Minnesota Antitrust Law of 1971: Interpretation and Analysis

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I. INTRODUCTION

Although federal statutes are generally perceived as the source of antitrust doctrine, the states were actually the initiators of antitrust legislation. Eclipsed by the federal enactments, these original state laws have been increasingly ignored. In Minnesota, for exam-


3. Ironically, legislative history indicates that the Sherman Act—the source of most present federal antitrust law—was intended to supplement state laws:

This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing and controlling the most dangerous combinations.

4. For example, in a 1956 survey, only five of 35 participating states reported even a single state antitrust action since World War II. See 1957 New York Report, supra note 2, app. 1, annex IV. In 1967, only eight states reported a "fairly active" antitrust enforcement program. See B. Burrus, Investigation and Discovery in State Antitrust 39-40 (1967).

It is not clear why the states reduced their antitrust activity. Two categories of reasons have been suggested. First, there were substantial technical difficulties involved in enforcing state statutes. The statutes themselves became antiquated, inadequate, and increasingly handicapped by restrictive judicial interpretation. See Moody & Waters Co. v. Case-Moody Pie Corp., 354 Ill. 82, 187 N.E. 813 (1933) (consolidation of manufacturers accounting for 40-65% of the market not illegal); Deon v. Kirby Lumber Co., 162 La. 671, 111 So. 55 (1927) (boycott not illegal unless malice shown); Howle v. Mountain Ice Co., 167 S.C. 41, 165 S.E. 724 (1932) (territorial market division not illegal). Their sanctions were either too weak or so harsh and arbitrary as to deter their use. See Address by John J. Miles, Assistant Attorney General for the Commonwealth of Virginia, 1978 Conference of Western Attorneys General, at 3 (Aug. 7, 1978) (on file at the Minnesota Law Review) [hereinafter cited as Miles Address]. The state

Second, significant motivational barriers hampered enforcement and stalled attempts to correct the technical deficiencies. Although most state legislators publicly supported the goals of antitrust legislation, they also perceived that strong enforcement of such laws would alienate politically powerful businessmen and might induce business to locate in less enthusiastic states. Miles Address, supra, at 3 & n.4. Thus, state legislators tended to discourage antitrust enforcement. This legislative attitude was complimented by a general lack of interest by the state attorneys general, id., and the public as a whole. See Wood, Resurgence of State Antitrust Action: Prices and Public Awareness, 9 Antitrust L. & Econ. Rev. 41, 42 (1977).


7. No enforcement efforts were made from 1913 until 1961, when the Attorney General's Antitrust unit was formed. W. Mondale, Report on the Attorney General's Antitrust Unit's First Year 1 (1962). Even then, little was accomplished until after 1971. See generally French, The Minnesota Antitrust Law, 50 Minn. L. Rev. 59 (1965); Interview with Alan H. Maclin, Special Assistant Attorney General for the State of Minnesota, Saint Paul, Minnesota (Oct. 19, 1978) [hereinafter cited as Maclin Interview].

8. See, e.g., In re Otto's Liquor, Inc., 321 F. Supp. 160 (D. Minn. 1970) (defense that creditors who filed involuntary petition in bankruptcy against defendant violated state antitrust law); AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 260 Minn. 499, 110 N.W.2d 348 (1961) (defense that lease for bowling pin spotting machines that lessor was seeking to enforce violated state antitrust law); General Talking Pictures Corp. v. DeMarce, 203 Minn. 28, 279 N.W. 750 (1938) (counterclaim of antitrust tie-in violation to action for recovery on past due promissory notes); Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 182 Minn. 159, 234 N.W. 463 (1931) (in action for breach of contract, counterclaim that contract violated antitrust laws); Espenson v. Koepke, 93 Minn. 278, 101 N.W. 168 (1904) (in a breach of contract suit, defense of contract void "as being a restraint of trade"). A few plaintiffs, however, did bring actions under the state antitrust statute prior to 1971. See, e.g., Red Owl Stores v. Meat Cutters Local 114, 108 F. Supp. 629, appeal dismissed, 205 F.2d 969 (8th Cir. 1953); Miller v. Minneapolis Underwriters Ass'n., 226 Minn. 367, 33 N.W.2d 48 (1948); Campbell v. Motion Picture Mach. Operators Local 219, 151 Minn. 220, 186 N.W. 781 (1922); George J. Grant Constr. Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N.W. 1055 (1917); Ertz v. Produce Exch. Co., 82 Minn. 137, 84 N.W. 743 (1901). Generally, however, Minnesota cases that could have been tried under the antitrust statute were decided on common law grounds. See, e.g., Combined Ins. Co. v. Bode, 247 Minn. 458, 77 N.W.2d 533 (1956) (covenant that former
Recently, however, state antitrust legislation and enforcement activity have been revitalized. Thirty-one states have enacted new antitrust statutes since 1970 and four states are actively involved in preparing new legislation. Antitrust staffs of state attorneys general have grown, and states now file many more claims under state law than under federal antitrust statutes.

9. The explanations offered for the recent resurgence of state antitrust activity are as speculative as those suggested for the previous inaction. It has been suggested, however, that a change in public attitude has made state antitrust enforcement just "good politics." Miles Address, supra note 4, at 4. Some trace this change in the political climate to an erosion of public confidence in the federal government's role as exclusive problem solver. Wood, supra note 4, at 44. Others see the recent growth of the consumer movement as creating a greater public awareness of price movements and the lack of price competition in many industries. See Miles Address, supra note 4, at 3; Wood, supra note 4, at 44-45. This public awareness may have been further heightened by publicity surrounding recent antitrust actions that have resulted in large damage awards. Perhaps the two most widely publicized cases were the "Electrical Conspiracy Cases," see C. Bane, ELECTRICAL EQUIPMENT CONSPIRACIES (1973), and the Tetracycline litigation. See e.g., West Virginia v. Charles Pfizer & Co., 324 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); Cotler Drugs, Inc. v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir.), cert denied, 404 U.S. 871 (1971).

It has also been suggested that the increased involvement of states in multistate federal antitrust class actions and bid rigging suits has resulted in the antitrust education of state attorneys general and their staffs. See Rubin, RETHINKING STATE ANTITRUST ENFORCEMENT, 26 U. FLA. L. REV. 653, 699-700 (1974). Recent increases in private federal antitrust actions have also broadened the base of antitrust expertise in each state. Id. at 699.

10. Miles Address, supra note 4, at 5.
11. Id. supra note 4, at 5 & n.8.
12. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ANTITRUST LAWS AND THEIR ENFORCEMENT 40-41 (1974); Miles Address, supra note 4, app. 3.

13. In a roughly one-year period (1976-1977), state antitrust divisions filed 104 suits under state antitrust law as compared with 56 filed under federal law. Miles Address, supra note 4, app. 4 (based on data from the National Association of Attor-
This national trend has not bypassed Minnesota. In 1971, Minnesota enacted a comprehensive new state antitrust statute.\textsuperscript{14} Since that time, enforcement of the state law has increased dramatically. During fiscal year 1978, for example, the Attorney General's Antitrust Division initiated twenty-five investigations based on the state antitrust law\textsuperscript{15} and filed four state actions.\textsuperscript{16} This level of activity is significant in comparison to that in 1969, when no state actions were filed under the state antitrust law and less than five percent of the Antitrust Division's time was spent on state enforcement.\textsuperscript{17}

Two factors suggest that this trend of increased state antitrust activity is likely to continue. First, increased state activity should be self-perpetuating. More litigation will increase the exposure of private attorneys and businessmen to state antitrust doctrine. This exposure will likely increase the willingness and ability of the state and private individuals to bring future actions.

In addition, the federal government has begun to encourage states to take a more active role in antitrust enforcement. The Justice Department and the Federal Trade Commission, for example, have responded to larger caseloads by encouraging states to intensify their antitrust activity and by increasing cooperation with states in investigation and information sharing.\textsuperscript{18} The federal government has also

\textsuperscript{14} Act of June 7, 1971, ch. 865, 1971 Minn. Laws 1715.


\textsuperscript{16} This increased the total number of state antitrust actions filed since 1971 to 16. Minnesota Attorney General's Antitrust Division, Antitrust Cases Filed by Year (1978) (unpublished memorandum) (on file at the Minnesota Law Review). By October 19, 1978, the State Antitrust Division consisted of five attorneys, two investigators, and two secretaries. Maclin Interview, supra note 7. Even with this increased activity, however, private actions under the new law remain scarce. As of May 1, 1979, no private action under the Minnesota antitrust law of 1971 had been decided by the Minnesota Supreme Court.


\textsuperscript{18} Address by Ky P. Ewing, Jr., Deputy Assistant Attorney General, U.S. Justice Dep't Antitrust Division, 1978 Conference of Western Attorneys General, East Glacier, Montana, at 7 (Aug. 7, 1978) (on file at the Minnesota Law Review) [hereinafter cited as Ewing Address].

We believe that the solution is not continuing, massive expansion at the
recently begun to fund state enforcement efforts. The United States Justice Department, through special Congressional appropriation, has awarded substantial grants to forty-five states, the District of Columbia, and Puerto Rico to assist in antitrust enforcement. These grants will allow the states to double their total antitrust enforcement personnel and enable twenty-five states to create antitrust divisions for the first time. Appropriations of additional grants for fiscal year 1979 have been approved by Congress.

The encouragement of state antitrust activity by the federal government appears to stem, at least in part, from a recognition that such activity serves to fill gaps existing in federal antitrust enforcement. While the scope of federal enforcement is extensive, it is not totally comprehensive. Congress has not extended all federal antitrust laws to their constitutional limits, and even in areas in which Congress has fully used its power to regulate interstate commerce, many local enterprises remain outside the reach of federal courts or federal level. Where problems can be handled locally, they should be, and in the area of antitrust enforcement, states do have the incentives to protect their citizens from economic crimes. We welcome state antitrust enforcement and in the last eight months alone we have referred some 21 cases of more localized violations to the Attorneys General of eleven states.

Id.

20. Grants awarded totalled $10,787,377. Miles Address, supra note 4, app. 2. The combined state antitrust budgets for 1977, in contrast, were estimated at "not more than $7 million." Wood, supra note 4, at 42.
21. Miles Address, supra note 4, app. 2.
22. Id.
23. Id.
25. The Justice Department's Antitrust Division has a staff of 442 and an annual budget of over $22 million. The Antitrust Bureau of the Federal Trade Commission has more than 200 lawyers and a budget of more than $20 million. Wood, supra note 4, at 42-43.
27. In enacting the Sherman Act, for example, Congress fully employed its power under the Commerce Clause. See, e.g., South-Eastern Underwriters Ass'n. v. Apex Hosiery Co., 322 U.S. 533, 558 (1944), Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). See also, Stern, supra note 26, at 716 n.2.
28. See, e.g., United States v. Yellow Cab Co., 332 U.S. 218 (1947) (combination to exclude competition in operation of local taxicabs); United States v. Starlite Drive-In, Inc., 204 F.2d 419 (7th Cir. 1953) (price fixing combination of drive-in theatres); St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045 (D. Minn. 1970) (restrictive covenant regarding regional shopping center); United States v. Em-
beyond the practical and budgetary reach of federal enforcement agencies.\textsuperscript{29} As a result, the antitrust implications of personal services, retail marketing, and state public contract bidding have been largely ignored by the federal government.\textsuperscript{30} State enforcement agencies, by contrast, are not restricted to policing only those activities affecting interstate commerce, are closer to the alleged violations,\textsuperscript{31} and may have a greater comparative "stake" in what might seem like a "small" violation to federal authorities.\textsuperscript{32}

State antitrust laws also offer private plaintiffs important strategic advantages not available under the federal laws.\textsuperscript{33} Some state statutes, for example, codify certain per se violations first recognized by federal courts.\textsuperscript{34} Thus, as the federal courts become more restrict-


\textsuperscript{30} The impact of this jurisdictional limitation on enforcement of the Sherman Act is made more significant by the policy of the Justice Department and the FTC not to pursue many cases they judge to have an insufficient effect on interstate commerce. See Rubin, supra note 9, at 700 & n.327.

\textsuperscript{29} See Ewing Address, supra note 18, at 6-7:
Federal resources are simply not sufficient to enable us to investigate and prosecute all of the violations that experience leads us to believe are occurring. The smaller cases—smaller, but no less significant to their victims—require the attention and diligence that state enforcement authorities can bring. The Antitrust Division and the Bureau of Competition of the Federal Trade Commission between us have fewer than 1,000 attorneys, an impossibly small number to police an economy approaching $2 trillion in gross national product.

\textsuperscript{31} See Johnson, The Role of State Antitrust Enforcement in Oregon, 21 Antitrust Bull. 611, 614 (1976).

\textsuperscript{32} This results in greater ease of detection and investigation, see Hanson, & von Kalinowski, The Status of State Antitrust Laws with Federal Analysis, 15 Case W. Res. L. Rev. 9, 31 (1963), less travel time and expense during pretrial and trial proceedings, and a better opportunity to engage in informal remedies. See, e.g., Fellmeth, Antitrust Enforcement by Local Prosecutors: Impediments and Prospects, 14 Cal. W. L. Rev. 1 (1978).

\textsuperscript{33} This is especially true in the area of anticompetitive bidding for public contracts of state and their political subdivisions. See Note, The Present Revival and Future Course of State Antitrust Enforcement, 38 N.Y.U. L. Rev. 575, 585 (1963).

\textsuperscript{34} On the other hand, some attorneys may choose to litigate their antitrust claims in federal court, since the greater case law authority on federal antitrust questions may provide more certainty concerning questions of interpretation. See Granger, A Glimpse at Plaintiff's Remedies Under the Kansas Antitrust Laws, 8 Washburn L.J. 1, 10 (1969); Miles Address, supra note 4, at 9 n.21. Moreover, federal court judges' greater experience with antitrust litigation makes them less susceptible to the significant delaying and hindering tactics available to the defense in an antitrust action. See generally Fellmeth, supra note 31, at 30; Comment, Colorado Antitrust Law: Untied and Drifting, 48 U. Col. L. Rev. 215, 232 (1977).

\textsuperscript{32} See Inman, The Uniform State Antitrust Act: A Review and Commentary,
tive in defining the reach of the doctrine of per se illegality,\textsuperscript{35} certain state antitrust laws may become more advantageous to plaintiffs.\textsuperscript{38} Antitrust litigation in a state court is, in addition, generally shorter in duration than actions brought in federal courts.\textsuperscript{34} Finally, an action under a state antitrust law may partially neutralize an opponent’s greater antitrust experience with federal law.\textsuperscript{38}

As a result of the recent increase in state antitrust activity, as well as the differences between the state and federal laws, the Minnesota legal and business community will become increasingly involved in the intricacies of the Minnesota antitrust law. Equally important to Minnesota lawyers and businessmen is information about present state antitrust enforcement philosophies and procedures. This Note explores both of these areas, and suggests changes in the Minnesota Antitrust Law of 1971.

