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MISSOURI LAW REVIEW



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STATE ANTITRUST LAWS: NEW DIRECTIONS IN MISSOURI

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I. INTRODUCTION

Missouri has had some form of antitrust law since 1889.¹ Sections 416.010 through .400, Missouri Revised Statutes 1969, the antitrust provisions in effect prior to Senate Bill 424, were derived from the enactment of 1907,² with amendments in 1913,³ revisions in 1949,⁴ plus some minor changes and additions. This prior antitrust legislation, prohibiting combinations in restraint of trade, agreements to fix prices or limit production, boycotts, trusts of corporate stock (where made with a view to limiting production or fixing price), and geographic price discrimination, served adequately for a number of years. Indeed, some commentators described Missouri as one of only four states having general antitrust laws which had demonstrated any degree of continuing enforcement activity over a substantial period of recent years.⁵ Such comments, particularly with regard

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1. Mo. Laws 1889, at § 1-3; RSMo 1889, §§ 7319-7326. *See McCulloch, MISSOURI STATUTE ANNOTATIONS* 341 (2d ed, 1902), indicating no prior legislation on this subject. This act made it unlawful for "... any corporation, ... partnership or individual or other association of persons whosoever ..." to "... create, enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced, or sold in this state ..." or to create a trust of corporate stock for the purpose of fixing price or restricting production. A portion of this act was declared unconstitutional in *State ex rel. Attorney General v. Simmons Hardware Co.*, 109 Mo. 118, 18 S.W. 1125 (1892), but the Missouri General Assembly had already anticipated this and repealed the act of 1889, replacing it with Laws Missouri 1891, p. 186. *See generally*, Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 Mo.L.Rev. 215, 220 n.19 (1953).

2. Mo. Laws 1907, §§ 377-384, §§ 8967-8977.

3. Mo. Laws 1913, §§ 549-556, §§ 10298-10313.

4. House Bill No. 2110, Act of 1949.

5. Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV., 753, 754 (1961); Sieker, *The Role of the States in Antitrust Law Enforcement—Some Views and Observations*, *id.* at 873.

to the last two decades, may be more generous than just, considering that the last Missouri appellate decision⁶ evidencing a state prosecution under its own antitrust statutes, was decided in 1964. Furthermore, the next most recent cases involving state antitrust prosecutions were decided by the Missouri Supreme Court in 1953⁷ and 1955.⁸ The general disuse of Missouri's antitrust statute during the past two decades led the Attorney General to propose a major overhaul.

The need to revise the Missouri antitrust laws was manifested by several inadequacies, of which the most important were:

1. Restraints of trade occurring in connection with service activities were not covered; only "articles of commerce"—defined as commodities or conveniences—were subject to the law.⁹
2. The law did not cover unilateral business activities which have adverse competitive effects. Monopolies or attempts to monopolize were only proscribed where there existed a contract, agreement or combination to such effect.¹⁰
3. The statute's penalties and enforcement provisions were insufficient and inadequate.¹¹ The relief permitted the State was limited to an injunction¹² or imposition of a fine and/or an imprisonment sanction.¹³ The monetary fine provisions were unrealistic

6. *State ex inf. Eagleton v. Stupp Bros. Bridge & Iron Co.*, 308 S.W.2d 382 (Mo. 1964). Appellate decisions do not tell the whole story. No actions were brought under the Missouri Act at the trial court or administrative levels, either.

7. *State ex rel. Taylor v. Anderson*, 383 Mo. 884, 254 S.W.2d 609 (1953).

8. *State ex inf. Dalton v. Miles Lab.*, 365 Mo. 350, 282 S.W.2d 564 (En Banc 1955).

9. *State v. Green*, 344 Mo. 985, 130 S.W.2d 475 (Mo. 1939) (laundry business a service); *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 60 S.W. 91 (1900) (newsgathering).

In *Green*, the court stated

... If the people engaged in laundry and similar business enterprises enter into pools to fix prices and stifle competition so as to be injurious to the general welfare of the public at large, the remedy lies with the legislature. The statute can be amended to meet such a condition . . .

Id. at 477.

Interestingly, although the laundry business was held to be a service, and hence beyond the reach of the antitrust laws, other cases had held that furnishing ice was covered, *Dietrich v. Cape Brewery & Ice Co.*, 315 Mo. 507, 286 S.W. 38 (1926), and that telephone service was a convenience and therefore covered, *Home Tel. Co. v. Granby & Neosho Tel. Co.*, 147 Mo. App. 216, 126 S.W. 773 (St. L. Ct. App. 1910).

10. *Home Tel. Co. v. Granby & Neosho Tel. Co.*, 147 Mo. App. 216, 126 S.W. 773 (St. L. Ct. App. 1910) (decided under RSMo. 1899, § 8978); *State ex inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1908) (dictum). A single business which attempts to monopolize or monopolizes an area of trade in intrastate commerce thus was not amenable to investigation and prosecution. The federal statutes were not applicable, because only intrastate commerce was affected, and no Missouri law precluded unilateral attempts to monopolize or monopolization.

11. Recognized deterrents to violations of antitrust statutes are: (1) private treble damages actions and (2) prosecution by the government. Although private treble damage actions are a strong, possibly the primary, deterrent (during the past decade, it has been estimated that there has been an increase of over 120% in the number of private antitrust suits filed), government enforcement is a necessary adjunct.

12. § 416.260, RSMo 1969.

13. §§ 416.050, .130 RSMo 1969.

deterrents and did not exact a financial penalty commensurate with the economic consequences of modern-day antitrust violations. The criminal sanctions were rarely applied in practice.

4. The State lacked adequate investigative procedures for enforcement. The Attorney General had to seek convention of a special hearing before a State Supreme Court justice to obtain the testimony of witnesses and production of documents.¹⁴ However, the high cost involved in applying to a justice of the Supreme Court before an investigation could begin, as well as the requirement that such an investigation be conducted before such a justice or a special examiner, was not conducive to expeditious, efficient investigation.

These and other shortcomings led the Attorney General to press for a complete revision of the law which was begun in 1973 but did not reach fruition until the passage of Senate Bill 424 during the 1974 legislative session. This bill repealed sections 416.010 through 416.400 and replaced them with fifteen¹⁵ new sections, sections 416.011 through 416.161. This was the first complete overhaul of the law in 67 years.

The balance of this article will present: (1) a brief legislative history of Senate Bill 424, (2) a brief overview of the new law, and (3) an analysis of the provisions of the new law.

II. LEGISLATIVE HISTORY

Senate Bill 424 was patterned on perfected Senate Bill 128, First Regular Session, 77th General Assembly, which had been drafted for the 1973 legislative session by Attorney General John C. Danforth's office and sponsored by Senator Maurice Schechter, 13th District, St. Louis County. Senate Bill 128 was third read and passed by the Senate on May 2, 1973,¹⁶ but did not reach debate in the House of Representatives and "died" on the House third reading calendar at the close of the legislative session on June 15, 1973.

Senate Bill 424 was prefiled in the Second Regular Session, 77th General Assembly, on December 4, 1973. Again, the bill was drafted by the Attorney General's office, was sponsored by Senator Schechter, and was handled in the House of Representatives by Representative James P. Mulvaney, 61st District, St. Louis County. The bill was referred to the Committee on Criminal Justice,¹⁷ from which it was reported out with the recommendation "do pass" with four Senate Committee Amendments¹⁸ on

14. § 416.300, RSMo 1969.

15. Although the enacting clause, § 1 of Senate Bill 424, speaks of *sixteen* new sections, there are in fact only fifteen, because § 416.101, which provided subpoena *ad testificandum* powers, was deleted. See text accompanying note 23 *infra*. The remaining sections were not renumbered.

16. *S. Jour.*, Seventy-Seventh General Assembly, First Regular Session, Sixty-First Day, Wednesday, May 2, 1973, pp. 854-55.

17. Senator Ike Skelton, 28th District, Chairman.

18. Senate Committee Amendment No. 1 struck from the bill subsections 4, 5, 6 and 7 of § 416.031. These subsections established a substantive price discrimination law generally comparable to the Robinson-Patman Act in the federal system. It also deleted subsection 3 of § 416.051, which contained a civil penalty,

January 30, 1974.¹⁹

On February 6th, the bill was taken up for perfection.²⁰ The Senate by voice vote adopted Senate Committee Amendment No. 1.²¹ By a roll call vote of 23-5, the Senate passed Senate Substitute Amendment No. 1 for Senate Committee Amendment No. 2.²² The substitute amendment struck from the bill all of proposed section 416.101, the subpoena *ad testificandum* section.²³ The Senate by voice vote also passed Senate Committee Amendments Nos. 3 and 4.²⁴

Senator Jones²⁵ offered Senate Amendment No. 1, which would have limited private and governmental enforcement of the state antitrust law to those proscribed activities engaged in by persons who themselves acted solely in intrastate commerce, and were not subject to the provisions of the federal antitrust laws. This amendment failed adoption by a vote of 14 to 15.²⁶ Senator Gant²⁷ then offered Senate Amendment No. 2 to strike from section 416.061 the language authorizing the Attorney General to employ special counsel in suits to enforce the provisions of the Act or in actions brought by the Attorney General's office in the federal court under the federal antitrust laws.²⁸ Senator Webster²⁹ offered Senate Substitute Amendment No. 1 for Senate Amendment No. 2. The substitute amendment limited appropriations made by the General Assembly for the Attorney General's office for purposes of enforcing the antitrust law to \$36,209.³⁰

substituted a new section providing for mandatory civil contempt penalties, and repealed subsection 4 of § 416.051, which provided for forfeiture of corporate charters.

