

**ANTITRUST ENFORCEMENT REGARDING
VERTICAL RESTRAINTS BY STATE ATTORNEYS GENERAL**

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I. INTRODUCTION

- A. Vertical enforcement continues to be a priority for the States. State attorneys general have been actively involved in prosecuting cases against restraints on the distribution of goods and services. High-visibility cases brought by states in recent years under the aegis of the National Association of Attorneys General have included:
1. Mylan Laboratories. Thirty-two states and the FTC reached a settlement with Mylan Laboratories, Cambrex Corp., Profarmaco SRL, Gyma Laboratories of America and SST Corp. to resolve claims that the maker of certain generic drugs choked off supply of active ingredient and thereby eliminated competition. The claims were settled for a total amount in excess of \$108.5 million including attorney fees and injunctive relief. A national claims process for affected consumers resulted in the disbursement of over 70 percent of the money with the rest going to compensate state governments.
 2. Contact Lens. Thirty-two states filed coordinated actions against the American Optometric Association, major manufacturers of contact lenses, and various trade groups alleging a restraints targeting mail order, pharmacy-based and discount sellers of contact lenses. The states acted after the FTC decided not to pursue the case. The cases settled for a payment of at least \$83 million in cash and free contacts.
 3. Nine West. All 50 states, D.C. and the FTC reached a settlement with Nine West, a manufacturer of women's shoes, to resolve claims that the company had entered into illegal agreements with stores to fix the retail price of women's shoes between January, 1998, and July, 1999. The government alleged that Nine West had engaged in illegal price-fixing by prohibiting shoe stores from discounting Nine West shoes for certain periods of time. The \$34 million settlement is to be used primarily for women's health, educational, vocational and safety programs.
 4. Microsoft. As has been widely reported, 19 states and the US DOJ successfully sued Microsoft, Inc. for violations of Section 1 and 2 of the Sherman Act. The DC Court of Appeals affirmed the key holding of unlawful monopoly maintenance while either remanding or overruling the other claims in the case. Although framed in the jargon of the computer industry, the case can be understood as a distribution restraints case in that the trial found that Microsoft had used its dominant position as a supplier of Intel-based PC operating systems to force computer makers and others to take Microsoft's internet browser so as to prevent competition and innovation that might have threatened Microsoft's operating system

dominance. The US DOJ and nine states settled for injunctive relief. Nine states and the District of Columbia are continuing to litigate. The trial court rulings can be found at: 84 F. Supp. 2d 9 (D.D.C. 1999)(Findings of Fact), 87 F. Supp. 2d 30 (D.D.C. 2000)(Conclusions of Law), and 97 F. Supp. 2d 59 (D.D.C. 2000)(Final Judgment/Remedy). The Court of Appeals decision is reported at 253 F.3d 34 (D.C. Cir. 2001).

5. Toys “R” Us. Forty-five states resolved claims against Toys “R” Us, Inc. and toy manufacturers for over \$50 million, in cash and toys. The toy manufacturers included Mattel and The Little Tikes Company and, in an earlier settlement, Hasbro. The states, following on a case originally brought by the FTC against Toys “R” Us alone, claimed that in an attempt to limit the competitive threat posed by low-margin, low-price warehouse clubs, Toys “R” Us used its market power to obtain agreements with and among toy manufacturers to limit the sale of certain toys to clubs or to sell toys to clubs only in “combination packs” to ensure that consumers could not easily compare the retail prices charged by the clubs to those charged by Toys “R” Us. Pursuant to the terms of the settlements, which are subject to court approval, defendant Toys “R” Us will pay \$40,500,000 in cash and toys. Mattel, the nation’s largest toy manufacturer, will pay \$8,222,900 in cash and toys, and the Little Tikes Company will pay cash and toys totaling \$1,316,250. Toy Manufacturer Hasbro, also a defendant in this lawsuit, previously agreed to pay \$5,950,000 in cash and toys.
6. American Cyanamid, Co. In 1997, 50 states, the District of Columbia, and Puerto Rico sued and settled with American Cyanamid claims that American Cyanamid’s requirement that its chemical crop protection dealers utilize margin maintenance programs in the sale of its chemicals to farmers, where the dealers were given rebates on sales after they had been made, but only if their resale prices were above minimum price levels set by the manufacturer. Under the settlement, \$7.3 million was paid to the states for various state-designated uses. The states and the FTC entered into parallel consent judgments providing for injunctive relief.
7. Zeneca, Inc. Also in 1997, 48 states, the District of Columbia and Puerto Rico resolved similar allegations with a consent judgment. Zeneca paid \$3.9 million to the states for various uses and consented to the entry of a consent judgment.
8. New York v. Reebok Int’l, Ltd. This case arose from an alleged nationwide scheme to set retail prices on athletic shoes. The states alleged that Reebok had been coercing adherence to a retail price maintenance program called the Centennial Plan (“the Plan”). The Plan provided retailers with a suggested minimum retail price for all Reebok products. As it was first written, the Plan also prohibited the advertising or sale of

