1974

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Enforcement Under the Illinois Antitrust Act*

JOHN T. SOMA**

Historically, state antitrust enforcement has been more mythical than real; however, Illinois has recently begun an active enforcement program. Mr. Soma surveys the Illinois Antitrust Act of 1965, as amended, discussing it from the perspective of its development as a legal concept. He provides an overview of the Act's scope, its statutory remedies and some of the problems encountered in enforcing it; thereafter, he briefly compares the modern trends in state antitrust laws adopted by Illinois and other leading states with the more traditional approaches of the Uniform Antitrust Act. Finally, based on Professor James A. Rahl's suggestion that it is more profitable to concentrate on enforcing the Act by prosecuting relatively simple cases such as price fixing and market allocation, Mr. Soma concludes that a wise selection of cases by the Illinois Attorney General has resulted in an excellent record of enforcement since 1969.

Federal antitrust enforcement began with the Sherman Act in 1890. Since that time, there have been numerous amendments to the federal antitrust laws and vigorous enforcement of these laws at the national level.1 Until recently, and with the exception of certain states, anti-
trust enforcement at the state level has been more mythical than real.\(^2\) The reach of federal antitrust enforcement into state activities is limited by the scope of the interstate commerce requirement under the enumerated powers of Congress.\(^3\) Because of this limitation, several federal suits arising out of Illinois have been dismissed for lack of federal jurisdiction. Still other cases brought by the federal justice department appear to be better suited for local enforcement due to their local character and state-wide effect.\(^4\) It is evident therefore, that there is a role which can best be fulfilled by state antitrust laws.\(^5\)

**HISTORY OF THE ILLINOIS ANTITRUST ACT**

The Conspiracy Act of 1874,\(^6\) the Antitrust Act of 1891,\(^7\) and the

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"Even in the most exuberant formative years of American antitrust policy, few state laws were vigorously enforced. And since before World War I, most of them have been virtually dead. In fact, they have been so dead that it may be wondered whether it would have been unethical in recent years for lawyers in most states to tell their clients to ignore them. They certainly have been ignored in fact."

3. The commerce clause within the enumerated powers of article I, section 8 states that Congress shall have the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ." U.S. Const. art. I, § 8.

4. United States v. Employing Plasterers Association of Chicago, 347 U.S. 186 (1954) (a conspiracy to restrain trade by local plastering contractors might affect commerce, and hence be prohibited by the Sherman Act. On remand, 138 F. Supp. 546, 548 (N.D. Ill. 1956), the district court found no evidence of the conspiracy affecting interstate matters, and consequently dismissed the suit); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (conspiracy to restrain trade in the purchase of taxi cabs did affect interstate commerce, and consequently was within the scope of the Sherman Act. But the service rendered by local taxi cabs in conveying interstate passengers between their homes in Chicago and the railroad stations was not an integral part of interstate commerce, and thus not proscribed by the Sherman Act); United States v. Starlight Drive-In, Inc., 204 F.2d 419 (7th Cir. 1953) (conspiracy of operators of drive-in theatres to fix admission prices did not affect interstate commerce and hence was not prohibited by the Sherman Act).


"Federal antitrust law has not become so pervasive as to eliminate the need for state laws at the local level. The federal laws are unable to cope with local problems (1) because the interstate commerce limitation is a substantial one, and (2) because federal authorities necessarily concern themselves with cases of major importance. Federal prosecuting authorities must show an "effect" on interstate commerce, which, at times, has proven difficult. . . Furthermore, certain activities are concededly beyond the reach of federal law, i.e., service industries such as laundries, barbershops, movie theaters, funeral directors, and real estate brokers.

Illinois Trust Act of 1893,8 made up the original Illinois antitrust laws.9 Between 1891 and 1905 only three cases were brought by the State of Illinois to enforce the 1891 Act,10 and in the period of 1905 to 1960, not one action was initiated by the state to enforce the 1891 Act.11 This lack of enforcement since the late 1800's can only be attributed to what Professor James A. Rahl has called a lack of desire on the part of enforcement officials to actively administer the state antitrust laws. Based on this lack of enforcement, in 1960 the Illinois State Bar Association and the Chicago Bar Association began work on a modern antitrust act.12 In 1965, the modern Illinois antitrust act was enacted with centralized enforcement in the hands of the Illinois Attorney General.13 Between 1965 and 1969, however, only three cases

8. Ill. Laws (1893) at 182.
13. The key provisions of the Illinois Antitrust Act are:
Every person shall be deemed to have committed a violation of this Act who shall:
(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:
   a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;
   b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);
   c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or
(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce; or
(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce; or
(4) Lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged thereof, 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 commodity or service of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.
were brought by the Attorney General.\textsuperscript{14} As with any new governmental department organized to enforce a new statute, part of this slowness in initial enforcement can be attributed to inherent difficulties encountered by Attorney General Clark in beginning enforcement under the new statute.

