Pennsylvania's Antibid-Rigging Act: A First Step towards an Antitrust Law or the Only Step

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The author analyzes Pennsylvania’s recently enacted Antibid-Rigging Act in the context of the state’s dearth of antitrust law and predicts the effect of the Act on future antitrust measures within the Commonwealth.

I. Introduction

Pennsylvania’s new Antibid-Rigging Act (the Act) became effective on December 27, 1983. The Commonwealth joins at least eleven other states with similar laws. An antibid-rigging statute is particularly significant in Pennsylvania because the Commonwealth is the only state in the nation that has no antitrust statute.

State Senator Jeanette F. Reibman introduced the Act in response to ever-increasing evidence that bid-rigging in the high-
way paving and road building industries had become so pervasive as to be considered part of the normal course of business.5 Sophisticated bid-rigging conspiracies had been uncovered in approximately twenty states, including Pennsylvania.6 Economists estimated that these conspiracies could inflate building and construction contracts by as much as thirty percent.7 Between December, 1979, and March, 1983, the United States Department of Justice filed 215 criminal actions against 183 corporations and 210 individuals in the highway building industry alone.8 Fines totaling $44 million have been recovered.9

Before the new legislation was enacted, Pennsylvania had little protection against bid-rigging in the letting of public contracts. Although such conduct is prohibited under federal antitrust laws,10 prosecution by the United States Department of Justice was insufficient11 and the Commonwealth's Attorney General possessed only limited power to enforce the federal mandates.12 Thus, the primary avenues of recourse against bid-rigging were state actions for fraud or conspiracy, with their at-

June 23, 1982). For a discussion of the legislative history of the Pennsylvania act, see infra notes 18-20 and accompanying text.

5. See Flax, The Crackdown on Colluding Roadbuilders, FORTUNE, Oct. 3, 1983, at 79, 80 (quoting Gregory Simmons, special agent of the Department of Transportation, as saying, "I have no doubt that it [bid-rigging] is going on everywhere."). In the largest of the Justice Department's criminal antitrust prosecutions, the participants in the alleged $366 million conspiracy reportedly "met openly and repeatedly, exchanging prices . . . in an unabashed, business-as-usual manner . . . even exchanging computer bid preparation data." Yunker, supra note 4, at 33. See United States v. Fischbach & Moore, Inc., 576 F. Supp. 1384 (W.D. Pa. 1983). See also Katz & Horwitz, supra note 3, at 17.

6. Flax, supra note 5, at 79; MacNeil-Lehrer transcript no. 1758, supra note 4, at 1.

7. MacNeil-Lehrer transcript no. 7258, supra note 4, at 4 ("economists' studies have shown that you tend to get a 10- to 30-percent increase in the price of a competitively bid contract as a result of a price-fixing"). See also Flax, supra note 5, at 80 (federal prosecutors were unable to pinpoint the actual total cost of bid-rigging, but there has been a 20% drop in bid estimate since prosecution began in 1980).

8. UNITED STATES GENERAL ACCOUNTING OFFICE, ACTIONS BEING TAKEN TO DEAL WITH BID RIGGING IN THE FEDERAL HIGHWAY PROGRAM 7 (Report to the Chairman of the House Committee on Public Works and Transportation, May 23, 1983).

9. Id.

10. For a discussion of the prohibitions of the federal antitrust laws, see infra notes 124-43 and accompanying text.

11. For a discussion of the inadequacies of the federal prosecution, see infra notes 146-47 and accompanying text.

12. For a discussion of the Attorney General's limited enforcement powers, see infra notes 144-77 and accompanying text.
tendant problems of proof. Conduct which did not evidence the requisite criminal intent was not sanctioned.

Pennsylvania law does require that most public contracts be let through a competitive bidding process, whereby sealed bids are submitted and the contract is awarded to the lowest responsible bidder. Indeed, the state constitution mandates such com-

13. See 18 Pa. Cons. Stat. Ann. § 903 (Purdon 1983) (prohibiting criminal conspiracy); id. §§ 4101-4116 (prohibiting criminal fraud, including deceptive business practices). In order to prove criminal conspiracy, the state must first prove that the underlying conduct is criminal. Id. § 903(a). Before the passage of the Act, bid-rigging did not constitute criminal conduct. Bid-rigging might, in some instances, be prohibited as tampering with records, or as forgery, a deceptive business practice. Id. §§ 4101, 4104, 4107. If the bid-rigging activity fits the definition of one of these offenses, the state could prosecute. To prove a conspiracy, the state would have to demonstrate specific intent to commit the crime as well as an agreement among the defendants in furtherance of committing the crime. Id. § 903(a). Bid-rigging, however, does not always fall within the definitions of Pennsylvania's criminal fraud offenses. Even when it does, it may be factually difficult to prove specific fraudulent intent and an agreement among the parties.

14. See, e.g., Letter from Philadelphia District Attorney Edward G. Rendell to Senator Frank J. O'Connell (June 22, 1983) (advocating passage of an antibid-rigging bill and demonstrating the need for such legislation with an example of a case of unfair bidding on a city contract which went unpunished due to insufficient evidence of the criminal intent required by existing statutes). Proof of the crime of forgery requires a showing of "intent to defraud or injure" someone, or "knowledge that [one] is facilitating a fraud or injury." 18 Pa. Cons. Stat. Ann. § 4101(a) (Purdon 1983). The offense of tampering with records or identification involves the "intent to deceive or injure anyone or to conceal any wrongdoing." Id. § 4104(a). Conviction for the offense of deceptive business practices has been held to require a misrepresentation which is knowingly or recklessly deceptive. Glessner v. Twig, 22 Pa. D. & C.3d 727 (Somerset Co. C.C.P. 1982).


Furthermore, the Pennsylvania Commonwealth Court has stated:

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petitive bidding. Violation of these laws and regulations can result in a business’ suspension or debarment from bidding on future Commonwealth contracts. However, this administrative sanction, although a potentially powerful weapon, is an inadequate remedy when a criminal conspiracy exists.

Accordingly, there was a clear need for antibid-rigging legislation. Senator Reibman first introduced the bill at the end of the 1981-1982 session of the Pennsylvania General Assembly. It was reintroduced on February 4, 1983. After numerous amendments, both houses of the legislature passed the bill unanimously,

The law in the field is that even in the absence of a constitutional or statutory requirement that a contract be awarded to the lowest responsible bidder, if in fact the public authority invites bids, public policy and the economical conduct of government business require that the contract be awarded to the lowest possible bidder.


Detailed discussion of government procurement practices and the competitive bidding process is beyond the scope of this article. For further information, see generally Council of State Governments, State and Local Government Purchasing (2d ed. 1983); Adler, State and Local Government Procurement, 53 Pa. B.A.Q. 154 (1982).

16. Pa. Const. art. III, § 22. This provision of the Pennsylvania Constitution states:

The General Assembly shall maintain by law a system of competitive bidding under which all purchases of materials, printing, supplies or other personal property used by the government of this Commonwealth shall so far as practicable be made. The law shall provide that no officer or employee of the Commonwealth shall be in any way interested in any purchase made by the Commonwealth under contract or otherwise.

Id.


and on October 28, 1983, Governor Thornburgh signed it into law.  

The Act establishes the crime of bid-rigging and provides for criminal, civil penalty, and damage actions for violations. Bid-rigging occurs when two or more persons agree to determine or fix in advance the successful bidder on a contract or subcontract let by any governmental agency. Any form of agreement relating to bid submission is prohibited. Such activity is classified as a third degree felony with concomitant fines and imprisonment. The Attorney General and district attorneys have concurrent authority for criminal prosecution. In addition, the Attorney General may bring an action for civil penalties and damages. Finally, a person who has engaged in bid-rigging may be suspended or debarred from bidding on subsequent Commonwealth contracts.

The purpose of this article is to provide a detailed analysis of the Act as an aid to its interpretation, and to discuss its significance in light of the existing antitrust protection in the Commonwealth. First, the specific types of protection provided by the statute are examined. Following a consideration of existing antitrust protection in the Commonwealth, the article then suggests how the new Act will affect the present statutory and common law scheme. After reviewing the history of Pennsylvania’s unsuccessful attempts to enact antitrust legislation, the article posits several explanations for the Commonwealth’s unusual posture in this area. Finally, it answers the question posed at the outset: Is the new Act a foundation for future antitrust law in Pennsylvania, or is it the only protection which will be afforded in the near future?

II. Analysis of Pennsylvania’s Antibid-Rigging Act

The Act gives law enforcement officials a powerful tool to protect the Commonwealth from hidden overcharges that increase the cost of goods and services which it purchases. Although the Act is a strong measure, it is not unreasonably puni-
It was modeled after North Carolina's bid-rigging statute. In Pennsylvania, however, unlike North Carolina, there was no prior law in this area. Thus, it was necessary to create a complete scheme defining the prohibited conduct, establishing fines and penalties, and providing for enforcement.

This section provides a detailed analysis and critique of key provisions of the Act in light of its legislative history.

A. Definitions and Scope of the Act

1. Definitions

Any alteration or predetermination of bids which are submitted for a government contract and paid for with public funds violates the competitive bidding process and is prohibited under the Act. The exact nature of the prohibited activity is delineated in the Act's definition of bid-rigging. An agreement between two or more persons as to the outcome of a bid is the crucial element


31. For a discussion of Pennsylvania's statutory void in the antitrust area, see supra note 3 and accompanying text and infra notes 241-71 and accompanying text.


33. Pa. Stat. Ann. tit. 73, § 1612 (Purdon Supp. 1984-85). Bid-rigging is defined as "[t]he concerted activity of two or more persons to determine in advance the winning bidder of a contract let or to be let for competitive bidding by a governmental agency." Id.
of bid-rigging. To beyond a simple agreement, there must be an additional quantum of activity which rises to the level of a combination, conspiracy, or collusion. From the language of the statute, it appears that there must be a criminal motive among the parties to the agreement. To establish a bid-rigging conspiracy, the prosecuting authorities must show that the defendants had the specific intent to commit the offense. In addition, they must allege and prove that these individuals committed an overt act in furtherance of the conspiracy. This definition of bid-rigging is followed by a comprehensive list of prohibited practices, which includes submitting identical bids to sell goods or services at a fixed price and sharing profits or establishing territories in order to limit competition.

It would seem, then, that the Act's definition of bid-rigging implicitly renders such conduct criminal. Yet, this component

34. Id. In addition to the prohibition on "concerted activity" in § 1612, the Act also specifically prohibits the following:
   (1) Agreeing to sell items or services at the same price.
   (2) Agreeing to submit identical bids.
   (3) Agreeing to rotate bids.
   (4) Agreeing to share profits with a contractor who does not submit the low bid.
   (5) Submitting prearranged bids, agreed upon higher or lower bids, or other complementary bids.
   (6) Agreeing to set up territories to restrict competition.
   (7) Agreeing not to submit bids.

35. Id. § 1613(a). The statute provides that "[i]t shall be unlawful for any person to conspire, collude or combine with another in order to commit or attempt to commit bid-rigging" on government contracts and subcontracts. Id. This part of the definition of bid-rigging is derived from the North Carolina statute. See N.C. GEN. STAT. § 133-24 (Supp. 1983). In that statute, the definition is augmented by incorporation of existing North Carolina law. See supra note 30. In other statutes, this § 1613(a)-type language is the only definition of prohibited conduct. See e.g., VA. CODE §§ 59.1-68.6 to -68.8 (Supp. 1982).

36. The inference of a requirement of criminal motive is drawn from use of language similar to that in § 1613(a) of the Act in other Pennsylvania criminal statutes. See, e.g., 18 PA. CONS. STAT. ANN. §§ 302(b)(1), 305(a)(2), 307(a)(1), 903(a) (Purdon 1983). In addition, classification of bid-rigging as a third degree felony indicates that a criminal motive may be required. See PA. STAT. ANN. tit. 73, § 1613(e) (Purdon Supp. 1984-85).

37. This requirement is drawn from the elements necessary to establish a criminal conspiracy. See 18 PA. CONST. STAT. ANN. § 903(a) (Purdon 1983).

38. See id. § 903(e). In order to establish attempted bid-rigging, which is prohibited under § 1613(a) of the Act, the law on the inchoate crime of attempt requires the prosecutor to prove that the accused individuals had the specific intent to rig bids and that they took a substantial step toward affecting the outcome of a contract award. See id. § 903(a).

39. For a list of the prohibited activities, see supra note 34.

40. See PA. STAT. ANN. tit. 73, §§ 1613(a), (g), 1614-1615 (Purdon Supp. 1984-85).
of the definition is inconsistent with those parts of the Act governing civil actions and alternative sanctions.\textsuperscript{41} Must one infer that these provisions, by referring to the prohibited activities, really imply a prerequisite of criminal motive? And if criminal activity is not present or there is insufficient evidence to establish a conspiracy, does that mean that the conduct is not unlawful? Probably not, since it is clear that the legislature intended noncriminal activity to be actionable as well. A reading of the liability provisions of the Act in their entirety supports this position.\textsuperscript{42} Perhaps this statutory ambiguity could be remedied by insertion of a noncriminal definition of bid-rigging and a prohibition thereof. The language which criminalizes the conduct could then be placed in a separate section providing for criminal sanctions.

2. Scope

Bid-rigging, by its definition, is a violation against the Commonwealth. Since it involves only those contracts let by a governmental agency, the scope of the Act is limited.\textsuperscript{43} Thus, the law is designed to redress harm to the agency or jurisdiction letting the contract. Enforcement rests solely with public officials.\textsuperscript{44} Private parties are not afforded any rights or remedies under the Act.

