AN OVERVIEW OF THE DELAWARE ANTITRUST ACT

By William E. Kirk III*

I. INTRODUCTION

Antitrust actions originated in the states in the late 1800s. Attacks by the Supreme Court and the passage of the Sherman Antitrust Act in 1890 led to the demise of state antitrust activity, leaving the federal government as the only major antitrust enforcer. By the 1970s many states found that the enforcement mechanism under federal law was inadequate. This discovery led many states to resume their enforcement activity by utilizing existing state statutes or enacting new antitrust laws.

This article addresses the efforts undertaken in Delaware to establish the state's first antitrust legislation, the Delaware Antitrust Act of 1980. After a brief introduction of the resurgence of state antitrust enforcement activity, this article reviews the history of the Delaware Antitrust Act. Part IV of this article discusses the particular provisions of the Act and the significant enforcement powers it awarded to the Attorney General. Part V summarizes the enforcement activities of the Attorney General's Office and court decisions rendered subsequent to the adoption of the Act.

II. THE ORIGINS AND SUBSEQUENT REVIVAL OF STATE ANTITRUST ENFORCEMENT

Despite the fact that federal antitrust laws are better known in the United States, individual states were the first to enact antitrust legislation. In the three years prior to passage of the Sherman Antitrust Act1 in 1890, at least twelve states adopted constitutional and statutory provisions relating to monopolies and restraint of trade.2 The ancestry of these laws can be traced to common law views of conspiracies and

2. Kansas was the first to adopt such provisions in 1887. It has been claimed that as many as 20 or 32 states had antitrust laws by 1890. Stone, Reviving State Antitrust Enforcement: The Problems With Putting New Wine in Old Wine Skins, 4 J. Corp. L. 547, 552 (1979) [hereinafter cited as Stone].
monopolies. The impetus for the passage of such laws was the economic and political unrest from the end of the Civil War to the turn of the century. Farmers and small businessmen who felt victimized by certain practices of railroads and industrial enterprises were able to muster the political pressure needed "for some kind of reassuring action against the trusts."4

The trusts in question were varied in form, but their common aim was to facilitate the suppression of price competition, the division of economic territories, and the assimilation of rival enterprises which were driven to ruin by predatory pricing practices. Sometimes the trusts were formal legal trusts, with trustees holding and managing the stock and assets of the participants. This device was pioneered by John D. Rockefeller, whose Standard Oil Company came to dominate the entire oil refining and distribution industry.5

Other trusts took the form of pools, and in states which permitted corporations to hold the stock of other corporations, the holding company was popular. New Jersey, having amended its corporation law to permit holding companies two years before passage of the Sherman Act, became known as the "Mother of Trusts."6

Despite the passage of state antitrust laws prior to 1890, some trusts escaped enforcement activity. The United States Supreme Court led the way in striking down numerous state antitrust and other economic regulatory laws because of their perceived interference with congressional power over interstate commerce.7 Growing frustration with the trusts and the ineffectiveness of state antitrust laws led to the passage of the Sherman Act. Although the Act's sponsor noted during floor debate that the bill was intended as a supplement to state laws rather than a replacement for them,8 the level of state antitrust

4. Stone, supra note 2, at 552-53.
8. Senator Sherman stated: 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
enforcement remained low.9

From World War I until the 1960s, there was very little state antitrust enforcement activity, while federal powers and activity increased. The Clayton Act of 1914,10 and its subsequent amendments, supplemented the Sherman Act by adding certain tying arrangements,11 refusals to deal,12 price discrimination,13 and anticompetitive mergers14 to the range of forbidden conduct.15 The Clayton Act permitted private parties to assume a role in enforcement by allowing treble damage actions for antitrust violations which caused injury to business or property.16 Still another enforcement agency was added by the Federal Trade Commission Act of 1914.17 Under that Act and its later amendments, the agency obtained antitrust authority to act against certain mergers as well as restraints of trade.18 The Commission's authority to take action against unfair methods of competition eventually encompassed the same range of conduct as that forbidden by section 1 of the Sherman Act dealing with restraint of trade.19

By the 1960s, the federal antitrust laws were the only American antitrust laws in substantial use,20 and the federal government and private parties were the only significant enforcers of those laws.21 But the seeds of a revival in the importance of state antitrust regulation

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affect injuriously the industrial liberty of the citizens of these states. It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . .

21 Cong. Rec. 2457 (1890). A number of state cases were filed between 1892 and 1906, including 24 cases brought by 11 states against Standard Oil trust participants. Rubin, Rethinking State Antitrust Enforcement, 26 U. FLA. L. Rev. 653, 661 (1974). This activity, however, soon trailed off and the federal government was left as the only major antitrust enforcer. Id.

