil, against violation of this section are set out in sections 7 and 10 of the statute. In addition, under the common-law doctrine against restrictive agreements, contracts in violation of section 3 are unenforceable at law or equity, by either party, unless the restrictive conditions are properly severable.\textsuperscript{91}

\textbf{SECTION 4: Acquisitions}

\textit{Language.} This section is based on section 7 of the Clayton Act.\textsuperscript{92} The

\textsuperscript{88} On the other hand, the specific measure of legality for the case, under any section of the law, may be influenced by the relevant market determination. That is, the percentage of the market affected which is deemed sufficiently large to justify an inference of anti-competitive impact may well vary with the degree of product interchangeability of competing goods. For example, as a substitute for determining whether waxed paper is in the same market as cellophane, because it is "in" for some purposes and at some prices but "out" in other circumstances, the court might (1) choose to exclude waxed paper from the market and take only cellophane into account, in computing the quantitative percentage share of the market that a cellophane firm has, but (2) take waxed paper into account as a factor lessening the qualitative economic importance of that percentage share (of cellophane alone) which had been established in the market found relevant. By the same token, the court might, instead, (1) include waxed paper in computing the quantitative percentage share of the market that the cellophane firm has, and then (2) take the imperfect substitutability of waxed paper into account as a factor increasing the qualitative importance of that percentage command of the market.


\textsuperscript{90} The alternative approach, to define the market more narrowly or widely in each case, depending on whether an "incipiency," "unreasonable restraint," or "monopoly" test is subsequently to be applied, is not adopted here because it is believed that such a practice would substantially decrease the value of precedent and render appellate review much more difficult, in that each case would stand only for its own facts. Thus, to help assure plaintiffs and defendants a reasonable basis for expectations, the principle of area of effective competition should be recognized as the same practical notion irrespective of which section of the statute the plaintiff elects to proceed under.

\textsuperscript{91} See discussion of remedies, \textit{infra}, pp. 747–51, as to section 10.

\textsuperscript{92} "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of com-
proposed uniform statute, unlike the federal statute, is not limited to acquisitions made from a corporation: any acquisition made by a non-natural person is subject to the law, whether the vendor is a corporation or a natural person.\textsuperscript{93} The other changes in the wording represent deletion of matter inapplicable to a state antitrust law or shortening and simplification of the language.

\textit{Necessity for legislation.} State antitrust action against mergers is particularly significant to maintenance of the vigor of competition in our economy because of the relatively limited power of the Antitrust Division of the United States Department of Justice. First, the number of mergers in commerce occurring every year is so great that the Department cannot fully cope with them, especially when the anticompetitive impact is felt primarily locally rather than in a multistate market. Second, in some of the most important segments of the economy—such as banking\textsuperscript{94} and insurance\textsuperscript{95}—the states have particular responsibility because Congress has chosen to rely on state regulation in the area. Third, even outside such reserved areas in commerce which have been committed to state monitoring, there is a large number of mergers involving firms not \textit{in commerce}, although they may \textit{affect} commerce. Such mergers are more susceptible to control under state antitrust jurisdiction, because Congress did not exhaust the full scope of the commerce clause in the specific federal antimerger law.\textsuperscript{96} These mergers may create clouds over various markets—the sum of which clouds may substantially inhibit the vitality of national as well as local competition. State antitrust law, then, has particu-

\textit{No corporation shall acquire, directly or indirectly the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.\ldots
lar significance in the merger field under our system of concurrent state-
federal jurisdiction.

In addition to the foregoing categories involving mergers with inter-
state consequences, there are, of course, the many mergers which have
purely intrastate impact. When, for example, one dry-cleaning firm
threatens to dominate the market in a city, because of its acquisitions of
its competitors, state antitrust action is probably the only remedy possible.