B. Fines, Penalties & Imprisonment

Since the Act charts new territory for Pennsylvania, it establishes a comprehensive scheme of sanctions. First, it makes bid-rigging a third degree felony,\textsuperscript{45} with accompanying fines and imprisonment.\textsuperscript{46} Second, in lieu of criminal prosecution, the Act

\begin{itemize}
\item \textsuperscript{41} Id. §§ 1613(d), (g), 1614-1615. For a discussion of the alternative remedies under the Act, see infra notes 45-88 and accompanying text.
\item \textsuperscript{42} See PA. STAT. ANN. tit. 73, §§ 1613(c)-(e), (g), 1614-1615, 1618 (Purdon Supp. 1984).
\item \textsuperscript{43} Id. § 1620.
\item \textsuperscript{44} Id. § 1618. For a discussion of the enforcement scheme under the Act, see infra notes 89-114 and accompanying text.
\item \textsuperscript{45} PA. STAT. ANN. tit. 73, § 1613(c) (Purdon Supp. 1984-85). The original draft of the bill classified bid-rigging as a second degree felony, but did provide for imprisonment. Memorandum from F. Murray Bryan, on Behalf of Associated Pennsylvania Constructors, to All Interested Parties (April 29, 1983), at 2-3 (discussing amendments to proposed Antibid-Rigging Act, S. 199, 167 Pa. Cong. (1983)). The proposed Act was amended to make bid-rigging a third degree felony, consistent with the grading of offenses in the Crimes Code. Compare 18 PA. CONS. STAT. ANN. §§ 106(b)-(e), 1103 (Purdon 1983) with PA. STAT. ANN. tit. 73, § 1613(c) (Purdon Supp. 1984-85).
\item \textsuperscript{46} PA. STAT. ANN. tit. 73, § 1613(c) (Purdon Supp. 1984-85) (providing a maximum of a $1,000,000 fine for entities other than individuals, a $50,000 fine for individuals, and/or a three year term of imprisonment). The provisions for
\end{itemize}
gives the Attorney General the right to seek a civil penalty. Finally, it provides for a civil damages action as well as for administrative sanctions.

An interesting feature of the Act is its enumeration of three factors which the court is directed to review in determining the amount of civil penalty or criminal fine, or the term of imprisonment. At a minimum, the court must consider the following: the individual's prior record and number of previous violations, his or her net worth, and the size and dollar amount of the contract. This permits the court, within the guidelines of the Act, to fashion a sanction which is appropriate to the nature and magnitude of the violation in question.

C. Damages

The Act affords any governmental agency which was a party to a contract affected by prohibited bid-rigging conduct a right of action for damages against participants in the prohibited conduct. In the final draft, the legislation provided for mandatory court-ordered restitution. Restitution is arguably a proper remedy in Pennsylvania to address bid-rigging.

47. PA. STAT. ANN. tit. 73, § 1613(d) (Purdon Supp. 1984-85) (providing for a $100,000 maximum penalty). Many states impose a civil penalty, similar to a fine but without the criminal consequences, for bid-rigging and similar violations.

48. PA. STAT. ANN. tit. 73, §§ 1613(g), 1614 (Purdon Supp. 1984-85). For a discussion of the remedy of a civil action for damages as provided in the Act, see infra notes 51-62 and accompanying text.

49. PA. STAT. ANN. tit. 73, §§ 1613(g), 1615 (Purdon Supp. 1984-85). For a discussion of the available administrative sanctions under the Act, see infra notes 63-88 and accompanying text.

50. PA. STAT. ANN. tit. 73, § 1613(f) (Purdon Supp. 1984-85).

51. Id. §§ 1613(g), 1614.

52. S. 199, 167th Pa. Cong., § 3(b) (1983). The bill required the court to order restitution pursuant to § 1106 of the Pennsylvania Crimes Code. Id.; see
edy in light of (1) the loss suffered by a governmental agency through inflated prices and (2) the fraudulent activity which secured the contract.\(^5\) Unfortunately this provision was deleted when the bill was amended in committee.\(^5\) As a result, restitution can be obtained only through a separate action for damages.\(^5\)

The requirement that damages be sought in a separate action constitutes a substantial deterrent to full relief, since it places a greater burden on the already strained resources of state and local agencies. Moreover, judicial and prosecutorial resources are wasted when parties are forced to file multiple actions. In essence, defense counsel and their clients are the only beneficiaries of this provision.\(^5\)

As to the measure of damages, the Act provides for treble the actual damages plus the cost of suit, including attorney’s fees.\(^5\)

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53. The fundamental objective of restitution as a basis for liability is to prevent unjust enrichment, particularly enrichment of a wrongdoer as a result of his own unlawful conduct. See Restatement of Restitution §§ 1, 3 (1942); G. Palmer, The Law of Restitution § 1.1 (1978). The injustice of retaining a benefit can spring from various sources, including fraud, reliance, inducement, duress or mistake. G. Douthwaite, Attorney’s Guide to Restitution 7 (1977). In order to be actionable, the unjust enrichment must be based on one of the specific principles recognized by law or equity. Id. at 20. Federal, state and local governments have the same rights to restitution as do private parties, Id. at 339-400. Remedies available on a theory of restitution include recovery of a money judgment on a quasi-contract, replevin, constructive trust, equitable lien, subrogation and accounting. G. Palmer, supra, §§ 1.1-6, at 1-33. For extensive treatments of the subject of restitution, see generally G. Palmer, supra; Wade, The Literature of the Law of Restitution, 19 Hastings L.J. 1087 (1968).


55. Pa. Stat. Ann. tit. 73, § 1614 (Purdon Supp. 1984-85). Section 1614, however, appears to provide for punitive damages in the form of trebling actual damages. See id. Punitive damages are not properly termed a restitutionary remedy because the object of restitution is not to punish or deter, but rather to restore the status quo. See G. Douthwaite, supra note 53, at 323.

56. Defendants are benefitted in that the necessity for multiple actions increases the likelihood that the government will not have the resources to seek civil damages in every case. Defendants also benefit from greater bargaining power in the administrative context or the precomplaint stage. Given the burden and expense of a separate civil damages action, the Attorney General’s office may be inclined to settle cases rather than pursue full-fledged litigation.

This provision was derived in part from the North Carolina statute, which gives the governmental agency the option to elect actual damages or ten percent of the contract price, which is then trebled.\(^58\) In bid-rigging cases, actual damages are extremely difficult to prove.\(^59\) Consequently, North Carolina's ten percent alternative serves as a guide for determining damages.\(^60\) Although the initial Senate version of Pennsylvania's legislation contained a similar provision, it was deleted when the bill was amended by the State Government Committee.\(^61\) Without this guideline, Pennsylvania's Act places the onus of proving damages on the government, the innocent party.\(^62\) The data most material to establishing damages are generally in the hands of the defendant, thereby requiring complex, detailed, and timely discovery in order to obtain sufficient proof of actual damages. Thus, although the Act is designed to protect the government, this provision for measurement of damages presents serious obstacles to its ability to recover just compensation.

D. Administrative Sanctions

Administrative sanctions, such as suspension or debarment from bidding on government contracts, are also available under the Act.\(^63\) These sanctions are powerful enforcement tools.\(^64\) Suspension is designed to be a temporary penalty, generally pending an investigation.\(^65\) Debarment follows a finding of viola-

\(^{58}\) See N.C. GEN. STAT. § 133-28(b) (Supp. 1983).


\(^{60}\) Id.


\(^{62}\) For a discussion of the difficulty of proving damages in an antitrust context, see supra note 59 and accompanying text.

\(^{63}\) PA. STAT. ANN. tit. 73, § 1615 (Purdon Supp. 1984-85).

\(^{64}\) For a thorough analysis of administrative sanctions and other methods of implementing competitive bidding policies, see generally Note, Prescribing Preventive Remedies for an Ailing Public Construction Industry: Reforms Under the New Massachusetts Competitive Bidding Statute, 23 B.C.L. REV. 1357 (1982).

\(^{65}\) Id. at 1380.
tion, and continues for longer periods of time.\(^\text{66}\) A firm that has been disqualified under either procedure cannot do business with the Commonwealth for the specified term.\(^\text{67}\) Although these sanctions are for limited durations, they may have a permanent effect,\(^\text{68}\) because firms receiving a large portion of their business from government contracts may be forced to close down.

Under the Act, debarment or suspension are discretionary sanctions which the governmental agency may choose to impose.\(^\text{69}\) The Act provides a maximum debarment period of three years for the first finding of prohibited conduct, and five years for any subsequent findings.\(^\text{70}\) A criminal conviction is not a prerequisite for imposing these sanctions.\(^\text{71}\) Under a related provision,

\(^{66}\) Id.

\(^{67}\) Pa. Stat. Ann. tit. 73, § 1615(a) (Purdon Supp. 1984-85). For a discussion of the time periods provided in the Act, see infra note 70 and accompanying text.

\(^{68}\) See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). The Gonzalez court observed:

  The impact of debarment on a contractor may be a sudden contraction of bank credit, adverse impact on market price of shares of listed stock . . . and critical uneasiness of creditors generally, to say nothing of “loss of face” in the business community.

Id. at 574. See also Note, supra note 64, at 1367-68 n.90.


Under the Act, governmental agencies proceed under their own rules and regulations regarding debarment and suspension, within the statutory limitation on the length of the ineligibility period. Pa. Stat. Ann. tit. 73, § 1615(a) (Purdon Supp. 1984-85). By way of example, two Pennsylvania agencies' regulations governing suspension and debarment are considered below.

The Department of General Services regulations provide a maximum three year debarment period, although an additional period may be imposed following notice and an opportunity for hearing. 4 Pa. Admin. Code § 60.5 (Shepard's 1984). Suspension is a temporary sanction, imposed for a period of investigation, which generally does not exceed six months. Id. § 60.7(b). Over the past few years, the Department has debarred four vendors for three years each and has suspended four others. Memorandum from Lamar E. Shomper, Director, Bureau of Purchases, Department of General Services, to Vendor Services Section, Bureau of Purchases (Feb. 13, 1984). To date, General Services has not debarred any contractors. Id.

In contrast to General Services' regulatory scheme, the Department of Transportation has no established guidelines for suspension or debarment. The procedure is, therefore, one of case-by-case review, with sanctions dependent upon the severity of the violations. Since 1979, the Department has suspended, debarred, or refused to renew contracts with 23 firms. Memorandum from John Hohenwarter, Director of Office of Legislative Affairs, to Senator Jeanette F. Reibman (March 7, 1984).

any agency which participates in the competitive bidding process is required to keep a list of all suspended or debarred individuals. The agency must furnish this list, upon request, to persons considering submission of a bid on an agency contract. In this way, individuals who wish to submit a bid are better able to determine whether other individuals with whom they may be preparing the bid have been disqualified.

An integral component of the administrative sanction is the Act's provision for noncollusion affidavits in which potential bidders must disclose prior bidding misconduct. Since the Department of Transportation's prequalification regulations require similar affidavits, this concept is not new in Pennsylvania. Under these regulations a potential bidder has an affirmative duty to disclose financial ability, adequacy of plant and equipment, and compliance with affirmative action and other regulatory require-

GEN. STAT. § 133-27 (Supp. 1983) (conviction is a prerequisite to suspension). Although conviction is a prerequisite to suspension under North Carolina law, governmental agencies may temporarily suspend an indicted individual pending resolution of the charges against him. Id. North Carolina's statute has survived a constitutional challenge that the section providing for temporary suspension violated the presumption of innocence in criminal matters. See Letter, supra note 59, at 2. For a discussion of this constitutional issue, see infra notes 84-88 and accompanying text.

72. PA. STAT. ANN. tit. 73, § 1615(b) (Purdon Supp. 1984-85).

73. Id.

74. Were it not for this requirement in the Act, an individual preparing a bid would have to check with all the possible state and local offices of each agency which could have debarred a potential bidder. A thorough investigation into the possible debarment of someone with whom one is preparing a bid is burdensome, inefficient and expensive. However, maintenance of a central agency-wide list poses the larger and more dangerous risk of inaccurate or stale information. North Carolina's statute takes a different approach, allowing various governmental agencies to develop regulations regarding confidentiality of bidders. N.C. GEN. STAT. § 133-33 (Supp. 1983); Letter, supra note 59, at 2-3. This scheme safeguards against wholesale distribution of potentially damaging and/or inaccurate information regarding bidders on public contracts.

75. PA. STAT. ANN. tit. 73, § 1617 (Purdon Supp. 1984-85). See also 67 PA. ADMIN. CODE §§ 457.1-.16 (Shepard's 1983) (Pennsylvania Department of Transportation regulations requiring all persons proposing to bid on Department contracts to prequalify by submitting a sworn statement). Cf. MASS. GEN. LAWS ANN. ch. 149, § 44D(a) (West 1982) (requiring general contractors to submit prequalification statement attesting to their organization, experience, and financial stability); N.C. GEN. STAT. § 133-30 (Supp. 1983) (requiring only prime contractors to submit bids).

76. See supra note 75 and infra notes 77-78. The Department of General Services, the state's other chief procurement agency, does not, however, have equivalent prebid requirements. Cf. MASS. GEN. LAWS ANN. ch. 149, § 44D(a) (West 1982) (requiring sworn prequalification statements of all bidders on public construction contracts).
ments. With this information, the Department determines whether a bidder is competent and responsible and then assigns the individual a prequalification rating.

The noncollusion affidavit is an important tool for enforcement. Information about an individual's prior bidding misconduct is relevant to the issue of his or her integrity and ability to perform future work. Accordingly, the government agency soliciting bids is entitled to notification of any malfeasance with respect to bidding on a public contract. The requirement that each agency maintain its own list of excluded persons is of limited value for these purposes, since a single list will contain only the names of those persons subject to administrative sanctions by one particular agency. To obtain a complete list, one would have to check all state and local agencies. For these reasons, information provided in the noncollusion affidavit, which includes any prior bidding misconduct, is especially important. It is critical in helping protect the Commonwealth from contractors who come into Pennsylvania after being debarred in another state, or contractors who had been doing business in one locality and, as a result of misconduct, moved to another. Without the advance disclosure provided by this affidavit, an agency's ability to examine the integrity of a prospective bidder and thereby protect the Commonwealth from unscrupulous conduct would be greatly hampered.