II. HISTORY OF THE MINNESOTA ANTITRUST LAW OF 1971

The 1891 Minnesota antitrust statute,\textsuperscript{39} even as amended,\textsuperscript{40} pos-

\begin{itemize}
\item \textsuperscript{36} Accord, Maclin Interview, supra note 7.
\item \textsuperscript{37} See generally Miles Address, supra note 4, at 22.
\item \textsuperscript{38} See Granger, supra note 33, at 12.
\item \textsuperscript{39} Act of Apr. 20, 1891, ch. 10, 1891 Minn. Gen. Laws 82 (repealed 1971).
\item \textsuperscript{40} From 1891 to 1971 the Minnesota antitrust act was the subject of several amendments. In 1899, the provisions of the act were elaborated and re-enacted. Act of Apr. 21, 1899, ch. 359, 1899 Minn. Laws 487 (repealed 1971). The 1899 version generalized the definition of what constituted a restraint of trade and added a provision dealing with anticompetitive mergers. It made any violation of the antitrust act a felony punishable by a minimum fine of $500 or a three to five-year imprisonment. Any corporation in violation of the law would suffer mandatory forfeiture of its right to do business. Any contract violating the act was made void. The scope of the act was further extended to any person who either entered “any correspondence, negotiations or agreement in this state” with the purpose of negotiating a contract or combination in violation of the act or who, being a Minnesota resident, entered another state for the purpose of engaging in such negotiations or agreement. Standing to sue was given to any citizen of Minnesota. The duty of enforcement was placed on the state attorney general. The 1891 provision relating to discovery was deleted. In 1901, boycotts were explicitly made illegal, labor organizations were exempted, and provisions were made for recovery of treble damages under the act. The jurisdiction of the district courts and the courts’ subpoena powers under the antitrust law were defined. Act of Apr. 10, 1901,
assessed many of the weaknesses common to most state antitrust statutes. Such deficiencies included mandatory, harsh penalties for all violations,\(^41\) judicial restriction of the statute to purely intrastate transactions,\(^42\) and uncertainty as to whether federal or Minnesota case law controlled the interpretation of the state statute.\(^43\)

In response to these problems, the Attorney General’s office began considering a new antitrust statute as early as 1963,\(^44\) and in 1971 provided the original working draft of the bill that was ultimately adopted.\(^45\) The original draft of the bill was based primarily on the first tentative draft of the *Uniform State Antitrust Act*,\(^46\) although the Illinois Antitrust Act of 1967 was also relied on in drafting

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41. The penalty for individuals was a mandatory fine of not less than $500 or a minimum of three years in a state prison. Domestic corporations were punished with a mandatory charter forfeiture, and the penalty for a foreign corporation was mandatory loss of the privilege to do business. Act of Apr. 21, 1899, ch. 359, § 3, 1899 Minn. Laws 487, amended by, Act of Apr. 18, 1905, ch. 103, § 5169, 1905 Minn. Rev. Laws 1088 (promulgated by Revision Commission authorized to codify extant law by Act of Apr. 11, 1901, ch. 241, 1901 Minn. Laws 383) (repealed 1971). A foreign corporation doing business within Minnesota, however, could be regranted its privilege to do business by filing an affidavit stating the corporation was no longer violating the law. Act of Apr. 22, 1913, ch. 378, 1913 Minn. Laws 527 (repealed 1971). Walter Rockenstein, former Special Assistant Attorney General, Antitrust Division, stated in a 1972 interview that the mandatory forfeiture plus the discrimination against domestic corporations was the major reason for non-enforcement of the pre-1971 statute. Interview with Walter Rockenstein, then Special Assistant Attorney General, Antitrust Division, in St. Paul, Minnesota (Nov. 28, 1972). See also French, supra note 7, at 78.


43. French, supra note 7, at 78.

44. Minnesota Attorney General's Antitrust Division, Memorandum on Revision of Antitrust Laws (unpublished memorandum) (n.d.) (internal references indicate the time frame was 1962-1963) (on file at the Minnesota Law Review).


several important provisions. The Attorney General's office eliminated from the original draft language concerning conspiracies to monopolize and a clause exempting exclusive franchise arrangements from per se scrutiny. The office also conditioned the Attorney General's authority to act on the existence of "reasonable cause." During subsequent senate consideration, further changes were incorporated: provisions making consciously parallel behavior circumstantial proof of an agreement and expressly exempting exclusive dealing arrangements from per se treatment were deleted; general exemptions for electrical cooperatives and collective bargaining were added; willful violations of per se offenses were elevated from misdemeanor to felony status; civil fine minimums were eliminated; and trebling of damages was made mandatory. Finally, the statute's provision for liability of corporate employees was altered to condition liability on "knowing" participation in the acts constituting the violation.

III. INTERPRETING THE MINNESOTA ANTITRUST LAW OF 1971

The proper interpretation of many provisions of the 1971 Minnesota antitrust law remains unsettled. This result is due both to a lack

While the Uniform Draft had not been formally approved by the National Conference of Commissioners on Uniform State Laws, it had, by 1971, received national attention as one of the leading prototypes for state antitrust law. See, e.g., Arnold & Ford, Uniform State Antitrust Act: Toward Creation of a National Antitrust Policy, 15 Case W. Res. L. Rev. 102 (1963); French, supra note 7, at 81. The Uniform State Antitrust Act was finally approved by the National Conference of Commissioners on Uniform State Laws in 1974. This 1974 version, however, differs substantially from the first tentative draft of the Uniform State Antitrust Act and remains largely unadopted by the states. See Miles Address, supra note 3, at 5.


50. Id. at 1060.

51. Id. at 2355-56 (May 7, 1971).

52. Id. at 1060 (Apr. 12, 1971).

53. Id. at 1896 (Apr. 30, 1971).

54. Id. at 1060 (Apr. 12, 1971).

55. Id. at 2356 (May 7, 1971).
of litigated cases and questions as to the weight to be given other authority. Before turning to the provisions of the act itself, it is necessary to examine the availability and utility of various interpretative aids.

A. INTERPRETATIVE AIDS

1. Minnesota Case Law

Minnesota case law provides little enlightenment on antitrust matters. While there has been significant state antitrust activity since 1971, most cases have ended in informal settlements, consent decrees, assurances of discontinuance, or unappealed and unreported district court decisions. Consequently, there is a complete absence of appellate decisions interpreting the new antitrust law.

Pre-1971 Minnesota antitrust decisions are of dubious value in interpreting the present statute. While other states, in order to perpetuate existing local antitrust doctrine, attempted merely to reform state statutes, the Minnesota Legislature adopted an entirely new and comprehensive antitrust statute. Minnesota's refusal to adopt a more limited approach suggests that the new statute was not in-

56. See Maclin Interview, supra note 7.

57. While the antitrust looseleaf services have recently begun more extensive reporting of state antitrust activities, see Miles Address, supra note 4, at 5, the only Minnesota case they have reported is State v. Robert L. Carr Co., [1978-1] Trade Cases ¶ 61,983 (Minn. Dist. Ct., Lyon Cty. Mar. 31, 1978). In that case, the Minnesota Fifth District Court rejected the defendant's motion to dismiss a state criminal action alleging price fixing in public contract bids.

58. In Harris v. Bolin, 310 Minn. 391, 247 N.W.2d 600 (1976), the Minnesota Supreme Court held, apparently under common law, that a forfeiture clause in a profit-sharing plan constituted an unlawful restraint of trade. Minn. Stat. § 325.8013 (1978) was cited only as evidence of a Minnesota policy disfavoring anticompetitive provisions and was not the basis of the decision.

59. See Rubin, supra note 9, at 701.


Even in those areas, however, there are differences. Under the pre-1971 law, for example, forfeiture was automatic upon a finding of guilt, but under the current law, forfeiture can never be used as a penalty until the offender has violated a final judgment or decree. Even then, use of forfeiture is in the discretion of the court. Minn. Stat. § 325.8022 (1978).
tended to be interpreted in light of past state antitrust decisions.\(^{61}\) Even if the pre-1971 decisions are considered as more than merely persuasive authority, few of them offer useful guidance.\(^{62}\) Of those few, some relate to areas exempted from the 1971 law\(^ {63}\) or reach re-

\(^{61}\) Another feasible interpretation for the legislature’s refusal to retain the substantive language of the pre-1971 statute is that it desired to replace the vague and outdated language with more sophisticated and comprehensive terminology. It may be argued that the pre-1971 law had as “its objective the same purposes as the current statute.” Therefore, according to one court, “the rationale of [pre-1971] decision[s] . . . [applies] as well under the current antitrust statute as . . . under the prior antitrust statute.” Anderson v. Marshall Publishing Co., No. CV78064, at 4 (Minn. Dist. Ct., Lyon Cty., Nov. 6, 1978) (memorandum and order).

\(^{62}\) Annotations to Minn. Stat. Ann. § 325.81 indicate that there were 27 decisions “relating” to the pre-1971 law. Only nine of those provide substantive interpretation of that law. See Red Owl Stores, Inc. v. Meat Cutters Local 114, 109 F. Supp. 629 (D. Minn.), appeal dismissed, 205 F.2d 959 (8th Cir. 1953) (complaint that plaintiff’s employees union and plaintiff’s competitors combined to force plaintiff to close at night states a cause of action); State v. Northern Sec. Co., 123 F. 692 (D. Minn. 1903), rev’d on juris. grounds, 136 Minn. 186 (1904) (holding company of two competing railroads that has no power to operate either railroad, not a restraint of trade); Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 182 Minn. 159, 234 N.W. 463 (1931) (contract whereby manufacturer agreed not to solicit contract work in particular locale and to sell exclusively to two local dealers who had a requirements contract with manufacturer held not restraint of trade); Campbell v. Motion Picture Mach. Operators Local 219, 151 Minn. 220, 186 N.W. 781 (1922) (combination to boycott theater is restraint of trade); George J. Grant Const. Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N.W. 1055 (1917) (union strike not restraint of trade); State v. Minneapolis Milk Co., 124 Minn. 34, 144 N.W. 407 (1913) (reasonableness of price no defense to price-fixing); State v. Duluth Bd. of Trade, 107 Minn. 506, 121 N.W. 395 (1909) (setting of commission rates by board of trade not restraint of trade); Espenson v. Koepke, 93 Minn. 278, 101 N.W. 168 (1904) (definition of “article, commodity or utility”); Ertz v. Produce Exch. Co., 82 Minn. 137, 84 N.W. 743 (1901) (association of dealers that controls the delivery of goods by its members is restraint of trade).

Of the remaining 18 cases, five dealt with procedural issues. See In re Otto’s Liquor, Inc., 321 F. Supp. 160 (D. Minn. 1970) (whether injury caused by creditors’ violation of state antitrust law is defense in bankruptcy); AMF Pinspotters, Inc. v. Harkins Bowling Inc., 260 Minn. 499, 110 N.W.2d 348 (1962) (whether statute extends to interstate activities); Miller v. Minneapolis Underwriters Ass’n, Inc., 226 Minn. 367, 33 N.W.2d 48 (1948) (availability of injunctive relief under the statute); State v. Creamery Package Mfg. Co., 115 Minn. 207, 132 N.W. 268 (1911) (whether court has discretion in imposing forfeiture of charter as penalty); Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N.W. 115 (1910) (whether antitrust claim was improperly united with another claim). In the remaining 13 cases, the state antitrust statute was not the basis for decision, see e.g., Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045 (D. Minn. 1970); General Talking Pictures Corp. v. DeMarco, 203 Minn. 28, 279 N.W. 750 (1938); State v. St. Paul Gaslight Co., 92 Minn. 467, 100 N.W. 216 (1904), or was not cited at all. See note 8 supra.

\(^{63}\) See Campbell v. Motion Picture Mach. Operators Local 219, 151 Minn. 220, 186 N.W. 781 (1922); George J. Grant Const. Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N.W. 1055 (1917). Both cases involved allegations that labor union activities were violations of the state antitrust law. Activities by unions are expressly
sults in direct opposition to present provisions.64

2. Federal Antitrust Doctrine

Although federal antitrust case law is extensively developed,65 its ultimate precedential impact on state cases is uncertain. Under the pre-1971 statute, the Minnesota Supreme Court held that because "[t]he Minnesota anti-trust law [was] . . . framed along the lines of the federal statute," the Minnesota courts should "look to the decisions made under [the] federal . . . statutes of a similar character for the principle by which to construe our own statute."66 The Minnesota court, under the pre-1971 law, adhered to this rule of harmonious construction even to the extent of overruling prior Minnesota precedent to reflect changes in federal doctrine.67

The continued application of this rule of conformity is uncertain. First, since the 1971 law may be seen as a clean break from the prior law,68 principles of construction established by prior Minnesota cases arguably have no special value in interpreting the new statute. Second, the rule of uniform construction was premised on the fact that the 1891 act was adopted from the Sherman Act.69 The 1971 law, by contrast, was founded largely on the first tentative draft of the Uniform State Antitrust Act70 and the Illinois Antitrust Act.71 Furthermore, the language of the current Minnesota law differs greatly from the language of the Sherman Act. In Colorado, similar differences in language between the state antitrust law and the Sherman Act led one court to determine that "it would be unwarranted to assume that the [state] . . . legislature intended to adopt the case

64. See State v. Duluth Bd. of Trade, 107 Minn. 506, 121 N.W. 395 (1909), holding that there was no restraint of trade when a board of trade established commission rates for its members and fined those who charged less. The 1971 Act makes such price-fixing illegal per se. MINN. STAT. § 325.8015(1)(1)(a) (1978).
65. See Granger, supra note 33, at 10-11.
67. See Campbell v. Motion Picture Mach. Operators Local 219, 151 Minn. 220, 186 N.W. 781 (1922) in which the court relied on federal decisions to limit State v. Duluth Bd. of Trade, 107 Minn. 506, 121 N.W. 395 (1909), which had held the state antitrust law inapplicable to personal services.
68. See note 61 supra and accompanying text.
70. UNIFORM DRAFT, supra note 46. See text accompanying note 46, supra.
law interpreting the Federal statutes." It is also significant that the Illinois Antitrust Act includes a provision expressly incorporating "the construction given to the Federal Law by the Federal Courts." The original working draft of the 1971 Minnesota antitrust statute also included such a provision. That provision, however, was deleted prior to the bill's introduction, suggesting that the statute's authors did not favor reliance on federal antitrust developments for construction of the new state statute.