12. Id.
15. See supra notes 11-14.
20. Stone, supra note 2, at 579-82.
21. Id. at 554.
were already present as the states became increasingly important private litigants for treble damages under federal law.\textsuperscript{22} With the growth of government at all levels came increasing amounts of purchases by those governments; some of the purchases were of items which had been subject to price-fixing and bid-rigging conspiracies.\textsuperscript{23} A number of sizable antitrust judgments and settlements caused several state attorneys general to consider establishing full-time antitrust staffs, and to take a new look at state antitrust legislation.\textsuperscript{24} By the early 1970s, a number of states had enacted new antitrust laws and had begun new enforcement activity.\textsuperscript{25}

\textsuperscript{22} Id. at 580.
\textsuperscript{23} Id. at 579.
\textsuperscript{24} Id. at 581.

A series of events in 1976 and 1977 gave new momentum to the revival. In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act. In part, the Act granted state attorneys general parens patriae power to bring antitrust damage cases on behalf of consumers. This power made it possible for an attorney general to sue for treble damages suffered by large numbers of ordinary citizens without having to deal with many of the obstacles to class action suits under the Federal Rules of Civil Procedure. Most notably, an attorney general can bring such suits without meeting the individual notice and manageability requirements of the Rules. The parens patriae law also permits proof of damages in the aggregate by statistical or sampling methods, without proof of individual injury to each consumer. Courts are given flexibility in distributing awards of damages, and the United States Attorney General is directed to assist state attorneys general.


30. Id. at § 15(e).
by notifying them of suspected violations and by providing access to federal investigative materials.31

That same year, Congress passed the Omnibus Crime Control and Safe Streets Act of 197632 which authorized the appropriation over three years of up to $30 million in grants to aid state antitrust enforcement. State attorneys general had lobbied vigorously for this money, and for the parens patriae power, through their national association. The funds were to be appropriated annually by Congress, and the Antitrust Division of the United States Department of Justice was charged with administration of the grant program.33

The first appropriation was for $11 million for fiscal years 1977 and 1978.34 From this, grants were made to forty-five states ranging in amounts from $76,644 to $412,500.35 Delaware’s Justice Department received a grant of $184,473.36 Additional appropriations of $10 million and $4 million were made by Congress for fiscal years 1979 and 1980, respectively. From these, Delaware’s attorney general received additional grants of $171,560 and $101,000.37

The federal grant program came at an important time; in 1977 the United States Supreme Court dealt private antitrust plaintiffs a major blow in the case of Illinois Brick Co. v. Illinois.38 The Court held that “indirect purchasers” could not receive antitrust damages from defendants with whom they did not deal directly. A key factor in the decision was the Court’s perception of the difficulty and complexity inherent in judicial attempts to apportion damages equitably when part or all of an illegal overcharge due to an antitrust conspiracy has been “passed on” to various levels of the chain of sale and distribution. This difficulty, coupled with the perceived unfairness of multiple liability for damages arising out of the same conduct, influenced not only the Court but the Congress in its continuing refusal to enact remedial legislation to reverse the case.39

31. Id. at § 15(f).
33. Id. at § 3739.
34. Stone, supra note 2, at 591.
35. Id. Wyoming and Nevada subsequently declined their respective grants of $123,270 and $76,644, so that the lowest grant actually awarded was $130,000 which was received by Maine. 830 Antitrust & Trade Reg. Rep. (BNA) D-2 (Sept. 15, 1977).
36. Stone, supra note 2, Table III, at 593.
39. Bills have been introduced but not enacted in the 95th, 96th, and 97th Congress. Another bill has also been introduced in the 98th Congress which, as of publication, is still pending. Cf. Comment, Passing-On in Antitrust: Was Hanover Shoe
The decision was greeted with dismay by the state attorneys general. Although states are major purchasers of goods, they rarely deal directly with manufacturers, and would thus be barred from damage suits against them. It was also feared that the decision would effectively kill the new *parens patriae* power before it was put to any real use, since such suits assert the claims of consumers who rarely deal directly with manufacturers. Faced with these problems, antitrust enforcers in the state attorneys’ general offices gave renewed attention to using existing state antitrust laws or obtaining passage where none existed. The *Illinois Brick* decision dealt only with federal actions for damages, and did nothing to hamper enforcement actions under state law.

By the end of 1977, the combination of *parens patriae* powers and the *Illinois Brick* decision had set the stage for a strong revival of interest in state antitrust laws and enforcement activity.

### III. History of the Delaware Antitrust Act

Delaware’s effort to establish an antitrust act under the federal grant program was more of a debut than a revival. When Attorney General Richard R. Wier, Jr., applied for funds in October 1977, the state had never had an antitrust statute or any full-time antitrust staff. Mr. Wier was given a “dubious achievement award” by Wilmington’s *News-Journal* papers at the end of the year for starting an antitrust program with no existing state law. After the federal grant was awarded, the State Department of Justice hired several full-time antitrust staff members and gave high departmental priority to the drafting and enactment of a state antitrust statute.