Unfortunately, however, this section of the Act is not likely to be fully effective because it gives full discretion to the agencies regarding bid disqualification. When agency regulations impose a duty to submit an affidavit, neglect of that duty should have a mandatory sanction, such as automatic disqualification of the bid. Although the original bill provided for mandatory dis-

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77. 67 Pa. Admin. Code § 457.3(b) (Shepard's 1983).
78. Id. § 457.3(c).
80. See id. § 1617. Section 1617 requires the following information in noncollusion affidavits of bidders:
   Any required noncollusion shall state whether or not the person has been convicted or found liable for any act prohibited by State or Federal law in any jurisdiction involving conspiracy or collusion with respect to bidding on any public contract within the last three years.
81. See id. (failure to provide an affidavit when one is required by the governmental agency "may be grounds for disqualification").
qualification, the present Act does not. Clearly, the integrity and responsibility of a bidder is called into question if he cannot comply with a simple request for information. The penalty of bid disqualification, therefore, is not an unreasonable one. As it now stands, the discretionary nature of the penalty dilutes the effectiveness of the Act's noncollusion affidavits.

A separate criticism may be levied against the Act's affidavit provisions with respect to the proper use of adverse information contained in the affidavit. That section provides that while information regarding prior bidding misconduct may be a ground for suspension or debarment, it does not necessarily bar a contract award. Implicit in this provision is that there be some administrative procedure before sanctions can be imposed on the basis of information in the affidavit. Detailed statutory language regarding the effect of the affidavit protects bidders from automatic rejections as a result of prior bidding misconduct. Yet such protection seems wholly unnecessary. The bidder has no pro-

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83. See supra note 81.

84. See PA. STAT. ANN. tit. 73, § 1617 (Purdon Supp. 1984-85). Section 1617 of the Act also provides, in pertinent part, as follows:

Any required noncollusion affidavit shall also state that a person's affidavit stating that a person has been convicted or found liable for any act, prohibited by State or Federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding on any public contract within the last three years, does not prohibit a governmental agency from accepting a bid from or awarding a contract to that person, but may be a ground for administrative suspension or debarment in the discretion of a governmental agency under the rules and regulations of that agency, or, in the case of a governmental agency with no administrative suspension or debarment regulations or procedures, may be a ground for consideration on the question of whether such agency should decline to award a contract to that person on the basis of a lack of responsibility.

Id.

85. Id. Specifically, language to the effect that adverse information “may be a ground” for disqualification pursuant to the agency's disqualification rules and regulations implies that more than mere information about prior misconduct is necessary. The agency, arguably, must take some step to analyze the veracity of the information. See id. In the absence of agency regulations and procedures, disqualifications may be based on a “lack of responsibility.” Id. This provision parallels federal regulations regarding prior misconduct by bidders on public contracts. See 41 C.F.R. § 1-1.1205 (1984). No specific procedure is required under federal law for the determination of responsibility. See Note, supra note 64, at 1388. Moreover, due process is not required for such a determination. Id. (citing Commercial Envelope Mfg. Co. v. Dunlop, No. 1573 (S.D.N.Y. 1979)).

86. See Memorandum from F. Murray Bryan, Esq., on Behalf of Associated Pennsylvania Constructors, to Interested Persons (June 17, 1983).
ected property interest at stake which would require due pro-
cess.87 Prior debarment, antitrust violations, and related criminal
activity are already grounds for disqualification under existing
agency regulations.88 In short, there is no reason why contracting
authorities should not be able to reject bids based on information
contained in the bidder's affidavit. In many instances, such a re-
jection might be desirable.

E. Enforcement

As noted, if there is a violation of the Act, public authorities,
who have exclusive responsibility for enforcement, may choose
from several options to redress the harm to the Commonwealth:
(1) criminal prosecution89 or civil penalties;90 (2) civil action, in-
cluding a right of action for damages;91 and (3) administrative
sanctions.92

The Attorney General and local district attorneys have juris-
diction over criminal prosecution under the Act.93 Concurrent
jurisdiction is necessary for several reasons. In the case of a large
criminal conspiracy crossing county lines, the Attorney General's

87. For examples of cases in which state courts have upheld the constitu-
tionality of statutes permitting the government to debar contractors on the basis
of previous misconduct, see Polyvend, Inc. v. Puckorius, 88 Ill. App. 3d 778, 411
N.E.2d 316 (1980) (upholding constitutionality of statute prohibiting award of
state contracts to a person who has admitted to bribery or attempted bribery of a
public official in the face of a due process argument); Trap Rock Indus. v. Kohl,
63 N.J. 1, 304 A.2d 193 (upholding the constitutionality of governmental debar-
ment of persons convicted of bribery and obstructing justice in the face of equal
protection objections), cert. denied, 414 U.S. 860 (1973). But see Steadman,
"Banned in Boston—Birmingham and Boise and...": Due Process in Debarment and
Suspension of Government Contractors, 27 HASTINGS L.J. 793 (1976) (criticizing the
current federal debarment procedure and advocating greater due process rights
for debarred contractors).

88. See 4 PA. ADMIN. CODE § 60.3(2), (4), (11) (Shepard's 1984); 67 PA. Ad-
89. PA. STAT. ANN. tit. 73, § 1613(c) (Purdon Supp. 1984-85). For a discus-
sion of the remedy of criminal prosecution under the Act, see supra notes 45-46
and accompanying text.
90. PA. STAT. ANN. tit. 73, § 1613(d) (Purdon Supp. 1984-85). For a discus-
sion of the remedy of civil penalties under the Act, see supra note 47 and accom-
panying text.
91. PA. STAT. ANN. tit. 73, § 1614 (Purdon Supp. 1984-85). For a discussion
of the remedy of a civil action for damages under the Act, see supra notes 51-62
and accompanying text.
92. PA. STAT. ANN. tit. 73, § 1615 (Purdon Supp. 1984-85). For a discussion
of the administrative sanctions available under the Act, see supra notes 63-88 and
accompanying text.
93. PA. STAT. ANN. tit. 73, § 1618(a) (Purdon Supp. 1984-85). Cf. 18 PA.
CONS. STAT. ANN. § 911(e)(2) (Purdon 1983) (providing concurrent
prosecutorial jurisdiction over criminal prosecutions of corrupt organizations).
power to prosecute\textsuperscript{94} is both logical and necessary. However, there have been instances where bidding violations were confined to a single county.\textsuperscript{95} In large counties, the local district attorney probably has more staff members than the criminal and antitrust divisions of the Office of Attorney General. Thus, concurrent jurisdiction gives the authorities greater resources to combat bid-rigging.

The Act may also be enforced through a civil action for damages brought by the Attorney General, on behalf of the Commonwealth and its agencies.\textsuperscript{96} Local government agencies have the right to bring an action independently,\textsuperscript{97} but they must first give notice to the Attorney General.\textsuperscript{98} Notification is necessary to coordinate enforcement of the Act as well as to reduce the possibility of duplicate investigations or enforcement proceedings.\textsuperscript{99} In addition, information received through this notice requirement enables the Attorney General to detect patterns of prohibited conduct across the state. Finally, as an alternative to independent action, a local agency may request the Commonwealth to act on its behalf at any time.\textsuperscript{100} Such a request would be particularly appropriate in a jurisdiction where authorities do not possess suf-
ficient staff or expertise to pursue a bid-rigging case independently.

A critical element of the Act's enforcement scheme is the investigative powers it bestows upon the Attorney General. The Act provides that the Attorney General "may require the attendance and testimony of witnesses and the production of books, accounts, papers, records, documents and files relating to the civil investigation."\textsuperscript{101} In the antitrust context, it is often difficult to detect violations without detailed investigation.\textsuperscript{102} Thus, investigative power is a particularly important enforcement tool in antitrust-related prosecutions, such as those under the Act. This power enables the Attorney General to determine whether there is a basis for an action and to properly allege violations in a complaint.\textsuperscript{103}

\textsuperscript{101.} Id. § 1619(a). For examples of this civil investigative power in other state law contexts, see 18 PA. CONS. STAT. ANN. § 911(f) (Purdon Supp. 1984) (relating to racketeering investigations of corrupt organizations); PA. STAT. ANN. tit. 73, § 307-3 (Purdon 1983) (relating to investigatory powers of the Bureau of Consumer Protection). See also Katz & Horwitz, supra note 3, at 23-24.


Although information gained by United States Attorneys General may be made available to state officials, it is important to note that the Act prohibits state criminal prosecution of individuals who have previously faced federal criminal charges based upon the same allegedly illegal conduct. PA. STAT. ANN. tit. 73, § 1613(h) (Purdon Supp. 1984-1985). Thus, although there may be coordination between state and federal officials, persons indicted under federal law are protected from being placed in double jeopardy under Pennsylvania law. See U.S. CONST. amend. V; PA. CONST. art. I, § 10 (providing that an individual may not be tried more than once for any given crime).

\textsuperscript{102.} This difficulty is evidenced by the fact that many states' antitrust laws grant enforcement authorities similar broad investigative powers. See, e.g., DEL. CODE ANN. tit. 6, § 2106 (Supp. 1982); R.I. GEN. LAWS § 6-36-9 (Supp. 1984); UTAH CODE ANN. § 76-10-917 (Supp. 1985); VA. CODE § 59.1-9.10 (1982).

\textsuperscript{103.} For examples of this rationale in the context of federal antitrust investigations, see Associated Container Transp., Ltd. v. United States, 502 F. Supp. 505 (S.D.N.Y. 1980) (purpose of broad investigatory powers is to allow the Justice Department to investigate antitrust violations without becoming prematurely involved in litigation), rev'd on other grounds, 705 F.2d 53 (2d Cir. 1983); Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397 (D. Minn. 1963) (purposes of the Antitrust Civil Process Act, providing Attorney General with broad investigatory powers, is to enable him to determine whether there has been a violation of antitrust laws and to allege those violations properly in a complaint), aff'd, 325 F.2d 1018 (8th Cir. 1964).
The government's ability to use information obtained in an investigation\textsuperscript{104} is somewhat limited, however, so as to guard against potential clashes with the constitutional privilege against self-incrimination.\textsuperscript{105} Still, for the subject of the investigation, the Act's protection is inadequate against criminal prosecution because, unlike civil investigation provisions in other statutes,\textsuperscript{106} there is no express protection of the constitutional right against self-incrimination.\textsuperscript{107} The language providing that no criminal proceeding may be brought "based solely upon" information obtained in a civil investigation is ambiguous.\textsuperscript{108} It is unclear what quantum of evidence beyond that obtained through a civil investigation is necessary to initiate criminal proceedings.\textsuperscript{109} Moreover, parallel civil and criminal proceedings may be brought, despite an implication in the Act that the former must precede the latter.\textsuperscript{110} Thus, the investigative powers provided by the Act give public authorities an important enforcement tool, as well as the discre-

\textsuperscript{104} PA. STAT. ANN. tit. 73, § 1619(c) (Purdon Supp. 1984-85) (information obtained through a civil investigation may not be the sole basis of a criminal prosecution).

\textsuperscript{105} See U.S. CONST. amend. V. The fifth amendment to the United States Constitution provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself." \textit{Id}. Were state officials allowed to subpoena a person under investigation or otherwise compel production of evidence in a civil investigation and then use that evidence in a criminal prosecution, the state would be accomplishing indirectly what it is forbidden by the Constitution to do directly. Hence, there is a statutory limitation on use of evidence obtained in a civil investigation in a simultaneous or subsequent criminal prosecution.

\textsuperscript{106} For examples of civil investigation sections of antitrust statutes which provide express protection of the constitutional right against self-incrimination, see 15 U.S.C. § 1312(c)(2) (1982); DEI. CODE ANN. tit. 6, § 2106(h) (Supp. 1982); R.I. GEN. LAWS § 6-36-9(i)(2) (Supp. 1984); VA. CODE § 59.1-9.10(k) (1982). As an added protection, it is clear in most statutes that a civil investigation cannot substitute for or circumvent the grand jury process; therefore, requests for information in a civil investigation which would be unreasonable or otherwise protected from disclosure for purposes of a grand jury investigation are generally prohibited. See, e.g., 15 U.S.C. § 1312(c)(1) (1982); DEI. CODE ANN. tit. 6, § 2106(e) (Supp. 1982); R.I. GEN. LAWS § 6-36-9(d) (Supp. 1984); VA. CODE § 59.1-9.10(b) (1982).

\textsuperscript{107} See PA. STAT. ANN. tit. 73, § 1619(c) (Purdon Supp. 1984-85).

\textsuperscript{108} \textit{Id}. (emphasis added).

\textsuperscript{109} Under Pennsylvania law, if there is a reasonable conclusion of possible criminal activity, prosecuting authorities may petition the court to impanel a grand jury. 42 PA. CONS. STAT. ANN. § 4543(b) (Purdon 1981). It is unclear what role information obtained during a civil investigation may play in reaching a "reasonable conclusion of possible criminal activity." 110 See, e.g., SEC v. Dresser Indus., 628 F.2d 1368, 1374-75 (D.C. Cir.) (parallel federal criminal and civil proceedings are permissible as long as the parties' rights are not substantially prejudiced as a result), \textit{cert. denied}, 449 U.S. 993 (1980).
tion and flexibility necessary to pursue civil remedies. However, the Attorney General’s use of information gained in a civil investigation may well be challenged on constitutional grounds in a subsequent criminal prosecution if there is no independent basis for the latter action.

One area in which the enforcement scheme falters is in its failure to afford rights or remedies for private parties.111 This is one of the Act’s major flaws. Under Pennsylvania case law, it has been recognized that a disappointed bidder who is also a taxpayer, and who has demonstrated injury from an improper contract award, has standing to enjoin the award of this contract.112 It follows that an individual injured by a bid-rigging conspiracy should be entitled to seek relief. Moreover, federal antitrust laws, which provide generous remedies for private parties, have long recognized the important role of private individuals in antitrust enforcement.113 If individuals could seek redress under the new

111. See PA. STAT. ANN. tit. 73, § 1618(b) (Purdon Supp. 1984-85) (granting the right to a civil cause of action to the Attorney General, political subdivisions, municipal corporations, home rule municipalities and school districts).