Reebok's most popular products ("Prestige products") at prices below those suggested by Reebok and the sale of non-Prestige products at discounts greater than 10 percent. The penalty for violating the Centennial Plan was clearly set forth. At a minimum, all orders for products sold or advertised in violation of the policy would be cancelled and no future orders would be taken. The case was settled for a \$9.5 million payment to the states to be used to fund improvements to athletic facilities and enhancement of athletic programs.

9. *In re Clozapine Antitrust Litigation*. In 1990, 34 states challenged a marketing plan for a new drug for the treatment of schizophrenia. Under the original distribution scheme, the drug could only be purchased in conjunction with an expensive patient monitoring and blood-testing program controlled by the manufacturer of the drug. The FTC settled a similar action against Sandoz in 1991. The state case was settled in 1992 for more than \$20 million in cash and coupons for supplies of the drug for needy patients served by government agencies and a non-profit corporation and a broader injunction than that negotiated by the FTC.
10. *Ked's*. This 1993 case challenged alleged vertical price restraints in the sale of women's sneaker-style shoes and was settled for \$7.2 million.
11. *Mitsubishi*. This case challenged alleged vertical price-fixing of 13" to 21" color televisions and was settled for \$8 million.
12. *Panasonic*. In 1989, 49 states challenged vertical price-fixing of consumer home electronic equipment. The case was settled for \$16 million.
13. *Minolta*. In this 1986 case, 37 states challenged vertical price-fixing of certain autofocus 35 mm. cameras and was settled for \$7 million.
14. *Nintendo*. This 1991 case challenged vertical price-fixing of 8-bit home electronic game machines and was settled for \$25 million in discount coupons. Because of complaints about the coupon program, the states have in subsequent negotiations taken a skeptical view of "coupon settlements."
15. *Primestar*. In 1993, 45 States and the District of Columbia sued and settled with a direct broadcast satellite ("DBS") joint venture among seven of the eight largest cable television multi-system operators ("MSO"). The states obtained injunctive relief and \$4.8 million. Vertically-integrated MSOs, like Time-Warner, were obligated to provide programming to competitors in the market for multi-channel video program distribution.

The US-DOJ entered into a narrower and separate decree with the defendants.

- B. Some states have taken particularly aggressive steps to address vertical restraints under the rule of reason. *New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848 (E.D.N.Y. 1993), unsuccessful challenge of exclusive territories for distribution of beer. Similarly, nineteen states and the District of Columbia filed suit against Microsoft, Inc., together with the Antitrust Division alleging, among other things, that Microsoft's distribution practices were in part anticompetitive and constituted unlawful tying.
- C. States have taken strong policy positions against vertical restraints, notably through amicus briefs in such cases as the recent *Kodak* decision. Indeed, the states were in large part motivated to enter the vertical restraint enforcement arena on a multistate basis as a reaction to positions taken by federal enforcers seeking to cut back on vertical restraint enforcement.
 - 1. Monsanto: In 1984, 43 states filed an amicus brief in support of the plaintiff-respondent in *Monsanto v. Spray-Rite service Corp.*, 104 S. Ct. 1464, in opposition to the position asserted by the United States Solicitor General. The U.S. had urged the court to overrule the precedent in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which had held vertical agreements per se unlawful.
 - 2. Legislation: In 1986, the States unanimously adopted a model antitrust improvements act which included a provision which would overrule the evidentiary holding in *Monsanto*. In 1990, 49 states supported legislation in Congress which would have partially overruled both *Monsanto* and *Sharp*.
 - 3. Khan: In 1997, 35 states filed an amicus brief urging the Supreme Court to maintain the per se rule against all vertical price-fixing, including agreements characterized as fixing "maximum" resale prices. The United States urged the Court to treat such "maximum" agreements as subject to the rule of reason and thereby overrule *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The Supreme Court overruled *Albrecht* but underscored the per se illegality of minimum resale price maintenance in doing so. *State Oil Co. v. Khan*, 118 S. Ct. 275 (1998).
- D. State law, whether invoked by state prosecutors or private parties, has become an important weapon against distributional restraints.