In 1969, Attorney General Scott proposed several changes to the 1965 Act. The resulting 1969 amendments specifically prohibited exclusive dealing,\textsuperscript{15} expanded the Attorney General's investigative powers to include pre-complaint subpoena powers, and added certain civil penalties to the 1965 Act.\textsuperscript{16} The years between 1969 and 1973 witnessed a great increase in enforcement activity by the state under Attorney General Scott.\textsuperscript{17}

\textbf{OVERVIEW OF THE ACT}

In brief, the present Illinois Antitrust Act covers all activity for gain, including the normal antitrust prohibitions against price fixing, limiting supply, and territorial allocations. Both the Sherman Act and the Illinois Act prohibit restraints of trade involving services. This addition of services by the 1965 Act filled a major loophole in the 1891 Act.\textsuperscript{18} The 1969 amendments brought business activities which flow into interstate commerce within the jurisdiction of the Illinois Act.\textsuperscript{19} Under the Illinois Act,\textsuperscript{20} three major classes of plaintiffs may sue: first, the Attorney General is empowered to sue both in an official capacity for violations of the Act, and also as a representative of political subdivisions which have been injured by activities prohibited under the Act; second, any political subdivision may sue independently of


\textsuperscript{15} The 1965 Act prohibited all unreasonable restraints of trade, and thus if an exclusive dealing contract unreasonably restrained trade, it was barred by the 1965 Act.


\textsuperscript{17} In 1970, Attorney General Scott applied for and received a $250,000 Federal Law Enforcement Assistant Grant to establish a special unit for combating official corruption and organized crime. Part of this money went to a study of the possible use of the antitrust laws in combating official corruption and organized crime.

\textsuperscript{18} Annot., Smith-Hurd ILL. ANN. STAT. ch. 38, § 60-1 (1967). The Annotation begins with a general discussion of the history of the Act and then discusses the relevant points of each subsection.

\textsuperscript{19} The enactment of § 7.9 in the 1969 amendments was the result of Vendo Co. v. Stoner, 105 Ill. App. 2d 261, 245 N.E.2d 263 (2d Dist. 1969) (Illinois Antitrust Act did not apply to interstate transaction). \textit{See also} Kosuga v. Kelly, 257 F.2d 48 (7th Cir.), \textit{aff'd on other grounds}, 358 U.S. 516 (1958) (Illinois Antitrust Act not applicable to an alleged restraint of trade in onion futures because interstate commerce involved).

\textsuperscript{20} ILL. REV. STAT. ch. 38, § 60-7 (1971).
the Attorney General; third, private litigants may bring suit under the Act. The effect of the first two provisions is to create an overlapping authority between the Attorney General and state political subdivisions. The Attorney General, however, will generally bring suit because of his greater expertise in the area.

Both Attorney General Scott and the bar associations opposed all exemptions except labor, agriculture, and regulated industries. The present Act, however, has numerous exemptions which can be classed into four major categories. The first is labor organizations which have traditionally been exempted from state antitrust legislation. Agricultural cooperatives comprise the second group exempted from the Act. The third category includes most industries which are regulated by state commissions. These include common carriers which are regulated by the Illinois Commerce Commission, and insurance companies which are regulated under the Illinois Insurance Act. A fourth category includes not-for-profit organizations such as churches and professional organizations such as bar associations. The political nature of the exemptions under the Illinois Act is well illustrated by the plight of barber trade associations. The Attorney General successfully prosecuted the barbers' associations under the Act for price fixing. In response to this action, the barbers' associations persuaded the General Assembly to pass a bill exempting them from the antitrust laws. The governor, however, vetoed the measure and the veto was not overridden by the General Assembly.

Section 3 of the Act includes all of the methods by which a firm can

21. Id. § 60(5).
22. A union is a combination, and consequently without an exemption it would be subject to any antitrust statute. On the federal level, however, it has been the national policy to exempt labor organizations from the federal antitrust laws to enable labor to bargain effectively with management. State antitrust laws also exempt labor organizations for similar reasons.
25. Without the exemption, any Illinois State Bar Association or local bar association suggested fee schedule would be within the scope of the Act.
27. S. 64, Ill. 76th Sess. (1971). The bill was introduced on February 3, 1971, passed May 6, 1971, and was vetoed on July 2, 1971. The motion to override the veto failed on October 14, 1973.
restrain trade or monopolize a market. The practices of limiting supply, price fixing, and allocating customers are included under section 3(1) and are *per se* offenses under the Act. These *per se* offenses are often referred to as the "hard core" offenses. Section 3(2) covers all unreasonable restraints of trade, including activities such as group boycotts, and vertical price fixing not exempt by the Illinois Fair Trade Act. In contrast, vertical price fixing and group boycotts are illegal *per se* under the Sherman Act. The attempt to monopolize is prohibited by section 3(3).

**Civil Remedies**

The civil remedies under the Act include both fines and injunctive relief. Reasonable attorney's fees and mandatory treble damages are awarded in cases of the *per se* offenses of sections 3(1) and 3(4). For violations of sections 3(2) and 3(3), actual damages and reasonable attorney's fees are awarded. If a willful violation of sections 3(2) and 3(3) occurred, however, the court may award treble damages to the plaintiff. The 1969 amendments added a civil penalty of up to $50,000 recoverable by the Attorney General against both individuals and corporations. Any party suing under the Act may also obtain injunctive relief.