[W]here bids for public contracts are invited and promised to be let to the lowest responsible competing bidder, a disappointed bidder who is also a taxpayer has standing to seek to enjoin the award of a public contract contrary to the promise.

Id.


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

Id. Courts are also authorized to award “simple interest on actual damages” under certain circumstances. Id.

The absence of a private cause of action and the resulting lack of incentive for private parties to participate in enforcement processes contributed to a low level of public support for state antitrust enforcement. Note, The Present Revival and Future Course of State Antitrust Enforcement, 38 N.Y.U. L. Rev. 575, 581 (1963). For a discussion of the role of private individuals in advancing the cause of antitrust legislation in Pennsylvania, see infra notes 266-70 and accompanying text. In recognition of the need for public support and the importance of private enforcement in building public support, some states have built private incentives into their antitrust law. See, e.g., Dibble & Jardine, The Utah Antitrust Act of 1979: Getting into the State Antitrust Business, 1980 UTAH L. REV. 73, 78-79 (Utah state antitrust laws offer generous remedial provisions and a choice of forum to private individuals to encourage private enforcement).
Pennsylvania’s Antitrust Act, a supportive constituency would arise. The invocation of private remedies is a necessary complement to public enforcement, and Pennsylvania citizens should not be without this protection.

F. Statute of Limitations

The Act establishes a four-year statute of limitations, and sets a repose period of ten years from the signing of the contract within which to bring a lawsuit. To determine when the limitations period begins, the Act provides that a cause of action arises when the contracting agency “discovered, or should have discovered” the prohibited conduct. By contrast, the general method of computing periods of limitation in Pennsylvania is from the time the cause of action arose. At the federal level, an antitrust action accrues when the defendant commits the injurious act. Only in exceptional situations, where the knowledge of injury is unattainable because of the laws of nature or because the wrongdoer commits fraud, does the discovery rule apply.

The theory of a discovery rule is that the limitations period should not run until the injured party learns or should have

114. For a discussion of the role private individuals could play in developing state antitrust law in Pennsylvania, see infra note 271 and accompanying text.


116. Pa. Stat. Ann. tit. 73, § 1614(d) (Purdon Supp. 1984-85). In its original form, the Act provided that the cause of action would arise at the time of discovery of the conspiracy. S. 199, 167th Pa. Cong. (1983). This provision was modeled after North Carolina’s bid-rigging statute. See N.C. Gen. Stat. § 133-28(c) (Supp. 1983); Letter, supra note 59, at 2. The language in the North Carolina statute differs slightly from that in Pennsylvania’s Act in that North Carolina’s law does not contain the “should have discovered” language found in Pennsylvania’s law. See N.C. Gen. Stat. § 133-28(c) (Supp. 1983). For a discussion of the issues raised by the “should have discovered” language in Pennsylvania’s Act, see infra notes 120-21 and accompanying text.


learned of the activities which establish a cause of action. Arguably, this rule could be said to impose a duty of due diligence on the government. If so, it is an unreasonably high standard. An agency would be required to scrutinize carefully all of its competitively bid contracts for indications of suspected activity. Yet contracting is only one of a myriad of responsibilities performed by a governmental agency. Moreover, bid-rigging conspiracies, many of which are quite sophisticated, are extremely difficult to discover.

A better view would be to read the discovery language as imposing a negligence standard, the standard traditionally used in tort cases. In the context of most of the cases arising under this statute, imposition of the due diligence standard would place an unreasonable burden on public officials and at the same time create another impediment to full realization of the statute’s purpose.

III. EXISTING ANTITRUST PROTECTION IN THE COMMONWEALTH

In order to gauge the significance of the Act and to predict its future effect on state antitrust protection, it is necessary to review existing trade regulation law in Pennsylvania. Although a comprehensive analysis of the antitrust laws is beyond the scope of this article, this section will provide a summary of the federal laws and a discussion of Pennsylvania’s limited ability to enforce the federal mandates. This is followed by a review of common law protections available under state law.

A. Federal Antitrust Protections

The threshold jurisdictional requirement of any federal antitrust prohibition is that the activity in question have some impact on interstate commerce. There are three primary federal anti-
trust laws: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. Of these three statutes, the Sherman Act is the cornerstone of antitrust law. Section one prohibits all contracts, combinations, and conspiracies in restraint of trade. Section two outlaws monopolization, attempts to monopolize, and combinations or conspiracies to monopolize. A violation of either of these sections is a felony, penalized by fines and imprisonment. The substantive focus of the Federal Trade Commission Act is its prohibition against unfair methods of competition and unfair or deceptive acts or practices. The act also established the Federal Trade Commission and granted it

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authority to take actions against these practices.\textsuperscript{132} Finally, the Clayton Act, as amended by the Robinson-Patman Act of 1936, prohibits price discrimination when the effect of such discrimination is to reduce competition or to tend to create a monopoly in any line of interstate commerce.\textsuperscript{133} The Clayton Act also provides a private cause of action and recovery of treble damages for individuals injured by violations of the federal antitrust laws.\textsuperscript{134}

In general, conduct said to have a pernicious effect on competition and to be of no redeeming virtue is deemed a per se violation of the antitrust laws and, in particular, of section one of the Sherman Act.\textsuperscript{135} Examples of such activity include price fixing, dividing of markets, tying arrangements, and group boycotts.\textsuperscript{136} When any of these practices are at issue, courts deem it unnecessary to inquire into the purpose or effect of these activities on competition.\textsuperscript{137} Given that there need be no actual showing of

\begin{itemize}
\item \textsuperscript{132} Id. §§ 41, 45(a)(2). For a more thorough discussion of the Federal Trade Commission, see E. Kintner, \textit{supra} note 122, at 13.
\item \textsuperscript{133} 15 U.S.C. § 13(a) (1982). Section 2(a) of the Clayton Act provides, in pertinent part, as follows:
\begin{quote}
It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.
\end{quote}
\item \textsuperscript{134} Id. § 15. Private parties may also seek injunctive relief to halt continuing violations of antitrust law. \textit{See id.} § 26.
\item \textsuperscript{135} Northern Pac. Ry. Co. v. United States 356 U.S. 1, 5 (1958) (railroad's preferential routing agreements were per se violations of the Sherman Act).
\textit{See also} United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 385-89 (1956) (discussing the development of and rationale for the judicial interpretation of the Sherman Act under which “some agreements and practices are invalid per se, while others are illegal only as applied to particular situations”). For a discussion of the effect of a finding of per se illegality, see \textit{infra} notes 136-37 and accompanying text.
\item \textsuperscript{136} \textit{See} International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements deemed to be per se unlawful), Fashion Originators’ Guild v. FTC, 312 U.S. 457 (1941) (group boycotts deemed to be per se unlawful); United States v. Sacony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing is per se unlawful); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff’d, 175 U.S. 211 (1899) (division of markets deemed per se unlawful).
\item \textsuperscript{137} \textit{See Northern Pacific}, 356 U.S. at 5. The \textit{Northern Pacific} Court described the effect of finding a per se violation as follows:
\begin{quote}
[The] principle of \textit{per se} unreasonableness not only makes the type of
Where the trade restraint is not a per se violation, the restraint must be unreasonable to come within the proscription of the antitrust laws.\textsuperscript{139} The standard analysis is the rule of reason, under which all of the pertinent facts and circumstances of a case are carefully scrutinized.\textsuperscript{140} If a particular trade practice imposes an unreasonable restraint on competition, it violates the Sherman Act.\textsuperscript{141} But when the challenged activities are wholly intrastate, it must be shown that they place a direct and substantial restraint on interstate commerce.\textsuperscript{142} Purely local activity whose effect is equally local, then, is obviously beyond the reach of federal antitrust law.\textsuperscript{143}

\begin{flushright}
restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable.
\end{flushright}

\textit{Id.}

\textsuperscript{138} United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970) (the illegality of price fixing did not depend on the amount of interstate commerce affected) (citing United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956)).

\textsuperscript{139} Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977) (limitation on the number of franchises that could be sold within a given location was not a per se violation of antitrust law and should be evaluated under the rule of reason); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-39 (1918) (the test of the legality of an agreement or regulation is whether it is a reasonable regulation of business consistent with the provisions of federal antitrust law, rather than an agreement designed to suppress or destroy competition); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (Congress intended that "the standard of reason" should guide the factfinder in determining which of all conceivable restraints of trade were prohibited by the Sherman Act).

\textsuperscript{140} Continental T.V., 433 U.S. at 49.

\textsuperscript{141} For citations to cases in which the "rule of reason" standard is articulated and applied, see supra note 139.


\textsuperscript{143} See, e.g., Lieberthal v. North Carolina Lanes, Inc., 332 F.2d 269 (2d Cir. 1964) (antitrust action dismissed because defendant's activity was wholly intrastate and did not have a substantial effect on interstate commerce, despite defendant's procurement of supplies from out-of-state). For a discussion of cases in which courts have refused to find a sufficient impact on interstate commerce to meet the jurisdictional requirements of federal antitrust law, see Katz & Horwitz, supra note 3, at 11-12.
B. State Enforcement of Federal Law

While the scope of the federal antitrust laws is broad and comprehensive, local and insular trade restraints are outside their jurisdiction. Without a state antitrust law, the Attorney General is powerless to sanction these activities. Although there is a general perception that federal law is sufficient to protect the interests of the state, it is an erroneous perception. Because of the interstate commerce requirement and other jurisdictional prerequisites, the Attorney General has only limited ability to enforce the federal mandates.

One important tool used by the Attorney General to implement antitrust policy is a parens patriae suit. Under the parens patriae doctrine, the state is said to represent all of its citizens when it is a party to a suit in a matter relating to its interests as a sovereign. Under section four of the Clayton Act, which grants “persons” injured by antitrust violations the right to sue for dam-

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144. For a discussion of the interstate commerce jurisdictional requirement of the federal antitrust laws, see supra notes 123 & 135-38 and accompanying text.

145. For a discussion of the common law remedies available to the state Attorney General and their inadequacy for redressing intrastate antitrust injuries, see infra notes 178-99 and accompanying text.


147. See, e.g., 15 U.S.C. §§ 15, 15a (1982) (requiring private persons and the United States, in suits for damages as a result of antitrust violations, to sue in the “United States district court for the district in which the defendant resides or is found or has an agent”).

148. Literally translated, parens patriae means “parent of the country.” BLACK'S LAW DICTIONARY 1003 (5th ed. 1978). It is a legal doctrine of standing under which a government may bring suit to protect quasi-sovereign interests. Id.

149. See generally Note, Federal Jurisdiction—Suits by a State as Parens Patriae, 48 N.C.L. REV. 963 (1970) (discussing the requirements for a state to bring a parens patriae suit).

The Supreme Court first applied the parens patriae doctrine in the antitrust field in Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). In that case, Georgia charged that the railroad company conspired to fix prices and give preferences to other localities, thereby injuring Georgia’s economy. Id. at 443. The Court upheld Georgia’s parens patriae claim for injunctive relief because the alleged misconduct of the defendant was a matter of “grave public concern in which Georgia had[d] an interest apart from that of particular individuals who may [have been] affected.” Id. at 451. For a detailed discussion of the use of parens patriae actions in antitrust cases, see Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1 (1971); Malina & Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 NW. U.L. REV. 193 (1970).
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ages, the state is considered a person.\textsuperscript{150} Thus, if the Commonwealth, as \textit{parens patriae}, were injured by conduct which violated the antitrust laws, it could bring suit in federal court.\textsuperscript{151}

\textit{Parens patriae} actions are particularly well suited to redress harm to consumers, who bear a significant portion of the injury from illegal overcharges.\textsuperscript{152} Prior to 1976, these actions were limited to injunctive relief,\textsuperscript{153} a remedy which did little to benefit consumers or deter unlawful conduct.\textsuperscript{154} Courts and commentators recognized the inadequacy of injunctive relief to redress injuries suffered as a result of intrastate antitrust violations.\textsuperscript{155} In


\textsuperscript{151} See generally Annot., 23 A.L.R. FED. 878, 880-81 (1975) (exploring the applicability of \textit{parens patriae} suits to antitrust violations under the Clayton Act); Note, \textit{supra} note 149.

Although this discussion centers on federal \textit{parens patriae} suits under the Sherman Act, it is important to note that Pennsylvania may bring an action as \textit{parens patriae} under state law as well. See, e.g., Pennsylvania v. Foster, 120 Pittsburgh Leg. J. 265 (1972) (a \textit{parens patriae} suit under Pennsylvania's consumer protection laws to enjoin unfair or deceptive trade practices). Of course, the practical utility of a \textit{parens patriae} suit under state law depends entirely upon the existence of a state law that addresses the particular injury the government may seek to remedy. For a discussion of antitrust protection in Pennsylvania, see infra notes 178-208 and accompanying text.


The cost of individual suits and class actions, as well as the procedural complexity of class action litigation, render it practically impossible for many consumers to recover damages suffered as a result of antitrust violations. There are exacting requirements of numerosity, typicality, commonality, and adequacy of representation involved in certifying a class for federal class action litigation. See FED. R. CIV. P. 23. In addition, the Supreme Court has interpreted rule 23 to require actual notice to all class members. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974). The cost of meeting these types of requirements renders many potential consumer class actions prohibitively expensive. See Note, \textit{supra} note 146, at 599.

\textsuperscript{153} See Hill, \textit{supra} note 152, at 1380. For examples of cases in which the courts refused to grant damages to states suing in \textit{parens patriae}, see California v. Frito-Lay, Inc., 474 F.2d 774, 777 (9th Cir.), \textit{cert. denied}, 412 U.S. 908 (1973); \textit{In re Multi-district Vehicle Air Pollution}, 481 F.2d 122 (9th Cir.), \textit{cert. denied}, 414 U.S. 1045 (1973).