Senate Committee Amendment No. 2, authored by the Attorney General's office, amended § 416.101 which proposed to give, under court supervision, subpoena *ad testificandum* powers to the Office of the Attorney General. Senate Committee Amendment No. 2 delineated numerous conditions on the use of such subpoena power in order to make its use essentially complementary to the civil investigative demand authority of § 416.091.

Senate Committee Amendments Nos. 3 and 4 struck from the bill proposed § 416.081 and related language which provided for an antitrust revolving fund.

19. *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session Twelfth Day, January 30, 1974, pp. 157-160.

20. *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Seventeenth Day, February 6, 1974, pp. 219-222.

21. See note 18 *supra*.

22. *Id.* The substitute amendment was offered by Senator Paul L. Bradshaw, 30th District, Springfield.

23. A similar provision had been contained in subdivision 1 of § 416.091 of Senate Bill 128 as originally proposed, but had been deleted in the bill as perfected by the Senate during the Seventy-Seventh General Assembly, First Regular Session. *S. Jour.*, Seventy-Seventh General Assembly, First Regular Session, Fifty-Sixth Day, Tuesday, April 24, 1973, pp. 755-757, and Fifty-Seventh Day, Wednesday, April 25, 1973, p. 779.

24. See note 18 *supra*; *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Seventeenth Day, February 6, 1974, pp. 219-222.

25. Senator A. Clifford Jones, 7th District, St. Louis County.

26. *S. Jour.*, *supra* note 20 at 221.

27. Senator Jack E. Gant, 16th District, Jackson County.

28. *S. Jour.*, *supra* note 20 at 221.

29. Senator Richard M. Webster, 32nd District.

30. *S. Jour.*, *supra* note 20 at 221.

The substitute amendment passed by voice vote, and Senate Bill 424, as amended, was declared perfected.³¹ On February 20th, the bill was taken from the informal calendar, read for the third time, and passed by roll call vote of 29-0.³²

Senate Bill 424 then went to the House,³³ where, on March 6th, it was referred to the House Committee on Criminal Jurisprudence.³⁴ The bill was passed out of the committee with the recommendation "do pass" with two House Committee Amendments and reported on the floor of the House on March 28th.³⁵

On April 17th, the bill was taken up for passage.³⁶ The House by voice vote adopted House Committee Amendment No. 1,³⁷ which amendment removed the limitation³⁸ on appropriations to the office of the Attorney General for antitrust enforcement. Also by voice vote, the House adopted House Amendment to House Committee Amendment No. 2,³⁹ replacing section 416.081, the antitrust revolving fund section, which had been deleted by Senate Committee Amendments Nos. 3 and 4.

Representative Gray⁴⁰ offered House Amendment No. 1 to increase the criminal fine in section 416.051(1) from \$50,000 to \$100,000; this was adopted by a roll call vote of 88-49.⁴¹ House Amendments Nos. 2, 3 and 4 were technical and clarification amendments, and were adopted by voice votes.⁴² As amended, Senate Bill 424 was read the third time and passed by a roll call vote of 134-9.⁴³

The Senate refused to concur in the House Amendments, and the House refused to recede from its position.⁴⁴ Accordingly, the bill was submitted to a conference committee on April 22nd.⁴⁵ The conference com-

31. *Id.* at 222.

32. *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Twenty-Fourth Day, February 20, 1974, p. 314.

33. *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Twenty-First Day, March 6, 1974, p. 769.

34. Representative Phil Snowden, 20th District, Clay County, Chairman.

35. *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Forty-Fourth Day, March 28, 1974, pp. 1107-08.

36. *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Fifty-Third Day, April 17, 1974, pp. 1362-65.

37. *Id.* at 1362.

38. Limitation of \$36,209 was added by Senate Substitute Amendment No. 1. for Senate Amendment No. 2.

39. *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Fifty-Third Day, April 17, 1974, p. 1362.

40. Representative James C. Gray, 41st District.

41. *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Fifty-Third Day, April 17, 1974, pp. 1362-63.

42. *Id.* at 1363-64.

43. *Id.* at 1364-65.

44. *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Fifty-Sixth Day, April 22, 1974, p. 783; *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Fifty-Fifth Day, April 22, 1974, p. 1398.

45. *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Fifty-Sixth Day, April 22, 1974, p. 785; *H.R. Jour.*, Seventy-Seventh General

mittee recommended that the House recede from its position on House Amendment No. 1 (increasing the criminal fines) and House Amendment No. 3 (clarification amendment adding additional language) and that the Senate concur in House Committee Amendment No. 1 (deleting the limitation on appropriations), House Committee Amendment No. 2, as amended (reinstating the antitrust revolving fund), and House Amendments Nos. 2 and 4 (technical amendments). The conference committee report was read and adopted in both the Senate and House of Representatives after which the bill passed in both houses.⁴⁶

The bill was duly signed by the president of the Senate and the Speaker Pro Tem of the House, and delivered to the Governor on May 7, 1974.⁴⁷ Governor Christopher S. Bond signed the bill on June 12th, to become law effective 90 days after adjournment on August 13, 1974.⁴⁸

III. OVERVIEW

The new law begins by defining several of the terms most crucial to interpretation of the act; importantly, section 416.021 by definition includes "services" within the act's coverage.⁴⁹ The act then delineates the types of conduct which violate the law: contracts, combinations or conspiracies in restraint of trade, monopolization, attempted monopolization, conspiracy, and types of anticompetitive conduct offensive to section 3 of the Clayton Act.⁵⁰ The exemptions from the act, carefully qualified, are set out in section 416.041. Section 416.051 specifies the criminal penalties, and places responsibility on the Attorney General to investigate and prosecute, with such assistance as he may require from the appropriate County Prosecuting Attorneys, suspected violations. This section also affords the Attorney General all the powers with respect to criminal prosecutions under this act that a County Prosecuting Attorney would have with respect to investigations and prosecutions of crimes generally. Section 416.061 is the jurisdic-

Assembly, Second Regular Session, Fifty-Fifth Day, April 22, 1974, p. 1398. The House conference committee members were Representatives: James P. Mulvaney, Sixty-First District; Bill Peterson, Forty-Sixth District; Phil Snowden, Twentieth District; George J. Donegan, One Hundred Forty-Sixth District; and, George E. Murray, Ninetieth District. The Senate conference committee members were Senators: Maurice Schechter, Thirteenth District, A.M. Spradling, Jr., Twenty-Seventh District; Donald L. Manford, Eight District; Edward Stone, Jr., Twenty-Sixth District; and, Paul L. Bradshaw, Thirtieth District.

46. *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Sixtieth Day, April 26, 1974, pp. 896-897; *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Sixtieth Day, April 28, 1974, pp. 1532-33.

47. *S. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Sixty-Fifth Day, May 7, 1974, p. 1073; *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Sixty-Third Day, May 7, 1974, p. 1687.

48. See Act 69, VERNON'S MISSOURI LEGISLATIVE SERVICE, No. 2, 1974 Regular Session, pp. 183-89.

49. *Id.* at § 416.021(3).

50. 15 U.S.C. § 14 (1970).

tion section; it also empowers the Attorney General to act on behalf of the State or its subdivisions in actions brought to enforce the provisions of the Act or in actions brought in the federal courts. Authority is granted for the Attorney General to use consent decrees to settle antitrust suits expeditiously, and makes a final judgment in a proceeding brought by the State *prima facie* evidence against the defendant. Section 416.071 grants state circuit courts broad equity powers to restrain violations and order corrective steps. Very importantly, section 416.081 establishes an antitrust revolving fund to finance investigations under the enforcement of the new law. Section 416.091 gives the Attorney General the power to use a civil investigative demand in his investigations of suspected violations, and provides important safeguards for the subjects of such investigations. Section 416.111 grants transactional immunity to any person compelled to testify concerning suspected violations. The civil liabilities section, section 416.121, generally follows prior law, although it does specify that the State in its proprietary capacity is also entitled to recover treble damages. Section 416.131, the general venue section, specifies the statute of limitations and provides for tolling of the statute during the pendency of civil or criminal proceedings and specifically denies that state enforcement will be barred by an effect on interstate commerce. Finally, section 416.141 provides for use of federal precedent in construing the state law, and makes it clear that the remedies available to the state are cumulative, but does preclude the state from securing duplicative recovery in its proprietary capacity.

IV. ANALYSIS OF SENATE BILL 424

416.011. Sections 416.011 to 416.161: may be known and shall be cited as the "Missouri Antitrust Law."

416.021. Unless a different meaning is clearly indicated by the context, for the purposes of sections 416.011 to 416.161

(1) "Commodity" means any kind of real, personal or mixed property, but does not include the labor of a human being;

(2) "Person" means any individual, corporation, firm, partnership, incorporated or unincorporated association or any other legal or commercial entity;

(3) "Service" means any kind of activity performed in whole or in part for financial gain but does not include labor which is performed by individuals as employees of others;

(4) "Trade or commerce" means any economic activity involving or relating to any commodity or service.

The definition of "commodity" in subdivision (1) of section 416.021 is intended to include all subjects of commerce other than service activities. Subdivision (3) defines "service," and is intended to bring all service-related activities within the scope of the new law. The old law, which necessitated differentiating between services and commodities or conveniences, amply demonstrated the need for such all-inclusive definitions.⁵¹

51. See note 9 *supra*.

This need is bolstered by our evolving economic system; in 1970, the Gross National Product of this country was \$976.4 billion, of which \$409.2 billion, or 42 per cent, was derived from service-related activities.⁵² It would be inappropriate, without substantial justification, to exempt from coverage of the antitrust laws activities comprising such a significant portion of the economy.⁵³

The need for a broadly-drawn antitrust law was also apparent in the inconsistencies which existed between different sections of the prior law. Although section 416.010, prohibiting combinations in restraint of trade, covered "any product or commodity . . . or any article or thing," section 416.020, prohibiting agreements to fix prices or to limit production, and section 416.030, prohibiting combinations to boycott or threaten to boycott, described their areas of coverage as "any article of manufacture, mechanism, merchandise, commodity, convenience or repair or any product of mining or any article or thing whatsoever of any class or kind." These inconsistencies gave neither the Attorney General, the courts, nor the business community adequate guidance as to precisely what the prior law covered.