Standard of legality. Because this section uses the same language in
setting forth the standard of legality as does section 3—"if the effect may
be to lessen competition substantially in any line of commerce"—the ge-
eral test here is essentially that discussed supra, under section 3. In hori-
zontal merger cases, the important factors in establishing illegality are:
percentage command of the market by defendant, size of the other large
firms (concentration of the industry militating against allowance of ad-
ditional merger), importance to the market of the competition eliminated
by the merger, and, extremely important, the ease and likelihood of the
entry of new competition. In vertical merger cases—where a customer
or supplier is acquired—the consideration is essentially that involved for
exclusive dealing contracts, discussed under section 3, i.e., the degree of
market foreclosure suffered by the acquiring firm's actual and potential
competitors; the principal difference is the greater permanence of the
merger-tie and the consequently greater threat to competition.

Specific intent is not a necessary element of the violation under sec-
tion 4. When a merger is undertaken, however, with the specific intent
of eliminating a troublesome rival or cutting off his source of supply or
means of distribution, then the intent of the acquiring firm goes a long
way toward supporting the inference that the effect of the acquisition
may indeed be to lessen competition substantially. In other words the
courts are entitled to take the defendant at his own word, and if he mani-
fests a belief or intent that his acts will have an anticompetitive effect,
then a "dangerous probability" of success exists; it would appear, cer-
tainly, that the courts are justified in not believing that such defendants
are merely self-deluded.

Remedies. The remedies, which are purely civil, for violation of this
section are set out in sections 7 and 10. For the state, proceeding under

97 The seriousness of the foreclosure may be gauged often by the significant horizontal
merger factors listed supra, e.g., ease and likelihood of new entry to replace the acquired
firms.

98 See Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960). The identical principle applies in section 3 cases. Moreover, it appears that
this is the rationale for intent as an alternative to or substitute for effect under section
1's "rule of reason," and for the "per se unreasonableness" of practices such as price

section 7, the principal relief sought is the undoing of unlawful mergers (i.e., divestiture of the acquired property). Subsidiary relief may include re-establishment of the acquired firm as a viable business and injunction against further similar acquisitions by the acquisitive firm. Private equity actions under section 10 may be brought by the management on behalf of the acquired firm, or by a dissenting minority. Moreover, adversely affected parties may secure damages in appropriate cases. Finally, a contract for an unlawful acquisition is, like any other illegal contract, unenforceable.

SECTION 5: DEFINITIONS

The definitions adopted are intended to exhaust the constitutional scope of state police power. The term "trade" has been discussed previously under section 1, and the same definition applies to "commerce." A similarly broad definition of "assets" is used, based on the recent decision by Judge Herlands in United States v. Columbia Pictures Corp. Thus, the term includes realty and personality, tangibles and intangibles, expectancies and interests of any description, choses in action, stock, inventories—in short, the whole or any part of any thing of value.

Part II: State Enforcement and Procedures

SECTION 6: CRIMINAL PENALTIES

The criminal penalties for violation of the proposed statute which are set out in section 6 parallel the federal provisions. Criminal penalties are restricted by this section to only the more serious offenses against public order, such as conspiracy or monopolization. Mergers, for example, unless they are part of a conspiracy to restrain trade or a monopolization, would not be subject to criminal sanctions. It is believed that the better practice is to restrict the use of criminal prosecutions to only those cases

100 Joining the acquired firm as a defendant for the purpose of securing such relief may prove necessary.

101 American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953).


where the law, as developed in prior civil or criminal cases, is clear or the facts reveal a flagrant offense, such as monopolization, price-fixing or boycott conspiracies, other predatory behavior, or a history of repeated violation.\textsuperscript{107} Contracts in restraint of trade, to some degree covered by section 3 as well as section 1, are not made punishable criminally by this statute. In extreme cases, however, where the contracts rise to the level of "conspiracy," the attorney general would have discretion to move against them criminally.