\textsuperscript{154} See Hill, \textit{supra} note 151, at 1380 (injunctive penalties provide violators with no incentive to comply until a damage action is brought against them).

\textsuperscript{155} See, e.g., California v. Frito-Lay, Inc., 474 F.2d 774, 777 (9th Cir.) (a state class action on behalf of injured consumers in the antitrust context had merit, but the legislature should fashion such a remedy), \textit{cert. denied}, 412 U.S.
response to this inadequacy, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act in 1976. This measure created comprehensive procedures which allowed state attorneys general to recover damages in parens patriae actions for violations of the Sherman Act. The new act also addressed an inherent difficulty in consumer class action cases: proof of damages. The new provisions required only that plaintiffs establish a violation of the Sherman Act, an injury, and an approximate amount of damage.

Unfortunately for consumers and for the Commonwealth's antitrust policy, the right of the Attorney General to bring parens patriae cases was severely circumscribed shortly after its statutory expansion. Passage of the Hart-Scott-Rodino Act sparked apprehension that state attorneys general would abuse the new device, but the small number of parens patriae suits which were actually filed indicates that these fears were unwarranted. See Maness, supra note 101, at 846-47. Between the time the legislation was enacted in 1976 and 1981, Pennsylvania had filed only one parens patriae suit, In re Mid-Atlantic Toyota Distribs., Inc., 525 F. Supp. 1265 (D. Md.), modified, 541 F. Supp. 62, 64 (D. Md. 1981). See National Association of Attorneys General, 1982 Antitrust Questionnaire [hereinafter cited as 1982 NAAG Questionnaire].


157. 15 U.S.C. § 15c (1982). The Sherman Act provides, in pertinent part, as follows:

Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court having jurisdiction of the defendant, to secure monetary relief . . . for injury sustained by such natural persons to their property by reason of [the Sherman Act].

Id. § 15c(a)(1).

158. Id. § 15d. Section 15d of this act provides, in pertinent part, that damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

Id.

159. Passage of the Hart-Scott-Rodino Act sparked apprehension that state attorneys general would abuse the new device, but the small number of parens patriae suits which were actually filed indicates that these fears were unwarranted. See Maness, supra note 101, at 846-47. Between the time the legislation was enacted in 1976 and 1981, Pennsylvania had filed only one parens patriae suit, In re Mid-Atlantic Toyota Distribs., Inc., 525 F. Supp. 1265 (D. Md.), modified, 541 F. Supp. 62, 64 (D. Md. 1981). See National Association of Attorneys General, 1982 Antitrust Questionnaire [hereinafter cited as 1982 NAAG Questionnaire].

Supreme Court ruled that only purchasers who bought directly from an alleged price fixer had standing under section four of the Clayton Act to recover damages for such violations. All other parties in the chain of distribution were without redress. Because most injured parties, including the state, are indirect purchasers who do not deal directly with the price fixer, the Court's decision has the effect of removing a vast number of consumers from the ambit of the statutory protection. As a result of Illinois Brick, the Commonwealth can bring parens patriae actions only on behalf of direct purchasers.


161. Illinois Brick Co. v. Illinois, 431 U.S. 720, 728 (1977). In Illinois Brick, the state of Illinois brought a civil action for damages against Illinois Brick Co., alleging that the company had conspired to fix the prices of its concrete block in violation of § 1 of the Sherman Act. Id. at 726-27. The state brought its suit on behalf of some 700 local governmental agencies, who were allegedly injured by illegal overcharges passed from Illinois Brick through the masonry and general contractors to the governmental agencies who let the construction contracts. Id. The Supreme Court found, however, that indirect purchasers who were harmed through the "pass-on" of illegal overcharges did not have standing to bring antitrust damages actions under § 4 of the Clayton Act. Id. at 428-29.

"Pass-on" in this context refers to "the process whereby a businessman who has been overcharged adjusts his own price upward to reflect the overcharge." McQuire, The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe, 33 U. Pitt. L. Rev. 177, 181 (1971). In an offensive pass-on situation, the plaintiff/indirect purchaser claims injury from overcharges which were passed on to him through intermediate purchasers in the chain of distribution. Shaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm. & Mary L. Rev. 883, 884 (1975). Defensive pass-on is an affirmative defense under which the defendant claims that the plaintiff/direct purchaser suffered no recoverable damages as a result of illegal overcharges because he was able to pass the overcharges on to his customers/indirect purchasers. See, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) (disallowing use of defensive pass-on in an antitrust action).

The Supreme Court banned the use of defensive pass-on in Hanover Shoe due to the difficulty of tracing overcharges. Id. at 493. This reasoning entered into the Court's decision to bar likewise the use of offensive pass-on in Illinois Brick. 431 U.S. at 741-45. The Illinois Brick court also expressed concern over the possibility of multiple liability for defendants if a defensive pass-on were prohibited while an offensive pass-on were allowed. Id. at 730-31.

Finally, the Court observed that denying recovery to indirect purchasers would not diminish the policy of encouraging private enforcement of antitrust laws because indirect purchasers would usually have such a small stake in any suit for damages that few would ever come forward to make a claim for their damages. Id. at 746-47.

162. See Note, supra note 146, at 584-86.

163. Id. at 585. The Supreme Court has recognized two limited exceptions to the general rule that indirect purchasers may not recover. The general rule will not apply in the case of a preexisting cost-plus contract under which the buyer bears the risk of increases in the seller's cost of production. 431 U.S. at 735-36. See Note, Illinois Brick Rule, supra note 160, at 810-11. Nor will the gen-
To overcome the effects of *Illinois Brick*, some states have enacted legislation which authorizes suits for indirect purchasers under state law. However, no such legislation, which effectively supersedes *Illinois Brick*, has been offered in Pennsylvania. At the federal level, legislative attempts to override *Illinois Brick* have been unsuccessful.

One administrative approach for circumventing *Illinois Brick* is to insert an assignment of claims clause in state purchasing contracts. Under such a clause, a vendor who sells goods or services to the Commonwealth assigns its rights to the Commonwealth for any subsequent cause of action arising out of the contract. Thus, if the vendor could have sued its supplier for antitrust violations, this right of action accrues to the Commonwealth. The use of assignment clauses in the antitrust arena has been upheld by several courts.


One of the comprehensive antitrust proposals introduced in the Pennsylvania legislature was drafted with the specific intent not to overrule *Illinois Brick*. See Memorandum from Attorney General Edward G. Biester, Jr., for General Distribution (Oct. 17, 1979) (analyzing the proposed H.R. 1594, 163d Pa. Cong., 1st Sess. (1979)).

In 1978, federal legislation to override *Illinois Brick* was introduced and reported out of both the House and Senate Judiciary Committees, but no further action was taken. See Katz & Horwitz, supra note 3, at 9 & n.55. In the 95th, 96th and 97th Congresses, bills to this effect were introduced but not enacted. See Kirk, An Overview of the Delaware Antitrust Act, 8 DEL. J. CORP. L. 243, 248 n.39 (1983). A measure introduced in the 98th Congress was still pending as of publication. See id.

See Maness, supra note 101, at 829. As of 1981, eighteen states reportedly included assignment of claims provisions in their standard purchasing contracts. 1982 NAAG QUESTIONNAIRE, supra note 159.

For examples of the construction of such clauses in the courts, see infra note 169.

See, e.g., D'Ippolito v. Cities Serv. Co., 374 F.2d 643, 647 (2d Cir. 1967) (antitrust claims of members of gasoline business partnership were assignable); Hicks v. Beacon Moving & Storage Co., 87 F.2d 583, 585 (9th Cir. 1937) (antitrust claim survives the death of the injured party and is assignable); Mercu-Ray Indus. v. Bristol-Myers Co., 392 F. Supp. 16, 18 (S.D.N.Y.) (corporate anti-
After *Illinois Brick* was decided, the Pennsylvania Department of General Services reprinted its invitation-to-bid forms. The reverse side of the bid form contains terms and conditions, including an assignment clause for price fixing claims. These clauses are now part of all purchasing contracts in Pennsylvania. They are not found, however, in construction contracts let by General Services. Therefore, Pennsylvania has not yet fully overcome the indirect purchaser limitation of *Illinois Brick*.

In summary, although *parens patriae* suits remain legally viable, as a practical matter they are of limited use. But at least with regard to state purchases, the assignment clauses combined with Pennsylvania's new antibid-rigging statute will enable the Commonwealth to recover most of the damages it incurs. The majority of cases of price fixing or collusion, however, are unrelated to state purchasing. In these cases, Pennsylvanians continue to be without a remedy.

In addition to *parens patriae* suits, the state may seek injunctive relief and damages in its proprietary capacity. This action, like most *parens patriae* cases, arises under the Clayton Act. A proprietary action is brought when the state is a consumer of goods or services. Such actions are particularly important to the Commonwealth given the volume of its annual purchases.

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171. See id. ¶ 9. Subsequently, in 1983, an additional assignment clause was included on the front side of the bid sheet. See Bureau of Purchases, Pennsylvania Department of General Services, Invitation-Bid Proposal (GSPUR-10) (rev. Oct., 1983). This provision is virtually identical to the language in Washington's assignment clause, which the Third Circuit implicitly held to be valid in *In re Fine Paper Litig.*, 632 F.2d 1081, 1090 (3d Cir. 1980).

172. "Proprietary capacity" describes the functions of a governmental unit engaged in a business-like venture, as contrasted with a governmental function. *BLACK'S LAW DICTIONARY* 1097 (5th ed. 1979).


174. The legislative history of the Clayton Act indicates that Congress intended that state governments be able to recover for injuries suffered in their capacity as consumers of goods and services. See *supra* note 173, at 467.

175. In 1973, the fifty states and their political subdivisions spent more than $75 billion for goods and services. *COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING* 11 (1975). By 1980, this figure had increased to
Thus, if the state buys paper or tires from parties who fixed prices or restrained trade, there is a cause of action under federal law.\footnote{176} Finally, a proprietary suit may also be brought as a class action, wherein the Commonwealth designates itself as class representative. In this instance it would usually represent municipalities or political subdivisions who have suffered a similar injury.\footnote{177}

C. Common Law Protections

Common law prohibitions against unreasonable restraints of trade were the only form of antitrust protection at the state level for many years.\footnote{178} Although the common law developed to prohibit restrictive convenants and price fixing agreements,\footnote{179} it was inadequate to protect the public from unfair trade practices.\footnote{180} As a result, many states enacted antitrust laws even before the

\footnote{176. See, e.g., In re Fine Paper Litig., 632 F.2d 1081 (3d Cir. 1980) (Pennsylvania is a party in its proprietary capacity as a purchaser of paper from defendants).

177. See, e.g., id. (dual state class action); In re Master Key Antitrust Litig., 76 F.R.D. 460 (D. Conn. 1977), aff'd mem., 580 F.2d 1045 (2d Cir. 1978) (multidistrict class action). See also In re Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305 (D. Md. 1979) (four private class actions and a state \textit{pars pro toto} class action brought on behalf of natural persons within the state of Maryland who sold real estate through the defendants).


179. See, e.g., Keeler v. Taylor, 53 Pa. 467 (1866) (restricive covenant not to compete for the defendant's lifetime declared void); Central Oil Salt Co. v. Guthrie, 35 Ohio St. 666 (1880) (enforcement of price fixing arrangement denied).

180. See H. Thorelli, \textit{The Federal Antitrust Policy: Origination of an American Tradition} 50-53 (1954). Because the common law is a body of tradiion which has developed over a long period of time to apply to many similar situations, it is not surprising that common law policies in the specific and distinct area of antitrust regulation are weak. Id. See also Limbaugh, \textit{Historic Origins of Anti-Trust Legislation}, 18 Mo. L. Rev. 215 (1953).}
federal government took action.  

In the absence of statutory antitrust law, it would seem that Pennsylvania's common law might have expanded to fill the resulting vacuum. Unfortunately, this has not happened. The foundation of Pennsylvania common law in this area is the prohibition against contracts in restraint of trade. The common law remedy holds such contracts void and unenforceable. In 1940, the Pennsylvania Supreme Court added the remedy of injunctive relief. Since then, however, there has been no substantial development of common law protection.

In determining whether specific acts and practices fall within the common law prohibition, Pennsylvania courts have been guided by decisions interpreting the Sherman Act. Commercial boycotts, horizontal and vertical price fixing, and unrea-
sonable restrictive covenants fall within the common law prohibition of restraints of trade. Exclusive dealing contracts, barred under federal antitrust statutes, are similarly prohibited at common law upon a showing of injury to the public. Yet other trade practices which plainly violate federal statutes are not necessarily illegal under state common law. These include tying arrangements, monopolization, price discrimination and predatory pricing.


190. See 15 U.S.C. § 1 (1982) (contracts in restraint of trade are unlawful); id. § 14 (1982) (contracts that are conditional upon the contracting party's not using goods of a competitor are unlawful).

191. For a discussion of exclusive dealing contracts under Pennsylvania law, see Comment, supra note 3, at 741-42 (Pennsylvania law is unclear, but there are a few cases which do exist upholding exclusive dealing contracts).

192. The Supreme Court defines a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase the product from any other supplier." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958). Tying arrangements have been held to be per se violations of § 1 of the Sherman Act, 15 U.S.C. § 1 (1982). See, e.g., Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949); International Salt Co. v. United States, 332 U.S. 392 (1947). However, the legal effect of tying arrangements under Pennsylvania law is uncertain. See Comment, supra note 3, at 740-41.