II. NAAG VERTICAL RESTRAINTS GUIDELINES

- A. Largely as an alternative to federal vertical restraints guidelines, which were withdrawn by the Antitrust Division in 1993, the National Association of Attorneys General issued guidelines for state enforcement in the vertical area in 1985. 49 Antitrust and Trade Reg. Rep. 996 (Dec. 5, 1985). These guidelines were last amended in March, 1995. *Reprinted*, 68 BNA Antitrust & Trade Reg. Rep 1706 (Mar. 30, 1995); 4 Trade Reg. Rep (CCH) ¶ 13,400. Apart from their value in predicting state enforcement decisions, these guidelines reflect a centrist view of the law of vertical restraints.

The NAAG Guidelines are attached to this outline together with the Resolution adopting them and an executive summary.

- B. The NAAG Guidelines have three major parts. The first section deals with resale price maintenance (“RPM”). The second section sets out the states’ approach to applying the rule of reason to non-price restraints. The final section deals with tying claims.
- C. The major elements of the NAAG Vertical Restraints Guidelines, including the revisions, are as follows:
1. RPM per se Unlawful: The NAAG Guidelines treat RPM agreements as per se unlawful in accordance with settled Supreme Court law. The court first adopted this rule in a 1911 decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, and most recently upheld its validity in the 1984 decision of *Monsanto Co. v. Spray-Rite Service Corp.* (NAAG Guidelines § 2.1). Arrangements which condition a supplier’s obligation to provide some benefit to a distributor on the resale price charged may be viewed as an RPM agreement. (NAAG Guidelines § 2.1). Although the Guidelines have not been amended since the decision in *State Oil Co. v. Khan*, 118 S. Ct. 275 (1998), holding maximum RPM not to be per se unlawful, it is fair to assume the states would be bound by and would follow federal law on this question in any federal challenge. It is not clear, however, that every state court would follow *Khan* on this point.
 2. Characterization Issues: Aside from maximum RPM agreements, the states characterize any agreement on price or price levels to be per se unlawful regardless whether the agreement might be characterized as “horizontal” or “vertical.” Similarly, where a price restraint is imposed simultaneously with a non-price restraint, the states would treat not only the price restraint as per se unlawful under *Monsanto Co. v. Spray-Rite Service Co.*, but also treat the non-price restraint as per se unlawful if the purpose or predominant effect of the non-price restraint is to reinforce or assure the success of the price restraint. See *Business Electronics Inc. v. Sharp Electronics, Inc.*, 108 S. Ct. 1515 (1988).

3. Intrabrand Conspiracies: The NAAG Guidelines make clear that intrabrand horizontal conspiracies (such as a price-fixing agreement among competing retailers of a particular manufacturer's product) are per se unlawful, in accordance with settled Supreme Court law announced in cases such as *United States v. General Motors*, 384 U.S. 127 (1966) (NAAG Guidelines § 2.2).
4. Coop Advertising: The States characterize an agreement conditioning the receipt of cooperative advertising funds on downstream price advertising above a specified level as per se unlawful, NAAG Guidelines §§ 2.1, 2.2, in reliance upon *Parke Davis*.
5. Non-Price Vertical Restraints: The NAAG Guidelines employ a rule of reason analysis for assessing the legality of non-price vertical restraints. This analysis takes into consideration the effect these restraints have on intrabrand competition, *i.e.*, the competition between sellers of the same brand of a product. The Supreme Court's 1977 decision in *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), requires anticompetitive intrabrand effects to be balanced against any pro-competitive interbrand effects (competition between different brands) in determining whether a non-price vertical agreement has unreasonably restrained trade (NAAG Guidelines §§ 3 and 4).
6. Structured Rule of Reason: The NAAG Guidelines employ a structured rule of reason test which seeks to measure any and all ascertainable interbrand effects of a non-price vertical restraint, whether they be pro-competitive or anticompetitive (NAAG Guidelines §§ 4 and 4.15).
7. Tying: The NAAG Guidelines deal with tying arrangements in accordance with the Supreme Court's ruling in *Eastman Kodak Co. v. Image Technical Services, Inc.* (NAAG Guidelines § 5).
8. Purpose of Guidelines: The NAAG Guidelines are a statement of the general enforcement policy of the state attorneys general to be supplemented in each state according to variations in state law, federal circuit law and individual prosecutorial prerogatives. The NAAG Guidelines are not intended as either a general amicus curiae brief or as a comprehensive restatement of existing case law (NAAG Guidelines § 1).
9. Market Definition: The NAAG Guidelines incorporate by reference the market definition methodology of the NAAG Horizontal Merger Guidelines in appropriate rule of reason cases (NAAG Guidelines § 6).