*Scienter* is a requirement under this section. But proof of subjective intent or purpose is not required, since the accused is presumed to appreciate the necessary consequences of his acts.\textsuperscript{108}

In conformity with familiar principles of criminal law,\textsuperscript{109} the provisions of this section are applicable to officers and directors of a corporation who authorize or carry out antitrust violations by their corporation,\textsuperscript{110} and they may be prosecuted together with or independently of their firm. This portion of section 6 of the statute codifies section 14 of the Clayton Act.\textsuperscript{111}

**Civil penalty alternative.** An alternative to the criminal penalty has been suggested in the State of Washington—a civil penalty.\textsuperscript{112a} This measure has several significant advantages over the conventional criminal action. First, it does away with the stigma of criminal conviction, which some believe inappropriate in the case of a crime like conspiracy.

\textsuperscript{107} See generally ATT’Y GEN. NAT’L COMM. ANTITRUST REP. 349–51 (1955). Although the wording of the proposed uniform section provides for a smaller area of criminal responsibility than does the federal statute, it codifies the actual federal practice. See *ibid.*

\textsuperscript{108} United States v. Patten, 226 U.S. 525, 543 (1913); United States v. Gold, 115 F.2d 235, 238 (2d Cir. 1940) (Hand, J.: “But purpose is never an excuse in these cases; only the intent of the accused, or the necessary result of his conduct, counts, and it would appear enough that they intended to stop all ‘marketing’ of service.”); United States v. Anderson, 101 F.2d 325, 330–331 (7th Cir.), cert. denied, 307 U.S. 625 (1939). See also Beall v. State, 203 Md. 380, 386, 101 A.2d 233, 236 (1953); People v. Connors, 253 Ill. 266, 97 N.E. 643 (1912).

\textsuperscript{109} See WILLIAMS, CRIMINAL LAW 686–690 (1953).

\textsuperscript{110} Among the federal antitrust cases in which corporate officers have been indicted for offenses they carried out on behalf of their corporation are Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); American Tobacco Co. v. United States, 228 U.S. 781 (1914); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Borden Co., 308 U.S. 188 (1939). That the corporate officers' acts were for the benefit of the firm, rather than their own immediate gain, is not recognized as a defense. See United States v. Bach, 151 F.2d 177 (7th Cir. 1945); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F. Supp. 728, 738 (W.D. Ky. 1941), aff’d sub. nom. Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943).


in restraint of trade.111b Second, it substitutes the civil burden of proof for the more stringent criminal standard,111c thereby facilitating enforcement.111d Finally, it makes possible for the state an appeal from adverse rulings in trial courts, which is unavailable in most jurisdictions.111e The federal experience shows that the inability to appeal rulings in criminal cases is frequently brought home to the prosecutor.111f

For these reasons, a text for a civil penalty alternative to the criminal provisions is set out in the margin.111g The foregoing commentary on the

CONG. REG. 8191-92 (1939). See also N.Y. GEN. BUS. LAW § 342-a; TEX. CIV. STAT. art. 7436 (Vernon 1948).

111b Stigma and antitrust violation are discussed generally in SUTHERLAND, WHITE COLLAR CRIME, ch. 20 (1949) (contrasting the blue and white collar criminals). A collection of authorities on criminal stigma in general is found in Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 YALE L.J. 543, 590-91 (1960) (status degradation ceremonies). For the view that criminal sanctions are essential as a deterrent to antitrust violaters, see Arnold, Antitrust Law Enforcement, Past and Future, 7 LAW & CONTEMP. PHRB. 5, 16 (1940); Berge, Remedies Available to the Government Under the Sherman Act, id. at 104.

111c See United States ex rel. Marcus v. Hess, 317 U.S. 537, 550-52 (1943); Berge, supra note 111b, at 111.

111d Some of the obstacles to criminal enforcement as compared to civil litigation are discussed in Berge, Some Problems in the Enforcement of the Antitrust Laws, 38 MICH. L. REV. 462, 470-71 (1940).