193. Under federal law, monopolization, attempts to monopolize and combinations or conspiracies to monopolize any part of interstate trade or commerce violate § 2 of the Sherman Act. See 15 U.S.C. § 2 (1982). Pennsylvania cases, however, do not paint a clear picture of exactly what conduct is prohibited. See Comment, supra note 3, at 743-46. The cases generally reflect an "abhorrence of anticompetitive monopolistic behavior . . . [and] promotion of a free market policy in Pennsylvania." Id. at 746. See, e.g., Schwartz v. Laundry & Linen Supply Drivers' Union, 399 Pa. 353, 362, 14 A.2d 438, 442 (1940) (invalidating a labor contract for various restraints of trade, including the "common-law prohibition of monopolies"); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 179 (1871) (monopolistic practices which destroy competition are illegal and void). But see Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 A. 988 (1910) (a buy-sell agreement which gave one firm 60-70% of the total brick manufacturing market is not an illegal restraint of trade); Monongahela River Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 A. 1088 (1904) (refusing to invalidate a restrictive covenant in a contract between plaintiff, who had monopoly on coal production and shipping; and defendant, who was to mine and ship coal exclusively for plaintiff).

194. The Robinson-Patman Act prohibits price discrimination. See 15 U.S.C. §§ 13(a)-(b), 21(a) (1982). Price discrimination, however, is a statutory offense. Since Pennsylvania has no statutory prohibition against price discrimination, it appears that there is no protection against such activity at the state level. See Comment, supra note 3, at 746-47. Courts have been unwilling to expand the common law in Pennsylvania to prohibit price discrimination. Id. Predatory pricing has been held unlawful by some Pennsylvania courts. Id. (citing Gillette Co. v. Master, 408 Pa. 202, 182 A.2d 734 (1962)). It also violates the
some forms of mergers. As to forms of relief, the Pennsylvania Supreme Court has fashioned no new remedies or sanctions for conduct violating antitrust principles, nor has it developed further procedural safeguards.

In short, the Pennsylvania judiciary has provided little clear guidance on the parameters of a judicially created remedy for antitrust violations. Nor has it enunciated any broad substantive prohibitions, sanctions or penalties. It seems unlikely, therefore, that any “little Sherman Act” will be fashioned to afford the Commonwealth’s citizens viable redress for antitrust-related injuries in the near future.

D. Related State Statutes

Unfortunately, Pennsylvania’s related state statutes do little to supplement the meager common law protection. The most directly relevant Pennsylvania statute is the Unfair Trade Practices and Consumer Protection Act. Modeled after the Federal

Pennsylvania Unfair Sales Act, which prohibits sales below cost when the seller’s intent is to injure competition. See PA. STAT. ANN. tit. 73, § 213 (Purdon 1971).

195. Under federal law, mergers are carefully scrutinized for possible anticompetitive effects under § 7 of the Clayton Act and under the Sherman Act. See 15 U.S.C. § 18 (1982) (prohibiting acquisition by one corporation of the stock of another where the effect of the acquisition is to substantially lessen competition or to tend to create a monopoly). Pennsylvania law, however, authorizes mergers without any statutory restrictions on possible antitrust violations. See PA. STAT. ANN. tit. 15, § 1901 (Purdon 1967 & Supp. 1984-85) (permitting the merger of any two or more business corporations).


197. Id. at 11.

198. One might argue, from its application of federal antitrust principles in Collins, that the Pennsylvania Supreme Court was on the track of creating a common law “little Sherman Act.” See Note, supra note 142, at 332-34 (state antitrust statutes are frequently labeled “Little Sherman Acts”). The Collins case, involving the issue of restraint of trade in intrastate commerce, seemed to indicate that a party could bring an antitrust suit under state common law, with federal Sherman Act decisions serving as precedent.

The Collins court granted equitable relief, but found no basis in the record to award damages. 452 Pa. at 352, 304 A.2d at 498. One commentator has argued that the Collins court left open the possibility of awarding compensatory damages when they could be determined to a reasonable degree of certainty. See Note, supra note 142, at 332-34. But see Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 MICH. L. REV. 375, 431 & n.214 (1974) (questioning the Collins court’s position that the common law embraces Sherman Act principles and maintaining that state law might not have developed along the lines of the common law without the impetus provided by federal statutes and decisions). For further discussion of the Collins decision, see supra note 186.

199. See Katz & Horwitz, supra note 3, at 10-11.

Trade Commission Act, this law is of limited scope, prohibiting only unfair and deceptive practices. It protects consumers and corporations from fraudulent and misleading practices in trade or commerce. Despite its extensive list of prohibited practices, this act has only limited effectiveness in punishing a vast array of business practices which may injure competition.

No clear policy or guidance can be garnered from existing state statutes with respect to the regulation of competition and unfair trade practices. Moreover, after a thorough review of

202. PA. STAT. ANN. tit. 73, §§ 201-2(4), 201-3 (Purdon 1971 & Supp. 1984-85). The Act defines unfair and deceptive practice to include passing off goods or services as those of another, causing confusion as to the source of goods or services or their association with another, representing goods to be of a certain age, geographic origin, quality, standard or style when they are of another, and false advertising.
203. PA. STAT. ANN. tit. 73, § 201-2(2) (Purdon 1971 & Supp. 1984-85) (in defining who is protected by the Act, the statute provides that the term "person" includes natural persons, corporations, and any other legal entity). Although the Act's definition of protected persons is a broad one, the provisions of the statute indicate that its primary thrust is consumer protection. See, e.g., id. § 201-7 (concerning rescission of door-to-door sales contracts).
204. See id. §§ 201-3 to -4, -8 to -9. The Act provides for both public and private enforcement. Id. § 201-3. The Attorney General may seek a permanent or temporary injunction. Id. § 201-4. If the terms of an injunction or assurance of voluntary compliance are violated, the wrongdoer incurs a civil penalty. Id. § 201-8. Courts also have the discretion to order restitution. Id. § 201-4. In addition, if a person has suffered ascertainable damages as a result of conduct in violation of the Act, he may bring a private action for damages and may be awarded punitive damages. Id. §§ 201-8, -9.2.
205. See supra note 202.

207. One commentator, upon review of the banking, liquor, milk marketing and public utility statutes and case law in Pennsylvania, concluded that the state legislature had failed to articulate an overall policy balancing regulation of competition with the promotion of economic well-being and public protection. See Comment, supra note 3, at 749-58. It should be pointed out, however, that the purpose of the banking and milk marketing statutes is, for reasons of public policy, to eliminate competition in those areas. See id. at 751, 757-58.
the common law on restrictive trade practices, one can only agree with a recent commentator’s observation that Pennsylvania’s policy on competition, if it exists at all, is weak and imprecise.208 The absence of strong common law protections, the lack of judicially fashioned guidelines, and an inadequate statutory scheme leave Pennsylvania with only meager antitrust protection.

IV. THE IMPACT OF PENNSYLVANIA’S ANTIBID-RIGGING ACT

Restraints of trade and conspiracies within the boundaries of the Commonwealth are not prohibited by the federal government.209 These purely local, intrastate violations must be addressed at the state level.210 Thus, the need for state antitrust enforcement is patent. Commentators have lamented Pennsylvania’s failure to address this problem,211 but the policymakers and judiciary have remained silent. Given the fiscal impact of antitrust conduct,212 the magnitude of the harm,213 and the seriousness of the offense,214 the absence of a state antitrust law is

208. See id. at 748.
209. For a discussion of the federal jurisdictional requirement of interstate commerce, see supra notes 122 & 135-38 and accompanying text.
210. Some commentators have suggested that responsibility for antitrust enforcement should actually rest with district attorneys at the local level, instead of, or in addition to, the jurisdiction of the Attorney General. See, e.g., Fellmeth, supra note 95, at 2-4; Note, supra note 146, at 579.
211. See Katz & Horwitz, supra note 3, at 1, 10-11, 17-18, 30; Comment, supra note 3; Note, supra note 142, at 332-34.
212. There are varying estimates on the economic impact of antitrust conduct. See, e.g., Fellmeth, supra note 95, at 8 (estimating cost to public of antitrust violations to be near $40 billion) (citing M. Green, THE CLOSED ENTERPRISE SYSTEM (1972)); Note, supra note 146, at 584 (discussing the impact of Illinois Brick on governmental purchasers and estimating that the federal government could lose nearly $205 million in recoveries and state governments could lose as much as $500 million). At least one commentator has observed that the benefits of antitrust prosecutions far exceed benefits of prosecution of other crimes because of the widespread economic effect of restraints of trades. See Fellmeth, supra note 95, at 8-11. For further discussion of the cost of trade restraints, see generally 2 P. Areeda & D. Turner, supra note 122, at 268-71; K. Elzinga & W. Brett, The Antitrust Penalties: A Study in Law and Economics 5-6 (1976).
213. The number of victims of any given antitrust violation is often difficult, if not impossible, to ascertain and may well exceed the federal procedural requirement that a class action be manageable. See, e.g., City of Philadelphia v. American Oil Co., 55 F.R.D. 45, 72-73 (D.N.J. 1971) (class of all persons who had purchased gasoline from retail outlets over a ten-year period in three states was too large to be manageable within the requirements of rule 23(b)(3)(D)).
214. Since 1974, antitrust violations have been classified as felonies with fines of up to one million dollars, and maximum jail sentences of three years. For a discussion of statutes imposing criminal penalties, see supra note 46 and accompanying text.
startling. In this setting, the Antibid-Rigging Act is especially significant.

When the Act made its way through the General Assembly, its prime sponsor, Senator Reibman, judiciously avoided any analogy to antitrust laws because of the bleak legislative history on this issue in Pennsylvania. In fact, the word "antitrust" was not used in any speeches or press releases until the bill was passed. Yet the Act is clearly an antitrust measure. In order to predict its impact on the future of Pennsylvania antitrust law, it is essential to understand how this Act fits into the general scheme of antitrust regulation. This section examines the kinds of antitrust activity which the bid-rigging statute may be interpreted to prohibit.

A single reading of the definitional section reveals that this Act is a relatively strong antitrust measure within its limited scope. Although it prohibits several direct restraints of trade, it is primarily a price-fixing statute. Bid-rigging, by definition, is a type of price fixing by which two or more parties determine in advance who will be the winning bidder on a competitively let contract. To be precise, this conduct is horizontal price fixing.

The term bid-rigging, as defined in the Act, includes at least two additional practices which restrain trade. One of these is a

215. For a discussion of the legislative history of previous antitrust bills, see infra notes 241 & 256-60 and accompanying text.

216. For a detailed discussion of the provisions of the Act, see supra notes 29-121 and accompanying text. For a discussion of the antitrust protection afforded by the Act, see infra notes 217-40 and accompanying text.


218. Briefly defined, horizontal price fixing is an agreement among sellers or buyers to join together and establish a price for their goods or services, rather than to compete with one another. Aycock, supra note 30, at 209 (citing N.C. GEN. STAT. § 75-5(b)(7) (1981)). This price-fixing statute represented North Carolina's first statutory effort to outlaw bid-rigging in the form of identical bids being received by the state's Division of Purchase and Contract. Id. North Carolina's price-fixing laws are "underdeveloped statutes" compared to the federal antitrust statutes. Id. at 227.

219. Resale price agreements were unquestionably legal in Pennsylvania until the Fair Trade laws were repealed in 1975 and 1976. Comment, supra note 3, at 736-37. See, e.g., PA. CONS. STAT. ANN. tit. 73, § 7 (Purdon 1971) (repealed 1976).
A territorial arrangement may be horizontal, whereby competitors agree to divide markets into geographic territory or product category, or to allocate customers. The effect of a horizontal territorial arrangement is to completely eliminate competition among the parties. Horizontal arrangements are, therefore, per se violations of federal law.

Territorial arrangements may also be accomplished vertically, as when a seller and buyer assign territories to particular parties and agree not to buy or sell in a territory assigned to another. In contrast to horizontal arrangements, vertical market division is not per se unreasonable under federal law. A seller is often free to select his customers and to refuse to deal with others, so long as he harbors no illegal purpose or intent to monopolize. The Act prohibits those territorial arrangements, horizontal or vertical, which are set up to "restrict competition."

The second anticompetitive practice encompassed by the definition of bid-rigging is a refusal to deal. Like vertical restraints, an individual refusal to deal is not prohibited by federal antitrust laws, unless coupled with the intent to destroy or injure a competitor's business. Moreover, a sale conditioned on the buyer's promise not to deal with a competitor is prohibited "when the effect of the arrangement may be to substantially
lessen competition or tend to create a monopoly in any line of commerce." 230 In the context of bid-rigging, if two or more persons were to agree not to submit bids on a contract or subcontract and such agreement were accompanied by an intent to restrain trade, 231 it would probably be considered an illegal refusal to deal.

Although the Act does not mirror the fundamental antitrust prohibitions of the Sherman Act, 232 it does prohibit some of the conduct which is contrary to the policy of the federal statute. 233 A combination or conspiracy which restrains trade in the area of governmental purchasing is unlawful under the Act. 234 Price-fixing, which is conclusively presumed to be an unreasonable restraint of trade under federal law, 235 would also violate Pennsylvania law under this new statute. 236 Territorial arrangements which restrict competition and agreements not to submit bids, both of which would violate federal law in some cases, 237 violate the Act as well. 238


231. With respect to the requirement that an agreement not to submit a bid be accompanied by an intent to lessen competition or have the effect of restraining trade, it is significant that the Pennsylvania Act contains no such express requirement. For the text of the Pennsylvania provision, see _supra_ note 33. The language of the statute simply prohibits "[a]greeing not to submit bids." PA. STAT. ANN. tit. 73, § 1612 (Purdon Supp. 1984-85). Proof of intent to injure competition or restrain trade is a critical element of a cause of action under the Act. A specific intent is required under § 2 of the Sherman Act. _See_ 15 U.S.C. § 2 (1982). In the absence of express guidelines, the Commonwealth should be guided by federal law in establishing the particular elements of a bid-rigging offense.

232. For a discussion of the provisions of the Sherman Act, see _supra_ notes 127-30 and accompanying text.


234. PA. STAT. ANN. tit. 73, § 1613(a) (Purdon Supp. 1984-85) (it is unlawful to conspire, collude or combine with another to commit or attempt to commit bid-rigging involving a contract let by a governmental agency, or any subcontract with a prime contractor for a governmental agency).