From the beginning of the project there was opposition to the concept of a state antitrust bill for Delaware. The state’s position as a leading haven for large corporations is a source of pride as well as revenue, not only for Delaware attorneys, but also for its government. Any legislation which is perceived as unfriendly to the state’s corporations is regarded with suspicion by key members of the business, legal, and governmental communities. Antitrust legislation is particularly suspect, partly because of the experience of Delaware’s leading cor-

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41. In 1979, Delaware received $114 million in franchise taxes, corporate taxes, and corporation fees; total state revenues were $561 million. OFFICE OF MANAGEMENT, BUDGET AND PLANNING OF THE STATE OF DELAWARE, DIMENSIONS ON DELAWARE: A STATISTICAL ABSTRACT FOR 1979, at 260 (1980).
porate citizens,\textsuperscript{42} and partly because Delaware's very preeminence as a corporate domicile can be traced to New Jersey's enactment in 1913 of a state antitrust law.\textsuperscript{43}

In order to reduce opposition to the proposed law, the drafters determined at the outset that there would be no criminal enforcement and that the range of prohibited conduct would be no broader than that already forbidden under federal law. Thus, there would be no new rules of conduct governing persons subject to the new law. This approach raised a question: if the new law added no conduct to that already proscribed under federal law, what was the point of enacting it? The department's answer was that, although existing federal law adequately defined illegal conduct, the enforcement mechanisms under federal law were inadequate.

In a letter to the original bill's sponsor, former U.S. Antitrust Division Chief John H. Shenefield pointed out that local antitrust conspiracies were "far too prevalent," and exceeded the investigative and prosecutive resources of the federal antitrust authorities.\textsuperscript{44} Even if federal authorities had the resources to pursue local conspiracies, in some cases they would have no jurisdiction because of a lack of impact on interstate commerce.\textsuperscript{45} Additionally, although state attorneys general may bring cases under the treble damages provisions of the Clayton Act, they have no authority to bring enforcement actions under the Sherman Act. Thus, the first goal of the drafters of the Delaware Act was to give the state attorney general the enforcement power lacking under federal law.

In preparing the first draft of a Delaware Antitrust Act, staff members reviewed all existing federal laws and the forty-six existing state antitrust laws. Attention was also given to Uniform and Model state antitrust acts. The draft was introduced on March 15, 1978, as


\textsuperscript{43} W. Kirk III, \textit{A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-eminence} 10 J. Corp. L. \textsuperscript{44} (1984).

\textsuperscript{44} Letter from John H. Shenefield to Senator Jacob W. Zimmerman (May 3, 1978).

\textsuperscript{45} United States v. Yellow Cab Co., 332 U.S. 218 (1947). A more recent case which also found a lack of federal jurisdiction was Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974). However, that case involved jurisdiction under the Clayton Act, which is narrower than the Sherman Act. See infra note 50. See also United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975).
Senate Bill 488 and was passed by the Senate in amended form on June 1, 1978. The bill failed to reach the House floor for a vote before the 129th General Assembly adjourned in June 1978.

Shortly after Richard S. Gebelein took office as Delaware's next Attorney General, a modified version of the bill was introduced in the 130th General Assembly on January 17, 1979, as Senate Bill 37. To some observers, it was remarkable that the new attorney general would support such a bill at all. Candidate Gebelein had raised Attorney General Wier's support for an antitrust act as a 1978 election issue, and when Gebelein reversed his position in 1979, the Wilmington papers needled him as they had his predecessor. The bill passed the Senate on February 1, 1979, by a vote of 16-1. While the House considered the bill over the next five months, the Delaware State Chamber of Commerce and others lobbied vigorously to have the bill amended. After public debates and discussions were held on the bill, the attorney general and his antitrust staff eventually reached an agreement with the Chamber of Commerce on a modified bill. A comprehensive amendment to the bill was introduced in the House on June 7, 1979, and passed by a 31-7 vote on June 19, 1979. The amended bill was returned to the Senate and passed on June 21, 1979, by a vote of 19-2. On July 3, 1979, Governor Pierre S. duPont IV signed the bill which, by its own provisions, took effect on January 3, 1980.

IV. PROVISIONS OF THE DELAWARE ANTITRUST ACT

A. Jurisdiction, Procedural Provisions, and Construction

The Delaware Act forbids restraints of "'trade or commerce of this State." That phrase is defined as "all economic activity carried on wholly or partially in this State, which involves or relates to any commodity, service or business activity." By including economic activity carried on wholly in Delaware, the Act reaches intrastate conduct which would not be subject to jurisdiction under the federal antitrust laws absent a substantial effect on interstate commerce.