111f For example, when the Government's criminal case for price-fixing against Parke Davis ended with a non-reviewable decision granting a motion for acquittal, the Government brought a civil action against the drug manufacturer, on the same facts. Again the district court dismissed the case, for the same reason, failure to make out a prima facie case, but this time the decision was appealable, and the Supreme Court reversed, holding that the facts made out a per se violation of the Sherman Act. United States v. Parke, Davis & Co., 362 U.S. 29 (1960). See also United States v. Parke, Davis & Co., 365 U.S. 125 (1961). Other recent Sherman Act criminal cases which were lost on unreviewable motions for acquittal include United States v. Arkansas Fuel Oil Co., TRADE REG. REP. (1960 Trade Cas.) ¶ 69619 (E.D. Okla. Feb. 13, 1960) (the Suez crisis oil price-fixing case); United States v. Eli Lilly & Co., TRADE REG. REP. (1959 Trade Cas.) ¶ 69482 (D.N.J. July 8, 1959) (the polio vaccine price-fixing case). Compare United States v. Bitz, 282 F.2d 465 (2d Cir. 1960) (Government victory on Sherman Act appeal after dismissal subject to review under 18 U.S.C. § 3731 [1958]). Thus important questions may come up in a criminal posture and never receive authoritative appellate resolution. See, e.g., the posture of the dismissal of the indictment in United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151 (D.D.C. 1956) (dismissal based on construction of statute, but after Government opened case).

111g SECTION 6: CIVIL PENALTY.

Any person who conspires to restrain trade unreasonably, or monopolizes, attempts to monopolize, or conspires to monopolize trade shall pay the State of [insert name of state] a civil penalty not to exceed $50,000, which sum shall be recoverable in a civil suit brought in the name of the State of [insert name of state]. Whenever a corporation is liable under this section, the individual directors, officers, or agents of said corporation who have authorized, ordered, or ratified the acts creating such liability, shall themselves be liable in accordance with this section. Exclusive jurisdiction to enforce this section is vested in the Superior Courts [or insert name of state court of general jurisdiction] of this state. No action under this section shall be
criminal version of the statute is applicable in all material respects to the civil penalty version. It should be noted that the civil penalty is cumulative to, rather than alternative to, the equity action under section 5 and (when it is appropriate) the state damages action under section 10.

SECTION 7: EQUITABLE RELIEF AND CHARTER FORFEITURE

Injunction. Section 7 enables the state to invoke the equity power of the courts of general jurisdiction to restrain violations of the substantive provisions of this statute by temporary injunction or restraining order and by permanent injunction. No proof is required that an adequate remedy at law does not exist.

Charter forfeiture. The section permits the courts, in their discretion, to order an ouster of, or charter forfeiture by, corporate antitrust violators. The courts may also suspend a charter or the right to do business in the state in lieu of permanent expulsion. It is assumed that such drastic remedies will be reserved for flagrant violations, such as those which would warrant imprisonment were an individual guilty of them. But it is not necessary to bring a criminal action as a prerequisite for this relief, nor does such action preclude this one.

Expedition. The courts are directed by this section to proceed to the hearing and determination of antitrust equity cases brought by the state "as soon as possible." It is intended that such cases should usually take precedence of all other business except criminal cases. However, it is

brought more than four years after the commission of the acts giving rise in whole or in part to the cause of action.


112 Approximately 60% of the states have such provisions in their antitrust laws. See Dep't of Justice, STATE ANTITRUST LAW REFERENCE HANDBOOK, map facing p. 16 (1960). There is also authority that such an action would lie in a quo warranto proceeding at common law or under general corporation law, even in the absence of a specific antitrust charter forfeiture statute or constitutional provision. See People v. Milk Producers Ass'n, 60 Cal. App. 348 212 Pac. 957 (1923); State v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902 (1909), aff'd, 224 U.S. 270 (1912); State v. Nebraska Distilling Co., 29 Neb. 700, 46 N.W. 155 (1890); State v. Gamble-Robinson Fruit Co., 44 N.D. 376, 176 N.W. 103 (1919). See generally Terret v. Taylor, 13 U.S. (9 Cranch) 43, 51 (1815) (Story, J.); Query: May the state oust a violator from doing interstate business? Cf. Castle v. Hayes Freight Lines, Inc., 349 U.S. 61 (1954) (ICC permit may not be invalidated by state action); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). A recent case raising this issue, but not presenting it properly for review, for procedural reasons, is Ford Motor Co. v. Pace, 335 S.W.2d 360 (Tenn.), appeal dism'd for want of a properly presented federal question, 364 U.S. 444 (1960).