There are, on the other hand, compelling reasons for continuing the application of the rule of uniform construction. First, although the 1971 statute was not specifically adopted from the Sherman Act, the new statute is, in large measure, a detailed codification of the federal Sherman Act case law as it existed in 1971. Indeed, the 1971 law mirrors federal substantive antitrust precedent more accurately than did the pre-1971 statute. Since the Minnesota courts found the prior state antitrust law sufficiently similar to the federal law to allow harmonious construction, the current statute should be given similar treatment. In addition, the elimination of the provision expressly incorporating federal interpretation into the current Minnesota statute was not necessarily a rejection of the incorporation principle. The deletion may merely signify that the authors of the 1971 Minnesota act thought that such language was unnecessary in light of the then-existing judicial rule of uniform construction. Moreover, other states incorporate federal antitrust precedent into their statutes without any express legislative directive.

72. Q-T Markets, Inc. v. Fleming Cos. Inc., 394 F. Supp. 1102, 1106 (D. Colo. 1975). This decision, however, has been strongly criticized. See Comment, supra note 33.

73. Ill. Ann. Stat. ch. 38 § 60-11 (Smith-Hurd 1977) ("When the language of this Act is the same or similar to the language of a Federal Anti-trust Law, the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Courts.").

74. See S. Crecelius, supra note 45, at § 27 ("When the language of this Act is the same or similar to the language of a Federal Antitrust Law, the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Court.").

75. See S.F. No. 1200, 67th Minn. Legis., 1971 Sess.

76. See text accompanying notes 70-71 supra.


78. See text accompanying notes 66-67 supra.

79. See text accompanying notes 72-76 supra.

Policy considerations also suggest that interpretation of the state law should be consistent with federal precedent, especially in the area of substantive offenses. Without a rule of uniform construction between state and federal antitrust laws, it may be more difficult for business operations, subject to federal as well as state law, to predict the antitrust implications of their business decisions. Efficient coordination of federal and state enforcement is, in addition, aided by a policy of uniform interpretation.

On balance, the Minnesota antitrust laws should be interpreted uniformly with federal court interpretations of the Sherman Act. Exceptions should be made in three situations. First, if federal interpretation is clearly in conflict with the 1971 law, the state legislature's intent, as expressed in the 1971 law, should prevail. Second, if a Minnesota Supreme Court decision clearly indicates its reasons for following a then-current federal interpretation or consciously departs from the then-current federal interpretation, later differing interpretations by the federal courts should not automatically take precedence. When, however, the Minnesota court makes a ruling primarily on the ground of uniformity with the then-viable federal case law, later differing federal interpretation should be controlling. Finally, the rule of uniform construction should carry substantially less weight with regard to the 1971 law's procedural provisions, since these provisions are significantly different from the analogous federal provisions. Moreover, federal-state incongruence in this area would not generate the same problems in business planning.

3. Other Sources of Interpretation

As previously noted, the 1971 antitrust law is based largely on the first tentative draft of the Uniform State Antitrust Act. Reliance on the comments to the Uniform Draft relating to sections taken from the Draft would thus usually be permissible. Since the Minne-

81. See French, supra note 7, at 72-74; Stern, supra note 26, at 718.
82. See generally Uniform Draft, supra note 46, Prefatory Note 2.
83. The rule of uniform construction should be limited to the case law interpretation of §§ 1 and 2 of the Sherman Act, since provisions analogous to the substantive portions of the Clayton and Federal Trade Commission Acts were not included in the 1971 Minnesota Antitrust Act. See note 126 infra.
84. Uniform Draft, supra note 46. See text accompanying notes 46-47 supra.
85. The Uniform Draft, see note 46, supra, contains a prefatory note and commentary after each section. These provide a detailed explanation of the policy and purpose of the Uniform Draft.
86. Minn. Stat. § 645.22 (1978) states, "Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them."
sota antitrust act was drafted by the Attorney General rather than the legislature, however, there is no assurance that the legislature considered the comments to the *Uniform Draft* when enacting the 1971 bill. The Attorney General's office did, however, consider both the *Uniform Draft* and its comments. The general rule that the understanding of the drafters of a statute should be given authoritative weight, even when the drafters are not legislators, thus mandates that the *Uniform Draft* and its comments be considered in interpreting the Minnesota act.

The Illinois Antitrust Act of 1967 was also the basis for portions of the 1971 Minnesota antitrust law. The general rule is that statutes borrowed from other states incorporate that state's existing judicial interpretation of the statute. The commentary to the Illinois act contains the legislative history of that act and the Illinois advisory committee comments. The Minnesota court has deemed such legislative commentary important in determining the interpretation to be accorded the state's statutes. Hence, the comments relating to cop-
ied Illinois provisions should be considered in resolving interpretative problems.\footnote{94}

B. THE PROVISIONS OF THE 1971 LAW

The Minnesota Antitrust Law of 1971 is composed of eighteen separate sections. The provisions deal with the jurisdiction and scope of the act,\footnote{95} definition of offenses,\footnote{96} exemptions,\footnote{97} civil remedies,\footnote{98} criminal sanctions,\footnote{99} enforcement authority,\footnote{100} statute of limitations,\footnote{101} and venue.\footnote{102} Each area can be examined in terms of general content, applicable specific sources of interpretation, and special problems of construction.

1. Jurisdiction and Scope

The threshold jurisdictional limitation on state antitrust actions is the requirement that the state have personal jurisdiction over all parties.\footnote{103} Additional jurisdictional boundaries of the Minnesota antitrust law are defined by sections 325.8016\footnote{104} and 325.8028.\footnote{105} Section

\begin{itemize}
  \item \footnote{94} Pre-1971 Illinois decisions relating to provisions of the Illinois antitrust law that are duplicated in the Minnesota law are also of interpretative value. \textit{Cf.} Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W.2d 292 (1969) (Minnesota court relied on Illinois court interpretation of Illinois statute that was the basis for Minnesota's long arm statute). Post-1971 Illinois decisions, of course, are of less value. \textit{Cf.} State v. Ritschel, 220 Minn. 578, 585-87, 20 N.W.2d 673, 677-78 (1945) (New York decision rendered after Minnesota's adoption of a similar municipal corporation statute held not controlling).
  \item \footnote{95} \textit{Minn. Stat.} §§ 325.8012, 8016, 8028 (1978).
  \item \footnote{96} Id. §§ 325.8013-.8015.
  \item \footnote{97} Id. § 325.8017.
  \item \footnote{98} Id. §§ 325.8018(1), 8019, 8020, 8022, 8023.
  \item \footnote{99} Id. § 325.8018(2).
  \item \footnote{100} Id. §§ 325.8021, 8025.
  \item \footnote{101} Id. § 325.8024.
  \item \footnote{102} Id. § 325.8026.
  \item \footnote{103} Id. § 325.8027.
  \item \footnote{104} See id. § 543.19; see generally Shaffer v. Heitner, 433 U.S. 186, 207 & n.23 (1977) (test for applying jurisdiction is same for \textit{in rem} as for \textit{in personam}; the court must have "jurisdiction over the interests of persons in a thing" hence "[a]ll proceedings . . . are really against persons.").
  \item \footnote{105} \textit{Minn. Stat.} § 325.8016 (1978):
    Sections 325.8011 to 325.8028 apply to:
    \begin{itemize}
      \item (a) any contract, combination, or conspiracy when any part thereof was created, formed, or entered into in this state; and
      \item (b) any contract, combination, or conspiracy, wherever created, formed, or entered into; any establishment, maintenance, or use of monopoly power; and any attempt to establish, maintain, or use of monopoly power; whenever any of the foregoing affects the trade or commerce of this state.
    \end{itemize}
  \item \footnote{106} Id. § 325.8028 ("No action under sections 325.8011 to 325.8028 shall be
325.8016 "in effect, conditions the application of the Act upon some reasonable connection with the prosecuting state." It is clear from subsection (a) of section 325.8016 that such a "connection" with Minnesota is formed if a contract or conspiracy is entered into within the territorial boundaries of the state. Slightly more ambiguous is the subsection (b) definition of a "reasonable connection" as conduct that "affects the trade or commerce of this state." Although the necessary level of effect on Minnesota trade and commerce is uncertain, reasonable construction of those words would suggest that conduct sufficiently affects trade or commerce if it causes some identifiable change in economic activity in Minnesota or economically injures a person in Minnesota.

Section 325.8028 ensures, however, that state jurisdiction will not depend on whether the alleged illegal activity is intrastate or interstate in nature. The provision is consistent with recent authority suggesting that state antitrust laws are not preempted by federal law and that states may exercise concurrent jurisdiction with the federal government. Despite the broad sweep of the language in section 325.8028, however, there still may be federal constitutional limitations as to the burden the 1971 law may place on interstate commerce.

barred on the ground that the activity or conduct complained of in any way affects or involves interstate or foreign commerce.

107. UNIFORM DRAFT, supra note 46, at § 5, Comment. The Illinois Antitrust Act includes no such provision.

108. See MINN. STAT. § 325.8016(a) (1978).

109. See id. § 325.8016(b).

110. An example of such an effect would be the purchase of a foreign commodity in Minnesota that carries the effect of an antitrust violation with it, such as higher prices. This situation is analogous to products liability cases in which the injection of defective goods into a state is sufficient to uphold jurisdiction. See id. § 543.19(1)(d)(2).

111. Id. § 325.8028; see note 106 supra.


114. See, e.g., Flood v. Kuhn, 407 U.S. 258, 282-84 (1972) (Court refused to
The activities covered by the 1971 law are delineated in section 325.8012, which defines the key terms appearing in the other provisions of the act. The definitions given "commodity," "service," and "trade and commerce" make it clear that all activities related allow application of a state antitrust law to baseball's reserve system, citing the state regulation's conflict with federal policy, the need for national uniformity in the operation of the reserve system, and the burden on interstate commerce).

115. MINN. STAT. § 325.8012 (1978) provides,

Subdivision 1. Unless a different meaning is clearly indicated by the context, for the purposes of sections 325.8011 to 325.8028, the terms defined in this section have the meanings ascribed to them.

Subd. 2. "Commodity" means any goods, merchandise, wares, produce, choses in action, land, article of commerce, or any other tangible or intangible property, real, personal, or mixed for use, consumption, enjoyment, or resale.

Subd. 3. "Service" means any kind of activity performed in whole or in part for financial gain.

Subd. 4. "Contract, combination, or conspiracy" means any agreement, arrangement, collusion, or understanding. "Contract" includes a purchase, a contract to purchase, a sale, a contract to sell, a lease, a contract to lease, a license, or a contract to license. "Combination" includes a trust, common selling or purchasing agent, pool, or holding company.

Subd. 5. "Person" means any individual, corporation, firm, partnership, incorporated and unincorporated association, or any other legal or commercial entity.

Subd. 6. "Trade or commerce" means any economic activity of any type whatsoever involving any commodity or service whatsoever.

116. Id. at § 325.8012(2). This definition duplicates the Uniform Draft, supra 46, at § 1(1). The comment, to this section states, "This statute is intended to cover all subjects of commerce. The purpose of this definition is to assure that all non-service subjects of commerce are included."

117. MINN. STAT. § 325.8012(3) (1978). This subsection is taken from Ill. Ann. Stat. ch. 38, § 60-4 (1977). The Historical and Practical Notes to section 60-4 of the Illinois Act state, "The broad definition of 'service' also makes it clear that . . . all types of service industries are to be subject to the provisions of the act." Tone & Stifler, Historical and Practical Notes—1967, appended to Ill. Ann. Stat. ch. 38, § 60-4 (1977). The Uniform Draft, see note 46, supra, did not define "service." MINN. STAT. § 325.8012(3) (1978), eliminates one of the seeming weaknesses of the prior law, which related only to "article[s] of trade" and left out the important area of services. Service-related industries accounted for 42% of the United States' gross national product in 1970. Almstedt & Tyler, State Antitrust Laws: New Directions in Missouri, 39 Mo. L. Rev. 489, 496 (1974). The court, however, in Campbell v. Motion Picture Mach. Operators Local 219, 161 Minn. 220, 231-32, 186 N.W. 781, 784-85 (1922), did interpret "article of trade" to include labor union activity and thus, by analogy, services. Moreover, while the "restraint[s] of trade" section of the pre-1971 law applied only to "article[s] of trade, manufacture, or use," the merger or "consolidation" segment of § 325.81(1) did relate to services.

118. MINN. STAT. § 325.8012(6) (1978) is taken in substance from § 1(6) of the Uniform Draft. The commentary to the section states, "The purpose of this definition is to guarantee coverage of all subjects of commerce when the Act uses 'trade or commerce' rather than 'commodity or service.'" Uniform Draft, supra note 46, at § 1(5), Comment.
to achieving economic gain within the competitive marketplace and not specifically exempted by section 325.8016 are covered by the state antitrust law. The definition of "person" indicates that the law regulates, and may be invoked by, all legal entities including a state and its political subdivisions. Finally, the definition assigned to "contract, combination, or conspiracy" specifically includes all collusive arrangements, regardless of form.

Consignment transactions, however, appear to be exempted from treatment as a "contract, combination, or conspiracy." This exclusion is significant. For example, if two manufacturers engage in vertical price fixing but one firm distributes through consignment while the other uses a sale-resale system, the latter may be found in violation of section 325.8013 while the former will escape liability. Such an interpretation, however, is contrary to current federal precedent and to sound policy, as it places form over substance.

119. This extremely broad coverage is similar to the federal law's scope. See generally United States v. Shubert, 348 U.S. 222, 226-27 (1955).
120. Minn. Stat. § 325.8012(5) (1978). This definition is also taken from § 1(4) of the Uniform Draft. The attached commentary states, "This is intended to be inclusive of all legal entities." Uniform Draft, supra note 46, at § 1(4), Comment.
122. Although Minn. Stat. § 325.8012(4) (1978) makes no reference to consignment transactions, that provision is taken directly from § 1(2) of the Uniform Draft. The comment reads:

This definition is designed to include within the Act all collusive arrangements regardless of form, sale, contract to sell, purchase, contract to purchase, lease, contract to lease, license, contract to license, trust, common selling or purchasing agent, pool, or holding company. Consignment transactions have not been included; a principal is at liberty to control the price and other terms upon which his agent may dispose of his commodities or services. Uniform Draft, supra note 46, at § 1(2), Comment.

123. Vertical price fixing occurs when a seller and a buyer agree to set the price at which the buyer may resell the product. L. Sullivan, Handbook of the Law of Antitrust 277 (1977). Such an agreement is illegal under Minn. Stat. § 325.8013 (1978).