46. Wilmington Evening J., May 1, 1979, at 8, col. 1; May 3, 1979, at 30 (cartoon), col. 3.
47. 62 Del. Laws 89 (1979). In order to illustrate the significance of various provisions in the bill as enacted, there will be occasional references to the "'original bill." Unless otherwise noted, such references are to Senate bill 37 as passed, with amendments, on February 1, 1979.
49. Id. at § 2102(4).
50. The Clayton Act's principal substantive provisions require that a defend-
The inclusion of activity carried on "partially" in Delaware indicates that some economic activity which is in or affects interstate commerce will be subject to the Act,\textsuperscript{51} unless it is preempted by an undue burden on or discrimination against interstate commerce or by an irreconcilable conflict with federal law.\textsuperscript{52} Although some exercises of state antitrust authority have been struck down on federal preemption grounds, the more recent trend is otherwise.\textsuperscript{53}

The Court of Chancery of the State of Delaware has exclusive jurisdiction of all actions arising under the Act or relating to its enforcement.\textsuperscript{54} The court of chancery is a court of equity which sits without a jury. However, the Act provides that if any party to an action would otherwise have a right to a jury trial of any issue of fact and demands such a trial, that issue alone will be heard before a jury in the superior court.\textsuperscript{55}

ant be engaged "in commerce" (meaning interstate commerce). 15 U.S.C. §§ 14, 18 (1976). Thus, wholly intrastate conduct is not subject to these provisions of the Clayton Act. The Sherman Act has a broader jurisdictional reach, applying to conduct simply "affecting" commerce as well as to conduct "in commerce." The Sherman Act's greater scope is based on the intent of Congress that it should apply to the fullest extent possible under the Constitution. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

51. In order for a state to assert antitrust jurisdiction, the conduct complained of must have local consequences. See, e.g., Baker v. Walter Reade Theatres, Inc., 227 A.D. 814, 237 N.Y.S.2d 795 (1962), in which the court refused to apply New York's antitrust law to a conspiracy which was allegedly consummated in New York, but had its principal consequences in New Jersey. The requirement of local consequences should allay the fear expressed by some opponents of the Act that an overly ambitious attorney general could use it to attack the national activities of the many Delaware corporations which do little or no business there.


53. The leading case against preemption is Standard Oil of Ky. v. Tennessee, 217 U.S. 413 (1910). See also Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972). In that case, the court noted that "numerous [Supreme Court] cases have held that the federal antitrust laws are not preemptive of state antitrust regulation." Id. at 1313. In Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946), the California Supreme Court upheld jurisdiction under the state antitrust law against a preemption challenge, even though interstate commerce was involved. Similar state cases include State v. Sterling Theatres Co., 64 Wash. 2d 761, 394 P.2d 226 (1964); Texas v. Southeast Tex. Chapter of Nat'l Elec. Contractor's Ass'n, 358 S.W.2d 711, cert. denied, 372 U.S. 969 (Tex. Civ. App. 1962); People's Savings Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960); Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950).


55. Id.
The statute of limitations under the Act is three years from the accrual of the cause of action.\textsuperscript{56} The Act is to be construed in harmony with "ruling judicial interpretations of comparable federal antitrust statutes."\textsuperscript{57} The drafters intended for this provision to direct courts to employ federal case law as it evolves, rather than being confined to federal case law as it existed at the time of the Act's passage.\textsuperscript{58}

**B. Substantive Provisions**

The substantive provisions of the Delaware Act, which are based on section 1 of the Sherman Act, provide that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce of this State shall be unlawful."\textsuperscript{59} The original bill included a provision based on section 2 of the Sherman Act, forbidding monopolization as well as conspiracies and attempts to monopolize.\textsuperscript{60} This provision was removed by amendment, as was a provision listing specific activities which would be deemed unlawful restraints of trade.\textsuperscript{61}

The ban on restraints of trade is the only substantive, conduct-governing portion of the Act. In addition to the deleted provision on monopolization, other noteworthy omissions include provisions based on sections 3 and 7 of the Clayton Act, which pertain to exclusive dealing arrangements and mergers, respectively.\textsuperscript{62} Delaware already has a price discrimination law\textsuperscript{63} based loosely on the federal Robinson-Patman Act.\textsuperscript{64}

Because the Act requires construction in harmony with federal
law, several noteworthy rules promulgated by federal courts will come into play under the Delaware Act. One of these is the "rule of reason," first set out in Standard Oil Co. v. United States, which provides that only unreasonable restraints of trade are considered unlawful. However, certain types of trade restraints have such an adverse effect on competition that they are presumed to be per se unreasonable. As a practical matter, a judicial determination of whether or not an offense is unreasonable per se is often dispositive of a case. If the per se rule does not apply, a plaintiff must establish not only that the offense took place, but also that the restraint was "unreasonable"; the economic evidence needed to show this is both complex and expensive. Among the practices consistently held to be per se offenses are price fixing by competitors, resale price maintenance, horizontal market allocations, and group boycotts. Tying arrangements are subject to a variation of the per se rule, under which liability is triggered by a showing of "some fairly perfunctory and easily established market facts."  