113 See discussion under section 6, supra.


believed better practice not to restrict the administration of the courts by any more definite a direction than that used in the phrase adopted.

**Venue.** In the case of defendants who are not natural persons, state equity suits may be brought in any county where defendant does business or may be found or in the county in which the state capital is located. This type of venue provision has been adopted for antitrust or related purposes in several states.\(^{116}\)

**SECTION 8: ENFORCEMENT**

Concurrent jurisdiction to enforce this statute is vested in the attorney general and the district attorneys of the various counties. The attorney general is given the power, however, to assume the control of any case brought by a district attorney. The purpose of this provision is to enable the state to maintain a consistent litigation policy, and, when necessary, in view of the specialized nature such trials may have, to assure development of a record adequate for an effective appeal to the state supreme court. Some have suggested that exclusive enforcement authority should be confined in the state attorney general.\(^{116a}\) But concurrent jurisdiction over antitrust enforcement is the more common practice,\(^{117}\) and the provisions contained in section 8 are believed to constitute the most politically acceptable compromise.

**SECTION 9: CIVIL INVESTIGATIVE DEMAND**

The civil investigative demand provision enables the attorney general to compel the production of documentary material during the precomplaint stage of antitrust investigation where civil, rather than criminal, proceedings are contemplated. Several states have similar provisions for investigation.\(^{118}\)

**Need for legislation.** The inevitable generality of most statutory antitrust prohibitions renders facts of paramount importance. Accordingly, effective enforcement requires full and comprehensive investigation before formal proceedings, civil or criminal, are commenced. Incomplete investigation may mean proceedings not justified by more careful search and study. Public retreat by the prosecutor may then be

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\(^{117}\) Concurrent jurisdiction is the pattern in most states. See Dep' t of Justice, State Antitrust Law Reference Handbook, map facing p. ii (1960).

difficult, and the result may be a futile trial exhausting the resources of the litigants and increasing court congestion. Thus the adequacy of investigatory processes can make or break any enforcement program.

It is believed that filing of a skeleton complaint, in hopes that civil discovery procedures will unearth the facts necessary to proof of what is charged in the complaint, is undesirable. The law should not compel the attorney general to “pretend to bring charges in order to discover whether actual charges should be brought.” Hence, this section permits the state attorney general to obtain a limited measure of civil discovery in order to determine whether initiation of a civil action is warranted in the circumstances.

Procedure. Section 9 provides that the attorney general may serve on any person that he believes possesses documentary evidence relevant to an antitrust investigation, a demand for production of such documents for the purpose of examination and copying. “Documentary evidence” as used here refers to papers, photographs, mechanical transcriptions such as disc or tape recordings, or any other method of tangible recording of information, wherever situate. The demand must describe what is sought with sufficient particularity as fairly to identify or designate the material in question, and a reasonable time for compliance is to be allowed. No documents may be required which would be privileged from disclosure if demanded in a grand jury subpoena duces tecum. The material disclosed may not be revealed to unauthorized persons or used for non-antitrust purposes. If the person on whom a demand is served believes that the demand is not permissible within this statute, or that the attorney general is otherwise acting unlawfully or unreasonably in the premises, he may file a petition in the superior court for the county in which the state capital is located, or in such other county as the parties may agree, in the form of a motion to quash, set aside, extend the return date for, or otherwise modify the demand. Criminal penalties for fraudulent behavior or willful refusal to comply with the statute are provided.