2. *Substantive Provisions*

The Minnesota Antitrust Law of 1971 contains three substantive provisions.\(^\text{128}\) Section 325.8013\(^\text{127}\) establishes a general “rule of reason” standard of legality for all transactions between two or more persons.\(^\text{128}\) Section 325.8015 specifies that certain transactions between two or more persons are per se illegal.\(^\text{129}\) Finally, section 325.8014 prohibits unilateral activities that tend toward monopolization.\(^\text{130}\)

a. *Unreasonable Restraints of Trade*

Section 325.8013,\(^\text{131}\) the “rule of reason” provision, is taken directly from section 2 of the first tentative draft of the *Uniform State Antitrust Act*.\(^\text{132}\) The ultimate source of the language, however, is the basic federal antitrust statute, section 1 of the Sherman Act.\(^\text{133}\) Given


There is, however, no provision in the Minnesota Act parallel to §§ 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14, 18 (1976), or § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45 (1976). These federal statutes were adopted to supplement areas of economic behavior Congress felt were inadequately covered by the Sherman Act, specifically tying arrangements, exclusive dealing contracts, and mergers. See L. Sullivan, supra note 123, at 432-34. While all such behavior would also be illegal under the Sherman Act if it caused a large enough restraint of trade, the additional statutes were designed to stop such conduct at a much earlier stage. Since Minnesota’s law is similar to the Sherman Act but does not include provisions analogous to the Clayton Act or the Federal Trade Commission Act, tying arrangements, exclusive dealing contracts, and mergers will have to reach the more severe level needed for Sherman Act notice before they will be considered to be violations of the Minnesota antitrust statute.

\(^{127}\) Minn. Stat. § 325.8013 (1978) (“A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful.”).

\(^{128}\) See text accompanying notes 136-40 infra.

\(^{129}\) See note 146 infra. Per se illegality under the Act is discussed at text accompanying notes 146-97 infra.

\(^{130}\) See text accompanying note 198 infra.

\(^{131}\) See note 127 supra.

\(^{132}\) Uniform Draft, supra note 46, at § 2.

\(^{133}\) 15 U.S.C. § 1 (1976) (“Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .”). The comment to the Uniform Draft supra note 46, at § 2 provides:

This section parallels section 1 of the Sherman Act and establishes a general standard of legality. The word “unreasonable” has been inserted to indicate that the Rule of Reason is to govern the construction of the Act. The adoption of the language of the Sherman Act will provide needed flexibility and it will also make available to state courts the entire body of federal precedent.
the Sherman Act section 1 precedent, and the likelihood that section 325.8013 will be interpreted in light of such precedent, the broad outlines of Minnesota's "rule of reason" standard may be sketched.

The threshold requirement for application of section 325.8013 is that the challenged activity must involve a "contract, combination, or conspiracy between two or more persons." Federal decisions have indicated that agreements need not be directly proven but may be inferred from the behavior of the alleged collaborators. Evidence that the Minnesota law follows this approach can be found in the broad definition given to "contract, combination, or conspiracy." The Minnesota Legislature, however, did not make "proof of consciously parallel business behavior" circumstantial proof of a combination. Federal decisions suggest, however, that such evidence will be circumstantial proof of a combination in situations where it is unlikely that the consciously parallel behavior resulted from independent business decisions.

The second requirement imposed by section 325.8013 is that the agreement or combination unreasonably restrain "trade or commerce." Because almost every contract restricts at least one party's economic behavior, trade or commerce will be affected in nearly every case. "Unreasonable" is the critical term; it indicates that the judicial concept of "the rule of reason" governs this section. Unfortunately, the concept of "rule of reason" is not suited to precise definition. In general, "rule of reason" implies inquiry into three

134. See text accompanying notes 65-83 supra.
135. MINN. STAT. § 325.8013 (1978).
138. An example of this activity would be identical pricing behavior by competing firms where each firm realizes the group's uniformity and his role in that uniformity. See American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).
139. Section 17 of the House counterpart to the bill that became law, H.F. No. 1475, 67th Minn. Legis., 1971 Sess., contained a provision stating, "Proof of consciously parallel business behavior is circumstantial evidence of a prohibited contract, combination, or conspiracy." The Senate never considered this bill, see [1971] Minn. Journal of the Senate 4019 (Senate record of House bills), and it died in the House. See [1971] Minn. Journal of the House 2768-69 (May 11, 1971) (last action by the House); id. at 4476 (House record of House bills indicating no subsequent proceedings).
140. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954) (mere parallel action of film distributors in uniformly refusing first-run films to a suburban theatre not proof of conspiracy as business reasons existed that would allow each distributor to make the decision independently).
141. See generally Standard Oil Co. v. United States, 221 U.S. 1, 5-6 (1911).
142. See UNIFORM DRAFT, supra note 46, at § 2, Comment.
143. The federal "rule of reason" standard was established in Standard Oil Co. v. United States, 221 U.S. 1 (1911).
interrelated factors: "(1) the effects of the conduct in question, both in its restraint on competition and in achieving a more efficient mode of performing desired economic functions, (2) the power of the parties in the market which they serve, and (3) the motives underlying their conduct." An action brought under a "rule of reason" standard thus entails detailed factual and theoretical inquiry and analysis.

b. Per Se Violations

Federal law has long recognized a major exception to the rule of reason:

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed . . . more certain . . . but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

The concept of per se violation theoretically allows the court to forego any inquiry into the actual anticompetitive effects of the alleged violations, the possible counter-balancing pro-competitive effects of the activity at issue, or the actual, resultant public harm. Proof of a certain type of behavior allows the conclusive presumption of an antitrust violation. Thus, the difference between the "rule of rea-

The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed . . . to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

Id. at 63-64.

144. H. BLAKE & R. PITOPSKY, CASES & MATERIALS IN ANTITRUST LAW 492 (1967).
145. See Stern, supra note 26, at 728.

It should be noted that most horizontal agreements are governed by the per se provisions of § 325.8015, the primary application of § 325.8013 will be to vertical restraints and to mergers. See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

147. See generally L. SULLIVAN, supra note 123, at 182-86, 192-94.
son” and per se standards is “whether the judicial investigation should consider all possibly relevant facts or whether certain factors simply may be ignored or presumed to exist.”

Certain activities are expressly declared to be per se illegal under section 325.8015 of the Minnesota antitrust law. Subdivision one of the section codifies many of the offenses traditionally given per se treatment under section 1 of the Sherman Act: horizontal price and production fixing, horizontal market allocation, bid rigging, and collusive refusals to deal. Subdivision two of section 325.8015 deals with the use of boycotts in a politically or socially discriminatory manner.

(1) Traditional Per Se Violations

Section 325.8015, subdivision 1(1), codifies three offenses: horizontal price fixing, horizontal production fixing, and horizontal market allocation. Inclusion of the language “between two or more persons in competition” indicates that vertical agreements or restraints are excluded from the reach of this subsection.

Subsection (1)(a) codifies the prohibition of one of the earliest and most widely recognized per se antitrust violations: price fixing between competitors. The Supreme Court has dealt harshly with such arrangements, holding that neither the reasonableness of the resulting price nor the benefit to the public are mitigating factors. If a horizontal agreement results in “interference with the setting of price by free market force,” it is illegal price fixing.

Subsection (1)(b) prohibits agreements between competitors to limit production. Since production fixing is an indirect method of

149. H. BLAKE & R. PTROFSKY, supra note 144, at 492.
150. MINN. STAT. § 325.8015 (1978).
151. See text accompanying notes 156-64 infra.
152. See text accompanying notes 165-69 infra.
153. See text accompanying notes 170-71 infra.
154. See text accompanying notes 172-87 infra.
155. See text accompanying notes 188-93 infra.
156. MINN. STAT. 325.8015(1)(1) (1978).
157. Id.
158. The term “vertical” signifies a relationship between a buyer and a seller. See L. SULLIVAN, supra note 123, at 376.
162. A horizontal agreement is a combination between competitors. See L. SULLIVAN, supra note 123, at 213.
price control, this subsection merely details another form of price fixing.

Subsection (1)(c), in accordance with federal doctrine, prohibits agreements between competitors not to compete with each other in certain designated product or geographic markets. One special problem with the prohibition of horizontal market allocation agreements arises in connection with covenants not to compete. Covenants not to compete are commonly used in the sale of an established business to ensure that the purchaser's interest in "customer good will" is not infringed upon by the seller. While covenants not to compete are clearly a type of market allocation agreement, a reasonable construction of the statute would exempt covenants not to compete from per se treatment, subjecting them instead to the "rule of reason" standard. Section 1 of the Sherman Act has been interpreted in substantial accord with this rule. Moreover, commentary to the Illinois antitrust provision that parallels section 325.8015, subdivision 1(1)(c) of the Minnesota law specifically exempts covenants not to compete from per se treatment, preferring to treat such agreements under the "rule of reason." Although the Minnesota provision has not been interpreted by the courts, Minnesota cases, both before and after 1971, indicate that covenants not to compete should receive "rule of reason" scrutiny.

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166. See generally L. Sullivan, supra note 123, at 213-29.


It seems clear, therefore, that truly ancillary covenants, such as a seller's reasonably limited agreement not to compete in connection with the sale of a business, would not be proscribed by the "per se" provisions of Section 3(1) relating to allocation of customers or territories. All covenants or restrictions which are truly ancillary to an otherwise proper business purpose may have their legality tested under the unreasonable restraint of trade provisions in Section 3(2) and if found to be truly ancillary and reasonably limited should be held lawful under that section.

169. See, e.g., Bennett v. Storz Broadcasting Co., 270 Minn. 525, 533-34, 134 N.W.2d 892, 898-99 (1965); Naftalin v. John Wood Co., 263 Minn. 135, 116 N.W.2d 91 (1962) (by implication). Two cases involving covenants not to compete have been decided by the Minnesota Supreme Court since 1971. See Bess v. Bothman, 257 N.W.2d 791, 794-95 (Minn. 1977); Harris v. Bolin, 310 Minn. 391, 247 N.W.2d 600 (1976). In both these cases, the court relied on a reasonableness test, making no mention of Minn. Stat. § 325.8015(1)(1)(c) (1978).
Section 325.8015, subdivision 1(2), declares bid rigging to be per se illegal, essentially defining another type of price fixing. Though overlapped by subsection 1, subsection 2 serves as an extra warning of the illegality of this type of price fixing and may serve as notice that the state will probably emphasize enforcement in this area. This subsection does not require bid rigging agreements to be horizontal. Thus, bid rigging agreements between bidders and public officials also appear to be per se illegal.

Section 325.8015, subdivision 1(3), makes agreements to refuse to deal with a certain person or class of persons per se illegal. This provision substitutes well-established Sherman Act doctrine for

170. Minn. Stat. § 325.8015(1)(2) (1978) declares the following to be unreasonable and unlawful restraints of trade:

A contract, combination, or conspiracy between two or more persons whereby, in the letting of any public contract, (a) the price quotation of any bid is fixed or controlled, (b) one or more persons refrains from the submission of a bid, or (c) competition is in any other manner restrained.

171. The only case involving § 325.8015(1)(2), is Anderson v. Marshall Publishing Co., No. CV78064 (Minn. Dist. Ct., Lyon Cty., Nov. 6, 1978), in which all the newspapers in Lyon County combined to submit a single bid to the Board of County Commissioners for publication of the county’s legal notices. The bid was at the maximum rate allowed by law. A private citizen brought an action charging that this was bid rigging in violation of § 325.8015(1)(2). The district court dismissed the action, relying on Brainerd Dispatch Newspaper Co. v. County of Crow Wing, 196 Minn. 194, 264 N.W. 779 (1936). The Brainerd Dispatch case held that the pre-1971 antitrust law was not applicable to a fact situation identical to the one at issue in Anderson. The Anderson court noted that although the antitrust statute had been “amended” since 1936, the rationale of the 1936 decision nevertheless applied. The court further noted that the “bid rigging” at issue was reasonable because of its complete openness, the freedom of choice the county had in accepting the single bid, and the fact that this combination of newspapers would permit a much larger coverage than would a single newspaper.

The Anderson decision may be strongly criticized. The court in Brainerd Dispatch decided the case under common law, ruling that the pre-1971 antitrust statute was not applicable to this form of bid rigging. 196 Minn. at 198, 264 N.W. at 781. Although such an approach is defensible under the pre-1971 law, which included only a “rule of reason” provision and did not mention bid rigging, the new antitrust statute specifically deals with bid rigging, making it per se illegal. Minn. Stat. § 325.8015(1)(2) (1978). The Anderson court’s reliance on prior common law was thus erroneous.

The Anderson court, erroneously reading Brainerd Dispatch as interpretive of the provisions of the pre-1971 statute, compounded this error by determining that Brainerd Dispatch remained authoritative after passage of the new statute. See notes 59-61 supra and accompanying text. In any event, as noted above, the 1971 statute plainly states that bid rigging is per se illegal.

172. Minn. Stat. § 325.8015(1)(3) (1978) declares as unreasonable restraints of trade “A contract, combination, or conspiracy between two or more persons refusing to deal with another person, except a refusal to deal by associations, trading boards, or exchanges when predicated upon a failure to comply with rules of membership.”

prior Minnesota law that appears to have allowed such combinations in a line of cases described as "the most numerous, and the least clear antitrust cases decided under the [pre-1971 Minnesota antitrust] statute . . . ." 174

Subsection (3) does not specify that parties to boycott agreements must be "in competition." This omission implies that the agreements outlawed by the provision include noncommercial boycotts,175 as well as vertical boycotts, such as exclusive franchises,176 and exclusive dealing or requirements contracts.177 This construction is strengthened by the fact that language exempting such vertical agreements from per se treatment was deleted from the original draft178 and from a House counterpart to the Senate bill that became law.179 Interpreting the 1971 statute to find exclusive franchises, exclusive dealing arrangements, and requirements contracts per se illegal makes Minnesota law more rigorous than federal antitrust law,
which exempts such vertical boycott agreements from per se treatment. 180

Subsection (3) does, however, except associations from per se treatment when their refusal to deal is prompted by the boycotted person’s unwillingness to comply with the association’s rules of membership. 181 This exemption is in harmony with federal doctrine. 182 Associations may, however, be held to a “rule of reason” test 183 to ensure their rules of membership are reasonable in light of valid association goals. 184

Section 325.8015, subdivision 1, as a whole, appears to be an attempt to codify most 185 of the Sherman Act section 1 per se offenses as they existed in 1971. The specificity of this subdivision, however, will tend to “freeze” the listed practices as a minimum definition of the per se standard in Minnesota. 186 Given the United States Supreme Court’s recent tendency to restrict the range of what was in 1971 considered per se illegal under federal law, 187 such a “freeze” may mean that the Minnesota law will be relatively more strict than federal antitrust doctrine.