Vertically imposed territorial restraints, such as those by a manufacturer on its distributors, were once subject to the per se rule but, pursuant to a 1977 United States Supreme Court ruling, they are no longer included. The relative speed with which the rule on this practice changed illustrates the advantage of couching the substantive provisions of the Delaware Act solely in the language of the Sherman Act. Some members of the business community had urged the drafters to follow the example of the Uniform State Antitrust Act, which contained a listing of specific per se offenses. In an effort to gain their

66. 221 U.S. 1, 58-62 (1911).
70. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
74. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). The Court noted that any departure from the rule of reason standard must be based upon a demonstrable economic effect, rather than upon "formalistic line drawing," which the per se rule utilizes. Id. at 58-59.
support, the drafters included such a listing in the original Senate bill.75 The attorney general and his staff later convinced the Chamber of Commerce that this was not a sound approach and the list was deleted in the bill as passed. If it had remained, future developments in federal case law could have rendered the Delaware Act more stringent than the Sherman Act, thus creating a double standard which the drafters thought undesirable. Moreover, future federal developments could have left the list under-inclusive.

G. Remedies

1. Attorney General Enforcement

The Act provides that "the Attorney General may bring an action for any violation or threatened violation of this chapter."76 This provision expresses the drafters' intent that the attorney general should have authority to bring enforcement proceedings in addition to the damages actions provided for elsewhere in the Act. Damages actions impose a number of threshold requirements such as injury to business or property, but an enforcement action may be triggered by a violation, or the threat of a violation, notwithstanding the lack of an injury such as would give rise to an award of damages. This is in constrast to damages actions under the Clayton Act, or under other provisions of the Delaware Act, which require standing by virtue of injury or threatened injury to business or property.77 In an enforcement action,

75. Section 2103(b) of the original bill provided:
Without limiting the effect of the foregoing, the following shall be deemed to restrain trade or commerce of this state unlawfully:

(1) A contract, combination, or conspiracy between two or more persons:
(i) for the purpose or with the effect of fixing, controlling, or maintaining the market price, rate, or fee of any commodity or service;
(ii) fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, distribution, sale, or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling, or maintaining the market price, rate, or fee of the commodity or service; or

(2) A contract, combination, or conspiracy between two or more persons whereby, in the letting of any public or private contract:
(i) the price quotation of any bid is fixed or controlled; or
(ii) one or more persons submits a bid intending it to be higher than another bid and thus complementary thereto, or submits a bid intending it to be substantially identical to another bid, or refrains from the submissions of a bid.

(3) A contract, combination, or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in paragraphs (1) and (2).
the court may award appropriate equitable relief such as a restraining order, preliminary or permanent injunction, restitution, or rescission. The term "equitable" relief replaced the narrower injunctive relief called for in the original Senate bill, because the drafters preferred to have a broader range of remedies available for appropriate cases. It seems clear that the Illinois Brick doctrine, which has been the bane of treble damage plaintiffs, should not apply in enforcement actions.

The court may also exact a monetary civil penalty from each defendant for each violation, which shall be not less than $1,000 and not more than $100,000. As the term would indicate, a civil penalty is in the nature of a punishment for violating the law, and it may be awarded to the state without proof of monetary damage. Another important aspect of the civil penalty section is its possible use as a pendent claim in a private damages suit brought by the attorney general under the Clayton Act.

2. Damages and Equitable Relief

The drafters of the Act had planned to provide for private rights of action similar to those available pursuant to the Clayton Act. The original bill made such provision, but it was eliminated as part of the compromise with the Chamber of Commerce.

The Act provides that the attorney general may bring an action on behalf of the state and its public bodies if it is "threatened with injury or injured in its business or property" by a violation of the Act.

for injunctions against "threatened loss or damage," with no reference to "business or property." Id. at § 26. This has been called a broader provision than the Clayton Act's damages section. Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). "Business or property" injury is the Delaware act standard for damages or nonenforcement equitable relief. Del. Code Ann. tit. 6, § 2108(a) & (b) (Supp. 1982).