10. Enforcement Actions: These guidelines have animated coordinated challenges by NAAG members to significant national distribution schemes as indicated in Section I above.
11. Guidelines: At least one court has cited the NAAG Vertical Restraints Guidelines with approval. *Commonwealth of Virginia v. Winslow*, 1987-1 Trade Cas. (CCH) ¶ 67,458 (Ch. Ct. Va. 1987).

III. SUBSTANTIVE LEGAL AUTHORITY OF STATE ATTORNEYS GENERAL

A. CRIMINAL ACTIONS

The last major criminal action brought against vertical price-fixing was a generation ago in the *Cuisinart* case. While there is no obvious constituency for the use of criminal penalties against distributional restraints, the criminal provisions of federal and state law apply to vertical as well as horizontal restraints.

1. Under Federal Law

State prosecutors do not have a statutory role under the criminal provisions of federal antitrust law. However, state prosecutors can be cross-designated as special assistant attorneys general in order to act with federal authority in joint state-federal investigations or prosecutions.

2. Under State Law

While each state's antitrust law is to some extent unique, over 40 states provide for criminal enforcement of state antitrust law. Approximately 25 states classify antitrust violations as felonies. *E.g.*, N.Y. General Business Law § 341 (restraints of trade and attempts are a class E felony, punishable by fines of up to \$100,000 and up to 4 years imprisonment for individuals, and \$1 million fines for corporations); Wis. Stat. § 133.03(1)(felony punishable by fines up to \$50,000 and up to 5 years imprisonment for individuals, and \$100,000 fines for corporations).

B. CIVIL ACTIONS

1. Under Federal Law

- a. Attorneys General have traditionally represented their states with respect to proprietary purchases of goods or services. *Georgia v.*

Pennsylvania Railroad Co., 324 U.S. 439 (1945). With respect to such purchases, state Attorneys General represent the state and state agencies, and can act as a class representative of entities at other levels of government, for example, cities and counties. Some states, including Florida, Massachusetts, New Jersey and North Carolina are authorized by statute or common law to act as unitary plaintiffs, where the Attorney General automatically represents all governmental entities without the necessity for Rule 23 class certification. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976); *In re Chicken Antitrust Litigation*, C.A. No. C74-2454A (N.D. Ga.1974)(Massachusetts) and C.A. No. C75-362A (N.D. Ga. 1977)(New Jersey); *Nash Co. Bd. of Ed. v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981)(North Carolina).

- b. States are persons within the contemplation of § 4 of the Clayton Act and can recover treble damages and costs, including a reasonable attorney’s fee. 15 U.S.C. 15; *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).
- c. By a 1976 amendment to the Clayton Act, state Attorneys General can represent natural person citizens of the state as *parens patriae* and recover treble damages. 15 U.S.C. § 15c. This form of representative action excludes monetary relief allocable to “any business entity.” 15 U.S.C. § 15c (a)(1). This is a key tool for bringing actions on behalf of consumers injured by distributional restraints.
- d. States can also seek injunctive relief under § 16 of the Clayton Act. *California v. American Stores*, 110 S. Ct. 275 (1990); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972)(for injury to the general economy of the state). States can recover costs, including a reasonable attorney’s fee, in any action in which they substantially prevail. 15 U.S.C. § 26.