The most drastic remedy available to a court is to order the revocation of a corporate charter. The revocation procedure, added by the 1969 amendments, has never been employed. Revocation of a corporate character is arguably a harsh method to discipline a violator of the Act. The ends of competition may not best be served by eliminating one firm from the market. Yet in extreme cases of totally unacceptable conduct on the part of a corporation, the remedy may be appropriate. The use of this remedy is purely at the discretion of the court and is limited to those cases where it is specifically requested by the Attorney General. Therefore, on balance, it appears that this remedy should remain as part of the Act, but its use should be reserved for extreme cases of willful misconduct under the Act.

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29. Illinois is a "fair trade" state, and consequently a manufacturer may force all retailers to sell his products at a uniform retail price. Ill. Rev. Stat. ch. 121-1/2, § 188 (1971).
33. Three other states, Maryland, Minnesota, and New Jersey, have recently en-
Criminal Penalties

On the criminal side, the 1965 Act included both a fine of $50,000 for violations of the *per se* offenses in section 3(1) and a jail sentence of six months. The 1969 amendment did not change the $50,000 provision or the six-month jail sentence, yet it did extend the *per se* category to the tying violations found in the newly enacted section 3(4). This combination of a relatively large fine and a jail sentence is especially well suited for the antitrust laws. An individual violating the Act has in most instances reaped a large gain from the illegal activity, and, consequently, a large fine should be assessed against such a violator. Large fines, however, are not a strong deterrent in that an executive will not be bothered by such large fines if he knows that the corporation will reimburse him after the litigation ends. A meaningful jail sentence, however, is a very strong deterrent. When a corporate executive knows that a willful violation of the Act will lead to a jail sentence which the corporation cannot repay, the executive will be more hesitant to violate the Act. In addition, a jail sentence will lead to community scorn, whereas a large fine is more readily accepted socially. For these reasons the 1965 Act included a six-month jail sentence for willful hard core offenses under section 3(1) in addition to the provisions for a large fine.

The penalty provisions of the 1965 Antitrust Act were altered as a result of the enactment of the Illinois Uniform Code of Corrections adopted in 1972. Under the Unified Code of Corrections, criminal antitrust violations are included in the business crime category with a maximum fine of $50,000. Because the business crime category did not have a jail sentence, the Attorney General actively sought to have the criminal provision of the Act amended to include one. Many individuals working in the antitrust area agree that a jail sentence is necessary for the criminal penalty provisions of the Act to be an effective deterrent. In July of 1973, the Illinois General Assembly again modified the criminal provisions of the Act by changing the criminal provisions from the business crime category to a class 4 felony with a maximum fine of $50,000. A class 4 felony carries a one-to-three-year jail sen-

34. ILL. REV. STAT. ch. 38, § 1005 (1972).
35. ILL. REV. STAT. ch. 60, § 6 (Supp. 1972).
36. Numerous attorneys in the antitrust field indicated their agreement to me during informal discussions. It should be noted that a jail sentence is only appropriate for hard core offenses such as price fixing.
37. Smith-Hurd ILL. ANN. STAT. ch. 60, § 6 (Supp. 1973). The relevant provision in section 6 is as follows:

*Every person who shall wilfully do any of the acts prohibited by subsections*
Consequently, the criminal provisions of the Illinois Antitrust Act are again a powerful deterrent against hard core violators of the Act. 3

Other essential provisions of the present Act include a four-year statute of limitations. But there is a special tolling provision for those plaintiffs who are waiting for the Attorney General to finish suit against a violator. 4 Those plaintiffs waiting for the conclusion of the Attorney General's case have an additional one year after the completion of the Attorney General's suit to bring their own suits. The purpose of this tolling provision is to enable the private plaintiff to effectively use the judgment obtained by the Attorney General as prima facie evidence. 41

In a novel provision, the Illinois Act empowers the Attorney General to appoint special assistant attorneys general to bring suit in the name of the Attorney General. 42 These special assistant attorneys general are private members of the bar, and relieve the Attorney General of excess caseload when his staff is overloaded. To prevent any conflict of interests between the private special assistant attorneys general and private attorneys representing defendants, the Attorney General must keep on public file a list of all special assistant attorneys general and the cases to which they have been assigned. 43 The publicity and availability of records will hopefully prevent any conflicts of interest.

ENFORCEMENT UNDER THE ILLINOIS ACT

There was little enforcement activity in Illinois before 1969; however, since 1969 numerous suits have been brought by the Attorney General. The resulting decisions can be best analyzed by viewing the Act as a developing legal concept.

Investigative Powers

Under the 1965 Act, the Attorney General had limited investigative

(1) and (4) of section 3 of this Act commits a class 4 felony and a fine shall be imposed not to exceed $50,000. The jail sentence will not be retroactive. See Calder v. Bull, 3 U.S. 386 (1798). See generally W. LAFAVE, CRIMINAL LAW 89 (1972).