79. In Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979), the court held that the Illinois Brick doctrine does not preclude indirect purchasers from seeking injunctive relief. Moreover, the attorney general brings an enforcement action not as a private party, but as the chief law enforcement officer of the state. The Illinois Brick doctrine has never been applied to criminal or civil enforcement proceedings by the United States Attorney General.
81. See infra notes 112-15 and accompanying text.
82. Section 2109(b) of the original bill provided: "A person threatened with injury or injured in his business or property by a violation of this act, may bring an action for appropriate injunctive relief, damages sustained and, as determined by the Court, taxable costs, and reasonable fees for expert witnesses and attorneys." Id.
This provision follows the language of section 4 of the Clayton Act.\textsuperscript{84} The United States Supreme Court has construed this language to mean that a private action does not require a "business" injury, but can also be sustained by ordinary consumers.\textsuperscript{85} The Act also provides for actions by the attorney general as \textit{parens patriae} in a manner similar to that added in 1976 to the Clayton Act. Such suits may be brought on behalf of natural persons residing in the state.\textsuperscript{86}

Thus, the attorney general may bring damage suits either on behalf of the state, its public bodies, or on behalf of natural persons as \textit{parens patriae}. In all such suits, the attorney general may obtain equitable relief, damages, court costs, and reasonable fees for expert witnesses and attorneys, including the attorney general.\textsuperscript{87} If the court finds the acts alleged were willful, it has discretion to award treble damages, in addition to costs and fees.\textsuperscript{88} Monetary relief awarded in a \textit{parens patriae} suit may be payable to the state or distributed in such manner as the court may authorize.\textsuperscript{89}

Unlike the enforcement authority granted to the attorney general, the damage suit authority adds much less to his existing powers under federal law. Under the Clayton Act, the attorney general already has power to sue for damages to the state, its public bodies, and its natural persons. The federal act has some advantages. Treble damages, if proved, are mandatory, and there are certain statistical sampling methods available in a federal \textit{parens patriae} suit which are not available under the Delaware Act.\textsuperscript{90} However, the Delaware Act may apply to some cases which the attorney general could not reach under federal law, such as those not affecting interstate commerce. Moreover, the attorney general may obtain the full range of equitable relief under the Delaware Act, in contrast to the injunctive relief limitation in private suits under the Clayton Act. Thus, remedies such as restitution, available in a suit under the Delaware section, might not be available in a federal suit.

\begin{footnotes}
\item[84] 15 U.S.C. § 45 (1976). As noted in \textit{supra} note 50, the Clayton Act's substantive provisions have a jurisdictional requirement that the conduct complained of be "in commerce." Although private federal actions are actually authorized by § 4 of the Clayton Act, the broader "affecting commerce" test applies to those private suits which allege violations of the Sherman Act.
\item[86] Del. Code Ann. tit. 6, § 2108(b) (Supp. 1982).
\item[87] Id. at § 2108(a) & (b).
\item[88] Id. at § 2108(c).
\item[89] Id. at § 2108(d).
\item[90] 15 U.S.C. § 15(d) (1976). In the original bill, § 2109(e) provided for proof of damages in the aggregate by statistical sampling. This was deleted by amendment.
\end{footnotes}
D. Exemptions

The Delaware Antitrust Act contains three categories of exemptions. First, nonprofit labor, agricultural, or horticultural organizations are exempted. Second, a type of state action exemption is found in the provision that nothing in the Act forbids "any conduct or arrangement required by any statute of this State or of the United States, nor any conduct or arrangement approved or required by a regulatory body or officer acting under statutory authority of this State or of the United States." Finally, certain activities of regulated, religious, and charitable entities enjoy specific exemption.

E. Attorney General's Investigations and Litigation Under the Act

1. General Powers

The attorney general has full power to investigate suspected violations of both the Delaware Antitrust Act and federal antitrust laws. The Act gives the attorney general power to investigate and litigate on behalf of the state and its public bodies, including school districts and political subdivisions such as counties and cities. This provision allows antitrust suits on behalf of Delaware's public bodies to be brought in the attorney general's own name without the necessity of bringing a class action or joining all the entities as plaintiffs. The attorney general does not have power to represent school districts in other types of cases.

2. Civil Investigative Demands

A useful tool for state and federal antitrust investigations is found in the investigative demand section of the Act, which authorizes precomplaint unilateral discovery by the attorney general in a man-