2. Under State Antitrust Law

- a. State law typically authorizes the recovery of treble damages and costs, including a reasonable attorney’s fee. *See, e.g.*, Ak. Stat. § 45.50.574; Cal. Bus. & Prof. Code § 16750; Gen’l Laws Mass., Chap. 93, § 12 (if with “malicious intent to injure”); NJ Rev. Stat. C.56:9-12; N.Y. Gen’l Bus. Law §340; Wash. Rev. Code § 19.86.090; Wis. Stat. § 133.18.
- b. Like federal law, state law also generally authorizes injunctive relief and recovery of costs, including a reasonable attorney’s fee.

See, e.g., Md. Com. Law Code Ann; § 11-209(a)(3); N.Y. Gen'l Bus. Law § 342.

- c. Class actions are typically allowed under state law. For actions on behalf of governmental entities, the state attorney general can often represent such entities unless they opt out of the action within a short period after receiving notice. *See, e.g.*, Cal. Bus. & Prof. Code § 16750(c); N.Y. Gen'l Bus. Law §342-b (Attorney General represents political subdivisions upon request).
- d. Some state statutes provide for a state *parens patriae* action generally analogous to the federal action. *See, e.g.*, Cal. Bus. & Prof. Code § 16760; Conn. Gen. Stat. § 35-32(e) & (d).
- e. Some states provide for recovery of civil penalties for violations of state antitrust law. *See, e.g.*, N.Y. Gen. Bus. Law § 342-a (civil penalties of up to \$1 million per corporation per violation and \$100,000 per individual per violation). *New York v. Hendrickson Bros, Inc.*, 840 F.2d 1065 (2d Cir. 1988)(federal court awarded treble damages under federal law and state civil penalties for bid rigging).
- f. State statutes typically provide for the voiding of contracts which are in violation of state antitrust law. *See, e.g.*, Cal. Bus. & Prof. Code § 16722.
- g. A number of states also have corporate “death penalties” whereby a corporation’s charter can be revoked for antitrust violations. *See, e.g.*, Cal. Bus. & Prof. Code § 16753; *e.g.*, Ill. Antitrust Act § 7(1); Wash. Rev. Code § 19.86.160.

3. Under State Analogues to the Federal Trade Commission Act

Numerous states have enacted Unfair and Deceptive Practices Acts, sometimes generically called UDAP or unfair competition acts. *See, e.g.*, Wis. Stats. § 100.20. Typically, these acts proscribe unfair, unlawful, or deceptive trade practices, and are roughly analogous to § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45. *See, e.g.*, N.Y. Gen'l Bus. Law § 349 (deceptive acts and practices are unlawful). A violation of state antitrust law can also be a violation of these acts on the theory that consumers are entitled to assume that prices and other conditions of sale have been determined by competitive market forces. Therefore, price fixing or other restraints of trade would be unfair and deceptive. Application of these statutes can trigger substantial civil penalties in addition to penalties provided by state antitrust law. *See, e.g.*, *People v.*

National Association of Realtors, 120 Cal.App.3d 459 (1982); *Papageorge, The Unfair Competition Statute: California's Sleeping Giant Awakens*, 4 Whittier L.R. 561 (1982).

4. Under State Analogues to the Robinson-Patman Act

Most states have statutes prohibiting price discrimination and below cost sales. While there is no universal pattern, most statutes provide the state attorney general with criminal and civil enforcement authority. *See, e.g.*, Cal. Bus. & Prof. Code §§ 16700 et seq.

IV. INVESTIGATIVE TOOLS AT THE STATE LEVEL

A. Grand Juries

As under federal law, grand juries are a traditional tool of the prosecutor, particularly in complex white collar crime investigations.

B. Search Warrants

Rarely used. However, probable cause to believe a criminal antitrust violation has been committed will support a request for a search warrant. The trend toward criminal prosecutions in the antitrust area will result in increased use of this technique.

C. Surreptitious Recordings

In a number of states, including Wisconsin and New York, only one-party consent is required to record a conversation. Therefore, either the sender or receiver of a communication may record it. Wis. Stats. § 968.34(2)(c); N.Y. Crim. Proc. Law § 700.05, N.Y. Penal Law §§ 250.00, *et seq.* In California, only law enforcement officials can authorize an individual to wear a “wire” and only for a law enforcement purpose. Cal. Pen. Code § 633; *People v. Carbonie*, 48 Cal.App.3d 679 (1975).