38. ILL. REV. STAT. ch. 38 § 1005-5-1(b)(5) (1972 Supp.).

39. Numerous other states have jail sentence provisions in their antitrust laws; see, e.g., LAWS OF MINNESOTA ch. 865.1-19 (1971).

40. ILL. REV. STAT. ch. 38, § 60-6(2) (1971). See also Atkins, I.B.J., supra note 14, at 729.

41. ILL. REV. STAT. ch. 38, § 60-8 (1971).

42. ILL. REV. STAT. ch. 38, § 60-7(2) (1971).

43. In another important provision of the Illinois Act, it is provided that federal antitrust law is to serve as a guide in interpreting the Illinois Act. Id. § 60-11.
powers. Attorney General Clark unsuccessfully attempted to include broad investigative powers in the 1965 Act. The lack of enforcement between 1965 and 1969 by the Attorney General was related to his lack of complete investigative powers under the Act. In 1969, Attorney General Scott formulated a provision with broad investigative powers which was included in the 1969 amendments. Both the Chicago Bar Association and the Illinois State Bar Association did not participate in the amending process; an attempt to eliminate the investigative powers failed in 1971.

Under the present law, the Attorney General may issue subpoenas before a complaint is filed. The subpoena must state the section under which the investigation is being conducted and the date and place for the person to appear either for oral questions or to present specified documents. This pre-complaint discovery in section 7(2), however, is limited to those cases in which a court could properly issue a subpoena duces tecum, and to those documents which are not privileged.

If a witness refuses to appear or produce the appropriate documents, the Attorney General may enforce his subpoena under section 7(6) by a petition to the Circuit Court of Sangamon or Cook County, or of the county in which the witness resides. The order will command the witness to appear and produce the appropriate documents. This pre-complaint subpoena power was validated by the Illinois Supreme Court in 1970 with the court attaching a copy of the subpoena in the appendix to its opinion. The Attorney General now uses the validated subpoena form and the form has been accepted by lower courts.

The broad subpoena power of the Attorney General was again challenged after the enactment of the 1970 Illinois Constitution in People v. Crawford Distributing Co. In addition to the constitutional attack on the investigative subpoena powers, the issue of the type of immunity intended under the Act and the need for Miranda warnings also arose in the case. In Crawford, the Attorney General brought suit...
against beer distributors in Decatur for price fixing of beer sold at wholesale in Mason County. A grand jury indicted seven corporations and six corporate executives for violation of section 3(1)a of the Act.

The Illinois Supreme Court again upheld the subpoena power stating that this grant of subpoena power was similar to the investigative power given to the Illinois Crime Investigating Commission which it had upheld in an earlier case.\(^5\) The court also stated that the Attorney General has inherent powers to investigate violations of the Act, and, consequently, this precomplaint subpoena power did not violate the separation of powers doctrine of the 1970 Constitution.\(^5\)

**Immunity Provisions**

The type of immunity granted under section 7(7) of the Act was the second major issue to be determined by the court in *Crawford*. Several of the defendants had been interviewed by the Attorney General, but had not given sworn statements. These defendants reasoned that the immunity provisions of section 7(7) prevented use of the information obtained in informal discussions with the Attorney General's staff because the Illinois Act had adopted the transactional type of immunity similar to criminal immunity provisions found in the Illinois Code of Criminal Procedure, Chapter 38, § 106.\(^5\) Transactional immunity means that the defendant's immunity is not limited to the evidence which is obtained directly from the defendant, but rather the defendant is immune from prosecution for the entire transaction or event for which the defendant has given evidence. Under the use immunity concept, only sworn statements are covered, and the defendant

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\(^5\) Illinois Crime Investigating Com. v. Buccieri, 36 Ill. 2d 556, 224 N.E.2d 236, *cert. denied*, 389 U.S. 848 (1967) (following the federal view that courts must not consider whether an investigative agency has probable cause for its proposed action, but only whether the proceedings are within the grant of statutory authority and whether the demand for information is reasonable).


\(^5\) ILL. REV. STAT. ch. 38, §§ 106-1 - 106-3 (1973). The relevant provisions include:

- § 106-1. In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.
- § 106-2. Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.
- § 106-3. Any witness who having been granted immunity refuses to testify or produce other evidence shall be in contempt of court subject to proceedings in accordance to law.
may still be convicted if evidence can be obtained independently of
the evidence which the defendant has given to the Attorney General.

The court interpreted section 7(7) as a use immunity provision
based on its language and noted that the constitutionality of the use
immunity concept had been settled in a recent United States Supreme
Court case. As a result of this determination, a defendant is only
granted immunity in those cases in which he gives sworn statements,
and the immunity only extends to the information which is con-
tained in such sworn statements. If evidence can be obtained inde-
dependently of the sworn statements, the defendant can still be prose-
cuted for violations under the Act. In Crawford, one defendant initially
classified personnel records as corporate records. During the investi-
gation, however, the defendant attempted to change the designation of
corporate records to personal records to obtain a fifth amendment per-
sonal immunity. In refusing to allow this change of designation once
the investigation had begun, the Illinois Supreme Court held that the
records were corporate records and thus could not be a basis for a
claim of personal immunity.