94. Id. at § 2105. See also In re Mid-Atlantic Toyota Antitrust Litigation, 541 F. Supp. 62 (D. Md. 1981), commenting on the attorney general's power. Id. at 64, 65.
95. Del. Code Ann. tit. 29, § 2515 (1974). The attorney general made use of this new power to sue on behalf of school districts and other political subdivisions in the Art Materials Antitrust Litigation. Multidistrict Litigation 436 (1980). The suit was filed without the need to name the subdivisions as parties; the ease of this procedure stands in sharp contrast to the difficulties faced by other state attorneys
ner similar to that used by the United States Attorney General under the federal Antitrust Civil Process Act.\textsuperscript{96} If the attorney general has reason to believe that any person, not only suspected defendants, may have knowledge of a possible violation of the Act, the attorney general may issue an investigative demand compelling that person to: (1) give testimony under oath before the attorney general; (2) produce documentary material; and (3) answer written interrogatories.\textsuperscript{97} Neither a court order nor court approval is required. The broad scope of demands under this section excludes only requirements which would be held unreasonable if contained in a subpoena issued in aid of a grand jury investigation.\textsuperscript{98} However, there are a number of procedural safeguards which are not available to grand jury witnesses. Witnesses summoned under civil investigative demands may be represented by counsel and may ordinarily procure transcripts of their testimony.\textsuperscript{99} If a person fails to comply with a demand on the ground that he may thereby be incriminated, the chancery court may order that person to comply but, after compliance, that person's testimony may not be used against him in a later criminal prosecution.\textsuperscript{100} This is "use" immunity, and it is narrower than the "transactional" immunity which must be granted to persons compelled to give testimony in non-antitrust matters.\textsuperscript{101}

The Act contains a provision which protects materials obtained pursuant to a civil investigative demand from mandatory disclosure under the Delaware Freedom of Information Act.\textsuperscript{102} This subsection

\begin{itemize}
\item \textsuperscript{96} 15 U.S.C. §§ 1311-1314 (1976).
\item \textsuperscript{97} Del. Code Ann. tit. 6, § 2106(a) (Supp. 1982).
\item \textsuperscript{98} Id. at § 2106(c). See Attorney General's Investigation of Creekside Homes, Inc., No. 6689 (Del. Ch. Sept. 15, 1982) (upholding an investigative demand over "relevance" objections).
\item \textsuperscript{99} Del. Code Ann. tit. 6, § 2106(d) (Supp. 1982).
\item \textsuperscript{100} Id. at § 2106(e). Presumably, this section applies only to state criminal prosecutions. However, under Murphy v. Waterfront Commission, 378 U.S. 52 (1963), such state compelled testimony cannot be used in a federal criminal case either.
\item \textsuperscript{101} Delaware's general immunity statute, Del. Code Ann. tit. 11, § 3506 (1974), requires full "transactional" immunity, which precludes any prosecution of the testifier based on the same transaction which was the subject of the testimony. "Use" immunity precludes only use of the testimony; the prosecution may proceed if there is other evidence. The change to narrower "use" immunity under the Antitrust Act parallels the move to narrower immunity under federal law. In the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970), Congress abolished transactional immunity and replaced it with use immunity. This action was upheld against a Constitutional challenge in Kastigar v. United States, 406 U.S. 441 (1972).
\end{itemize}
also provides that such material shall not be disclosed to any person other than authorized employees of the Department of Justice, thus precluding discretionary disclosure by the attorney general. However, nothing in the confidentiality provisions prevents the attorney general from introducing such material in state or federal court, or before a grand jury.103

3. Attorney General Subpoenas

The Act provides that the powers it grants to the attorney general shall be in addition to those granted him at common law, or under the Constitution, statutes, and rules of the courts of Delaware.104 One such power, contained in the general statute relating to powers of the attorney general, gives him authority to investigate matters involving "public peace, safety and justice."105 This provision, which grants a power similar to that held by a grand jury,106 does not require the attorney general to obtain a court order before issuing a subpoena to compel testimony or the production of evidence. Thus, the attorney general has two ways of obtaining unilateral precomplaint discovery under the Antitrust Act: attorney general subpoenas or civil investigative demands.

V. Litigation Under the Act

Although there may never be a vast quantity of litigation pursuant to the Delaware Antitrust Act, the issues addressed in this article, as well as an examination of noteworthy proceedings initiated under the Act, are important for a proper understanding of the legislation.107 The first case filed pursuant to the Antitrust Act was in April 1980. The action, alleging price-fixing of dry cleaning services, was settled by a consent decree.108 Cases have been initiated under the Act which

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104. 62 Del. Laws ch. 89, § 6 (1979). This section of the Act was not added to the Delaware Code.
107. Any discussion of Delaware antitrust cases should probably begin with Bradley’s Executor v. Baynard, 7 Del. (2 Houst.) 559 (1863). In that case, the seller of a piece of land secretly employed a person to bid up the price of the land at a supposedly open auction. The court stated: "Any secret arrangement . . . having a tendency to mislead a bidder is in our opinion, a serious departure from fair dealing, and if the price be thereby enhanced, it clearly amounts to a deception practiced by the seller upon the purchaser . . . ."
allege that bids were rigged on state contracts for the purchase of highway construction services;109 other cases alleged that six mobile home park operators in resort areas had illegally tied the rental of desirable lots to the purchase of mobile homes from the operators.110 These cases were also settled by consent decrees. Another case has been filed alleging price-fixing by makers of copper tubing; as of publication it is still pending.111