The addition of sections defining "commodity" and "service" within the State's antitrust law should accomplish two purposes: (1) it should clarify what is covered by the statute; and, (2) it should make it clear that all activities related to achieving economic gain within the competitive market place are covered by the law, except those areas specifically exempted.

Both the definitions of "commodity" and "service" exclude "labor of a human being,"⁵⁴ or "labor which is performed by individuals as employees of others,"⁵⁵ respectively. Together with the exemption for labor organizations contained in section 416.041, these exclusions make it clear that the lawful activities of labor organizations are exempt from the new law.

The definition of "person" in subsection 2 of section 416.021 includes any form of business or governmental entity. The need for such a definition is seen in the line of cases⁵⁶ in which the federal court had to consider what type of business entity was covered by the word "person" under the Sherman Act.⁵⁷ The language, "other legal or commercial entity" would include municipalities and other political subdivisions. Thus, anybody or anything injured in its business or property by an antitrust violation would have recourse under the state antitrust law (section 416.121), and would

52. U.S. Dep't of Commerce, *STATISTICAL ABSTRACT OF THE UNITED STATES* 319, table 515 (1973).

53. Illinois recognized this in the 1965 revision of its antitrust law, *ILL. ANN. STAT.*, Ch. 38, § 60-2 (1967).

54. Act 69, *VERNON'S MISSOURI LEGISLATIVE SERVICE*, No. 2, 1974 Regular Session, § 416.021(1), p. 183.

55. *Id.* at § 416.021(3), p. 184.

56. *E.g.*, *United States v. Brookman Co.*, 229 F. Supp. 862 (N.D. Cal. 1964).

57. 15 U.S.C. § 1 (1970).

also be susceptible to suit if it participated in an anti-competitive practice, except for the enumerated exceptions under the Act and for actions immune under the judicially created "state action" doctrine.

The definition of "trade or commerce" in subdivision (4) is needed because section 416.031, which enumerates the substantive offenses, speaks in terms of "trade or commerce". It also reinforces the broad language of the definitions of "commodity" and "service", further emphasizing that all forms of economic activity are covered.

416.031. 1. Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.

2. It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.

3. It is unlawful for any persons engaged in trade or commerce in this state, in the course of such trade or commerce, to lease or make a sale or contract for sale of any commodity, whether patented or unpatented, for use, consumption, or resale within this state, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in this state.

Subsection 1 of section 416.031 generally parallels section 1 of the Sherman Act,⁵⁸ proscribing "every contract, combination . . . or conspiracy in restraint of trade or commerce." The rule of reason, which has been established as a rule of judicial construction of "restraint of trade" in the federal legislation, would seem to apply to this section.⁵⁹ The rule of reason, first enunciated in *Standard Oil Co. v. United States*⁶⁰ proscribes only "unreasonable" restraints of trade. The rule allows the court to employ a flexible approach, emphasizing the importance of the facts of each case.

The United States Supreme Court has interpreted the language of section 1 of the Sherman Act to mean that certain types of conduct constitute *per se* violations.⁶¹ Examples of this type conduct include: price

58. *Id.*

59. As to whether the rule of reason applied to Ch. 416, RSMo 1969, see *State ex rel. Barrett v. Boeckeler Lumber Co.*, 301 Mo. 445, 531-45, 256 S.W. 175, 199-204 (En Banc 1923).

60. 221 U.S. 1 (1911).

61. The distinction between a *per se* test and a rule of reason test lies in determining the scope of inquiry permitted. Certain conduct is deemed so hostile to competition as to merit condemnation without detailed inquiry as to its "reasonableness" or "unreasonableness"; illegality follows automatically upon proof that the particular agreement under attack is in fact, for example, a price-fixing agreement. Under a rule of reason test, on the other hand, particular conduct is illegal only if it is found to have an *unreasonable* effect on trade or commerce. A detailed inquiry into all the facts and circumstances surrounding the challenged conduct is necessary to determine its reasonableness. This, in turn, leads to consideration of masses of economic data in many cases, resulting in the "big" case.

fixing,⁶² vertical⁶³ and horizontal⁶⁴ agreements concerning distribution and production, group boycotts,⁶⁵ horizontal allocations of territories,⁶⁶ and tying arrangements.⁶⁷ Because subsection 1 of section 416.031 was drawn to encompass the spirit and intent of section 1 of the Sherman Act, and in view of the legislative directive in section 416.141 to construe the act in harmony with judicial interpretations of comparable federal antitrust statutes, these offenses should also be viewed as *per se* violations of the new law.

Subsection 2 parallels, generally, section 2 of the Sherman Act,⁶⁸ and enumerates three offenses: monopolization, attempts to monopolize, and conspiracy to monopolize. Both multiple party and single-party activities that restrain trade are proscribed. The federal case law developed under section 2 of the Sherman Act should be applicable to guide Missouri judicial decisions in this particular. However, past Missouri case law, such as that enunciated in *State ex. inf. Hadley v. Standard Oil Co.*,⁶⁹ in which the

62. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940). See generally Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 Nw. U.L. Rev. 137 (1962).

63. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). In a vertical agreement concerning distribution, a person at one level of the distribution process (e.g., the manufacturer) agrees with someone at another level of the process (e.g., a wholesaler) to maintain a particular retail price, or to restrict sellers to particular geographic areas. Most recent cases have involved resale price maintenance schemes or territorial allocations.

64. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). A horizontal agreement is one between persons operating at the same level of the distribution process. *Sealy*, for example, dealt with trademark license agreements which restricted each licensee to manufacturing and sales within a designated territory. Since *Sealy, Inc.* was formed and owned by the licensee manufacturers, the Court viewed the arrangement as though it were a horizontal agreement directly among the manufacturers, ignoring the vertical aspects.

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

66. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). A horizontal allocation of territory occurs when competitors agree among themselves to restrict their activities to particular geographic markets.

67. *Northern Pac. R.R. Co. v. United States*, 356 U.S. 1 (1958). "... (A) tying arrangement may be defined as an agreement by a party to sell one product [the "tying product"] but only on the condition that the buyer also purchases a different (or tied) product, or at least on the condition that he will not purchase that product from any other supplier." American Bar Association, *ANTI-TRUST DEVELOPMENTS 1965-1968* at 5,6 (1968).

68. 15 U.S.C. § 2 (1970).

69. 218 Mo. 1, 116 S.W. 902 (1909), *aff'd*, 224 U.S. 270 (1912). The Missouri supreme court defined monopoly as follows:

... A monopoly, within the meaning of the antitrust laws, is created when, as a result of any contract or combination, previously competing businesses are so concentrated into the hands of a single individual or corporation, or of a few individuals or incorporations acting in concert, that they thereby have the power to practically control the prices of commodities, and thus practically suppress competition . . .

The chief consideration in determining whether a monopoly exists is not that prices are raised and competition is destroyed, but does the

court discussed the elements of monopoly power, should not be disregarded.

The offense of monopolization has two elements: (1) the possession of monopoly power in a relevant market, and (2) an element of deliberateness in the acquisition or maintenance of that power.⁷⁰ The offense of attempt to monopolize, however, requires a specific intent to effectuate a consequence definable as monopolization, and conduct which creates a dangerous probability of the accomplishment of that objective.⁷¹ The final offense within subsection 2, conspiracy to monopolize, requires only proof of a forbidden agreement; no overt act need be shown.⁷²

The omission in subsection 2 of the term "combination", which does appear in the Sherman Act, appears to have been inadvertent. Under the federal law, the offenses of monopolization or attempted monopolization may be committed by both single entities or by combinations of entities; conspiracy necessarily requires more than one conspirator. The former Missouri law required a combination before any violation would be found.⁷³ The omission of the term "combination" in this section should not be interpreted as an attempt to eliminate the offense of combination, but rather as expanding the scope of the law to include violations based upon single-firm activity. Although a combination to fix prices might be found to be within the language "monopolize" or "attempt to monopolize" or "conspire to monopolize", it would be desirable to add a clarifying amendment to specifically include combinations under subsection 2 in order to avoid a judicial interpretation which seizes upon this omission as a basis for not following comparable federal judicial interpretations of section 2 of the Sherman Act.

Subsection 3 is patterned on section 3 of the Clayton Act,⁷⁴ and prohibits exclusive dealing arrangements and requirements contracts. For example, the sale of a product upon the condition that the buyer will not deal in or use a competitive product could be proscribed under subsection 3, provided the requisite economic harm could be shown. A requirements contract, requiring the buyer to purchase all his requirements of a particular item from the seller, as a condition to the purchase, would have the same economic effect as an exclusive dealing arrangement.

Clayton Act, section 3, proscribes exclusive dealing arrangements,⁷⁵

power exist in the combine to raise prices to destroy competition at pleasure? . . .

218 Mo. at 457, 116 S.W. at 1045-46 (citations omitted).

70. United States v. Grinnell Corp., 384 U.S. 563 (1966).

71. Swift & Co. v. United States, 196 U.S. 375 (1905); see generally, Smith, *Attempt to Monopolize: Its Elements and Their Definition*, 27 GEO. WASH. L. REV. 227 (1958); Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 304 (1956).