(2) Discriminatory Boycotts

Section 325.8015, subdivisions 2 and 3, 188 were added to the Minnesota antitrust law in 1977189 in an apparent response to Arab-induced boycotting of certain Jewish businesses. 190 The subdivisions prohibit exclusion of a business or person from a commercial transaction on the basis of widely recognized categories of discrimination or because that business or person has done business with a particular

185. See text accompanying notes 151-54 supra, and note 195 infra.
186. See Rubin, supra note 9, at 725. That minimum definition is subject to expansion by § 325.8013. See text accompanying notes 194-97 infra.
190. Maclin Interview, supra note 7.
country. The statute also goes to extensive lengths to make clear that mere compliance with or acquiescence to a demand by another to participate in such discrimination is per se illegal. Given possible preemption by a similar congressional act, the significance of section 325.8015, subdivisions 2 and 3, is likely to be slight.

c. The Relationship Between the "Rule of Reason" and "Per Se" Provisions

As noted, section 325.8015 is essentially a codification of the various types of activities the federal courts have labeled per se illegal under section 1 of the Sherman Act. Certain activities that have achieved per se status under Sherman Act section 1, however, are not included under section 325.8015. This raises a question as to whether these activities should receive per se or "rule of reason" treatment under section 325.8013. Inclusion of the language "[w]ithout limiting section 325.8013 . . ." as a preface to section 325.8015 indicates that behavior not included in section 325.8015 may still receive per se treatment under section 325.8013.

A reasonable construction of section 325.8013 is that it is fully extensive with Sherman Act section 1, establishing the "rule of reason" as the general standard of legality for agreements or combinations that affect trade or commerce. Certain behavior may also be given per se treatment under section 325.8013 in harmony with cur-


192. Id.


194. See text accompanying notes 151-54 supra.


196. MINN. STAT. § 325.8015 (1978).

197. A counter-argument is that the use of the term "unreasonable" in § 325.8013, a term not found in Sherman Act § 1, 15 U.S.C. § 1 (1976), indicates that this section is restricted to "rule of reason." This inference is strengthened by the express enumeration of explicit per se violations in the separate section of the 1971 law, § 325.8015.
rent federal decisions. Section 325.8015 serves only to ensure that its enumerated activities will always receive per se scrutiny regardless of federal decisions under the Sherman Act.

d. Monopolization

Section 325.8014 establishes the standard of legality for conduct tending toward or accomplishing monopolization:

The establishment, maintenance, or use of, or any attempt to establish, maintain, or use monopoly power over any part of trade or commerce by any person or persons for the purpose of affecting competition or controlling, fixing, or maintaining prices is unlawful.198

The provision finds its immediate source in section 3(a) of the Uniform Draft.199 Its ultimate source, however, is section 2 of the Sherman Act200 and therefore the federal decisions construing section 2 provide the best guide for interpretation.201

Under federal interpretation of the Sherman Act, proof of the offense of monopolization has three elements. First, the relevant market must be delineated.202 Second, the defendant must possess monopoly power in that relevant market.203 Third, there must have been

198. MINN. STAT. § 325.8014 (1978).
199. UNIFORM DRAFT, supra note 46, at § 3(a), Comment. The commentary provides, Subsection (a) establishes a more definite standard of legality for the offense of monopolization. Monopoly power is of course required, but in place of the additional federal requirement of "deliberateness" the statute substitutes a more definite requirement of purpose to exclude competition or control, fix, or maintain prices. This test, though perhaps narrower than the federal, should be more easily administered.
200. 15 U.S.C. § 2 (1976): Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
201. See text accompanying notes 65-83 supra.
202. The relevant market is the market in which the product alleged to be monopolized competes. The market consists of both geographic and product segments. The relevant geographic market is the "area in which the seller operates, and to which the purchaser can practically turn for supplies." Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). The relevant product market is a function of the interchangeability of the product at issue and other closely related products. See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-95 (1956). Note that the smaller the defined relevant market, the easier it is to find monopoly power.
203. Monopoly power is "the power to control prices or exclude competition."
a "deliberateness" in the acquisition or maintenance of that monopoly power, commonly referred to as a "general intent" to monopolize. Although section 325.8014 does not explicitly require the delineation of a relevant market and a showing of monopoly power in that market, application of the doctrine of uniform construction requires constructive incorporation of both these federal requisites. In place of the federal deliberateness requirement, however, the Minnesota provision expressly substitutes the more definite and restricted requirement of a "purpose of affecting competition or controlling, fixing, or maintaining prices." Section 325.8014 thus appears to establish a stricter standard of illegality for the offense of monopolization than does section 2 of the Sherman Act.

The offense of attempted monopolization in Minnesota more closely parallels the federal law. Under section 2 of the Sherman Act, an illegal attempt to monopolize is shown by delineation of the relevant market, proof of specific intent to monopolize that relevant market, and evidence of a dangerous probability of success in such monopolization. The Minnesota law seems to require proof of the same three elements.

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). The firm's percentage share of the relevant market is a useful guide. Although "[ninety] percent . . . is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." United States v. Aluminum Co., 148 F.2d 416, 424 (1945).

204. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). Proof of that "deliberateness" or general intent may be shown in three ways. First, proof that the monopoly power was acquired or maintained by the use of means that if done in combination with others would constitute a violation of Sherman Act § 1 is sufficient. Second, it is sufficient to show monopoly power plus use of any exclusionary practice even if it is not technically a restraint of trade. Finally, proof of monopoly power and a failure by the possessor of that power to show the power was solely obtained or maintained by legitimate business activity aimed at short-term profit maximization is sufficient evidence of a "general intent" to monopolize. See United States v. United Shoe Mach. Corp., 110 Supp. 295, 342 (D.C. Mass. 1953).

205. See text accompanying notes 65-83 supra. See also Uniform Draft, supra note 46, at § 3(a), Comment.

206. See note 204 supra.

207. MINN. STAT. § 325.8014 (1978).


209. Although § 325.8014 expressly addresses the element of intent, the Minnesota statutory definition is similar to the definition of specific intent given by federal courts in attempted monopolization cases. See Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (specific intent to monopolize is not merely the general intent to do the acts complained of, but a specific intent to destroy competition or achieve monopoly). In addition, absence of express reference in § 325.8014 to the requirements of a relevant market and dangerous probability of success in monopolization indicate federal precedent in these areas should be followed. See text accompanying notes 65-83 supra.
Section 2 of the Sherman Act also makes it an offense to conspire to monopolize. The Act states that it is illegal to "combine or conspire with any other person or persons, to monopolize." The Uniform Draft section from which section 325.8014 was taken includes similar language. This language, however, was not included in the Minnesota statute, indicating that the legislature did not intend to include an offense of conspiracy to monopolize within section 325.8014.

3. Exemptions

Traditionally, certain activities have been exempted from federal antitrust scrutiny on the assumption that noncompetitive behavior in certain segments of the economy is in the public interest. The Minnesota statute similarly limits application of its substantive pro-


212. UNIFORM DRAFT, supra note 46, at § 3(b) ("A combination or conspiracy between two or more persons to establish monopoly power over any part of trade or commerce is unlawful.").

213. One may argue, however, that the inclusion of the words "by any person or persons," MINN. STAT. § 325.8014 (1978) (emphasis added), was meant to allow an action for conspiracy to monopolize. The original draft of the 1971 antitrust bill followed the Uniform Draft's format of having two subsections within the section on monopolization. See S. Crecelius, supra note 45, at § 4. The first subsection related to unilateral conduct and the second dealt with conduct by two or more entities. See note 212 supra. When introduced, however, the bill contained only the first Uniform Draft subsection and, the phrase "[t]he establishment, maintenance, or use of, monopoly power over any part of trade or commerce by any person," had been changed to read "by any person or persons." S.F. No. 1200, § 4, Minn. State Senate, 1971 Sess. This suggests that the introduction of the words "or persons" was intended to incorporate the deleted concept of "conspiracy to monopolize."

214. Initial reasons for allowing or encouraging cartelization include a judgment that competition will not work in a certain area, a policy decision that cartelization will transfer economic power into a beneficial group, or a decision that cartelization will facilitate greater stability. It should be noted, however, that exemptions may continue to exist long after the policy reasons for their creation have disappeared. L. SULLIVAN, supra note 123, at 717-19.

The federal exemptions for labor organizations and agricultural cooperatives are intended to shift power to beneficiary groups and, perhaps, to enhance stability. Id. at 718. The federal exemptions for governmental actions is predicated on the conviction that direct action by federal or state government that is inconsistent with antitrust doctrine represents a sovereign decision that the role of competition should, in a particular instance, be displaced. Id. at 719. A collective bargaining exemption reflects the national policy of encouraging collective bargaining. Id. at 723.
visions through exemptions provided by section 325.8017.\textsuperscript{215} The section is divided into three subdivisions: the first excepts "labor, electrical, agricultural, or horticultural organizations;\textsuperscript{216} the second exempts governmentally regulated activity;\textsuperscript{217} and the third exemption deals with collective bargaining.\textsuperscript{218} The language of these exemptions is often vague and thus vulnerable to broad interpretation. In light of the overriding policy of antitrust law of promoting competition,\textsuperscript{219} however, these exemptions should be given strict construction.\textsuperscript{220}

a. Labor, Agricultural, and Electrical Organizations

Section 325.8017, subdivision 1, exempts the activities of labor, agricultural, electrical, and horticultural non-profit organizations "instituted for the purpose of mutual help, and not conducted for profit.\textsuperscript{221} The state exemption for labor organizations, taken largely from section 6 of the Clayton Act,\textsuperscript{222} may be superfluous since the state's authority to regulate labor organizations is already sharply limited.\textsuperscript{223}

\textsuperscript{215} \textit{Minn. Stat.} § 325.8017 (1978).
\textsuperscript{216} \textit{Id.} § 325.8017(1).
\textsuperscript{217} \textit{Id.} § 325.8017(2).
\textsuperscript{218} \textit{Id.} § 325.8017(3).
\textsuperscript{219} \textit{Uniform Draft, supra} note 46, Prefatory Note.
\textsuperscript{220} \textit{See} United States v. First City Nat'l Bank, 386 U.S. 361 (1967).
\textsuperscript{221} \textit{Minn. Stat.} § 325.8017(1) (1978):

\begin{quote}
Nothing contained in sections 325.8011 to 325.8028, shall be construed to forbid the existence or operation of labor, electrical, agricultural, or horticultural organizations instituted for the purpose of mutual help, and not conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the provisions of sections 325.8011 to 325.8028, when lawfully carrying out the legitimate objects thereof.
\end{quote}

\textsuperscript{222} \textit{Id.} Section 6 of the Clayton Act, 15 U.S.C. § 17 (1976), provides, in part, Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof be held or construed to be illegal combination or conspiracies in restraint of trade, under the antitrust laws.


\textsuperscript{223} \textit{See, e.g.}, Association of Street Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Council v. Garmon, 389 U.S. 236 (1969); Local 24, Int'l Bhd. of Teamsters
The state exemption for "agricultural or horticultural organizations" also finds its source in section 6 of the Clayton Act as well as section 1 of the Capper-Volstead Act. Under federal law, agricultural cooperatives are allowed the right to jointly process, handle, and market their products, but do not enjoy immunity when they combine with groups that do not qualify for the agricultural cooperative exception. This interpretation is consistent with the language of section 325.8017, subdivision 1.

The Minnesota electrical cooperative exception has no explicit counterpart in the federal laws. Under federal law, an electrical cooperative must seek exemption under the general exception for governmentally regulated activity. As introduced in the legislature, the Minnesota law also provided no specific electrical cooperative exception, but electrical cooperatives were added shortly after the bill's introduction. As with other cooperatives, the exemption should not extend to combinations with groups not exempted by the provision.

b. Governmental Regulation

Section 325.8017, subdivision 2, exempts various types of governmentally regulated activity. The vague language of this subsection appears to create two types of exemptions. The first is for "actions or arrangements otherwise permitted" by the state. Given the origins of this section, a reasonable conclusion is that this is a shorthand...
alternative to listing the specific statutes authorizing industry practices that might otherwise conflict with the 1971 antitrust law. The second exemption in subsection 2 is for "actions or arrangements . . . regulated by any regulatory body or officer acting under statutory authority of this state or the United States." 235 Federal precedent in this area makes clear that an express statutory exemption in the law creating a regulatory body 236 activates this exemption. Beyond these obvious cases, however, the courts take a case by case approach. Key factors in allowing exemption include the pervasiveness of the regulatory framework, the degree of industry noninvolvement in the initial decisionmaking, and the extent to which the agency considers antitrust implications within its decisional process. 237

Specially Regulated Industries," § 6(b) allowed the states to choose between two alternatives.

ALTERNATE 1

[(b) Nothing contained in this Act shall be construed to forbid actions or arrangements authorized or regulated under [here should follow the acts authorizing or regulating actions, or arrangements in particular industries, for example in the sponge, milk, tobacco, alcohol, fishing, oil, insurance, or banking industries].]

ALTERNATE 2

[(b) Nothing contained in this Act shall apply to actions or arrangements otherwise permitted, or regulated by any regulatory body or officer acting under statutory authority of this state or the United States.]

Id. (brackets in original). The second alternative provides legislators with a way to avoid listing specific "acts authorizing . . . actions or arrangements in particular industries." Id. (Alternate 1). The 1971 law follows the second alternative. See Minn. Stat. § 325.8017(2) (1978).


236. See, for example, the Federal Aviation Act:

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws," as designated in section 12 of title 15, and of all other restraints or prohibitions made by, or imposed, under authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.


If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply.


c. Collective Bargaining

Section 325.8017, subdivision 3, like subdivision 1, relates to labor. Subdivision three, however, focuses solely on the collective bargaining process, exempting from antitrust scrutiny all agreements among employers or labor unions made during involvement in collective bargaining. The subdivision ensures that management and labor can temporarily combine with other management or labor units to bargain collectively concerning terms and conditions of employment throughout an industry, without fear of violating the antitrust law.239

4. Civil Remedies

The Minnesota antitrust law provides three non-exclusive alternative civil remedies: civil penalties;240 equitable relief;241 and treble damages.242

The civil penalty provisions allow the state to enforce its antitrust law while avoiding the disadvantages of a criminal prosecution. Less stigma attaches to civil conviction,243 the burden of proof is lower, and the state may appeal adverse trial court decisions.244 In addition, unlike the case in treble damage actions, the civil penalty provisions permit the state to proceed in the absence of provable monetary damages.

Three provisions of the 1971 Minnesota antitrust law relate to civil penalties. Under Section 325.8018, subdivision 1,245 the Attorney

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238. MINN. STAT. § 325.8017(3) (1978) ("Nothing in sections 325.8011 to 325.8026, shall apply to agreements among employers or agreements among labor unions made for the purpose of furthering the position of any of the agreeing employers or agreeing unions in the course of the collective bargaining process.").