235. For a discussion of the per se unreasonableness of price fixing under federal law, see _supra_ note 136.


237. For a discussion of territorial arrangements under federal law, see _supra_ note 156 and accompanying text. For a discussion of refusals to deal under federal law, see _supra_ note 229 and accompanying text.

Pennsylvania's Antibid-Rigging Act

It is important to state what the Act is not. It is not a bar against monopolization, mergers, tying arrangements or price discrimination. Nor is it a "little Sherman Act." Finally, unlike some antitrust statutes, it does not contain a litany of unfair or deceptive trade practices.

V. Pennsylvania's Antitrust Vacuum—An Explanation

In the past ten years, several antitrust proposals have been introduced in the General Assembly. Had there been significant federal sanctions against monopolization are found in § 2 of the Sherman Act. See 15 U.S.C. § 2 (1982). For a general discussion of price discrimination and mergers under federal antitrust law, see Aycock, supra note 30, at 233-253.

For an example of a more extensive state antitrust scheme, see N.C. Gen. Stat. § 75-5 (1981) (listing a large number of prohibited trade practices).


Also in 1973, the former Pennsylvania Department of Justice began to develop its own antitrust proposal, derived from the National Association of Attorneys General's critique of the Uniform State Antitrust Act and from a review of existing state laws. Trinkle, Pennsylvania Antitrust Law: A Review of the Present—A Look at the Future 11-12 (June 1975) (unpublished manuscript). This was introduced in the General Assembly in 1975 as S. 369, 159th Pa. Cong. (1975). 1975 Pa. Legis. J. 139 (Feb. 25, 1975). The bill was committed to the Business and Commerce Committee and there is no record of further action taken on it. See id. For a general discussion of this proposal, see Letter from Gerry J. Elman, Deputy Attorney General, to David Berger, Esq. (April 24, 1973); Memorandum from Gerry J. Elman, Deputy Attorney General, to Ronald G. Lench, Governor's Special Assistant for Legislation (April 18, 1974). It is interesting to note that this particular proposal was offered as a model antitrust act by the National Association of Attorneys General. See National Ass'n of Attorneys General, Committee on the Office of Attorney General, State Antitrust Laws and Their Enforcement app. (Oct. 1974).

cant debate on any of these measures, it might have proven useful to analyze and compare them. Since no such debate has occurred, the relevant issue is not the merits of any particular bill. Rather, it is the broader issue of why Pennsylvania is the only state in the nation without an antitrust statute. The purpose of this section is to offer possible reasons for this state of affairs.

At the outset, it is important to establish the role of the states in antitrust enforcement. As previously noted, the first antitrust statutes were enacted in the states. Then, in 1890, the Sherman Act was passed. The legislative history demonstrates that Congress clearly intended that the states continue to enforce their antitrust laws. State enforcement was meant to complement federal efforts. Expressions of congressional intent, however, are not mandates. The mere fact that antitrust laws were

21:30. For a discussion of the latest antitrust proposal to be introduced in the General Assembly, see infra note 258.

242. See generally Katz & Horwitz, supra note 3; Comment, supra note 3; Note, supra note 140, at 332-34. These commentators criticize Pennsylvania's lack of antitrust legislation, but do not offer any explanation for this statutory void.

243. Legislative history of the federal antitrust laws indicates that federal action was a response to the perceived limitations in state law remedies, not because of an absence of state antitrust law. See 21 Cong. Rec. 2456, 2460 (1890). In addressing the Senate on the issue of the need for federal antitrust law, Senator Sherman observed:

Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set aside such combinations as I shall hereafter show, but these courts are limited in their jurisdiction to the State, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us. . . . Each State can deal with a combination within the State, but only the General Government can deal with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State.

Id.

244. For a discussion of the provisions of the Sherman Act, see supra notes 127-30 and accompanying text.

245. In addressing the Senate as to the role federal antitrust legislation would play in the overall scheme of antitrust enforcement, Senator Sherman indicated that its purpose was to

supplement the enforcement of the established rules of common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property and trade of the people of the United States.

21 Cong. Rec. 2456, 2457 (1890).

246. See Note, supra note 146, at 557-58.
enacted early in the nation's history does not necessarily indicate that outlawing trade restraints was a priority for state officials. 247 Indeed, state enforcement activity until the early 1970's had been fairly minimal. 248

In Pennsylvania, the absence of a state antitrust law is attributable to several related factors: (1) a misconception of the state's role in the antitrust arena; (2) a lack of strong public leadership; (3) the opposition of the business community; and (4) public apathy. As least in the twentieth century, antitrust litigation has been viewed as a federal issue resting in the exclusive domain of the national government. 249 As a result, the matter was largely ignored at the state level until the recent surge in state enforcement activity. 250 This general perception, however, is erroneous. The legislative history of the federal statutes indicates that the states were intended to be the primary enforcers of the antitrust laws. 251 And the Supreme Court, by narrowing the scope of activities considered to be "in commerce" for purposes of the federal laws, has placed an increased emphasis on state antitrust laws and their enforcement. 252 

247. See id. at 549-50, 578-79. A comprehensive analysis of the development of state antitrust laws and the policy rationales behind such legislation is beyond the scope of this article. For more general discussions of the subject, including its relative priority among state government concerns, see Maness, supra note 101; Rahl, Toward a Worthwhile State Antitrust Policy, 39 Tex. L. Rev. 753 (1961); Note, supra note 181.

248. For a discussion of historical trends in state antitrust enforcement, see Note, supra note 144, at 550-56, 578-610. This commentator posits several reasons for an overall nationwide reluctance to enforce existing state antitrust laws. Id. at 569-78. These include the myth of adequate federal enforcement, the myth of driving business away, public apathy, lack of funds, and lack of experienced trial attorneys to prosecute cases. Id. The lack of funding or personnel would appear to be a deficiency in the particular statutory scheme or administrative organization of a given state; but the other factors shed light on Pennsylvania's failure to pass antitrust legislation as well as the failure of other states to enforce existing legislation. For a discussion of the role these factors have played in Pennsylvania's failure to enact antitrust legislation, see infra notes 249-70 and accompanying text.

249. For discussions of the misperception that federal antitrust law preempts state law, or renders it practically useless, see Fellmeth, supra note 95, at 1, 4; Rahl, supra note 247, at 769-74.

250. For discussions of the discouraging effect that passage of federal antitrust law had on state enforcement, see Katz & Horwitz, supra note 3, at 9; Note, supra note 146, at 550-56.

251. For a discussion of the legislative history of the Sherman Act as it relates to the interaction between federal and state antitrust statutes, see supra notes 243-45 and accompanying text.

252. See Fellmeth, supra note 95, at 5 & n.16. In Gulf Oil Corp. v. Copp Paving Co., the Supreme Court held that the defendant corporation's local sales of asphaltic concrete for use in construction of interstate highways did not meet the
The perception of antitrust enforcement as a federal responsibility also displays an ostrich-like approach to a problem of sizable magnitude.\textsuperscript{253} It ignores the limitations on federal resources.\textsuperscript{254} More importantly, it ignores the fact that the vast majority of commercial activity occurs within the boundaries of the Commonwealth.\textsuperscript{255} Most everyday business transactions, such as grocery purchases or dry cleaning services, are purely local affairs. Yet these transactions are beyond the scope of the federal laws because of the absence of a nexus with interstate commerce.

The second reason for Pennsylvania's statutory void is the absence of a vigorous antitrust proponent. Although the two most recent Pennsylvania governors endorsed antitrust legislation, their administrations failed to make passage of these proposals a priority.\textsuperscript{256} The Attorney General's office initiated efforts for a state statute and managed to have several proposals intro-

Robinson Patman Act's jurisdictional requirement of interstate commerce. Gulf Oil Co. v. Copp Paving Co., 419 U.S. 186, 199 (1974). The Court rejected a "nexus with interstate commerce" test for whether jurisdictional conditions had been met. \textit{Id.} In order to invoke federal jurisdiction, the Court held that a plaintiff must "prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods" and not merely allege a formalistic "nexus" with interstate commerce. \textit{Id.} at 202.

On the political side of this issue, it is noteworthy that increased responsibility for antitrust enforcement at the state level is consistent with the theory of new federalism. \textit{See R. Reagan, The New Federalism} (1972).

\textsuperscript{253} For a discussion of the magnitude of local antitrust violations, see \textit{supra} notes 212-13 and accompanying text.

\textsuperscript{254} As an example of the limitations on federal resources, a staff of fifteen trial attorneys is responsible for investigating and prosecuting criminal and civil federal antitrust cases in five states, including Pennsylvania. Telephone Interview with John J. Hughes, Chief, Antitrust Division, Middle Atlantic Office, U.S. Department of Justice (Apr. 15, 1985).

\textsuperscript{255} Letter from John J. Hughes, Chief, Antitrust Division, Middle Atlantic Office, U.S. Department of Justice to Pennsylvania Attorney General Edward G. Biester, Jr. (Sept. 20, 1979) (regarding the resource constraints of the regional office). Mr. Hughes observed:

Complaints involving purely local matters or matters with minimal interstate contact have been given our lowest priority. . . .

[Action has been deferred or declined in many local or marginal interstate matters.

Because of the absence of an antitrust statute in Pennsylvania, many valid complaints of local anticompetitive behavior . . . have not received, and will not receive in the future, the prompt attention and action required.

\textit{Id. See also} Fellmeth, \textit{supra} note 95, at 5-6 (describing a similar situation involving limited resources and large numbers of local claims in California).

\textsuperscript{256} Former Governor Milton Schapp's 1975 State of the Commonwealth address identified the passage of antitrust legislation as a priority of his administration. Letter from Deputy Attorney General Gerry Elman to Richard Stern and Joe Sims, Antitrust Division, U.S. Department of Justice (Apr. 17, 1975);
However, the Commonwealth's leading law enforcement officials have not considered this an important public crusade. In the legislative sector, there has been a modest level of support for an antitrust law; yet, again, it has not been perceived as a critical issue.

A third and often cited explanation is the alleged negative impact of an antitrust law on business. Members of the business community from Deputy Attorney General Gerry Elman to Ronald G. Lench (June 6, 1975).

Similarly, Governor Dick Thornburgh endorsed the idea of a state antitrust statute in a 1979 legislative address. Biester Endorses Antitrust Proposal, The Patriot (Harrisburg), Oct. 18, 1979, at 27. See also Ecenbarger, Time the State Enacted an Antitrust Law, The Philadelphia Inquirer, June 4, 1979, at 7-A, col. 2. The Thornburgh administration's proposal was embodied in H. 1594, 163rd Pa. Cong., 1st Sess. (1979), 1979 Pa. Legis. J. 1489 (June 29, 1979). Interestingly enough, despite the endorsement of a Republican governor, the bill was referred to the Business and Commerce Committee and was never called up for consideration by the Republican chairman of that committee. See id.

For a discussion of the proposals put forth by the Attorney General, see supra note 241 and accompanying text.

In ten years, Attorney General Edward Biester was the only leading law enforcement official in Pennsylvania to hold a press conference on the need for state antitrust legislation. Office of Attorney General E. Biester, Press Release (Oct. 17, 1979); Biester Endorses Antitrust Proposal, The Patriot (Harrisburg), Oct. 18, 1979, at 27.

Until 1979, the antitrust division of the Pennsylvania Attorney General's Office consisted of a single attorney who dealt primarily with multidistrict cases. Note, supra note 146, at 587 & n.404; Memorandum from Deputy Attorney General Gerry T. Elman to Attorney General Robert P. Kane (Oct., 1, 1976) (describing the antitrust division's need for staffing). This staffing shortage undoubtedly contributed to the low level of involvement and advocacy on the part of the Attorney General concerning state antitrust legislation. See id.

State attorneys general may be very influential in the passage of state antitrust legislation. One commentator has concluded that a primary catalyst for the revival of state antitrust enforcement in the seventies was the renewed interest of attorneys general. Kirk, supra note 166, at 246-48. Delaware, like Pennsylvania, was without state antitrust legislation in 1979 when Attorney General Richard S. Gebelein actively supported and won passage of an antitrust law soon after he was elected. Id. at 249.

Numerous legislators have been involved in sponsoring state antitrust bills. See, e.g., 1977 Pa. Legis. J. 502 (March 30, 1977) (some 88 members of the Pennsylvania House joined in introducing H. 845, 161st Pa. Cong. (1977) into the General Assembly). It has been observed that legislative apathy is a significant impediment to effective state antitrust enforcement. See Note, supra note 181, at 580 & n.37. Pennsylvania's legislators have been supportive enough to sponsor numerous proposals; however, no single member has taken a leadership role on any of these proposals. Such a legislative standstill may be indicative of an absence of widespread concern.

For a review of the ultimate demise of every state antitrust proposal introduced in the last ten years, see supra note 241.
ness community express fears that a state antitrust law will have a deleterious effect on business, will create an unfavorable business climate and will ultimately cause businesses to move out of the Commonwealth.\textsuperscript{262} These fears are largely without foundation.\textsuperscript{263} Indeed, if these expressions were accurate, Pennsylvania would be a businessperson's paradise. It is well established that the purpose of the antitrust laws is to promote a healthy free economy where businesses can openly and fairly compete.\textsuperscript{264} Trade restraints violate this free market system. Small businesses and consumers can only benefit from the protection of an antitrust law. Even if an antitrust statute were to cause some businesses to leave the Commonwealth, any resulting loss of revenue must be balanced against the costs of trade restraints through inflated prices and business closings.\textsuperscript{265}

Finally, there is no active constituency requesting this kind of legislation in Pennsylvania.\textsuperscript{266} Although antitrust legislation has been accurately characterized as a consumer issue,\textsuperscript{267} the organized consumer lobby has not recognized it as such.\textsuperscript{268} Public in-

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\textsuperscript{262} See United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972). In Topco, the Supreme Court observed that antitrust laws are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster. Id. See also 1982 NAAG QUESTIONNAIRE, supra note 159 (discussing the purpose and benefits of state antitrust legislation).