Miranda Warnings

The third major issue in Crawford was the extent to which Miranda
warnings might be required when the Attorney General is seeking an
indictment under the Act. The court brushed aside the defendants'
assertion that the Attorney General’s failure to give Miranda warnings in
the context of this particular case might be fatal to the prosecution.
Instead, a copy of the indictment was attached to the opinion to clarify
what the court would thereafter accept as proper under the Act. This
indictment form is currently used by the Attorney General. In addition,
the court followed the General Assembly’s suggestion that the federal
antitrust laws be used as a guide to interpret the Illinois Act. Yet the
court made it clear that the selection and use of statutory interpretation
guides are to be functions of the judiciary.

54. Kastigar v. United States, 406 U.S. 441, 462 (1972). The Court stated:
We conclude that the immunity provided by 18 U.S.C. sec. 6002 [use immu-
nity concept in the Federal Immunity of Witness Act] leaves the witness and
the prosecutorial authorities in substantially the same position as if the wit-
tness had claimed the Fifth Amendment privilege. The immunity therefore
is coextensive with the privilege and suffices to supplant it.

See also Comment, 4 LOYOLA CHI. L.J. 193 (1973).
56. Id. at 346, 291 N.E.2d at 656. See also United States v. Globe Chemical Co.,
311 F. Supp. 535, 546 (S.D. Ohio 1969) (Miranda warnings not required in a similar
situation).
Grand Juries

Another issue relating to post-1969 enforcement is the use of grand juries in antitrust cases. In dealing with a criminal case in which the penalty may be a felony conviction, the Attorney General must convene a grand jury to indict a defendant unless the defendant waives the grand jury. In the first criminal case under the Act, a grand jury was convened in September of 1971 to investigate charges of price and quantity fixing in the coal industry. After eighteen months of deliberation, the grand jury returned a five-count indictment against eleven Chicago retail coal dealers. The Attorney General presented his evidence for thirteen weeks after which the defendants moved to dismiss, and the court granted the motion.

Tying Offenses

Much of the controversy over the 1969 amendments centered around the addition of tying offenses to the list of per se offenses. Section 3(4), which was added by amendments in 1969, made tying arrangements, requirements contracts, and exclusive dealing contracts illegal if these practices tend to create a monopoly or substantially lessen competition. Thus, not only is monopolizing itself illegal but the incipiency or tendency to create a monopoly is also illegal. The penalty provision of section 7(2) defined section 3(4) violations as hard core

The court stated that in its opinion the reliance on the federal experience was wise, and thus the federal experience would be used as a guide in interpreting the Illinois Act.

One general limit to the Attorney General's grand jury power has developed out of a case involving a special antitrust grand jury; the effect, however, is on all grand juries convened by the Attorney General and is not limited to special antitrust grand juries. In People v. Hughes, 46 Ill. 2d 448, 450, 263 N.E.2d 832, 833 (1970), the presiding judge of a special grand jury suppressed evidence and quashed a subpoena duces tecum. The Attorney General appealed to the Illinois Supreme Court, but the court held that such orders could not be appealed, because the special grand jury investigation was not a criminal case, "but simply a secret investigation which may or may not result in the commencement of criminal proceedings."

The court held that such orders could not be appealed, because the special grand jury investigation was not a criminal case, "but simply a secret investigation which may or may not result in the commencement of criminal proceedings."


See Atkins, I.B.J., supra note 14, at 724 (discussion of the incipiency doctrine).
offenses. Consequently, tying arrangements, requirements contracts, and exclusive dealing which only tend toward monopoly are subject to both civil fines and criminal punishment.

Criminal liability for business activities such as tying arrangements which only tend to monopolize may appear to be harsh because tying arrangements are normal business practices. No criminal cases, however, have been brought since the enactment of this section in 1969. Apparently, the absence of criminal actions is due to the different burdens of proof required for criminal and civil cases. In civil antitrust cases, the burden of proof required is preponderance of the evidence while, in criminal cases, the burden is beyond a reasonable doubt. The stricter criminal standard acts as a safeguard against potential misuse of these provisions. The different burdens of proof appear to prevent the Attorney General from bringing suits against innocent business persons who make tying agreements which tend to monopolize a market in only a limited manner.

Since the passage of the 1969 amendments the Attorney General has been involved in several civil suits alleging violations of the tying provisions of section 3(4). In People v. George Arquilla Co., defendant-seller required its buyers of residential property to use defendant or one of defendant's agents as a broker in the resale of land, if the land were resold within five years. The consent order entered by the court required defendant to notify all previous buyers that this part of the purchase contract was no longer enforceable.

Franchising has also raised tying issues. The problem of franchising in this respect can be divided into two categories. First, there is a problem of fraud in the recruitment of the franchisee. This involves questions of contract law and fraud. Second, once the franchise is in operation, there can be further problems with tying and exclusive dealing. Based on section 3(4), any tying arrangements whereby the franchisee is obligated to purchase many or all of its products from the franchisor may be illegal.