241. Id. § 325.8020.

242. Id. § 325.8019.

243. While the stigma attached to criminal conviction may be a significant deterrent for a businessman contemplating the violation of a widely recognized antitrust provision (such as those listed as per se offenses in § 325.8015(1)), that stigma loses deterrent value in the more ambiguous area of non-per se offenses, where the civil penalty is more widely used. Moreover, when the Attorney General is unconvinced that an offender knew he was acting outside the bounds of legitimate business practices, the sole option of bringing a criminal action with its attached stigma might deter the Attorney General from bringing any action at all.

244. Stern, supra note 26, at 743-44.

245. MINN. STAT. § 325.8018(1) (1978) provides,
General may bring a civil action for the imposition of monetary penalties for violation of any substantive section of the 1971 law as well as for violation of final decrees of judgments. Section 325.8022 permits a court to order the suspension or forfeiture of a firm's charter and rights to do business within the state for failure to comply with the terms of consent decrees and final judgments. Courts have wide discretion in setting the terms of a suspension or forfeiture. Wise policy dictates sparing use of such penalties.

Any person who is found to have violated section 325.8011 to 325.8028, shall be subject to a civil penalty of not more than $50,000. Any person who fails to comply with a final judgment or decree rendered by a court of this state issued for a violation of sections 325.8011 to 325.8028, shall be subject to a civil penalty of not more than $100,000.

The subdivision is a much condensed version of Uniform Draft, supra note 46, at § 11, with substantially higher maximum penalties. The commentary to § 11 of the Uniform Draft provides,

This section fixes civil penalties for violation of the Act, or an injunctive order or consent decree based on the Act. A civil rather than the traditional criminal penalty was adopted because it eliminates the disadvantages attendant criminal prosecutions. The stigma tied to criminal conviction, the strict criminal burden of proof, and the impediment to state appeal from adverse decisions in trial courts are all removed by this change in the nature of the penalty.

Uniform Draft, supra note 46, at § 11, Comment.


247. An action for civil penalties is not available against "an individual who fails to comply with . . . a consent settlement approved by a court of this state concerning an alleged violation of this act." Language allowing such a penalty, included both in the Uniform Draft, supra note 46, at § 11, and the initial Antitrust Division draft of the 1971 law, S. Creceius, supra note 45, at § 13, was deleted before the bill was introduced. Section 325.8018(1) is also not applicable to violators of assurances of discontinuance. See S.F. 918, Minn. State Senate, 1975 Sess. (the bill, which would have established a civil penalty of not more than $25,000 for failure to comply with assurances of discontinuance, was not passed). An action for contempt of court, however, is available for failure to comply with a consent decree or assurance of discontinuance. Moreover, if the violation of the assurance of discontinuance or consent decree is also a violation of the antitrust law, a new action may be brought.


249. Failure to comply with a consent decree is a violation unreachable by civil penalty. See note 247 supra.

250. Assuming a request by the Attorney General for the maximum sanction allowed by § 325.8022, the options available for a court are to either

1) do nothing;
2) suspend a limited number of privileges (applicable to either a domestic or foreign corporation);
3) suspend all privileges (applicable to either a domestic or a foreign corporation);
4) revoke a limited number of privileges (applicable to either a domestic or a foreign corporation);
5) order the forfeiture of the privilege of a foreign corporation to do business in Minnesota;
sanctions. Suspension or forfeiture partly or totally eliminates a competitor from the market, thus frustrating the fundamental goal of antitrust law. Such sanctions are also likely to have more severe economic and social consequences for those innocent state citizens connected with the sanctioned business\textsuperscript{251} than would be the case if fines were imposed or officers were imprisoned.

Section 325.8023\textsuperscript{252} provides that while a corporation is responsible for the acts of its employees, the employees themselves remain individually liable for knowingly\textsuperscript{253} contributing to the commission of

\begin{enumerate}
\item[(6)] order the forfeiture of the charter rights and privileges of a domestic corporation; or
\item[(7)] order the dissolution of a domestic corporation.
\end{enumerate}


Section 325.8022(2) is designed to prevent the “person” who has forfeited the right to do business within the state from circumventing the forfeiture decree by doing business under another name. See id. § 325.8022(2). The Comments to §§ 8-10 of the Uniform Draft—the model for § 325.8022(2) (1978)—provide, “This section is intended to prevent the person who has forfeited its right to do business, and, if not a natural person, its officers, members, or agent, from circumventing the forfeiture decree by doing business in the state under another name.” Uniform Draft, supra note 46, at § 10, Comment.

251. Those who would suffer a hardship, as innocent state citizens connected to a business sanctioned by forfeiture, may include employees who lose their jobs and members of the community who depend on the business as a tax resource and as an incentive for community growth.

252. Minn. Stat. § 325.8023 (1978). The provision is taken directly from the Uniform Draft, supra note 46, at §§ 12-13. The Comment to § 12 of the Uniform Draft—the model for § 325.8023(1)—provides, “This section imposes liability on a business entity for the acts of its agents acting within the scope of their authority. Proof of the acts of the agent is prima facie proof of the acts of the business entity.” Uniform Draft, supra note 46, at § 12, Comment. The Comment to § 13 of the Uniform Draft—from which § 325.8023(2) is derived—states,

Any individual who authorized[, ordered, did, or participated in, or aided, abetted, or advised in the commission of any of the acts constituting a violation by a business entity is liable as an individual under sections 11 and 14. Individuals are liable whether or not they acted for their own benefit or on behalf of the corporation. In any proceeding against the corporation under sections 11 or 14, these individuals, if subject to personal jurisdiction, must be joined with their business entity as parties defendant. The purpose of this compulsory joinder requirement was to give greater force to the imposition of liability on corporate, association, firm, or partnership officers.

253. “Knowingly” was not included in the Uniform Draft, supra note 46, at § 13, or the bill as introduced, S.F. No. 1200, Minn. State Senate, 1971 Sess., but was added by amendment. [1971] Minnesota Journal of the Senate 2356 (May 7, 1971). “Knowingly” seems to require at least that the employee be aware to a substantial certainty that his conduct will cause the act that constitutes the crime. It is possible that the legislature intended “knowingly” to incorporate the general standard for criminal intent, a subjective intent to do the act constituting the crime. As to criminal intent, see State v. Everson, 286 Minn. 246, 248, 175 N.W.2d 503, 505 (1970). Use of
an antitrust violation.\textsuperscript{254}

The 1971 antitrust law also enables the state or private parties to invoke the equity power of the courts to restrain continuing violations of the Minnesota antitrust statute.\textsuperscript{255} Such relief may be granted by temporary, interlocutory, or permanent injunction. Unlike an action for damages,\textsuperscript{256} however, private parties seeking solely injunctive relief under the 1971 antitrust law are not entitled to reasonable attorney fees.

Finally, the Minnesota statute provides for treble damages. Section 325.8019,\textsuperscript{257} which is modeled after section 4 of the Clayton Act,\textsuperscript{258} permits any legal entity\textsuperscript{259} to bring an action for injury caused by a violation of the Minnesota antitrust law. Success results in an automatic trebling of all damages awarded and recovery of all costs and reasonable attorney fees. The trebling of damages and reimbursement of attorney fees operates as a punitive measure against the violator\textsuperscript{260} and provides encouragement for private plaintiffs to bring what usually become costly and time-consuming lawsuits.\textsuperscript{261}

\textsuperscript{254} The term "willfully" in § 325.8018(2), however, tends to indicate that "knowingly" is something less than general criminal intent. See text accompanying notes 263-67 infra.

\textsuperscript{255} Section 325.8023 follows the long standing case law principle that both the master and servant are jointly liable for tortious acts of the servant that are within the scope of the servant's employment. See, e.g., Kisch v. Skow, 305 Minn. 328, 331-32, 233 N.W.2d 732, 734 (1975).

\textsuperscript{256} MINN. STAT. § 325.8020 (1978).

\textsuperscript{257} See text accompanying notes 257-61 infra.

\textsuperscript{258} 15 U.S.C. § 15 (1976) provides,

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

\textsuperscript{259} The reference in § 325.8019 to "person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured by a violation of sections 325.8011 to 325.8028, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees.")

\textsuperscript{260} Such punitive measures may be justified by the overriding concern for the operation of the economy and by the tendency of actual damages to be an insufficient deterrent in cases in which the offensive business practices are especially profitable.

\textsuperscript{261} Minnesota seems to emphasize this second function with its provision for mandatory trebling. Minnesota's statute departs from its model, the Uniform Draft, which provides for a discretionary "increase [in] damages to an amount not in excess of three times the actual damages sustained." UNIFORM DRAFT, supra note 46, at §
5. Criminal Sanctions

Criminal sanctions for antitrust violations are available only for willful violation of per se offenses.262 While "willful" is not used elsewhere in the Minnesota criminal code,263 and does not appear in federal antitrust legislation,264 the term is found in the Illinois provision for criminal prosecution of per se antitrust offenses.265 Commentary to the Illinois section provides

Under the statute, criminal actions lie only against those who willfully enter into a conspiracy to do the prohibited acts. This does not require proof that a person intentionally joined in activity he knew to be a violation of section 3(1). It does require a showing that the person had knowledge that he was engaging in the challenged conduct, e.g., price fixing.266

Such a construction is in accord with Minnesota's general definition of criminal intent.267

6. Enforcement Authority

Section 325.8021 places primary responsibility for enforcing the
state antitrust law on the Attorney General. The Attorney General also derives antitrust enforcement authority from the statutory definition of the Attorney General’s general enforcement powers.26 In several respects, the general section overlaps and duplicates the grant of authority in the 1971 antitrust act. In addition, however, the general grant of enforcement powers includes specific grants of authority not included in the 1971 act, yet essential to effective antitrust enforcement.

Most significantly, section 325.907, the general enforcement provision, provides the Attorney General with full discovery power prior to the commencement of an action.27 The Attorney General may not initiate investigative action, however, until he has “reasonable cause to believe that a violation is imminent, is occurring, or has occurred.”28 The “reasonable cause” standard was discussed in the recent Minnesota district court decision, In re Civil Investigative Demand Served upon Joseph Schlitz Brewing Co.29 In that case, Schlitz refused to produce documents requested pursuant to section 325.907, subdivision 2. On motion by the state to compel production, Schlitz argued that the scope of the state’s inquiries exceeded “the probable cause” for belief that an antitrust violation had occurred.

attorney general may request the [district attorney of the county in which any proceedings may be brought] to aid and assist in the conduct of any proceedings brought for violations of this Act.

Comment

This section places primary enforcement responsibility on the attorney general. Secondary responsibility is lodged with district or county attorneys. Because of their responsibility for and knowledge of local conditions, and because of the limitations of the attorney general’s enforcement resources, it is believed that the local government attorneys should assume secondary responsibility. Absolute control over enforcement measures, however, rests with the attorney general so that a coordinated and uniform antitrust enforcement policy may be maintained.

UNIFORM Draft, supra note 46, at § 7 & Comment (emphasis and brackets in original).

269. MINN. STAT. § 325.907 (1978). MINN. STAT. § 325.8021 (1978) incorporates MINN. STAT. § 325.907 (1978) into the Minnesota Antitrust Act of 1971: “The investigatory authority of the attorney general under sections 325.8011 to 325.8028 shall include, but not be limited to, the authority provided for in section 325.907.”

270. MINN. STAT. § 325.907(2)(a) (1978). These investigative powers are as extensive as the “civil investigation demand” powers available to the federal enforcement agencies. See 15 U.S.C. §§ 1311-1314 (1976). Accord, Maclin Interview, supra note 7. Section 325.907(2)(b) also grants the Attorney General the enforcement option of “assurances of discontinuance,” a remedy not included in the 1971 antitrust act. For more extensive discussion of the Attorney General’s enforcement power, see notes 311-37 infra and accompanying text.

271. This language is found in both MINN. STAT. § 325.8021 (1978) and § 325.907(2) (1978).

The court rejected the argument, focusing on the “broad grant of investigative authority” inherent in the words “any person has violated . . . any of the laws enumerated in subdivision 1” and “discovery from any person.” The federal courts have adopted an equally liberal construction of a parallel federal provision. Thus, while no precise definition of “reasonable cause” under section 325.907 exists, the trend is toward allowing proof of such “cause” to be of a very general nature.

Section 325.8025 complements the Attorney General’s information gathering powers by requiring that the Attorney General be given notice of the commencement of all private antitrust actions.

7. Collateral Estoppel

Section 325.8024 governs the subsequent use of decisions in state antitrust actions. Under this section a private plaintiff may use a prior judgment of antitrust violation as “prima facie” evidence.

273. In re Civil Investigative Demand Served upon Jos. Schlitz Brewing Co., No. 734207 (Minn. Dist. Ct., Hennepin Cty., Apr. 4, 1977) (memorandum and order) (emphasis by the court). The State argued, with apparent success, that an affidavit of a Special Assistant Attorney General stating that “the Attorney General, from information in his possession, has reasonable ground to believe” that violation of the state antitrust law has occurred is sufficient proof of “reasonable cause.” Memorandum in Support of the State of Minnesota Motion to Compel Production of Documents, at 3-4, In re Civil Investigative Demand Served upon Jos. Schlitz Brewing Co., No. 734207 (Minn. Dist. Ct., Hennepin Cty., Apr. 4, 1977).


275. Minn. Stat. § 325.8025 (1978). The section is identical to § 18 of the Uniform Draft, the comment to which reads,

It is appropriate that the attorney general, the chief public officer charged with the duty of enforcement of this act, receive notice of actions by private parties. In this way, the attorney general will receive notice of alleged violations of this Act that might never otherwise come to his attention. Cf. N.Y. Gen. Bus. Law § 340.

Uniform Draft, supra note 46, at § 18, Comment.

276. Minn. Stat. § 325.8024 (1978). This section is taken from § 17 of the Uniform Draft, the comment to which reads, “The purpose of this section is to aid private litigants in suits for damages under this Act.” Uniform Draft, supra note 46, § 17, Comment. A second probable effect of the inclusion of this provision in the state antitrust law is that defendants in state actions are more likely to try to avoid an unfavorable “final judgment or decree,” either by early settlement, assurance of discontinuance, consent decree, or just fighting harder at trial.

277. Section 325.8024 applies only to “a final judgment or decree” in an action brought by the state. The section cannot be activated by a private action, consent decree, or assurance of discontinuance under the state law nor is it applicable to any government or private proceeding under the federal antitrust laws. The section does not apply to a subsequent state action. The doctrine of res judicata, however, would
of antitrust violation in his suit, provided that the final judgment would have res judicata effect in a subsequent suit between the state and the defendant.

The federal counterpart to section 325.8024 is section 5(a) of the Clayton Act. The federal provision gives similar prima facie effect, in later private suits against the same defendant, to criminal guilty pleas, criminal convictions, and adverse judgments rendered in government-sponsored civil injunction actions. No prima facie effect is granted, however, to decisions in earlier government damage suits. The apparent inclusion of state-initiated damage actions within the section 325.8024 language "any civil or criminal proceeding... brought by or on behalf of the state of Minnesota" would thus make the Minnesota provision broader than the analogous federal law.