\textsuperscript{263} See Note, supra note 146, at 574 ("A competitive market may be as likely to attract business as to drive it away."); Note, supra note 181, at 579-80.

\textsuperscript{264} See, e.g., United States v. Topco Assoc., Inc., 405 U.S. 596 (1972).

\textsuperscript{265} See generally Note, supra note 181, at 579-80; Note, supra note 146, at 574.

\textsuperscript{266} For discussions of the discouraging effect of the lack of public interest in state antitrust enforcement, see Note, supra note 181, at 580.

\textsuperscript{267} See Memorandum, supra note 261 (characterizing antitrust law as a consumer issue).

\textsuperscript{268} For an example of the lack of consumer involvement, see Trinkle, supra note 241, at 12 (one piece of proposed antitrust legislation was temporarily released from committee for the express purpose of engendering public feedback and not one private individual responded).
terest organizations are constantly plagued by a lack of resources. Diverse interest groups may form coalitions to influence certain issues, but, for the most part, these groups remain fragmented. As a result, the consumer lobby's effectiveness is greatly impeded. Consumers who ultimately suffer the most harm from unlawful overcharges are usually unknowing and silent victims of antitrust violations. 269 Finally, the inadequacy of remedies for injured private parties contributes to the lack of public support for antitrust programs. 270

The foregoing discussion outlines four reasons for Pennsylvania's statutory void. Yet two of them are based on erroneous perceptions of the function and role of an antitrust law. It is the remaining two, lack of public leadership and lack of grass roots support, that are the primary substantive factors contributing to this vacuum. These two factors operate in tandem; the development of one will bolster the other. Given the present demonstrated public apathy and the silent invidious nature of trade restraints, however, it is incumbent upon public officials to initiate and advocate an antitrust law. Public pressure, which is critical to the success of local antitrust prosecution, as well as enactment of legislation, will then follow. 271

VI. THE FUTURE OF ANTITRUST LEGISLATION IN PENNSYLVANIA

Will Pennsylvania's Antibid-Rigging Act develop into a full antitrust statute to include other trade restraints? Or is it the

269. Consumers may be direct victims of overcharges via price fixing by local businesses, or they may be indirect victims, through higher taxes or reduced government services as a result of overcharges on public contracts. See Fellmeth, supra note 95, at 7-8; Note, supra note 181, at 585. 270. For a discussion of the effect of the failure to provide adequate private remedies to those injured by antitrust violations, see Note, supra note 181, at 584. By way of contrast, the federal government's enforcement scheme acknowledges the importance of private enforcement by providing generous private remedies. See supra note 113 and accompanying text. 271. In discussing the importance of public support to successful state antitrust enforcement, one commentator has observed:

It is a somewhat surprising but unfortunate reality that the success of antitrust prosecution, to the extent success has been achieved, rests with the public. It is the members of the public who widely support the concept of free competition, free choice, the survival of small business and antitrust prosecution. It is the public which reprimands violators severely and which thus forms, perhaps, the most potent sanction from the point of view of suspects: the public humiliation and loss of business which can accompany a successful antitrust prosecution.

Fellmeth, supra note 95, at 46.
maximum protection that will be afforded to the Commonwealth's citizens and businesses?

Based on the foregoing analysis it appears that a Pennsylvania antitrust statute will not become a reality. The common law on restraint of trade contains only a general prohibition. There have been no judicial innovations which have expanded the common law. Pennsylvania's legislative history in the antitrust area is dismal, showing little interest for antitrust legislation and no public support. No individual legislator made this issue a priority and gubernatorial leadership has been weak.

Pennsylvania's only hope for an antitrust law is strong public leadership. In Delaware, a corporate haven, an antitrust law was recently enacted. The attorney general's support and advocacy were critical factors in securing passage of that law. Under the leadership of a public official who is dedicated to passage of such a law, business opposition will decrease and public support will follow. If an antitrust law can be passed in Delaware, it is not an impossible mission in Pennsylvania. Until then, the Antibid-Rigging Act will remain the only trade regulation protecting consumers and honest businesses in the Commonwealth.

APPENDIX

THE PENNSYLVANIA ANTIBID-RIGGING ACT*

Section 1. Short title.

This act shall be known and may be cited as the Antibid-Rigging Act.

Section 2. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise.

"Bid-rigging." The concerted activity of two or more persons to determine in advance the winning bidder of a contract let or to be let for competitive bidding by a governmental agency. It


273. For a discussion of the Delaware Attorney General's involvement in passage of the state's new antitrust act, see Kirk, supra note 166, at 249-51, 263.

shall include, but not be limited to, any one or more of the following:

(1) Agreeing to sell items or services at the same price.
(2) Agreeing to submit identical bids.
(3) Agreeing to rotate bids.
(4) Agreeing to share profits with a contractor who does not submit the low bid.
(5) Submitting prearranged bids, agreed upon higher or lower bids, or other complementary bids.
(6) Agreeing to set up territories to restrict competition.
(7) Agreeing not to submit bids.

“Governmental agency.” The Commonwealth and any of its departments, boards, agencies, authorities and commissions, any political subdivisions, municipal corporations, home rule municipalities, school districts and any of their agencies, boards, commissions or authorities.

“Person.” Any individual, partnership, corporation, association or other entity organized for the purpose of doing business as a contractor, sub-contractor or supplier.

Section 3. Prohibited activities.

(a) Bid-rigging unlawful.—It shall be unlawful for any person to conspire, collude or combine with another in order to commit or attempt to commit bid-rigging involving:

(1) A contract for the purchase of equipment, goods, services or materials or for construction or repair let or to be let by a governmental agency.

(2) A subcontract for the purchase of equipment, goods, services, or materials or for construction or repair with a prime contractor or proposed prime contractor for a governmental agency.

(b) Simultaneous bids.—Notwithstanding other provisions of this act, it shall not be unlawful for the same person to simultaneously submit bids for the same work, or a portion thereof, as a proposed prime contractor and subcontractor.

(c) Fines and imprisonment.—Every person who violates this section commits a felony of the third degree and shall, upon conviction, be sentenced to pay a fine not to exceed $1,000,000, if an entity other than an individual, or a fine not to exceed
$50,000, if an individual, or to serve a term of imprisonment for not more than three years, or both.

(d) Alternative civil penalty.—In lieu of criminal prosecution for violation of this section, the Attorney General may bring an action for a civil penalty. In this action, a person found by a court to have violated this section shall be liable for a civil penalty of not more than $100,000.

(e) Disposition of fines and penalties.—Criminal fines and civil penalties collected under subsections (c) and (d) shall be paid into the State Treasury and deposited in the appropriate fund.

(f) Factors to be considered in determining fines, imprisonment or civil penalties.—In determining the appropriate sanctions to be imposed for a violation of this section, the court shall consider at least the following three factors:

(1) The prior record and the number of previous violations.
(2) The net worth of the person.
(3) The size and amount of the contract involved.

(g) Civil actions not barred.—Any conviction or civil penalty imposed under this section shall not bar the governmental agency from pursuing additional civil actions and administrative sanctions.

(h) Limitation on prosecution.—No criminal prosecution under this section shall be brought against a person who has been previously charged by information or indictment with a criminal violation of the Federal antitrust laws, based upon the same allegedly unlawful conduct upon which a criminal prosecution under this act could be based, where jeopardy has attached under the Federal prosecution.

Section 4. Civil action and damages.

(a) Government agency to have right of action.—Any governmental agency entering into a contract which is or has been the subject of activities prohibited by section 3 shall have a right of action against the participants in the prohibited activities to recover damages.

(b) Options.—The governmental agency shall have the option to proceed jointly and severally in a civil action against any one or more of the participants for recovery of the full amount of the damages. There shall be no right to contribution among participants not named defendants by the governmental agency.

(c) Measure of damages.—The measure of damages recov-
erable under this section shall be the actual damages, which damages shall be trebled plus the cost of suit, including a reasonable attorney's fee.

(d) When cause of action arises.—The cause of action shall arise at the time the governmental agency which entered into the contract discovered, or should have discovered, the conduct amounting to the offense declared to be unlawful by this act. The action shall be brought within four years of the date that the cause of action arose. No civil action shall be maintained after the expiration of ten years from the date the contract was signed by the parties.

(e) Conviction to be dispositive of liability.—Any conviction under section 3 shall be dispositive of the liability of the participants with the only issues for trial being the fact of damage and amount of damages.

Section 5. Suspension or debarment

(a) Maximum suspension or debarment.—A governmental agency proceeding under its rules and regulations to exclude or render ineligible a person from participation in contracts or subcontracts based upon conduct prohibited by section 3 shall limit the exclusion or ineligibility to a period not to exceed the following time periods:

(1) Three years in the case of a person found for the first time to have engaged in this conduct.

(2) Five years in the case of a person found to have engaged in this conduct for a second or subsequent time.

(b) Lists of persons excluded.—A governmental agency that lets a contract by competitive bidding shall maintain a current list of persons excluded or ineligible by reason of suspension or debarment for participation in contracts or subcontracts with that agency and shall furnish a copy of the list upon request to a person considering the submission of a bid as a prime contractor or a subcontractor.

Section 6. Liability for increased costs.

A person who enters into a contract with a governmental agency, either directly as a contractor or indirectly as a subcontractor, during a period of suspension or debarment imposed upon that person by that agency under its rules and regulations shall be liable to the governmental agency and to an eligible contractor for increased costs incurred as a result of replacing the excluded or ineligible person.

Section 7. Noncollusion affidavits.
Noncollusion affidavits may be required by rule of any governmental agency from all persons. Any such requirement shall be set forth in the invitation to bid. Failure of any person to provide a required affidavit to the governmental agency may be grounds for disqualification of his bid. Any required noncollusion affidavit shall state whether or not the person has been convicted or found liable for any act prohibited by State or Federal law in any jurisdiction involving conspiracy or collusion with respect to bidding on any public contract within the last three years. Any required noncollusion affidavit shall also state that a person's affidavit stating that the person has been convicted or found liable for any act, prohibited by State or Federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding on any public contract within the last three years, does not prohibit a governmental agency from accepting a bid from or awarding a contract to that person, but may be a ground for administrative suspension or debarment in the discretion of a governmental agency under the rules and regulations of that agency, or, in the case of a governmental agency with no administrative suspension or debarment regulations or procedures, may be a ground for consideration on the question whether such agency should decline to award a contract to that person on the basis of a lack of responsibility. The provisions of this section are in addition to and not in derogation of any other powers and authority of any governmental agency.

Section 8. Responsibility for enforcement.

(a) Criminal prosecution.—The Office of Attorney General and the district attorneys of the several counties shall have concurrent jurisdiction for the investigation and prosecution of violations of section 3.

(b) Civil actions.—The Office of Attorney General shall have the authority to bring civil actions under section 4 on behalf of the Commonwealth and any of its departments, boards, agencies, authorities and commission. Political subdivisions, municipal corporations, home rule municipalities and school districts shall have the right to bring a civil action under section 4. Upon the filing of a complaint, a copy thereof shall be served on the Attorney General. The plaintiff, at any time, may request the Attorney General to act on its behalf. The Attorney General, upon determining that it is in the best interest of the Commonwealth, shall have the authority to intervene on behalf of the Commonwealth in such actions.
Section 9. Investigation.

(a) Required attendance.—Whenever the Office of Attorney General believes that a person may be in possession, custody or control of documentary material or may have information relevant to the subject matter of a civil investigation for the purpose of ascertaining whether a person is or has been engaged in a violation of this act, he may require the attendance and testimony of witnesses and the production of books, accounts, papers, records, documents and files relating to the civil investigation; and, for this purpose, the Attorney General or his representatives may sign subpoenas, administer oaths or affirmations, examine witnesses and receive evidence during the investigation. A request for information shall state the subject matter of the investigation, the conduct constituting the alleged violation which is under investigation and the provisions of this act applicable to the alleged violation. A request for documentary material shall describe the material to be produced with reasonable particularity so as to fairly identify the documents demanded, provide a return date within which the material is to be produced and identify the member of the Attorney General’s staff to whom the material shall be given. In case of disobedience of a subpoena or the contumacy of a witness appearing before the Attorney General or his representative, the Attorney General or his representative may invoke the aid of a court of record of the Commonwealth, and the court may thereupon issue an order requiring the person subpoenaed to obey the subpoena or to give evidence or to produce books, accounts, papers, records, documents and files relative to the matter in question. Failure to obey an order of the court may be punished by the court as a contempt.

(b) Confidentiality.—No information or documentary material produced under a demand under this section shall, unless otherwise ordered by a court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, a person other than the Attorney General or his representative without the consent of the person who produced the information or material; except that the Attorney General or his representative shall disclose information or documentary material produced under this section or information derived therefrom to officials of a governmental agency affected by the alleged violation, for use by that agency in connection with an investigation or proceeding within its jurisdiction and authority, upon the prior certification of an appropriate official of the agency that the infor-
mation shall be maintained in confidence other than use for official purposes. Under reasonable terms and conditions as the Attorney General or his representative shall prescribe, the documentary material shall be available for inspection and copying by the person who produced the material or a duly authorized representative of that person. The Attorney General or his representative may use such documentary material or information or copies thereof as he determines necessary in the civil enforcement of this act, including presentation before any court. Material which contains trade secrets or other highly confidential matter shall not be presented except with the approval of the court in which a proceeding is pending after adequate notice to the person furnishing the material.

(c) Limitation on use.—No criminal prosecution under section 3 may be brought by either the Attorney General or a district attorney based solely upon information or documents obtained in a civil investigation under this section.

Section 10. Applicability.

This act shall apply to all contracts with governmental agencies entered into on or after the effective date of this act.