However, in states without statutes limiting or regulating surreptitious recordings, federal law may allow any party to a conversation to record it. *See United States v. White*, 401 U.S. 745 (1971).

D. Investigative Subpoenas (State CID's)

Many states have the authority to issue and enforce subpoenas similar to the Civil Investigative Demands (CID's) issued by federal authorities. This authority may be part of the state antitrust statute, or, as in the case of California, be part of a broader authority. *See, e.g.*, California Gov. Code § 11180, *et seq.*; Hawaii Rev. Stat. § 480-18; Kentucky Rev. Stat. § 367.240; Maryland Code Ann. § 11-210; New York Gen. Bus. Law § 343; Ohio Rev. Code § 1331.16; Wisconsin Stats. § 133.11.

V. STATE PROSECUTORS AND THE POLICY DEBATE OVER DISTRIBUTIONAL RESTRAINTS

The appropriate legal treatment of distributional restraints has been a central policy challenge for the antitrust bar since the 1970's. *See* Peritz, *A Genealogy of Vertical Restraints*, 40 *Hastings L.J.* 511 (1989). At one end of the policy spectrum are representatives of the so-called Chicago School of law and economics. As articulated by Robert Bork, this group believes that "vertical price fixing (resale price maintenance), vertical market division (closed dealer territories), and, indeed, all vertical restraints are beneficial to consumers and should for that reason be completely lawful." Bork, *The Antitrust Paradox*, 297 (1978); *See also*, Liebler, *Resale Price Maintenance and Consumer Welfare*, 36 *UCLA L. Rev.* 889 (1989). Failing treatment of all distributional restraints as per se legal, advocates of this view have sought rule of reason treatment for these restraints as a way of reaching their policy goals indirectly through imposition of stiff evidentiary burdens on plaintiffs.

Despite the great success of this school of thought in the Reagan Administration and in some key court decisions, this view is not universally accepted. Cracks have been identified in Chicago theories. *See, e.g.*, Commanor, *Vertical Price-Fixing, Vertical Market Restrictions, and The New Antitrust Policy*, 98 *Harv. L.R.* 983 (1985); Scherer, *The Economics of Vertical Restraints*, 52 *Antitrust L.J.* 687 (1983). In particular, the critical identity of interests between manufacturers and consumers which underlies much Chicago School analysis of vertical restraints is being challenged. W.A. Cann, Jr., *Vertical Restraints and the "Efficiency" Influence*, 24 *Am. Bus. Lawyer* 46 (1986); Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per se Rule Against Vertical Price Fixing*, 71 *Georgetown L.J.* 1487, 1491-95 (1983).

These insights are consistent with earlier work indicating that vertical restraints are only successful when there is exploitable market power at both the manufacturing and retail levels. Bowman, *Resale Price Maintenance-A Monopoly Problem*, 25 *J. of Bus.* 141 (1952). This analysis suggests that vertical price fixing, far from being a benign market phenomenon, is found only when markets are not fully competitive.

In general, state attorneys general do not embrace Chicago School theories. As a consequence, they are likely to be making case filing decisions based on the assumption

that vertical restraints, particularly vertical price fixing, is a substantial economic problem which unnecessarily raises prices for consumers.

V. STATE PROSECUTORS AND STATE LAW

State law is increasingly important for both state prosecutors and private plaintiffs. Indeed, so important are state antitrust laws that it is critically important to analyze state law irrespective of who one represents.

A. State Procedures may be Better for Plaintiffs

1. Summary Judgment Practice

Federal courts are keeping more and more antitrust cases away from juries. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 471 U.S. 1002 (1985). This has had the effect of having antitrust cases decided by judges who have been “schooled” in Chicago School explanations of economic behavior. P.H. Fox, *Antitrust Economics and the Courts: The “When” and “How” of Judicial Miseducation*, 20 *Antitrust L. & Econ. Rev.* 95 (No. 3, 1988). The importance of these developments in federal antitrust litigation cannot be minimized. One estimate suggests that a substantial percentage of all antitrust actions decided in federal courts in 1987 were decided for defendants by summary judgment. Editors, *Judges vs. Juries in Antitrust: The Rush to Summary Judgment*, 20 *Antitrust L. & Econ. Rev.* 1 (1988).