72. Nash v. United States, 229 U.S. 373 (1913); Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950).

73. See note 10 and accompanying text *supra*.

74. 15 U.S.C. §14 (1970).

75. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

but only as applied to limitations placed on buyers by sellers. Subsection 3 of section 416.031 is subject to the same restrictive interpretation. However, the competitive market can also be damaged if a powerful buyer imposes a corresponding limitation on his suppliers: *i.e.*, we will purchase widgets from you on the condition that you will not sell to our competitor—in effect, an output contract. For this reason, in Senate Bill 128 as proposed in 1973, the counterpart of subsection 3 was worded as follows:

“Any contract, combination, agreement, or understanding that one person shall not engage in trade or commerce with a competitor of the other person is unlawful if the effect may be to substantially lessen competition in any line of trade or commerce.”

The intent of this language was to follow the case history of section 3 of the Clayton Act as to exclusive dealing and requirement contracts, but to make the language broad enough to include both limitations placed on buyers by sellers and limitations placed on sellers by buyers. This section was deleted during the debate on Senate Bill 128 in the Senate in May of 1973;⁷⁶ no effort was made to reintroduce that provision in Senate Bill 424. It would seem therefore that this section will be interpreted as only placing restrictions on limitations imposed by sellers on buyers. As noted above, the economic effect on the marketplace is identical, whether the limitation is imposed by the seller on the buyer or by the buyer on the seller. Accordingly, serious consideration should be given to amending subsection 3 to make it applicable to both situations.

The repeal of sections 416.010 to 416.040, Missouri Revised Statutes 1969, and the adoption of section 416.031 are not intended to expunge previous case authority where it is consistent with the intent and spirit of section 416.031. The new section incorporates the intent and spirit of the federal antitrust laws. The following judicial pronouncements on substantive offenses should continue to be controlling in Missouri:

- (1) Territorial allocations are unlawful.⁷⁷
- (2) Combinations of corporations to curtail output of their products are unlawful.⁷⁸
- (3) Any agreement to regulate, control, fix or maintain the price of any article is unlawful.⁷⁹
- (4) Tying arrangements are illegal.⁸⁰

76. *S. Jour.*, Seventy-Seventh General Assembly, First Regular Session, Fifty-Seventh Day, Wednesday, April 25, 1973, pp. 78-81, Senate Amendment No. 10.

77. *State ex inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909).

78. *Attorney General v. Arkansas Lumber Co.*, 260 Mo. 12, 169 S.W. 145 (1914).

79. *Temperato v. Horstman*, 321 S.W.2d 657 (Mo. 1959); *State ex rel. Dalton v. Miles Labs., Inc.*, 365 Mo. 350, 282 S.W.2d 564 (En Banc 1955).

80. *Temperato v. Horstman*, 321 S.W.2d 657 (Mo. 1959).

- (5) Combinations for the purpose of refusing to deal with a firm (boycotts) are illegal.⁸¹

In accord with previous judicial pronouncements, an agreement which has the effect of unreasonably restraining trade should be considered a combination in restraint of trade despite a failure to show actual injury to the public or a complete monopoly.⁸² Likewise, numerous defenses to antitrust lawsuits should continue to be disallowed by the courts. This would include the limitations placed on the "single trader doctrine",⁸³ the plea that a participant in an illegal combination did not fully participate in the illegal restraint of trade,⁸⁴ the close scrutiny of trade associations and other arrangements to circumvent the law prohibiting price fixing,⁸⁵ and the reasonableness of fixed prices.⁸⁶ However, the defense of *in pari delicto*, permitted under the prior Missouri antitrust law except where a party was coerced or intimidated into joining the illegal combination,⁸⁷ may be untenable under the new law in light of the Supreme Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*,⁸⁸ in which the majority held that the doctrine is not to be recognized as a defense to an antitrust action.

In 1961, Professor Rahl suggested that states avoid incorporating the substantive provisions of the Clayton Act, especially sections 2, 3 and 7, into their own law, because to do so would embroil state law in the ambiguities and controversies surrounding federal law.⁸⁹ He felt that a state

81. *Reisenbichler v. Marquette Cement Co.*, 341 Mo. 744, 108 S.W.2d 343 (1937).

82. *State ex inf. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903).

83. The "single-trader" doctrine has been defined as the right of one engaged in a private business to trade, or refuse to trade, with whomever he pleases. *See, e.g., Dietrich v. Cape Brewery & Ice Co.*, 315 Mo. 507, 286 S.W. 38 (1926); *Staroske v. Pulitzer Publishing Co.*, 235 Mo. 67, 138 S.W. 36 (1911). In *State ex inf. Dalton v. Miles Labs., Inc.*, 365 Mo. 350, 282 S.W.2d 564 (En Banc 1955), the court stated:

But, there is an obvious difference between a mere refusal to sell and an agreement between or understanding to fix or maintain retail prices . . . , even though the path between the two may be narrow . . . and the line of demarcation may be indistinct and may defy precise definition And, the single trader doctrine . . . has been 'much hedged about by later cases,' confers only a 'limited dispensation' . . . , and certainly affords no license for a combination, agreement or understanding forbidden by our antitrust statutes. . . .

365 Mo. at 362, 282 S.W.2d at 571 (*citations omitted*):

84. *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S.W. 101 (1912).

85. *State ex rel. Barrett v. Boeckeler Lumber Co.*, 301 Mo. 455, 256 S.W. 175 (1923).

86. *State ex inf. Attorney General v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914).

87. *Temperato v. Horstman*, 321 S.W.2d 657 (Mo. 1959); *Bersh v. Fire Underwriters of St. Louis*, 241 S.W. 428 (Mo. En Banc 1922).

88. 392 U.S. 134 (1968).

89. Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753, 772-73 (1961).

law having a Sherman Act-type prohibition of contracts in restraint of trade such as section 416.031(1) would be sufficient to reach the serious cases.⁹⁰ Although the cases since that time have contributed little to clarification of the Clayton Act section 3, the Missouri courts should attempt to fashion a coherent doctrine in their application of the proscriptions of section 416.031(3). Judicious selection of cases for prosecution under this section may help in that effort.

Practical considerations will, of course, limit the effectiveness of section 416.031. Offenses such as contracts in restraint of trade can be enjoined, and competitive harm thus avoided. Monopolization, however, does not lend itself to such facile treatment. The only meaningful remedy for single firm monopolization is some form of divestiture, or restructuring of the relevant market, a task for which state agencies are woefully ill equipped.⁹¹ It is difficult for a state to attempt to break up a large, highly diversified, interstate corporation because it lacks the manpower and resources to handle one of the "big" cases.⁹² Clearly, the State must eschew pursuing these targets, at least on the charge of monopolization. This does not mean that there is then no meaningful role for the monopolization language of section 416.031(2). There may be intrastate monopolies, or attempts to monopolize within a portion of a state. Such monopolies would be beyond the reach of federal legislation; and they would not require the extensive manpower and resource commitments of the big cases. But, it will be incumbent on those charged with enforcement of the new law to recognize these limitations and select their cases accordingly.

One legislative amendment of this section deserves mention. Senate Bill 128 as introduced in January, 1973, included two additional subsections, numbers 4 and 5. Subsection 4 declared it unlawful for any person to use any threat, intimidation or boycott to effectuate any of the acts forbidden by the Missouri antitrust law. Subsection 5 incorporated the provisions of the Robinson-Patman Act,⁹³ which modified section 2 of the Clayton Act to forbid price discrimination activities. Both subsections were deleted in the form in which Senate Bill 128 was perfected on April 25, 1973.⁹⁴ A modified form of the substantive anti-price discrimination provision was reintroduced in Senate Bill 424, but was deleted by Senate Committee Amendment No. 1, on January 31, 1974.⁹⁵

90. *Id.* at 773.

91. *Id.* at 772. See C. KAYSEN & D. TURNER, ANTITRUST POLICY (1959) for a general appraisal of these problems.

92. For example, the famous *Alcoa* litigation [United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)] was initiated in 1937, and was more or less finally disposed of in 1950, after the expenditure of vast amounts of time, energy, and money.

93. 15 U.S.C. § 13 (1970).

94. S. 128, 77th General Assembly, First Regular Session, [Perfected], April 25, 1973.

95. See note 18 and accompanying text *supra*.

The deletion of the proposed subsection 4 should not be interpreted as a legislative determination to strike from the new antitrust law the prohibitions against threats, intimidations, or boycotts to achieve an unreasonable restraint of trade. Such activities are proscribed by subsections 1 and 2 of section 416.031.⁹⁶ The elimination of the price discrimination provisions, however, may be a more serious matter. In the federal scheme of antitrust regulations, the Robinson-Patman Act has been a fertile field for private litigation in recent years. This may imply that price discriminations are quite common, and that the State should have some mechanism to combat at least those discriminations which are beyond the reach of federal jurisdiction. Some commentators, on the other hand, have suggested that state officials would be well advised to avoid duplicating the Robinson-Patman Act because of the controversies it has engendered, both as to its meaning and the policy behind it.⁹⁷ In deleting the price discrimination provision, the legislature may have adopted the latter viewpoint. Or price discriminations may come within the purview of subsections 1 or 2⁹⁸ so that the rejected provision may have been considered superfluous. The Attorney General's Office should make recommendations for future amendment of the law, if necessary, based on its experience with the new law.