Consent Decrees

The use of consent decrees by the Attorney General as a method of

63. See People v. Willow Lakes Estates, Inc., 1972 Trade Cas. ¶ 74,255 (Ill. Cir. Ct., 16th Jud. Cir., Nov. 3, 1972) (consent decree whereby defendant agreed to stop leasing lots in a mobile home park development with a condition or agreement that lessee also enter into a sales agreement to purchase a mobile home from defendant).
64. 1972 Trade Cas. ¶ 73,863 (Ill. Cir. Ct., Cook County, Feb. 17, 1972).
65. See generally Atkins, A.B., supra note 4, at 382.
enforcing the Act has been widespread since 1969. In a consent decree, the defendant agrees to stop doing what he has been doing and he may even agree to pay a fine for his previous action. The defendant does not, however, admit or deny having committed any offenses. This is significant because such a confession would expose the defendant to liability from private litigants. There are several benefits from the use of the consent decree. The consent decree procedure is much simpler than a complete trial; and, consequently, the limited resources of the Attorney General's office can more effectively be used. Also, the same result is reached through the consent decree as after a protracted court battle; and the consent decree is immediate. Post-consent decree enforcement, however, is as difficult as post-decision enforcement. Both decrees are issued by a court, and thus any defendant who violates either a consent decree or a final judgment is in contempt of court. The major weakness of a consent decree is that private litigants cannot use the consent decree as prima facie evidence of a violation by the defendant. Thus, one of the chief deterrents which might prevent antitrust violations is eliminated.

Several industry investigations conducted by the Attorney General have resulted in consent decrees. Two juke box trade associations and their members were prohibited from conspiring to control the placing or leasing of juke boxes in *Illinois v. Gagliano*.\(^67\) This case is unique in that the parties were able to agree to the terms of the consent decree, but could not agree on the civil penalty. The parties finally agreed to leave the determination of an appropriate fine to the court, and the court assessed a civil penalty of $50,000 against the juke box associations and their members. Consent decrees have also recently been issued against an auto rebuilders association,\(^68\) a barbers' association,\(^69\) and against a real estate association.\(^70\) Once consent decrees have been issued, there

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\(^67\) 1971 Trade Cas. ¶ 73,426 (Ill. Cir. Ct., Cook County, Jan. 5, 1971).


\(^69\) *Illinois v. Master Barbers & Beauty Culturists*, 1972 Trade Cas. ¶ 74,418 (Ill. App. 1st Dist., March 23, 1973) (consent decree against barbers' association did not specifically mention defendant; however, defendant did have notice and, therefore, even though acquitted of a criminal case involving the same matter, defendant was found to have violated consent decree by acting in concert with the barbers' association).

\(^70\) *Illinois v. MAP Multiple Listing Service*, 1971 Trade Cas. ¶ 73,654 (Ill. Cir. Ct., Cook County, July 1, 1971) (the consent decree required the exclusive listing period to be reduced from 90 days to 45 days and the MAP membership fees reduced from a $4000 loan payment to $500 and $1000 payable within two years of joining MAP). See also Philip Hirshfield & George Staffer v. York Bd. of Realtors, Inc., 1972 Trade Cas. ¶ 74,218 (Pa. Ct. of Common Pleas, York County, March 9, 1972) (defendant's
is still a need for follow-up investigations. The Attorney General has in two instances found continued violation of the consent decree and has obtained contempt citations and fines against these groups.\textsuperscript{71}

**Private Enforcement**

Private enforcement under the Act has not developed to the point at which a fair evaluation can be made. The hoped-for increase in private litigation after 1969 has not materialized.\textsuperscript{72} One possible explanation for this lack of private activity is that the number of cases which the Attorney General has successfully settled by consent decree is large compared to the cases resulting in court judgments. The use of the consent decree may therefore not be as effective as one would think. Private litigants' use of the Act could be a strong deterrent against violations of the Act,\textsuperscript{73} but the costs of a private case are very high. Many plaintiffs wait for the Attorney General to bring suit and use the resulting decision in their own cases. Yet a consent decree cannot be so used. Therefore, it seems likely that the public-private balance will continue to be struck in favor of the fast and efficient consent decree despite the loss of deterrent benefits of the court judgment otherwise available in conventional litigation.

**THE ATTORNEY GENERAL IN FEDERAL COURT**

The Illinois Act also authorizes the Attorney General to represent the State of Illinois, political subdivisions of the state, and the citizens of Illinois in federal court. In representing the political subdivisions of the state, the Attorney General may seek damages for any injuries caused by the defendant. Although the 1965 Act omitted injunctive relief as one of the remedies which the Attorney General could seek when suing in federal court on behalf of political subdivisions, a recent case allowed the Attorney General to obtain injunctive relief.\textsuperscript{74} If the

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\textsuperscript{73} Atkins, I.B.J., supra note 14, at 716.