The Delaware Act’s provisions for restitution and civil penalties have also figured in demands for relief in federal antitrust cases brought by the state in Delaware’s United States District Court. One case alleged price-fixing of educational art supplies sold to schools and consumers,112 while another alleged a type of automobile price-fixing conspiracy by several automobile dealers and a distributor.113 These cases are also pending, with settlement discussions in progress, at the time of publication. The courts have not addressed the viability of the pendent state law claims for restitution and civil penalties advanced in these cases. If the state law claims can be pursued in federal courts, state attorneys general will be able to minimize the adverse impact of the *Illinois Brick* decision.114 Although it might seem that the existence of a remedy under state law would make it unnecessary for an attorney general to proceed in federal courts, the federal forum has distinct advantages in some cases. Both of the above federal actions were transferred to other districts where a number of similar suits were pending. By consolidating similar actions in multidistrict federal cases, the attorneys general of the various states involved can share labor and expenses,

114. *But see* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971). The court ruled that the plaintiff lacked standing to bring a federal antitrust case for damages under an older test, the so-called “target area” test. With no viable federal claim remaining, the court also dismissed the pendent claim for relief under state law, noting that the plaintiff still had a remedy in state court. However, the dismissal of the pendent claim is discretionary, not mandatory. Moreover, in many cases a state attorney general would still have a viable federal claim for injunctive relief even if *Illinois Brick* was a bar to a claim for damages. Such a claim would distinguish the case from *Calderone*, in which the federal claim was dismissed in its entirety.
and participate in the committee structures contemplated under the Manual for Complex Litigation. In cases alleging national or regional conspiracies, the savings resulting from combining resources can be substantial.

Following the Act's passage, the Justice Department's antitrust staff continued a number of activities which had commenced earlier. The staff pursued the state's proprietary interests in a number of previously filed federal multidistrict private antitrust cases and oversaw the calculation and distribution of several settlements resulting from them. Another aspect of the staff's activities involved the continuous monitoring of various state regulations to guard against potentially anticompetitive effects. One result was a formal attorney general opinion in March 1980, which ruled that a minimum pricing regulation of Delaware's Alcoholic Beverage Control Commission was unsupported under the Sherman Act; as a result, the Commission promptly suspended enforcement of the regulation. An association of liquor retailers filed suit seeking to enjoin the suspension of the rule; in ruling against the association, Chancellor William Marvel noted the recent passage of the Antitrust Act as being indicative of "a legislative intent to turn away from the condonation of price fixing and the like." The Commission later repealed the rule outright.

Later in 1980, the Department's antitrust efforts received another judicial acknowledgement in a case to which it was not a party. Nationwide Mutual Insurance Company had brought an antitrust suit in federal court in 1978 against several Delaware automobile body repair shops and two affiliated trade associations. The complaint alleged price-fixing of repair services on automobiles insured by Nationwide. The case was settled by a consent judgment which ordered, inter alia, the dissolution of the trade associations and a ban on certain specified anticompetitive practices. In order to insure compliance with its terms, the judgment further required the body repair shops to permit the Department of Justice to inspect and copy all their relevant records and to interview their employees for a five year period. This arrangement was acceptable to the parties to the action, as well as

116. The Departments antitrust staff at the time of publication has made settlement recoveries worth over $400,000.
117. 1980-1 Trade Cas. (CCH) ¶ 63,259.
to the Department of Justice which had a separate interest in promoting a competitive market for automobile repairs.

The year 1982 saw the election of another Attorney General, Charles M. Oberly III, who has continued his predecessors' support for the program. With his endorsement, legislation was introduced in the 132d General Assembly to create a revolving fund, consisting of judgments and settlements recovered by the attorney general in antitrust and other cases, which would then be used to pay the costs of supporting the enforcement activities. At the time of publication the legislation had passed the Delaware Senate and cleared committee in the House.¹²⁰

VI. CONCLUSION

Although the federal grant program expired in all states by the end of 1982, Delaware's antitrust program appears to be firmly established. The support of three consecutive Attorneys General has been vital, as was the financial support supplied by the federal grant program. The nationwide revival of interest in state antitrust enforcement has created a highly cooperative and mutually supportive network of enforcement officials,¹²¹ many of whom have assisted Delaware's staff.

But the chief factor in making the program viable was the passage of the antitrust act with its new enforcement tools for the attorney general, especially the civil penalty remedy, the provision for actions as parens patriae and the investigative demand power. The Delaware Antitrust Act will be far more powerful than its "dubious achievement" roots initially indicated.

¹²⁰ Senate Bill 216, 132d Gen. Assembly.
¹²¹ 980 Antitrust & Trade Reg. Rep. (BNA) D-1 (Sep. 11, 1980). The Eastern States Antitrust Coordinating Committee (ESAC) provides tactical and strategic advantages to 14 states, including Delaware.