416.041. 1. Nothing contained in the Missouri antitrust law shall be construed to forbid the existence or operation of:

(1) Any labor organization, instituted for the purpose of mutual help and not conducted for profit, or of individual members thereof as to any activities which are directed solely to labor objectives which activities are lawful under the laws of either this state or the United States;

(2) Any agricultural or horticultural organization instituted for the purpose of mutual help and not conducted for profit, or of individual members thereof as to any activities which are directed solely to activities of such organizations which activities are lawful under the laws of either this state or the United States.

2. Nothing contained in the Missouri antitrust law shall be construed to apply to activities or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of this state or of the United States.

Subsection 1 generally parallels section 6 of the Clayton Act,⁹⁹ but is made more explicit than the Clayton Act by limiting the exemption accorded to labor and agricultural organizations to those activities "directed solely to activities which . . . are lawful under the laws of either this state or the United States."¹⁰⁰ The lawful activities criterion neces-

96. See notes 78 and 81 and accompanying text *supra*.

97. Rahl, *supra* note 89, at 773.

98. See note 79 and accompanying text *supra*; *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

99. 15 U.S.C. § 17 (1970).

100. This concept is also embodied in the Illinois Antitrust Act. ILL. REV. STAT. ch. 38, § 60-5 (1969).

sarily incorporates both federal and state statutes and judicial pronouncements. The test would be whether, under state or federal statutory or case law, the objective of the activity is lawful. If the objective is only partly, as opposed to wholly, lawful, the exemption would not be available. This test is consistent with that laid down in the *Allen Bradley* case,¹⁰¹ which found that labor organizations lose their immunity from the federal antitrust laws when they "aid non-labor groups to create business monopolies and to control the marketing of goods and services."¹⁰²

The federal interpretation of the labor exemption would apply and serve as a guide to the construction of section 416.041.1(1) where the federal decisions are not inconsistent with the plain and literal meaning of that section. The major decisions¹⁰³ in this area indicate that unilateral action by labor organizations is exempt from antitrust regulation when the action is aimed at accomplishing legitimate purposes. However, if the union is inspired by or acts in concert with non-union groups, and this results in a combination in restraint of trade, there is no exemption. In the final analysis the trier of fact must determine whether particular conduct is unilateral or is part of a combination in restraint of trade.

The labor exemption of section 416.041.1(1) must also be read in conjunction with the provision of subsection 3 of section 416.021 which declares that labor performed as an employee is not a "service" within the meaning of the Missouri Antitrust Law. Taken together, these provisions ensure that both management and labor can bargain collectively concerning the terms and conditions of employment without fear of violating the antitrust law.

The agricultural exemption of section 416.041.1(2) is likewise limited to "activities [which] are lawful." Because this also generally parallels section 6 of the Clayton Act, federal precedent will be applicable as a guide in the construction of this provision, so long as the federal decisions are not inconsistent with the plain and literal meaning of the section. For example, in *United States v. Borden*,¹⁰⁴ the Court rejected the contention that agricultural cooperatives enjoyed complete immunity from the antitrust laws and established the rule that the exemption did not extend to situations in which agricultural associations are alleged to have combined with groups which do not qualify for the agricultural cooperative immunity. Other relevant decisions¹⁰⁵ establish that unilateral action by an association

101. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945).

102. *Id.* at 808.

103. *Associated Food Retailers v. Jewell Tea Co., Inc.*, 381 U.S. 761 (1965); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945); *United States v. Hutcheson*, 312 U.S. 219 (1941).

104. 308 U.S. 188 (1939).

105. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962); *Maryland & Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458 (1960); *Case-Swayne Co. v. Sunkist Growers Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 387 U.S. 384 (1967).

of farmers or growers is not generally proscribed, but any form of monopolistic or conspiratorial arrangements with non-cooperative enterprises are illegal.¹⁰⁶

Subsection 2 of section 416.041 provides antitrust immunity to regulated industries, whether regulated by state or federal authority. The exemption applies where the specific activity or arrangement in question is in fact "expressly approved or regulated . . . under statutory authority." The States of Connecticut¹⁰⁷ and Minnesota¹⁰⁸ have provisions with comparable, but not identical, language; these provisions have not yet been judicially construed.

416.051. 1. Any person who violates any of the provisions of subsections 1 or 2 of section 416.031 is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of up to fifty thousand dollars or by imprisonment in the county jail for a term not to exceed one year, or by both such punishments at the discretion of the court. The attorney general shall not commence prosecutions under this section against any defendant who, at the time, is a defendant with regard to any current information or indictment filed by the United States for violation, or alleged violation, of the Federal Antitrust Statutes involving substantially the same subject matter.

2. The attorney general, with such assistance as he may require from the appropriate county prosecuting attorney, shall investigate suspected criminal violations of this act and shall commence and try all criminal prosecutions under this act. Prosecutions under this act may be commenced by information or indictment. With regard to the investigation, commencement and trial of such prosecutions, the attorney general shall have all the powers and duties vested in him by law with respect to criminal investigations and prosecutions generally. All reasonable and necessary expenses incurred by a prosecuting attorney or his staff in assisting the attorney general shall be reimbursed from appropriations made to the attorney general.

3. Any person who is found to be in contempt of any court order issued to enforce the provisions of section 416.031 arising out of any proceeding brought by the attorney general shall forfeit and pay to the state a civil penalty of not more than twenty thousand dollars. For the purposes of this section, the circuit court issuing any such court order enforcing the provisions of section 416.031 shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for recovery of civil penalties.

The first subsection follows the penalty provisions of the Sherman

106. Although the decisions enumerated in note 105 *supra* dealt, in certain aspects, with the Capper-Volstead Act of 1922 (7 U.S.C. §§ 291, 292 (1970)), they are applicable to the general exemption for agricultural associations.

107. CONN. GEN. STAT. ANN. ch. 624, Title 35, § 31(b) (Supp. 1974).

108. MINN. STAT. § 325.8017(2) (Supp. 1974).

Act.¹⁰⁹ It should be noted that the criminal sanctions are applicable only to violations of section 416.031, subsections (1) and (2). It is believed that criminal penalties are a desirable weapon in the arsenal of antitrust enforcement devices, primarily because less severe penalties are unlikely to be as effective in deterring individuals.¹¹⁰ However, the application of such penalties should be reserved for the more egregious types of violations, where it can be demonstrated that there was an illegal purpose to restrain competition. The courts' concern with imposing criminal sanctions for "economic" or "business" crime is reflected in the paucity of criminal convictions of individuals under the federal legislation. Indeed, until the "electrical industry conspiracy" of the 1960's,¹¹¹ criminal sanctions had rarely been imposed on individuals. It is believed, however, that the types of offenses included in subsections (1) and (2) of section 416.031 warrant such treatment, provided the requisite intent is found. Not all of the offenses which fall within the proscriptions of subsections (1) and (2) lend themselves to the imposition of criminal sanctions; such sanctions, although not appropriate for some offenses related to market structure, such as monopolization, are appropriate for conduct-type offenses such as entering into a contract or conspiracy in restraint of trade.

By adopting the federal standard for criminal penalties, the new antitrust law increases the maximum criminal fine to \$50,000. The old law's \$5,000 upper limit was too low to be a real deterrent—firms could afford to take a chance on being fined. The new limit offers more deterrence, though it, too, is probably much less than the potential gains from anti-competitive conduct. For that reason, the availability of imprisonment for up to one year is an important supplemental sanction. Any person convicted is deemed guilty of a misdemeanor, again in line with the federal model. Because the statute imposes a criminal conviction, the accused must be found guilty beyond a reasonable doubt. The high standard of proof required should quiet the concerns of those who fear undue persecution by the authorities.

The last sentence of subsection (1) protects antitrust defendants from the difficulties of defending concurrent state and federal prosecutions involving "substantially the same subject matter." It does not, however, protect that person from suit by the State after the federal prosecution has been completed. Given the relatively limited resources available to the

109. 15 U.S.C. §§ 1, 2 & 3 (1970).

110. Rahl, *supra* note 89, at 780.

111. See Smith, *The Incredible Electrical Conspiracy (Parts 1 and 2)*, *FORTUNE MAGAZINE*, April, 1961, p. 132, and May, 1961, p. 161. Approximately 394 individuals received jail sentences ranging from four hours to one year during the period from 1909 to 1964. However, most of these sentences were suspended. S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS* 866 (3d ed., 1968). See also Wright, *Jail Sentences in Antitrust Cases*, 37 F.R.D. 183 (1965); S. OPPENHEIM & G. WESTON, *supra*, at 866, nn.66-70.

Attorney General's Office, it seems unlikely that it would indulge in a vendetta. Rather, it seems far more likely that some form of state-federal cooperation will evolve, leaving each agency free to concentrate on those matters for which it is best adapted. However, there is no reason to bar the State from pursuing a known or suspected violation simply because the federal authorities at one time initiated proceedings. The federal case may be dismissed or lost for reasons having nothing to do with the violation of the state law, and the State should be free to attack the transaction after the federal proceedings have been concluded.

Subsection (2) empowers the Attorney General to investigate and prosecute criminal violations of the antitrust law, and to obtain assistance from the appropriate prosecuting attorneys for any criminal investigation or prosecution. Prior Missouri law¹¹² authorized the Attorney General to institute and conduct all suits and proceedings for the violation of the law but did not specify the manner of investigation (except for the provisions of sections 416.300 *et seq.*, R.S.Mo.1969). However, the new law specifically authorizes the Attorney General to "investigate suspected criminal prosecutions under this act and . . . [to] commence and try all criminal prosecutions under this act," and empowers the Attorney General to participate in the convening of any grand jury to investigate suspected criminal violations of the statutes. Under Missouri law, a grand jury can only be convened upon an order of a proper judge,¹¹³ but the prosecuting attorney of the county has the right to appear and participate.¹¹⁴ Now, by specific legislative mandate,¹¹⁵ the Attorney General is authorized to participate in any grand jury investigation of a suspected violation of the Missouri antitrust law.¹¹⁶

112. § 416.240, RSMo 1969.