By contrast, state courts have not embraced federal summary judgment practice. *See, e.g., Biljac Assoc. v. First Interstate Bank*, 218 Cal. App.3d 1410 (1990).² This means that juries, made up of ordinary consumers, will be making judgments about whether a discounting dealer was cut-off for price or non-price reasons. This suggests that highly technical defenses may not be as successful in state court proceedings.

A recent decision of the Ninth Circuit suggests that *Matsushita* may have limited effects in that circuit. *In re Coord. Petroleum Prods. Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990). If accepted in other circuits, this decision could have broad implications for litigants in federal court. M. Spiegel & W. Liao, *Lessons from Petroleum Products: Avoiding Summary Judgment After Matsushita and Monsanto*, 5 *Antitrust* 12 (Spring 1991).

1. Non-Unanimous Jury

² The summary judgment provisions of California law were amended in 1992. Cal. C.C.P. § 437c(n). The effects, if any, of these changes on California cases have yet to be determined.

Federal rules require a unanimous jury “[u]nless the parties otherwise stipulate.” FRCP Rule 48. Because plaintiff bears the burden of persuasion, the defense wins if it can persuade a single juror. Because of its obvious tactical significance, defense counsel rarely stipulate to other than a unanimous jury. Less-than-unanimous verdicts are permitted in civil cases in some states. *See, e.g.*, Wis. Stats. § 805.09(2), five-sixths verdict shall be the verdict of the jury; Cal. Code of Civil Proc. § 618, decision by three-fourths of jury sufficient.

B. Substantive Antitrust Law may be Better in State Court

1. Standing

Standing has become a powerful tool to keep some antitrust plaintiffs out of federal court. This was illustrated in *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 492 U.S. 328 (1990). While the issue of standing in maximum price-fixing cases has not come up in state court recently, at least one state appellate decision rejected the ARCO rule, grounding its decision on the existence of a state indirect purchaser statute. *Cellular Plus, Inc. v. Superior Court*, 14 Cal.App.4th 1224, 1233-34 (1993).

2. Finding an Agreement

Federal decisions have steadily increased the burden of proof imposed on plaintiffs in distribution cases. *See, e.g.*, *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752 (1984); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). The extent of this erosion depends in large part on the circuit in which a case is brought. *Compare, e.g.*, *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988) with *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987); *See also* Steuer, *Clarity and Confusion in Vertical Restraints*, 58 Antitrust L.J. 421 (1989). However, state case law in some jurisdictions has not tracked recent federal developments. *See Mailand v. Burckle*, 20 Cal. 2d 367 (1978); *R.E. Spriggs Co., Inc. v. Adolph Coors Co.*, 94 Cal.App.3d 419 (1979). At least one state court has flatly rejected federal analysis in this area. *Savin Corp. v. Copy Distribution Co.*, 1986-2 Trade Cas. [CCH] ¶ 67,324 (Tex. Ct. App. 1986).

3. Unfair Practices

Federal courts continue to erect barriers to plaintiffs in below cost sales cases. *See, e.g., Brooke Group v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1992). These barriers do not exist in some states. *See, e.g., Diesel Electric Sales & Service v. Marco Marine San Diego Inc.*, 16 Cal.App.4th 202 (1993). This has led to a significant shift to state courts by knowledgeable plaintiffs' lawyers. *See* M. Walsh, *A Cure for the Antitrust Blahs*, *The Recorder* (San Francisco), 1 (November 8, 1993).

Individual states have a mixed bag of prohibitions on secret rebates, price discrimination and locality discrimination. *See* Anno., 41 A.L.R.4th 612 (Below cost sales); Anno., 41 A.L.R.4th 675 (Discriminatory rebates); Anno., 67 A.L.R.3d 26 (Locality discrimination).

4. Specialized Statutes Regulating the Relationship between Dealers and Manufacturers

Some states have enacted statutes that regulate, in whole or in part, the relationship between dealers and manufacturers. A Wisconsin statute, for example, regulates the grounds upon which a dealer may be terminated. Wisconsin Fair Dealership Act, Wisc. Stats. 1989-90, Ch. 135.