8. Statute of Limitations and Venue

Section 325.8026, subdivision 1, provides a four-year statute of limitations for all criminal and civil actions brought under the state antitrust law. Subdivision 2, however, suspends the running of the statute of limitations if the cause of action arises from fraud or concealment. The statute of limitations would then be tolled from the date of fraud or concealment.

...
statute of limitations while a state action is pending, thereby ena-
blimg private litigants to wait to file until after the state judgment is
complete.\textsuperscript{285} Protected from the statute of limitations by this tolling
 provision, private litigants can, upon return of a judgment against
the defendant in the state action, assert such judgment as "prima
facie evidence" against the defendant in any private action under
section 325.8024.\textsuperscript{288} Subdivision 1, identical to a provision in the
Uniform Draft,\textsuperscript{287} is also in substantial agreement with section 4(b)
and 5(b) of the Clayton Act.\textsuperscript{288}

antitrust suits. See General Elec. Co. v. City of San Antonio, 334 F.2d 480 (5th Cir.
1964). There is no indication that § 325.8026 was drafted to exclude the application of
this doctrine.

286. Section 325.8026(2) provides,

If any proceeding is commenced under sections 325.8011 to 325.8028, by
the attorney general on behalf of the state of Minnesota, its departments or
agencies, or its political subdivisions, the running of the statute of limita-
tions in respect of every right of action arising under sections 325.8011 to
325.8028, and \textit{based in whole or in part on any matter complained of in the
aforementioned proceeding} shall be suspended during the pendency thereof
and for one year thereafter. If the running of the statute of limitations is
suspended, the action shall be forever barred unless commenced within the
greater of either the period of suspension or four years after the date upon
which the cause of action arose.

\textit{Id.} (emphasis added). Given that the purpose of the tolling is "so that the private
litigant is not prejudiced by awaiting the entry of the final decree in the public action
before commencing suit," \textit{Uniform Draft, supra} note 46, at § 20, Comment, the phrase
italicized above should be interpreted in light of Minn. Stat. § 325.8024 (1978), the
"prima facie" evidence provision. Reference to § 325.8024 suggests that if a matter in
the intended private suit is also a matter involved in the state brought claim, a
collateral estoppel could be worked by a private litigant using the state judgment as
"prima facie" evidence provision. Reference to § 325.8024 suggests that if a private
litigant can use a state judgment as "prima facie evidence" against the defendant, the
private litigant's right of action is "based in whole or in part" on that state judgment.
This construction would allow application of the ample state precedent of res judicata
to settle the issue of when the statute of limitations is tolled.

287. \textit{Uniform Draft, supra} note 46, at § 19, Comment, states, "This section
established uniformity with the federal law regarding the statute of limitation." \textit{See
id.} at § 20, Comment (the model for § 325.8026(2));

\textit{Under section 17 decrees entered against a defendant in an action by the
attorney general for civil penalties or forfeiture are prima facie evidence of a
violation of the Act and may be subsequently used by private parties in
damage actions under section 16. This section tolls the statute of limitations
during the pendency of the public action so that the private litigant is not
prejudiced by awaiting the entry of the final decree in the public action
before commencing suit.

288. \textit{15 U.S.C. §§ 15(b), 16(i)} (1976). The federal provisions differ from the
Minnesota law in their use of a five-year statute of limitations on criminal actions. \textit{See
As provided in section 325.8027, state and private antitrust actions under the 1971 law may be brought in district court in the county in which the offense was committed, any defendant or his agent "resides or is found," or where any defendant does business.

IV. ENFORCEMENT OF THE MINNESOTA ANTITRUST LAW

Minnesota is among the most aggressive states in antitrust enforcement. Its total enforcement budget for fiscal year 1978 was the twelfth largest nationwide, greater than many states with larger areas and populations. Since 1971, the state has filed sixteen actions under the state antitrust laws, eight within the last two years. They have ranged over such varied business areas as mobile homes, office furniture, liquor wholesaling, beauty supplies, cosmetics, shopping center leases, oil refining, sugar refining, fine paper production, and construction. The cases have resulted in

290. Maclin Interview, supra note 7.
291. The budget consists of both state and federal funding directed toward enforcement efforts.
292. In a survey of all 50 states (based on data from the National Association of Attorneys General), Minnesota was listed as having a total fiscal year 1978 antitrust enforcement budget of $316,839. States with budgets exceeding that sum were California, Connecticut, Florida, Iowa, Louisiana, Maryland, Massachusetts, Missouri, New York, and Oregon. In terms of purely state appropriations, Minnesota ranked fifth, exceeded only by California, New York, Oregon, and Wisconsin. Miles Address, supra note 4, app. 1.
six consent decrees, three assurances of discontinuance, one civil judgment, and one criminal judgment. Through these actions, the state recovered over $50,000.

A. Objectives of Enforcement

Given ultimately limited resources, the Minnesota Antitrust Division is continually forced to decide which areas require enforcement attention. The state has, accordingly, tended to focus on regional and local conspiracies and markets. Within these geographical limitations, efficient use of Minnesota's Antitrust Division resources is enhanced in a number of ways. State enforcement officials generally refrain from breaking "new ground," at least in terms of federal precedent. Within the area of well established federal precedent, moreover, emphasis is placed on the per se violations listed in section 325.8015, since these offenses were specifically emphasized by the legislature, are generally easier to prove, and usually involve the worst offenders. Priority is given to the individual per se violations that have caused or are causing the greatest injury to the public.

In addition to following these general guidelines in the investigation and litigation of possible state antitrust violations, the Antitrust Division has taken on an educational role. It has urged state regula-


307. See Minnesota Attorney General's Antitrust Division, supra note 21, at 2.

308. While there is no express listing of the type of violations that the Minnesota Antitrust Division emphasizes in enforcement, the guidelines just discussed seem to be generally followed in the Division's enforcement activity. See Rockenstein, Antitrust Enforcement: The Attorney General of Minnesota, in MINNESOTA CONTINUING LEGAL EDUCATION, AN INTRODUCTION TO ANTITRUST LAW AND PRACTICE 155, 158-59 (1972); Maclin Interview, supra note 7; See also Address by Alan H. Maclin, Special Assistant Attorney General for the State of Minnesota, before the Antitrust Section of the Minnesota State Bar Association 2 (Dec. 13, 1978) (on file at the Minnesota Law Review).
tory agencies to stop certain activities that may tend to decrease competition.309 Most recently, the Division has begun to educate the public in order to decrease the number of inadvertant antitrust violations and increase the reporting of antitrust violations.310

B. THE PROCESS OF ENFORCEMENT

1. Investigative Functions

Information regarding possible antitrust violations may come from within the Antitrust Division, from citizens and business complaints, through public purchasing officials' reports of bidding irregularities, through referral from the Antitrust Division of the United States Justice Department and the Bureau of Competition of the FTC, and from communications with other states.311

If investigation is warranted,312 the Division usually proceeds under the state civil investigative demand provision313 to obtain the necessary relevant information.314 Failure to comply with a request for information may be countered by an application to district court.315

309. For example, minimum fee schedules for cosmetology services were recently abolished at the urging of the Antitrust Division. See generally 2 State Register 1037 (1977) (deletion of MSBC 64 which set a scale of minimum prices). The Division has filed similar comments with the Minnesota State Board of Accountancy and the Minnesota State Board of Dentistry. Response is pending. See Minnesota Attorney General's Antitrust Division, Attachment to S.F. 424, Application of Minnesota, Section IV: Remarks, at 2 (Nov. 1, 1978) (on file at the Minnesota Law Review).

310. Id. Such efforts include meetings with and addresses to state purchasing agents, businessmen, and attorneys. The education campaign also encompasses distribution of publications printed by the Division. See, e.g., Minnesota Attorney General's Antitrust Division, Antitrust Enforcement in Minnesota: A Guide for Business, Purchasing Agents & Consumers (Sept. 1978) (unpublished memorandum); Minnesota Attorney General's Antitrust Division, 10 Questions Indicating Anticompetitive Activity (n.d.) (unpublished memorandum).

311. See Rockenstein, supra note 308, at 159-60.

312. Some complaints may be handled by sending letters to alleged offenders, informing them of the law, and advising them of the received complaint. Maclin Interview, supra note 7.

313. MINN. STAT. § 325.907(2) (1978). Within the last four and one-half years, 22 civil investigative demands have been issued involving 110 business concerns. Maclin Address, supra note 390, at 2.

314. See text accompanying notes 269-73 supra. Pre-complaint discovery is limited by the doctrines of relevancy and privilege and by the normal safeguards relating to pretrial discovery. See MINN. R. CIV. P. 26.02, 30.02, .04.

315. MINN. STAT. § 325.907(2)(a) (1978). The Minnesota Antitrust Division's pre-complaint discovery efforts have been challenged three times. In each instance, the courts have ordered compliance with the civil investigative demand. See In re Civil Investigative Demand Served upon Jos. Schlitz Brewing Co., No. 734207 (Minn. Dist. Ct., Hennepin Cty., Apr. 4, 1977); In re Civil Investigative Demand Served Upon Lyon Chemical, Inc., No. 408261 (Minn. Dist. Ct., Ramsey Cty., Dec. 9, 1975); In re K-Mart
If a criminal action is contemplated, the Antitrust Division must rely on the investigatory powers of a grand jury. Once convened, however, the expansive subpoena powers of the grand jury and the Minnesota immunity statute provide immense investigatory power.

2. Assurance of Voluntary Compliance

The Antitrust Division may, after obtaining information relating to a violation of the antitrust law and before filing a complaint, enter into an assurance of voluntary compliance or discontinuance with the violator. The inducements for agreeing to such a settlement include the avoidance of possible litigation created stigma, the lack of any estoppel or section 325.8024 “prima facie” value in such a settlement, and the avoidance of a time-consuming and inconvenient suit that might result in harsher penalties. The advantages to the Antitrust Division include the same time and resource conservation factors.

An assurance of discontinuance takes the form of an affidavit stating the identity of the party and his business, the nature of the claimed violation, and the party’s promise to discontinue the specified activity. The affidavit also often contains a stipulation for performance by the party of “other equitable relief” or for the payment of damages and costs to the state or some other injured party. The assurance is filed with and subject to the approval of a district court. Failure to comply is punishable through contempt proceedings.

3. Commencement of a Lawsuit

If the Antitrust Division decides that a violation is serious


316. See Rockenstein, supra note 308, at 160. Pre-commencement discovery might still be obtained, however, if both a civil and criminal action against the party in question are contemplated. Although admission of such evidence in the subsequent criminal action could raise “search and seizure” problems, see generally State v. Robert L. Carr Co., [1978-1] TRADE CASES ¶ 61,983 (Minn. Dist. Ct., Lyon Cty., Mar. 31, 1978), the data could be used informally in deciding whether to proceed with the criminal action. Once the grand jury is convened, such evidence may be properly obtained for use in the criminal trial. Id.

317. Minn. Stat. § 609.09 (1978). This provision removes the constitutional plea of self-incrimination as an excuse for refusing to testify.

318. Id. at § 325.907(2)(b). In a criminal action, assurances of non-prosecution may be used. Interview with Alan H. Maclin, Special Assistant Attorney General for the State of Minnesota, Saint Paul, Minnesota (Dec. 15, 1978).

319. Rockenstein, supra note 308, at 162.


321. Id.
enough to warrant litigation, it then must decide on the type of suit to file. Several options are available: a civil suit for injunctive relief, an action for civil penalty, a civil suit for damages, a criminal action, or some combination. The choice depends on the substantive section violated, the nature and seriousness of the violation, the sophistication and knowledge of the defendants, the duration of the offense, the cooperation by the defendants, and whether the state or its subdivisions suffered damage. If the alleged violation is a continuing one, the Division is likely to seek injunctive relief. If there is damage to the state or its subdivisions, it may also seek damages. If the trebling of the damages is thought to be an insufficient sanction for the alleged violation, then civil penalties may be asked for. Finally, if the alleged violation is a per se offense and appears willful, criminal sanctions may be sought. Due to the procedural and policy disadvantages of a criminal antitrust proceeding, however, the Division is likely to seek such sanctions in only the most damaging situations.

4. Consent Decrees

After the action is commenced, the state still has the option of settlement by the use of a consent decree. A consent decree is a final judgment in an antitrust suit arrived at without any adjudication of fact or law. In form, it differs from a decree in a litigated case only in the introductory paragraph, which invariably reads:

By stipulation, the parties hereto consent to the making and entry of the Order for Consent Judgment, without trial or adjudication of any issues of fact or law herein and without this Order for Consent Judgment constituting any admission by any party with respect to any issues.

The decree may contain stipulations as to the performance or payment of all civil remedies available under the Minnesota antitrust

322. Id. § 325.8020.
323. Id. § 325.8018(1).
324. Id. § 325.8019.
325. Id. § 325.8018(2).
326. Rockenstein, supra note 308, at 162, 164.
327. See generally L. Sullivan, supra note 123, at 768-69.
329. The consent decree is often filed simultaneously with the complaint. Maclin Interview, supra note 7.
A consent decree has the same force as an adjudicated final judgment except that it is not "prima facie" evidence against the defendant in subsequent proceedings by another party. Further, the violation of a consent decree is not punishable by the extra civil fine provided for in section 325.8018, subdivision 1.

The use of consent decrees has been substantial and is expected to increase. While extensive use of consent decrees benefits the state enforcement effort by conserving enforcement resources that would have been spent in complete trials and by reaching desired results more quickly, their use can have disadvantageous side effects. Post-consent decree enforcement is more difficult due to the decree's lack of "prima facie" impact and because the threat of an extra civil fine is absent. Moreover, consent decrees create no state antitrust precedent. Such lack of precedent makes future enforcement more difficult and deters private actions under the state law.

V. SUGGESTED IMPROVEMENTS IN THE MINNESOTA ANTITRUST LAW

Due to the relative newness of the Minnesota antitrust law and the lack of decisions under it, the gaps and weaknesses that are inherent in any law have not yet been fully exposed. Yet, possible improvements in the Minnesota law can be suggested.

A. SUBSTANTIVE ADDITIONS

The existing substantive provisions of the 1971 antitrust law seem relatively sound. Improvement lies in addition to those provisions. A provision specifically dealing with mergers and acquisitions,
modeled on section 7 of the Clayton Act, for example, should be added to the Minnesota law. Under the federal law, one firm's acquisition of another firm's assets or the merger of two firms can be a violation of both the specific anti-combination standards of the Clayton Act section 7 and the general restraint of trade standard of section 1 of the Sherman Act. The standards for violation of the two provisions differ, however. The Clayton Act is violated when "the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." Thus, the Clayton Act applies to combinations even when there is only a reasonable probability that the merger will, in the future, have anticompetitive results. Moreover, the Clayton Act may be applied even decades after the merger if anticompetitive effects begin to manifest themselves. Under the Sherman Act, by contrast, the merger must currently have sufficient anticompetitive effects to cross the generally higher threshold of unreasonable restraints of trade. The result of this difference is that section 7 of the Clayton Act has much greater utility in merger cases.