113. Ch. 540, RSMo 1969.

114. §§ 540.130, .140, RSMo 1969.

115. § 416.051, subsection 2, specifically states:

[T]he attorney general shall have all the powers and duties vested in him by law with respect to criminal investigations . . . generally.

116. During floor debate in the House, an amendment was offered to add, following "him" in the quotation in note 114, *supra*, the phrase: "or in a county Prosecuting Attorney." See *H.R. Jour.*, Seventy-Seventh General Assembly, Second Regular Session, Fifty-Third Day, April 17, 1974, p. 1363. It was argued that this was a clarification amendment, to make it clear that the Attorney General was to have all the powers which any other persons had under state law with regard to investigations, commencements and trials of prosecutions. During debate, it was stated that this clarification amendment was not necessary and that the present language sufficed, but it passed nevertheless. Because the amendment was not considered necessary, it was stricken from the bill in final form in which Senate Bill 424 passed both houses of the legislature.

The successful attempt to add a clarification amendment, the conference committee decision that such an amendment was unnecessary, and its recommendation to delete the clarification language should not detract from the acknowledged legislative intent to afford the Attorney General access to participation before and use of grand juries. During committee debate in both the Senate and House and floor debate in the Senate, the contention was made that one reason

Subsection (3) provides for issuance of a civil contempt citation against any person found in contempt of any court order enforcing the substantive provisions of the statute. The court has no discretion, except for the amount of the civil fine. The fine can range up to \$20,000.¹¹⁷ This provision provides a valuable means to ensure compliance with enforcement orders.

416.061. 1. The several circuit courts of this state are invested with jurisdiction to prevent and restrain violations of section 416.031.

2. It shall be the duty of the attorney general to enforce the provisions of this act. It shall be the duty of the attorney general to institute civil proceedings to prevent and restrain violations of this act. The attorney general may employ special counsel in suits to enforce the provisions of this act or in actions on behalf of the state or in his representative capacity under subsection (3) of this section in the federal courts brought under federal statutes pertaining to antitrust, trade regulation, restraint of trade or price fixing activities. The attorney general, at his discretion, may direct the appropriate county prosecuting attorney of any county in which any proceeding is instituted or brought by the state under this act or in which any investigation of a violation of this act is occurring to aid and assist him in the conduct of such investigations and proceedings. All reasonable and necessary expenses incurred by a county prosecuting attorney or his staff in assisting the attorney general shall be reimbursed from appropriations made to the attorney general.

3. The attorney general may represent, besides the state and any of its political subdivisions or public agencies, all other political subdivisions, school districts and municipalities within the state in suits to enforce the provisions of this act or in actions brought in the federal courts under any federal statute pertaining to antitrust, trade regulation, restraint of trade or price fixing activities.

4. The attorney general is authorized to enter into consent judgments or decrees with any party defendant in an action brought under this act. However, no such consent judgment or decree shall become final until approved by the circuit court where filed or until a period of sixty days has elapsed since the filing of the consent judgment or decree whichever occurs first; provided, however, that no such approval may be entered by the Circuit Court until the thirty-first day after the filing of the consent judgment or decree.

why the proposed subpoena *ad testificandum* authority (proposed § 416.101) was not necessary was that the Attorney General under § 416.051(2) would now have (which the Office did not have prior to the passage of the new law) the right to participate in and use any convened grand jury as an investigatory tool. During debate, it was acknowledged that the intent of the language of the third sentence of § 416.051(2) was to afford the Attorney General access to grand jury usage. However, since the grand jury could only be called by a proper judge, *supra* note 112, and since grand juries in out-state Missouri are not convened on a regular basis, the burden would rest on the Attorney General to convince the judge to convene such a body. For that reason the proposed subpoena *ad testificandum* authority was sought as a complimentary tool to the civil investigative demand contained in § 416.091.

¹¹⁷ This section follows, generally, the Missouri Merchandising Practices Act, § 407.110, RSMo 1969.

5. A final judgment or decree rendered in any civil or criminal proceeding brought by the state under this act shall be prima facie evidence against the defendant in any action or proceeding brought by any other party under this act against the defendant as to all matters respecting which the judgment or decree would be an estoppel between the parties thereto, provided that any such action is maintained within one year of the date the judgment or decree is entered. This subsection does not apply to consent judgments or decrees entered before the taking of any testimony in the case or to judgments or decrees entered in actions brought in the state courts under section 416.121.

Subsection (1) vests jurisdiction in the circuit courts of the state to prevent and restrain violations of section 416.031; it continues the provisions of prior law.¹¹⁸ This section, together with sections 416.071 (defining the scope of relief which may be granted) and 416.131(1) (venue provisions), specifies the judicial role with greater clarity than did the prior law.

Subsection (2) continues, with some modifications, the purposes of its predecessor, section 416.240. Responsibility for enforcement of the anti-trust law continues to be centralized in the office of the Attorney General, which commentators have favored over the approach taken by some states of granting dual enforcement authority to state and local law officers.¹¹⁹ The Attorney General is specifically charged with the duty of bringing civil actions to prevent and restrain violations of the act, and is empowered to employ special counsel both in suits to enforce the act and in actions brought in his representative capacity. Although it was contested in the Senate,¹²⁰ this feature is important to the effective enforcement of the law because it permits the Attorney General the flexibility to augment his permanent staff when necessary. The Senate, in rejecting Senate Amendment No. 2,¹²¹ clearly opted for this strengthening of the Attorney General's hand. This subsection also permits the Attorney General to call upon the appropriate County Prosecuting Attorneys for aid, and provides for reimbursement of all reasonable and necessary expenses incurred by the County Prosecuting Attorney.

Subsection (3) authorizes the Attorney General to represent various political entities within the state, both with respect to suits brought under this act and in a representative capacity in the federal courts. In light of the current interest in state *parens patriae* actions¹²² this provision will be extremely important. It may become even more important as a complement to legislation presently pending in Congress.¹²³ The proposed congressional

118. § 416.260, RSMo 1969.

119. Rahl, *supra* note 89, at 764.

120. See note 28 and accompanying text *supra*.

121. See notes 29-31 and accompanying text *supra*.

122. See, e.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); Note, 18 N.Y.L.F. 465-475 (1972).

123. H.R. 12528, 93d Cong., 2d Sess., which has been referred to the Committee on the Judiciary.

legislation would permit a state attorney general to bring civil actions under the Clayton Act¹²⁴ on behalf of the citizens of their states. Subsection (3) provides the authority for the state to act as the representative for the designated entities even though, under applicable federal and state class action law, the state would be unable to substantiate its representative character.

Subsection (4) authorizes the Attorney General to use consent judgments, which can greatly expedite enforcement of the act. It provides for approval of such decrees by the proper circuit court (with an automatic final date of 60 days after filing, if the court does not approve), but sets a mandatory 30-day waiting period before a consent judgment can become final. This waiting period should help to insure that interested persons have an opportunity to review and digest the provisions of the consent decree, and propose modifications which they may deem necessary.

Subsection (5) makes a final judgment or decree rendered in either a civil or criminal proceeding *prima facie* evidence against the respective defendant in any private action and contains appropriate tolling provisions. This subsection tracks section 5 of the Clayton Act,¹²⁵ so that federal case law developed thereunder should be available to guide the construction of section 416.061(5) where the federal decisions are not inconsistent with the plain and literal meaning of section 416.061(5).

416.071. 1. In addition to all other remedies provided by this act the circuit courts of this state are invested with jurisdiction to grant such preliminary or permanent injunctive relief and to issue such temporary restraining orders as necessary to prevent and restrain violations of section 416.031.

2. In any civil action brought under this act, in addition to granting such prohibitory injunctions and other restraints as it deems expedient to deter the defendant from, and secure against, his committing a future violation of this act, the court may grant such mandatory relief as is reasonably necessary to restore or preserve fair competition in the trade or commerce affected by the violation.

Subsection (1) generally follows its prior statutory counterpart¹²⁶ in explicitly giving the circuit courts authority to enter preliminary injunctions and to grant temporary restraining orders. It is also similar to section 15 of the Clayton Act,¹²⁷ so that precedent under that section may aid in statutory construction. Such preliminary relief may be of utmost importance in securing adequate enforcement, especially where preparation for a full trial may require protracted periods of time. Temporary relief can be and has been used in such situations to avoid serious potential anticompetitive effects during the pendency of the litigation.¹²⁸

124. 15 U.S.C. § 12 (1970).

125. 15 U.S.C. § 16 (1970).

126. § 416.260(1), RSMo 1969.

127. 15 U.S.C. § 25 (1970).

128. See, e.g., *State ex rel. Taylor v. Anderson*, 363 Mo. 884, 254 S.W.2d

Subsection (2), in addition to empowering the courts to enjoin future violations of the law, authorizes the use of such mandatory relief as the court deems necessary "to restore or preserve fair competition." Such relief might include divestiture of property improperly acquired, divorcement of business units, or dissolution of a domestic corporation, if such drastic action were required to restore competition. Thus, although it is written in more general language than the corresponding provision of the Illinois Act,¹²⁹ this subsection should embody all the flexibility which that section provides. Subsection (2) should be a valuable tool for either state or private enforcement where the alleged violation is predatory in nature and nothing short of restitution to the injured business or consumers concerned, divestiture or some other sanction would preserve or restore competition to the desirable level.