C. State Business Torts as an Alternative to Federal Antitrust Law

Often an antitrust violation can be a business tort as well. Of increasing importance to antitrust plaintiffs, a "combination" within the meaning of the antitrust laws may not be required. *See* W.L. Jaeger, *Business Torts and Unfair Competition: New Tools for the Plaintiff in the 1990's*, 4 *Antitrust* 4 (Spring, 1990). For example, a recent case decided by the United States Supreme Court involving predation in the commercial garbage hauling market in Burlington, Vermont yielded a judgment of \$153,438 for violations of federal antitrust law and a judgment of \$6,066,082 for compensatory and punitive damages on a pendent state tort claim. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

The Restatement (Second) of Torts § 766 *et seq.*, followed in most states, describes the elements of a tortious interference claim as follows: (1) a contract, or a legitimate expectancy of economic gain; (2) defendant's awareness of the contract or expectancy; (3) an intentional or improper act that causes a breach of contract or frustration in the expectancy; and (4) damages. These elements establish a "broad and undefined tort" with potentially very significant utility to the antitrust litigator. W. Prosser & W.P. Keeton, *Law of Torts* 979 (5th ed. 1984)

Successful interference claims can be based on intentional or negligent conduct. *See, e.g., Blank v. Kirwan*, 39 Cal.3d 311 (1985), intentional interference; *J'aire*

Corp. v. Gregory, 24 Cal.3d 799 (1979), negligent interference. Punitive damages may be available for both torts. See, e.g., Cal. Civ. Code § 3294(c)(1). Breach of the implied covenant of good faith and fair dealing may also give rise to a substantial claim, although at least in California this tort has been recently limited in its scope. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988).

State law claims for tortious interference have been successfully employed when one or more elements of an antitrust claim could not be proved. See, e.g., *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683 (10th Cir. 1989); *Deauville Corp. v. Federated Department Stores, Inc.*, 756 F.2d 1183, 1196 n.9 (5th Cir. 1985).

VI. STATE ANTITRUST LAW MATERIALS

Publications on state antitrust law are not as voluminous as those on the Sherman Act, but there is a growing list of useful resources. As a consequence, analyzing a state antitrust law question involving several states can be time-consuming and frustrating. In addition to those listed below, the antitrust law sections of several state bar associations have prepared handbooks on state law and practice. See, e.g., State Bar of California (Antitrust & Trade Regulation Law Section), *California Antitrust Law* (1991). In addition, the following publications can be helpful:

A. ABA Antitrust Section, *State Antitrust Practice and Statutes* (1991).

This three-volume work provides state-by-state reviews of state antitrust law and practice. This was prepared in conjunction with local practitioners of state trade regulation law, and is currently the best single reference work on this subject.

B. R.E. Folsom, *State Antitrust Law and Practice* (Prentice-Hall).

A two-volume treatise on state antitrust law and practice. Updated regularly.

C. Trade Regulation Reporter (CCH).

Volume 6 of this multi-volume reference work, starting at ¶ 30,000, reprints state antitrust statutes.

D. Von Kalinowski, *Antitrust Laws and Trade Regulation* (Matthew Bender).

Volumes 13 and 14 of this multi-volume treatise describe the antitrust laws and cases in all states in approximately twenty pages per state. This publication provides an accessible overview of the antitrust laws of the various states. Updated regularly.

E. W.J. Haynes, *State Antitrust Law* (BNA 1989).

This one-volume handbook is written by a former state antitrust enforcer who is now a federal magistrate. Contains very useful information, but does not cover all states in as much detail as the multi-volume works.

VII. DEALING WITH A MULTI-STATE ANTITRUST INVESTIGATION

- A. The first step is to determine if your client is the subject of a multi-state investigation. Typically, state investigators will indicate whether an investigation is being coordinated with other states. If so, you may be dealing with 2-10 states, which are actively coordinating their investigative resources. These states meet regularly, usually via conference telephone calls, and share investigative leads, information and research chores. While each state will be using its own investigative authorities and resources, multi-state coordination of these efforts results in increasingly efficient national investigations.

Jurisdictional squabbles are often resolved by having another state issue investigative subpoenas. As a consequence, it often pays to cooperate with investigators who first contact your client.

- B. If your client is the subject of a multi-state inquiry, you may wish to seek agreements concerning the confidentiality of documents which may be shared with other investigating states.
- C. If an inquiry is likely to be concluded with a settlement, states typically select representatives to negotiate on behalf of all states. While each state is sovereign, great weight is given to the views of designated negotiators.