The Justice Department, even with section 7 of the Clayton Act, cannot adequately handle all the merger and acquisition violations that affect Minnesota. The department simply lacks the resources to deal with the large number of mergers each year. It therefore only monitors the mergers affecting a multistate market. Furthermore, there are certain segments of the economy, such as banking and insurance, in which Congress has chosen to rely on state regulation. Finally, a large number of mergers are, because of their intrastate nature, beyond the Clayton Act's jurisdiction.

No provision analogous to the Clayton Act section 7 was included in the 1971 Minnesota law, perhaps "because of the complexity of

339. Id.
345. See Stern, supra note 26, at 740; Inman, supra note 34, at 183.
348. See Stern, supra note 26, at 740.
economic issues raised”350 and because of the “ambiguity” existing in the federal merger law.351 These two arguments have lost much of their persuasive impact. The federal case law surrounding section 7 has been further explained,352 and much of the complexity present in federal merger litigation is absent when the antimerger provision is adopted for state antitrust uses.353

The only existing provision of the Minnesota antitrust law governing mergers, section 325.8013,354 is inadequate. Under section 325.8013, Minnesota can prohibit mergers only if the merger meets the restrictive Sherman Act test. A series of local acquisitions may take place before the combination reaches the proportion necessary to amount to an unreasonable restraint of trade.355 In the meantime, several small competitors may be consumed and divestiture may become so complex that no effective remedy is available.356 A state provision paralleling section 7 of the Clayton Act therefore should be enacted.357

A second valuable substantive addition to the Minnesota antitrust law would include resale price maintenance and tying arrangements in the list of per se violations established by section 325.8015. Tying arrangements and vertical price fixing, both per se illegal

350. This was the justification for not including such a provision in the Uniform Draft. UNIFORM DRAFT, supra note 46, Prefatory Note 2.
351. Stern, supra note 26, at 772.
353. When an antimerger provision is adopted for state purposes, the complexities of determining the product and geographic markets are substantially reduced. Arnold & Ford, supra note 46, at 110.
354. Federal case law interpreting § 1 of the Sherman Act as prohibiting the most serious anti-competitive mergers indicates that § 325.8013 may be used in the same way. The state Antitrust Division is presently trying a merger case under § 325.8013 in federal court under a theory of pendent jurisdiction. See Maclin Interview, supra note 7.
355. Inman, supra note 34, at 184.
356. Id.
357. A possible model is the merger provision included in Richard Stern’s 1961 proposal for a uniform state antitrust law: “It is unlawful for any person not a natural person to acquire an asset from any person if the effect may be to lessen competition substantially in any line of commerce.” Stern, supra note 26, at 722. Following this provision, Stern comments:

This section is based on section 7 of the Clayton Act. The proposed uniform statute, unlike the federal statute, is not limited to acquisitions made from a corporation: any acquisition by a non-natural person is subject to the law, whether the vendor is a corporation or a natural person. The other changes in wording represent deletion of matter inapplicable to a state antitrust law or shortening and simplification of the language.

Id. at 739-40 (footnotes omitted).
under federal law,\textsuperscript{358} are clearly as "pernicious" as other activity presently per se illegal under the Minnesota law.\textsuperscript{359} Although such activities may be declared per se illegal under section 325.8013, their addition to section 325.8015 would clarify any ambiguity about the status of resale price maintenance and tying arrangements.

B. PROCEDURAL CLARIFICATION

Under federal law, at least since the 1977 opinion in \textit{Illinois Brick Co. v. Illinois},\textsuperscript{360} indirect purchasers\textsuperscript{361} may not bring antitrust actions under section 4 of the Clayton Act.\textsuperscript{362} Since section 325.8019 of the

\begin{itemize}
\item \textsuperscript{358} See, e.g., United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (resale price maintenance agreements per se illegal under Sherman Act § 1); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (tying arrangement in which the tying party has significant power in the tying product market and in which there is a "not insubstantial" amount of commerce in the tied product restrained is per se illegal under § 1 of the Sherman Act).
\item \textsuperscript{359} See \textit{Northern Pac. Ry. v. United States}, 356 U.S. 1, 6 (1958) (citation omitted):
\begin{quote}
Indeed, "tying agreements serve hardly any purpose beyond the suppression of competition . . ." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.
\end{quote}
\item \textsuperscript{360} See \textit{Northern Pac. Ry. v. United States}, 356 U.S. 1, 6 (1958) (citation omitted):
\item \textsuperscript{361} Indirect purchasers are those who do not deal directly with the antitrust violator, but still are injured by the violation because of the higher prices they pay on the goods they purchase. \textit{See generally} \textit{Illinois Brick v. Illinois}, 431 U.S. 720, 732 (1977).
\end{itemize}
Minnesota act is modeled after section 4 of the Clayton Act, the doctrine of uniform construction suggests that indirect purchasers do not have a right to damages under the Minnesota antitrust act. Such an interpretation is not desirable. The rule of *Illinois Brick* leaves damaged consumers without recourse. This is especially significant in the case of the state itself, since most state purchases are indirect in nature. Furthermore, although the *Illinois Brick* Court's concern for "multiple liability" appears legitimate, that concern may be alleviated by allowing an indirect purchaser to recover only that portion of the overcharge passed on to him and by giving the seller a "pass-on" defense. Finally, the Minnesota legislature may have intended to permit recovery by indirect purchasers since in 1971, when Minnesota enacted its antitrust statute, federal courts allowed indirect purchasers to recover damages under section 4 of the Clayton


363. See text accompanying note 258 supra.
364. See text accompanying notes 65-83 supra.
365. While Minnesota has not recovered in enough actions under its relatively new state antitrust law to provide relevant data, in federal cases Minnesota has successfully proven damages from indirect purchases of over $2.4 million. Minnesota Attorney General's Antitrust Division, State and Political Subdivisions, Antitrust Disbursements for Indirect Purchases (n.d.) (on file at the Minnesota Law Review) (total recovery for indirect purchases during the years 1971-1976). Accord, Maclin Interview, supra note 7.
366. This parallels a federal bill introduced into but unpassed by the second session of the 95th Congress. The bill is reported at 876 Antitrust & Trade Reg. Rep. (BNA) Supp. No. 1 (Aug. 10, 1978). For an explanation of a "pass-on" defense, see note 258 supra.
Act. 367 Conforming section 325.8019 to current Clayton Act section 4 interpretation is thus not justified;368 the issue of indirect purchasers' rights to damages under the Minnesota antitrust law should be clarified by amending section 325.8019 to expressly allow recovery by indirect purchasers.369

C. REMEDY ADJUSTMENTS

Adjustments in the remedies provided by the 1971 law are needed to more fully coordinate those remedies with the justifications underlying them. Current penalties overlap in a way that defies justification. A defendant may be repeatedly sanctioned for the same offense with no requirement that the courts take notice of prior sanctions. Under federal law, a defendant may receive a three-year federal jail sentence370 and a $1,000,000 federal criminal fine for a single antitrust offense.371 For that same offense, he may then receive from a Minnesota court the following punishment: a five-year jail sentence,372 a $50,000 criminal fine,373 a $50,000 civil fine,374 a judgment extracting treble damages in a state action,375 and a judgment extracting treble damages in a private action,376 all simultaneously and all without consideration of the federal punitive action.377


368. The rule of conformity with federal precedent has its greatest utility in interpreting the substantive provisions of the Minnesota statute since it is in that area that there is the greatest need for state-federal uniformity (based on the need for out-of-court planning and legal compliance by businesses subjects to both laws, see text accompanying note 86 supra) and for resort to a developed case law (based on the need for both out-of-court planning and ease in litigation, see text accompanying notes 318-20 supra). Standing to sue is a procedural matter that does not affect whether a certain business activity is illegal, and therefore does not affect business planning. Its only effect is on who can sue if the law is broken. Thus, the rule of harmonious construction with federal case law has less weight in this matter.

369. This amendment could be modeled after the proposed federal amendment. See note 366 supra.


371. Id. §§ 1,2.

372. MINN. STAT. § 325.8018 (2) (1978).

373. Id.

374. Id. § 325.8018 (1).

375. Id. § 325.8019. While actual damages are arguably not punitive, the trebling of those damages is justified as a punitive sanction. See text accompanying note 258 supra.

376. MINN. STAT. § 325.8019 (1978).

377. Note that such parallel punitive action on the federal and state level does not constitute a problem of double jeopardy. See State v. End, 332 Minn. 266, 45 N.W.2d 378 (1950).
Such unjustified duplication of penalty can be remedied. Federal penalties for the same offense should be considered as mitigating factors in a state court's assessment of fines. State civil and criminal penalties should be made mutually exclusive, the commencement of an action for one barring an action for the other. If the state obtains a criminal or civil penalty for a specific offense, it should be limited to actual, not treble, damages in a subsequent state damage suit on that offense. The state should also be forbidden to recover

378. See Or. Rev. Stat. § 646.760(3) (1977), which provides,

The court shall take into consideration in mitigation of any penalty assessed under this section, any fine or penalty imposed against the defendant by a United States court in a final judgment under sections 1 to 45 of Title 15 of the United States Code, which the court finds to be based on the same or substantially the same acts of defendant.

379. See Or. Rev. Stat. § 646.815(2) (1977), which states,

The commencement of trial seeking civil penalties in any action under ORS 646.760 shall bar any subsequent criminal prosecution for violation of ORS 646.725 or 646.730, based upon the same acts complained of. The commencement of trial in a criminal prosecution for violation of ORS 646.725 or 646.730 shall bar any subsequent action for recovery of civil penalties under ORS 646.760, based upon the same acts complained of, but shall not bar a subsequent suit for injunctive relief under ORS 646.760.

This would not bar simultaneous criminal action for penalties and civil action for injunctive relief or actual damages.

380. See Or. Rev. Stat. § 646.780 (1977), which provides,

(1) A person including the state or any municipal corporation or political subdivision injured in its business or property by a violation of ORS 646.725 or 646.730 may sue therefor and shall recover threefold the damages sustained and the costs of suit, including necessary reasonable investigative costs and reasonable experts' fees and a reasonable attorney fee, except that the state may recover only its actual damages sustained, plus costs of suit including necessary reasonable investigative costs and reasonable experts' fees and a reasonable attorney fee, if it brings an action pursuant to ORS 646.760 or commences a prosecution under ORS 646.815 and subsection (3) of 646.990.

(2) Unless there is a subsequent judgment that the court lacks jurisdiction, the taking of any testimony at the commencement of trial on a complaint filed under this section shall constitute an absolute bar and waiver of any right of plaintiff to recover damages from the same defendant under federal law for the same or substantially the same acts of defendant.

(3) Unless there is a subsequent judgment that the court lacks jurisdiction, the taking of any testimony at the commencement of trial on a civil complaint for damages filed under the antitrust laws of the United States shall constitute an absolute bar and waiver of any right of a plaintiff in such action to recover damages from the same defendant under this section for the same or substantially the same acts of plaintiff.

This, however, may lead to the problem of the state resorting to the federal courts, where it could still get treble damages. While this might be prevented by legislation barring the state from seeking federal treble damages if it has obtained state civil or criminal penalties against the defendant in question, such legislation is likely to gener-
treble damages and then seek civil or criminal penalties. A private party should be limited to actual, not treble damages when using, as "prima facie" evidence in his damage suit, a prior state judgment in which the common defendant was sanctioned. Such revisions will result in sanctioning a defendant only once for his offense while redressing actual damage to the state and private parties.

A final remedial adjustment would allow recovery of reasonable attorney fees and costs to a successful private plaintiff in an action solely for injunctive relief. The underlying rationale of encouraging private enforcement of the state antitrust laws applies whether the private plaintiff is seeking injunctive or monetary relief. Such an amendment to the Minnesota Antitrust Law of 1971 would help make private suits seeking only injunctive relief more viable.

VI. CONCLUSION

State antitrust activity is increasing nationwide. Minnesota is participating in that trend with its new antitrust law and increasing enforcement program. Interpretation of the new statute is aided by reference to the first tentative draft of the Uniform State Antitrust Act, the Illinois Antitrust Act, and Sherman Act precedents. While, constitutional problems in that it would deny recourse to a valid federal law. Similar constitutional issues may be involved in parts of the quoted Oregon statute. See id. § 646.780(2), (3).

381. MINN. STAT. § 325.8024 (1978).
382. See OR. REV. STAT. § 646.780(1)(b) (1977):

Notwithstanding paragraph (a) of this subsection, in any action under this section in which the plaintiff prevails solely on the basis of a judgment or decree entered in a proceeding under sections 1 to 45 of Title 15 of the United States Code or in another action by the state under ORS 646.760, 646.770 or this section, used as collateral estoppel against a defendant pursuant to ORS 646.805, plaintiff's recovery shall be limited to the actual damages sustained and the costs of suit, including necessary reasonable investigative costs and reasonable experts' fees and a reasonable attorney fee.

This approach is justified since the trebling is no longer needed to sanction the defendant nor is there as much concern about encouraging private enforcement when there has already been state enforcement. Concern that a private party might not seek his personal damages in such a situation due to the high costs of an antitrust suit is reduced by the inclusion of the provision awarding costs and attorney fees to a successful plaintiff.

384. See Rubin, supra note 9, at 711.
however, the new Minnesota antitrust law follows many aspects of federal antitrust doctrine, its variance from federal law is evident in its definition of “contracts, combinations, and conspiracies,” its express enumeration of per se offenses, its per se treatment of exclusive franchises and requirements contracts, and its stricter standard for the offense of monopolization. Also distinct are the Minnesota provisions for charter forfeiture and for collateral estoppel.

Minnesota's new antitrust statute is also distinguished by the increasing attention paid it by the state Antitrust Division, now one of the most aggressive in the nation. Particularly important in this enforcement effort are the state's refinement of its enforcement objectives, its broad use of pre-complaint discovery, and the variety of remedial measures available.

As the Minnesota antitrust law continues to have an increased impact on the Minnesota legal and business community, scrutiny of possible improvements must also increase. Suggested changes include the addition of provisions specifically addressing mergers and clarifying the per se illegality of tying arrangements and resale price maintenance. The ability of indirect purchasers to sue for damages under the Minnesota law also needs clarification. Finally, the remedies provided by the 1971 law need to be coordinated more fully with their underlying justifications.