\textsuperscript{74} State of Illinois v. Associated Milk Producers, 1972 TRADE CAS. \# 74,256 (N.D. Ill., Nov. 9, 1972) (Attorney General has broad inherent powers which include obtaining injunctive relief).
Attorney General loses in state court he may sue under the relevant federal statutes in federal court.\textsuperscript{75}

In bringing suit on behalf of all injured citizens of the state, the Attorney General may use one of two alternative theories: \textit{parens patriae} or federal class actions.\textsuperscript{76} Although the two theories are quite similar in some respects, there are several differences in the outcomes under each alternative; and therefore, it is wise to examine separately each of the theories. \textit{Parens patriae}, or literally “parent of the country,” is a common law concept whereby the Attorney General may bring suit on behalf of all injured citizens. The Supreme Court first accepted this concept in federal antitrust litigation in 1945,\textsuperscript{77} but in \textit{State of Hawaii v. Standard Oil Co. of Cal.}\textsuperscript{78} the Court limited the \textit{parens patriae} technique to cases wherein states are only seeking injunctive relief under section 16 of the Clayton Act. In \textit{State of Hawaii v. Standard Oil}, the defendant was charged with illegal price fixing and limiting supply which injured the citizens of Hawaii. Plaintiff attempted to sue for damages to the state’s general economy under section 4 of the Clayton Act using the \textit{parens patriae} theory. The Court rejected this theory and reasoned that duplicate recoveries might occur if states were allowed to recover damages under section 4 and at the same time private plaintiffs could also recover for the same damages caused by the illegal antitrust violations. The Court also stated that the definition of business or property found in section 4 of the Clayton Act did not include general injury to the state’s economy and, therefore, a state could not use \textit{parens patriae} under section 4 to recover damages. States may continue, however, to use \textit{parens patriae} to sue under section 16 of the Clayton Act for injunctive relief against antitrust violators.\textsuperscript{79} The Court ended by stating that Rule 23 class actions were “definitely preferable in the Antitrust Area.”\textsuperscript{80}

The second theory which the Attorney General may use in bringing suit in federal court on behalf of injured citizens and political subdivisions is the class action under Federal Rule 23.\textsuperscript{81} Once the class is

\textsuperscript{77} Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).
\textsuperscript{78} 405 U.S. 251 (1972).
\textsuperscript{79} See California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), cert. denied, — U.S. —, 93 S. Ct. 2291 (1973) (Ninth Circuit holding that California could not sue under \textit{parens patriae} for recovery of injuries from alleged price fixing by snack food manufacturers).
\textsuperscript{80} 405 U.S. at 266.
in federal court on its own behalf, the Attorney General may seek to be class representative based on Rule 23 procedures. If the Attorney General acts as class representative, there are no attorney's fees and, consequently, the class is able to receive more of the damages than would have been possible with a private attorney. The Attorney General has been involved in several such class action suits under Rule 23.

The Attorney General has also been involved in several other federal suits. In *State of Washington v. General Motors*, for example, the Attorneys General of Washington and Illinois sought original jurisdiction in the United States Supreme Court against three auto manufacturers to force the three auto manufacturers to install anti-pollution devices in all cars made during the existence of a conspiracy not to install pollution control devices in automobiles. The Court stated that although it had original but not exclusive jurisdiction, in its discretion it would not accept original jurisdiction and instead referred the individual state cases to the appropriate district courts.

**The Uniform Act and Modern State Acts**

A brief comparison of the Illinois Act to the Uniform Antitrust Act and three recently enacted state statutes will help place the Illinois Act in proper perspective. There are basically two approaches to

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83. *See generally* *State of Illinois v. Chas. Pflizer & Co., Inc.*, 1973 Trade Cas. ¶ 74,343 (S.D.N.Y.) (allocation of recovery based on 50 cents per dollar of sales without deduction for counsel fees, expenses of counsel, or administrative expenses).
87. *See also In re Multidistrict Private Civil Treble Damage Antitrust Litigation involving Motor Vehicle Air Pollution Equipment*, 1970 Trade Cas. ¶ 73,317 (C.D. Cal. Sept. 4, 1970) (states could not qualify as class representatives because they were not themselves in the class of injured state citizens).
state antitrust acts. One approach is to parallel the federal antitrust statutes and, in effect, to enact a miniature federal antitrust act for the state. The alternative is to enact a state antitrust act which meets the needs of the individual state. Illinois and several other states have followed this approach. Most states have statutes running back as far as the late 1800's; however, Maryland, Minnesota, New Jersey, and Illinois have all recently revised their statutes and appear to be establishing a trend of modern state antitrust statutes. There are several key areas in these statutes dealing with broad investigative powers, penalties, statutes of limitations, and corporate revocation provisions, which merit discussion.

The four state statutes and the Uniform Act have the same prohibitions and market definitions. Each Act includes services in its market definition and each permits the Attorney General to sue on behalf of political subdivisions. The number and extent of exemptions under the four state statutes indicate the political realities of industries constantly attempting to gain exemption from their respective state acts. The Uniform Act, not being subject to such influences, exempts only labor and agricultural organizations from its coverage.