Part III: Private Actions

Section 10: Private Remedies

10 differs from these sections, however, in several important respects. First, it removes an important loophole which a number of federal courts have found to exist in federal section 4, and which is criticized in the vigorous dissent by Judge Rives in *Nelson Radio & Supply Co. v. Motorola, Inc.* According to that case's interpretation of section 4 of the Clayton Act, a businessman, who is injured because he refuses to join a conspiracy in restraint of trade or otherwise accede to an unlawful scheme in violation of the antitrust laws, is denied any legal redress.

In the *Nelson* case a radio jobber was cut off by his supplier when he refused to accede to a demand that he deal on an exclusive basis. The cancelled dealer's complaint was dismissed by the court for failure to state a cause of action, because no illegal contract *had been entered into* by the plaintiff dealer. This technical approach is expressly rejected in the proposed damages provision. Section 10 provides that the businessman injured because he refuses to be a party to an unlawful arrangement—i.e., one that would violate the substantive provisions of this statute—may be made whole by the courts, including the extent of his reasonable expectation damages. It is believed necessary to avoid this loophole in the antitrust damages law because the ordinarily legitimate right of a company to choose those with whom it will deal has, unfortunately, often led to abuse, oppression, and the coercion of independent local businessmen by powerful national firms who choose to disregard the antitrust laws.

Second, the proposed law eliminates the deficiency in federal section 16 with respect to reasonable attorney fees in equity suits. Although the private litigant who vindicates the public interest—thereby functioning

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121 200 F.2d 911, 916 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953). This criticism has been echoed in 6 CORBIN, CONTRACTS § 1417 (Supp. 1960); Kessler & Stern, *Competition, Contract, and Vertical Integration,* 69 YALE L.J. 1, 83–91, 115–116 (1959).

as a private attorney general—by winning a damages verdict against an antitrust violator who has injured him is compensated for the cost of his suit by an award to cover his lawyer's fee, the private attorney general who wins only an injunction against an antitrust violator injuring him is given no compensation under federal law for the expense of hiring his attorney. The proposed uniform section 10 puts the law and equity actions on a par with one another in this respect, in order further to encourage private parties to vindicate the public interest in free and unfettered competition.

The elements of the damages cause of action. Under section 10, as under the federal law, there are three elements to the cause of action: (1) an antitrust violation by defendant, or, in the case of a refusal to deal suit, a proposal which if complied with would result in such a violation, (2) an injury to plaintiff, and (3) a proximate-cause relationship between the violation and the injury. "Public injury" is not an additional element to the cause of action, which must be pleaded or proved as such. To the extent that factor (1)—antitrust violation—cannot be present except when there is public injury, i.e., actual or potential injury to competition itself rather than a mere private injury—then "public injury" is indirectly an element of the cause of action. However, it need not be alleged as such nor need it be proved separately from violation itself.

As to the general pleading requirements in such cases, so long as the foregoing elements of the cause of action are alleged, plaintiffs have been held only to the standard associated with ordinary negligence cases. Hence, the extent of damages need not be pleaded precisely. And the causal connection between damage and violation may be alleged in the form of general conclusions or ultimate facts.

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125 See Niagara of Buffalo, Inc. v. Niagara Mfg. & Distrib. Corp., 262 F.2d 106 (2d Cir. 1958); New Home Appliance Center, Inc. v. Thompson, 250 F.2d 881 (10th Cir. 1957); Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957); Package Closure Corp. v. Sealright Co., 141 F.2d 972, 978 (2d Cir. 1944); Clark, Special Pleading in the "Big Case," 21 F.R.D. 45 (1957).

126 In Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 113 F. Supp. 737, 744-45 (E.D. Pa. 1953), plaintiffs were permitted in their complaint to allege "generally that they have been financially damaged by defendants' activities by increased expense of operation and by loss of accounts with resultant loss of profits and prospective profits" since it was asserted that "these damages are presently incapable of exact ascertainment but will be proved at time of trial."