416.081. 1. There is created a revolving fund for the office of the attorney general to be known as the "Antitrust Revolving Fund", which shall consist of money transferred by the general assembly of the state of Missouri from the general revenue fund to be credited to such fund, and any money paid into the state treasury and required by law to be credited to such fund. This fund shall be kept separate and apart from all other moneys in the state treasury and shall be paid out by the state treasurer upon warrants issued by the state auditor as certified to by the state comptroller, upon verified vouchers of the attorney general.

2. Such money, after appropriation pursuant to law, shall be available for the payment of all costs and expenses incurred by the attorney general in investigation, prosecution or enforcement of the provisions of this act or federal laws relating to antitrust, trade regulation, restraint of trade or price fixing activities.

3. Ten percent of all recoveries obtained by the attorney general pursuant to the authority conferred upon him by this act, whether by settlement or by judgment, shall be paid into the state treasury to the credit of the antitrust revolving fund. All moneys recovered as court costs by the attorney general pursuant to litigation brought under the authority of this act or federal laws relating to antitrust, trade regulation, restraint of trade or price fixing activities, shall be paid into the state treasury to the credit of the antitrust revolving fund.

Since the days of Hammurabi, legislatures have demonstrated a proclivity for adopting "strong" legislation, but then effectively weakening it by failing to provide funds adequate to enforce the laws. This process makes even the strongest-sounding laws worth less than the paper on which

609 (1953), sustaining a grant of injunctive relief during pendency of trial under § 416.260, RSMo 1969.

129. ILL. REV. STAT. ch. 38, § 60-7(1) (1973) provides:

... The court, in its discretion, may exercise all equitable powers necessary for this purpose, including, but not limited to, injunction, divestiture of property, divorcement of business units, dissolution of domestic corporations or associations, and suspension or termination of the right of foreign corporations or associations to do business in the State. . . .

they are printed. It has been said¹³⁰ that the key to the lack of adequate enforcement of state antitrust legislation has been lack of the money and personnel required to do the job. Effective antitrust enforcement is not a job for amateurs, nor even for able attorneys charged with enforcing a variety of laws; experts and specialists are required, and this costs money. Those states which have created special antitrust enforcement staffs have much more effective programs.¹³¹

Section 416.081 goes far to meet the cost problems by establishing a revolving fund from which all costs and expenses incurred by or under the office of the Attorney General in investigation, prosecution or enforcement of the state or federal antitrust laws are to be paid. This section was extensively debated in the legislature.¹³² It is to the legislature's credit that the section was restored to its present form. Under section 416.091 the Attorney General now has significant investigative powers including the power of investigation through grand jury proceedings. If these powers are to be meaningful, the necessary funds must be provided on a continuing basis.

The new law does not, by its terms, make provision for a special antitrust section within the office of the Attorney General; that is left to the Attorney General. As experience develops and time progresses, the antitrust enforcement staff should emerge and grow as needed, and Missouri will rejoin the ranks of the states having a viable and effective antitrust enforcement program.

416.091. 1. Whenever the attorney general has reason to believe that a person under investigation may be in possession, custody, or control of any books, documents, records, writings or tangible things, hereinafter referred to as "documentary material", relevant to a civil investigation of a violation of section 416.031, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for examination.

2. Each such demand shall:

(1) State the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

(2) Describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such documentary material to be fairly identified;

(3) Prescribe a return date which will provide a reasonable period of time within which the documentary material so demanded may be assembled and made available for inspection and copying or reproduction; and

130. Rahl, *supra* n.89, at 764.

131. *Id.*

132. See notes 18, 24, and 38, and accompanying text *supra*.

(4) Identify the custodian to whom such documentary material shall be made available.

3. No such demand shall:

(1) Contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of this state in aid of a grand jury investigation of such alleged violation; or

(2) Require the production of any documentary material which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of this state in aid of a grand jury investigation of such alleged violation.

4. Service of a demand by the attorney general as provided herein may be made by:

(1) Delivery of a duly executed copy thereof to the place of business of the persons to be served in this state or if the person has no place of business in this state to his principal place of business or to the residence of the person to be served; or

(2) Mailing by certified mail, return receipt requested and signed by the person to whom service is directed, a duly executed copy thereof addressed to the person to be served at his place of business in this state, or if the person has no place of business in this state, to his principal place of business or to the residence of the person to be served.

5. A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand signed by the person to whom service is directed.

6. The attorney general shall designate a member of his staff as document custodian.

7. Any person upon whom any civil investigative demand issued under this section has been duly served shall make such documentary material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct on the return date specified in such demand or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such documentary material originals thereof.

8. The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this section. The custodian may cause the preparation of such copies of such documentary material as may be required for official use. While in the possession of the custodian, no documentary material so produced or copies thereof shall be available for examination, without the consent of the person who produced such documentary material, by any individual other than the attorney general or a duly authorized member of his staff. Under such reasonable terms and conditions as the attorney general shall prescribe, documentary material while in the possession of the custodian shall be

available for examination by the person who produced such material or any duly authorized representative of such person.

9. Whenever any attorney has been designated to appear on behalf of the state, before any court or grand jury in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the state. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn and copies thereof which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

10. Upon the completion of the investigation for which any documentary material was produced under this section and any case or proceeding arising from such investigation, the custodian shall return to the person who produced such documentary material all such documentary material and copies thereof which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

11. When any documentary material has been produced by any person under this section for use in any antitrust investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the attorney general, to the return of all documentary material and copies thereof so produced by such person.

12. In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section, or the official relief of such custodian from the responsibility for the custody and control of such documentary material, the attorney general shall promptly designate another official to serve as custodian thereof, and transmit notice in writing to the person who produced such documentary material as to the identity and address of the successor so designated. Any successor so designated shall have with regards to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

13. Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such documentary material, the attorney general, through such officers or attorneys as he may designate, may file, in the circuit court of the state for the circuit in which such persons resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such circuit such petition may be filed in any such circuit, or in such other circuit in which such person transacts business as may be agreed upon by the parties to such petition.

14. Within twenty days after the service of any such demand upon any persons, or at any time specified in the demand, whichever period is shorter, such person may file, in the circuit court for the circuit within which such person resides, is found, or transacts business in this state in the circuit court within which the office of the custodian is situated and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

15. At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file in the circuit court for the circuit within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

16. Whenever any petition is filed in any circuit court under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section. Any final order so entered shall be subject to appeal by writ of prohibition. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

This section provides the Attorney General broad investigative powers through the medium of the "civil investigative demand" which has become a feature of both the federal¹³³ and several state¹³⁴ enforcement procedures. Under prior law,¹³⁵ the Attorney General's investigative powers to acquire documentary material were both inadequate and unrealistic. This section establishes an expedient, efficient manner by which the Attorney General's office may inspect documentary material in the possession of a person under investigation when such material is relevant to a civil investigation of a violation of the antitrust statute.

Subsections (2) through (7) set out the procedure and manner in which the investigation is to be conducted. These subsections generally follow provisions of the federal and other state laws, under which judicial decisions afford guidance in interpretation.

Subsections (2) and (3) specify what the civil investigative demand

133. 15 U.S.C. §§ 1311-1314 (1970).

134. *See generally*, HAWAII REV. STAT., § 480-18 (1968); KAN. STAT. ANN., § 50-153 (1964); N.Y. Consolid. Laws, ch. 20, Art. 22, § 343; WASH. REV. CODE, § 19.86.110 (1970). The civil investigative demand is also a feature of the UNIFORM STATE ANTITRUST ACT approved by the House of Delegates of the American Bar Association in February, 1974. *See* UNIFORM STATE ANTITRUST ACT, § 6.

135. §§ 416.300-.390, RSMo 1969.

must contain and what it cannot contain. Subsections (4) and (5) establish the manner in which the demand is to be served. Subsection (6) provides that a member of the attorney general's staff shall serve as custodian of the documents while subsection (7) provides where the material is to be produced.

Subsection (8) of section 416.091 establishes that the custodian must take possession of the material and cannot show such material to any other person outside the attorney general's jurisdiction without the consent of the person who produced the material. The documentary material produced is always available for inspection by the person producing the same. Subsection (9) provides that the material so produced may be used by the State for prosecution of any antitrust violation. Subsections (10) and (11) establish the procedures for the return of the original documents to the proper party, while subsection (12) provides for substitution of custodians of the documents so produced.

Subsections (13) and (16) of section 416.091 establish the procedure by which the attorney general may compel compliance with the civil investigative demand. Subsections (14), (15) and (16) afford to the person upon whom such demand is served the procedure for (1) opposing the production of documents under this law and (2) compelling the attorney general to perform any duty imposed upon him under this section. It should be noted that any appeal from a final order entered by a circuit court to "carry into effect the provisions" of section 416.091 is by writ of prohibition. The purpose of providing the appeal by a special writ was to expedite the appeal process so that it could not become a device to thwart a proper investigation.

As introduced, Senate Bill 424 had a complementary provision, section 416.101, authorizing the Attorney General to seek a subpoena *ad testificandum*¹³⁶ in circuit court. It was envisaged that this power would be employed, primarily, during the preliminary stages of an investigation, before the need to convene and participate in a grand jury proceeding arose. As already noted,¹³⁷ the subpoena *ad testificandum* was defeated roundly in the Senate. It is hoped that, if experience demonstrates the need for such authority, a future legislature will be prepared to amend the law to add it.

416.111. In any investigation or proceeding brought to enforce the provisions of this act, no individual shall be permitted to refuse to answer any question material to the matter in controversy or to refuse to produce documentary material on the ground that the testimony or documentary material required of him may tend to

136. That is, a subpoena to testify, as distinguished from a subpoena *duces tecum* which compels a person who has in his possession or control some document or paper which is relevant to the issues in a pending controversy to produce the document or paper at trial. See BLACK'S LAW DICTIONARY 1595 (4th ed. 1951).