The procedures for official investigations by the Attorney General vary greatly between the Uniform and the four state Acts. Under the Uniform Act, the Attorney General must first ask the suspected offender to appear with the appropriate documents. If his request is ignored, the Attorney General must take the suspected violator to court and request the court to issue a subpoena. This was the procedure under the original 1965 Illinois Act, but the 1969 amendments gave the Attorney General broad pre-complaint subpoena powers, which have subsequently been upheld by the Illinois Supreme Court. The other three states have also given their attorneys general broad investigative powers. Under federal antitrust laws, the Federal Trade Commission has pre-complaint investigative powers, but the Justice Department does not have such powers.

The present Illinois Act agrees with the Uniform Act on the amount of damages to be assessed against violators. Both provide for a $50,000 civil penalty. The four states, however, have fines and jail sentence

89. Curtis, supra note 12, at 700.
90. Professor Rahl cautions state legislatures against strict copying of all federal antitrust statutes. Rahl, supra note 2, at 773.
94. Section 45 of the Federal Trade Commission Act states that the Commission shall have the power:

(a) To gather and compile information concerning, and to investigate from
provisions. Minnesota has the most severe jail sentence penalty of from one to five years. This very large jail sentence, however, may be counter-productive because business persons will be discouraged to make complaints due to the severity of the criminal punishment. Maryland's whopping $500,000 fine for per se offenses is the stiffest fine of the four state statutes and the Uniform Act.

The four states have a general four-year statute of limitations and, in addition, a tolling provision whereby the four-year limitation is tolled for private plaintiffs awaiting the results of a suit by the Attorney General. Under the four state statutes the judgment obtained by the Attorney General can be used as prima facie evidence for one year after the conclusion of the Attorney General's case. The Uniform Act has a four-year statute of limitations, but does not have a parallel one-year tolling provision for Attorney Generals' judgments. Consequently, under the Uniform Act, the value of a judgment obtained by an Attorney General as prima facie evidence is weakened because many cases by the Attorney General may extend beyond the four-year general statute of limitations.

Finally, all four of the states have forfeiture of corporate charter provisions. The deterrent effect of this provision is hard to measure; however, the revocation of a corporate charter eliminates one competitor from the market and, thus, should be used sparingly. Minnesota has mandatory forfeiture procedures for those corporations convicted of per se offenses. The Uniform Act does not have a parallel forfeiture of charter provision.

CONCLUSION

Overall, the four state acts mentioned are, in most instances, very

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95. N.Y. STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTRUST LAWS, app. I, 96a (1957).
96. The 1955 amendment to section 5(b) of the Clayton Act has a similar tolling provision. See State of Illinois v. Hardy Salt Co., 377 F.2d 768 (8th Cir.), cert. denied, 389 U.S. 912 (1967) (section 5(b) of the Clayton Act suspending statute of limitations applied to defendant even though defendant was only a named conspirator of the original case and not an original defendant).
similar to the Uniform Act, although more stringent in some areas. Their major differences are in the areas of investigative powers, jail sentences for *per se* violations, a tolling provision of the four-year statute or limitations for those cases in which a private plaintiff is waiting for the Attorney General to finish his case, and forfeiture of corporate charter provisions. It appears that the four states are setting a trend in modern state antitrust acts with particular emphasis on broad investigative powers, penalties, statutes of limitations, and corporate revocation procedures. More time will be necessary before a definite national trend can be established because many states are only beginning to realize the importance of state antitrust enforcement; consequently, they are only beginning to enact modern state antitrust statutes.

The combination of the 1965 Act and the 1969 amendments appears to have enabled the Attorney General to begin a vigorous enforcement policy of the Illinois Antitrust Act. This enforcement has been effective and should continue in the future. Continued diligence against the addition of exemptions as in the case of the barbers is necessary for the Act to maintain the necessary broad coverage for total effectiveness. The Illinois Antitrust Act will continue to evolve as it did in cases like *People v. Crawford*, *supra*.

An evaluation of enforcement under the Illinois Act in both federal and state courts is difficult. Mere statistics as to how many cases were investigated and number of suits brought do not tell the entire story. Instead, an evaluation of the enforcement of the Illinois Antitrust Act by the Attorney General can only be made on the basis of a subjective analysis. Professor Rahl has suggested that state enforcement of antitrust laws should concentrate on the relatively simple cases of prohibited behavior such as price fixing and market allocation, and avoid "blowing itself out" on big cases involving complex problems such as market structure, merger, and oligopoly. Applying this standard to evaluate the enforcement under the Illinois Act, one can conclude that a wise selection of cases by the Attorney General's office has resulted in an excellent record of enforcement since active enforcement began in 1969.


98. Rahl, *supra* note 2, at 772. As a basis for this conclusion, Professor Rahl states that 17 of the 21 cases brought by the Justice Department between 1947 and 1960 under section 3 of the Sherman Act in the District of Columbia and other U.S. possessions (analogous to state antitrust enforcement) were price fixing cases. *Id.* at 770.