127 See C. E. Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255, 261 (1940) (plaintiff "has been damaged in that its business was rendered unprofitable, and [its] profits ... have diminished, and the plaintiff company has suffered loss and been damaged
Standard of proof. The proof of the extent of damages is necessarily difficult in these cases because the fact finder must compare what would have happened but for the violation with what did happen, and then estimate the financial differences to the plaintiff. If the conspiracy in restraint of trade has been so effective that it has eliminated any independent competitive market that could be available for comparison purposes, the problem becomes extremely difficult. In such cases, the courts have allowed juries considerable latitude in basing verdicts on whatever evidence was available with respect to both the fact of damage being caused by the scheme and the measurement of such damage. As the Supreme Court replied to one wrongdoer who asserted the defense that the damages involved were speculative: "the wrongdoer is not entitled to complain that they [the damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of the injured party.

Damages actions by state bodies. Section 10 further provides that treble damages actions may be brought by the state or its political subdivisions. In such cases, however, it was deemed inappropriate to allow attorney fees also. The propriety of multiple damages for state bodies might be questioned as well, but, since federal law allows state bodies treble damages, denying it under state law will probably only work a change in forum when (as is frequent in state damages cases) federal jurisdictions exists.

Invalidity as a defense. Codification, into this section or another, of the common-law doctrine that contracts in restraint of trade are unenforceable, was omitted as inappropriate, because: (1) The common law doctrine is well recognized, and this statute does not supersede it. (2) The doctrine is merely one special case of the general contract law principle that illegal contracts are unenforceable, rather than a special anti-
trust law principle. Therefore, cases involving enforceability would best be treated, once antitrust illegality has been determined, in the same manner as would, in the particular state, any other question of the enforceability of an unlawful contract.

The fact that a contract violates sections 1, 2, 3 or 4 of this statute can be raised as a defense, then, by either party, at law or equity.\textsuperscript{131} The effectiveness of in pari delicto as a defense has been considerably limited in such cases.\textsuperscript{132} When restrictive conditions are properly severable, however, the contract may be enforced, in accordance with ordinary contract law principles.\textsuperscript{133}

**SECTION 11: LIMITATION OF ACTIONS**

Section 11 provides a four-year statute of limitations for private damages actions brought under section 10. The statute is tolled, however, during the course of any action brought by the state against the violation on which the section 10 action may be based. The purpose of such tolling is to enable the plaintiff to take full advantage of the provisions of section 12, which makes the state's case available as evidence to the private plaintiff. This section is similar to section 5(b) of the Clayton Act.\textsuperscript{134}

**SECTION 12: EVIDENTIARY EFFECT OF JUDGMENT IN FAVOR OF STATE**

Section 12 provides that private litigants proceeding under section 10 may use final judgments or decrees rendered in favor of the state, in civil or criminal actions under sections 6 or 7, as prima facie evidence that the defendant did violate the antitrust laws with respect to those acts involved in such judgment or decree. Consent decrees and nolo pleas are excluded from this provision when they are entered before trial and involve no determination by the court of illegality. This section is similar to section 5(a) of the Clayton Act.\textsuperscript{135}

This section further provides that the state shall remain entitled to any collateral estoppel to which it is entitled against defendants when it brings its own treble damages actions following a successful civil or criminal prosecution. The purpose of this provision is to avoid depriving the state of a conclusive presumption of illegality in cases where it would enjoy one, but for the statutory prima facie provision. Whether this collateral


\textsuperscript{133} See Beloit Culligan Soft Water Serv., Inc. v. Culligan, Inc. 274 F.2d 29 (7th Cir. 1959).


estoppel is to extend to political subdivisions of the state, as well as to the state itself, has been left to be determined by the state law on the scope of collateral estoppel.

It shall be noted that this provision does not extend to section 10 litigants the use of federal antitrust decrees obtained by the United States. Perhaps it would be more desirable to make federal decrees available to state court suitors in such cases, but a scrupulous regard for the preservation of state sovereignty appeared to dictate avoidance of interaction between state and federal judiciary systems. And, in most cases, treble damage litigants to whom the provisions of a federal decree would be applicable will have federal remedies and the federal forum available, should they decide that they require the benefit of Clayton Act section 5(a).