137. See note 23 and accompanying text *supra*.

incriminate him or subject him to a penalty; but no such person shall be subject to criminal prosecution or to any action for a criminal penalty or forfeiture on account of any transaction, matter or thing concerning which he may testify or produce documentary material.

This section provides compulsory immunity for witnesses called pursuant to subpoena as part of an investigation or for the purpose of testifying at an enforcement proceeding. The immunity granted is intended to be transactional; *i.e.*, the testifying witness is granted absolute protection against prosecution for any event or transaction about which the witness testified.¹³⁸ In order to obtain the immunity, the witness must plead his right against self-incrimination. With few exceptions, the immunity cannot attach accidentally; if the prosecutor asks the question and the answer is tendered without pleading the immunity, the immunity has been waived. The answer itself cannot grant immunity.

Since the immunity section now applies to both investigations and proceedings for enforcement, judicial authority¹³⁹ under the prior law's counterpart limiting this section¹⁴⁰ to proceedings, and not investigations, is no longer controlling. Because the Attorney General now has authority to gain access by appropriate investigation to all pertinent data relevant to an antitrust violation, the grant of immunity is mandated in order to avoid foreclosing possible avenues of access.

416.121. 1. Any person, including the state, who is injured in his business or property by reason of anything forbidden or declared unlawful by this act may sue therefor in any circuit court of this state in which the defendant or defendants, or any of them, reside or have any officer, agent or representative, or in which any such defendant, or any agent, officer or representative may be found. Such person may:

(1) Sue for damages sustained by him, and if the judgment is for the plaintiff he shall be awarded threefold damages by him sustained and reasonable attorneys' fees as determined by the court, together with the costs of suit; and

(2) Bring proceedings to enjoin the unlawful practices, and if decree is for the plaintiff he shall be awarded reasonable attorneys' fees as determined by the court, together with the costs of the suit.

Subsection 1(1) continues the treble damage incentive of prior law, and the provisions awarding a successful plaintiff the costs of suit and reasonable attorney's fees.¹⁴¹ The comparable federal provision is found in

138. *But see* note, *The End of Transactional Immunity: A Rip In Our Constitutional Fabric*, 42 U.M.K.C. L. REV. 258 (1973), for a discussion of *Kastigar v. United States*, 406 U.S. 441 (1972), the latest decision of the Supreme Court to discuss the ambit of protection afforded by the Fifth Amendment's guarantee against self-incrimination.

139. *Ex parte Arvin*, 112 S.W.2d 113 (K.C. Mo. App., 1937).

140. § 416.400, RSMo 1969.

141. § 416.090, RSMo 1969.

section 4 of the Clayton Act.¹⁴²

The coverage of subsection 1 includes the State when acting in its proprietary capacity, and makes the award of treble damages in such cases mandatory. When the State acts as a purchaser and is damaged by an anti-trust violation, there is no reason to treat the State differently from any other plaintiff. Of course, when the State is acting in a representative capacity under section 416.061(3), the same considerations apply.

It should be noted that trebling of damages in such cases is mandatory, not discretionary. This differs from the Uniform Act approach and the approach taken by some states¹⁴³ which make trebling of damages discretionary with the court, but coincides with the approach taken by several other states.¹⁴⁴ It also differs from the approach taken under section 4A of the Clayton Act,¹⁴⁵ which permits the federal government to recover for injury to its business or property, but limits recovery to the amount of actual damages sustained.

416.131. 1. Any action or proceeding, civil or criminal, authorized by this act, shall be brought in the circuit court for the circuit in which any defendant resides, engages in business or has an agent, unless otherwise specifically provided herein.

2. Any action brought under this act shall be barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this act shall be revived by this act.

3. Whenever any civil or criminal proceeding is commenced by the state to prevent, restrain or punish violations of this act, but not including an action under section 416.121, brought by the state, the running of the statute of limitations in respect to every private right of action arising under this act based in whole or in part on any matter complained of in such proceedings shall be suspended during the pendency thereof and for one year thereafter, except, however, that whenever the running of the statute of limitations in respect of a private cause of action arising under this act is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

142. 15 U.S.C. § 15 (1970).

143. UNIFORM STATE ANTITRUST ACT, § 8; WASH. REV. CODE, § 19.86.090 (1970), 4 TRADE REG. REP. ¶ 35,203.09 (1970).

144. See, e.g., CALIF. BUS. & PROF. CODE, Div. 7, Part 2, Ch. 2, § 16750(a) & (b) (1974), 4 TRADE REG. REP. ¶ 30,601.12; CONN. GEN. STAT., 1971 Noncum. Supp., Title 35, Ch. 624, § 35-35, 4 TRADE REG. REP. ¶ 30,901.12; ILL. REV. STAT., § 60-7 (1973), 4 TRADE REG. REP. ¶ 31,601.07; MD. ANN. CODE, 1957, Art. 83, § 41(2), 4 TRADE REG. REP. ¶ 32,302.06; MINN. STAT. § 325.8019 (1974), 4 TRADE REG. REP. ¶ 32,602.09; N.J. REV. STAT. § 12 (1972), 4 TRADE REG. REP. ¶ 33,301.12.

145. 15 U.S.C. § 15A (1970).

4. No action under this act shall be barred on the ground that the activity or conduct complained of in any manner affects or involves interstate or foreign commerce.

Subsection (1) establishes the proper venue for suits under the new law, and subsection (2) sets the statute of limitations for institution of suit. The four-year statute of limitations is comparable to that contained in the federal legislation¹⁴⁶ and in the Uniform Act.¹⁴⁷

Subsection (3) provides for tolling of the period of limitations during the pendency of and for one year after any civil or criminal proceeding brought by the state, except for action brought by the state in its proprietary capacity under section 416.121. This tolling provision is also comparable to the federal provision.¹⁴⁸

Subsection (4) codifies prior judicial authority¹⁴⁹ holding that suits under the state antitrust law are not barred because the acts complained of affected or involved interstate commerce. Contrary holdings have hindered state enforcement in other jurisdictions,¹⁵⁰ but should present no problems in Missouri, particularly in view of the precedent noted above.

416.141. This act shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.

This section makes available, as a guide to interpretation of the statute, the vast body of federal precedent under the Sherman and Clayton Acts,¹⁵¹ where such precedent is not inconsistent with the plain and literal language of the act itself. Thus, it should not be necessary to wait for the development of appellate precedent under the new Missouri act to lend meaning to the general language used. Furthermore, the intent of the proponents of the new Act, in advocating passage of substantive law generally similar to the federal Sherman and Clayton Acts, was to establish standards of business conduct generally known to and acquiesced in by the great majority of businesses in Missouri. Any other approach might have resulted in establishment of a new standard, different from that controlling under federal jurisdiction.

416.151. The remedies afforded the state under this act shall be cumulative but the state shall not be permitted more than one recovery of monetary damages arising out of the same act or injury.

146. 15 U.S.C. § 15(b) (1970).

147. UNIFORM STATE ANTITRUST ACT, § 10.

148. 15 U.S.C. § 16 (1970).

149. State *ex inf.* Attorney General v. Arkansas Lumber Co., 169 S.W. 145 (Mo. 1914), and authority cited therein.

150. Rahl, *supra* note 89, at 757 nn.24 & 25 and accompanying text.

151. Perhaps the best overall reference in this area is the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), as supplemented by ABA SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS 1955-1968 (1968). A new volume updating the latter is in preparation.

Section 416.151 makes it clear that the remedies available to the state are cumulative. For example, the State, in its sovereign capacity, may obtain through the Attorney General a criminal indictment against an alleged antitrust violator, and at the same time file a companion civil action to enjoin particular conduct. In the criminal prosecution, the State may recover a criminal fine. The State may also seek recovery of damages in its proprietary capacity, if it was a purchaser injured in its business or property as a result of the alleged violation. However, the last clause of section 416.151 makes it clear that the state may not obtain duplicative recovery, under both the state and federal laws, in its proprietary capacity for the same cause of action. Section 416.151 was *not* intended to take away the State's right to recover treble damages granted under section 416.121.

416.161. If any provision of this act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the act and the applicability thereof to other persons and circumstances shall not be affected thereby.

This is a standard savings clause, self-explanatory and unexceptionable.

VI. CONCLUSION

The enactment of Senate Bill 424 represents a giant step forward in Missouri's antitrust coverage. The new law not only meets many of the problems which plagued the old, but adds important clarifications and new powers for state enforcement. The Attorney General has taken the initial steps in establishing an antitrust enforcement section within that office; in time, this will provide the expertise and manpower so important to a viable and effective enforcement program. The legislature should provide adequate funding to the Antitrust Revolving Fund and for antitrust personnel in the Office of the Attorney General. Without funds, meaningful enforcement is impossible.

As stated at various points in the analysis, elements of the new law could be strengthened—most particularly, the addition of subpoena *ad testificandum* powers in the Attorney General's arsenal of enforcement weapons. The antitrust specialists in the Office of the Attorney General in future years should periodically review their operations under the law and recommend additions and changes to the legislature. In this way, the law will grow and keep pace with present and future-day problems, and will not allow a lag in enforcement activities because of the inadequacies of the statutory scheme.

Antitrust is far too important to be left to the federal government alone; the states very definitely have a role to play, a role which can be crucial to the growth and protection of the business and economic climate of the state. An effective and meaningful antitrust enforcement program can be developed under the new Missouri Antitrust Law.