Calendar No. 763

94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-803

THE ANTITRUST IMPROVEMENTS ACT OF 1976

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1284

PART I

MAY 6, 1976.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976

69-509 O

CONTENTS

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HART-SCOTT ANTITRUST IMPROVEMENTS ACT OF 1976

MAY 6, 1976.—Ordered to be printed

Mr. HART of Michigan, for the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1284]

The Committee on the Judiciary, to which was referred the bill (S. 1284) to improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass. The amendments are set forth commencing at pages 79 and 83.

I. PURPOSE AND SUMMARY

The purpose of S. 1284, the Hart-Scott Antitrust Improvements Act of 1976, is to support and invigorate effective and expeditious enforcement of the antitrust laws, to improve and modernize antitrust investigation and enforcement mechanisms, to facilitate the restoration and maintenance of competition in the marketplace, and to prevent and eliminate monopoly and oligopoly power in the economy.

A major factor underlying the ineffectiveness of the antitrust laws is the inadequacy of existing investigatory, enforcement, deterrent, and procedural aspects of present law. The remote possibility of antitrust violators getting caught, coupled with the relatively small penalties imposed, encourages an atmosphere conducive to antitrust violations. In the words of one businessman, under the existing system, white collar crime *does* pay:

> When you're doing $30 million a year and stand to gain $3 million by fixing prices, a $30,000 fine doesn't mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars. *Business Week* (June 2, 1975).

S. 1284 contains five interrelated, although separate, titles. Many of its provisions have been the subject of direct or indirect hearings or discussions by the Antitrust and Monopoly Subcommittee over the past 17 years. Each in its own way is designed to overcome a particular and basic weakness of present antitrust law. The Committee believes that enactment of S. 1284 should significantly strengthen the antitrust laws, deter violations, and facilitate a return to free and unfettered competition as the rule of trade in this country.

The essence of S. 1284 is contained in titles II, IV, and V. Title II amends the Antitrust Civil Process Act, substantially improving the investigatory authority of the Antitrust Division of the Department of Justice. Title IV amends the Clayton Act, substantially improving the deterrent effect of its private damage provisions by authorizing State attorneys general to bring private treble damage actions to secure redress for damage done to natural persons residing in their States. Title V also amends the Clayton Act, substantially improving its merger provisions by providing for advance notification of large mergers and for improved procedures to enjoin illegal mergers prior to consummation.

The Act is supported in whole or in substantial part by Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division; the Federal Trade Commission; the National Association of State Attorneys General; a majority of the Antitrust Section of the Federal Bar Association responding to a questionnaire soliciting their views; some 70 academic and practicing economists; a number of law professors; the Computer Industry Association; the National Congress of Petroleum Retailers; Consumer Federation of America; United Mine Workers of America; National Farmers Union; AFL/CIO; National Rural Electric Cooperative Association; United Auto Workers; International Ladies Garment Workers Union; Independent Gasoline Marketers Council; National Consumers League; Retail Clerks International Association; National Retired Teachers Association; American Association of Retired Persons; United Steelworkers of America; Energy Action Committee; Committee for Public Advocacy; National Consumer Congress; Public Interest Economics Center; Common Cause; National Council of Senior Citizens; National Education Association; Amalgamated Clothing Workers of America; International Association of Machinists and Aerospace Workers; Congress Watch; and the American Federation of State, County, and Municipal Employees.

The Committee has carefully considered the contentions raised during and after extensive hearings on, and markup of, this measure, that its enactment would result in ruinous liability to honest businessmen and subject them to harassment through the grant to the Antitrust Division of inquisitorial authority. For the reasons specified throughout this report, the Committee rejects these contentions and finds them to be devoid of merit.

(a) Title I—Declaration of Policy

This title capsulizes the basic social, political, and economic purposes underlying the antitrust laws in general, and this Act in particular. It states—

That the United States is committed to a free enterprise system in the belief that competition spurs innovation, promotes productivity, prevents undue concentration of economic, social, and political power, and preserves a free democratic society;

That diminished competition and increased concentration in the marketplace have been important factors in the ineffectiveness of monetary and fiscal policies in reducing the high rates of inflation and unemployment;

That vigorous and effective enforcement of the antitrust laws can contribute to reducing prices, unemployment, and inflation, and to preserving our democratic institutions and personal freedoms; and

That it is the purpose of this Act to support and invigorate effective and expeditious enforcement of the antitrust laws, to improve and modernize antitrust investigation and enforcement mechanisms, to facilitate the restoration and maintenance of competition in the marketplace, and to prevent monopoly and oligopoly power in the economy.

(b) TITLE II—ANTITRUST CIVIL PROCESS AND CLAYTON ACT AMENDMENTS

Section 201—Amendments to the Antitrust Civil Process Act

This title amends the Antitrust Civil Process Act, originally enacted in 1962. Title II is similar to S. 1637, an Administration-sponsored measure introduced by Senator Hiram Fong and cosponsored by Senators Hugh Scott and Philip A. Hart, and it is personally supported by the President. It provides the Antitrust Division of the Department of Justice with the most basic of investigatory tools utilized by virtually every Federal regulatory agency, including the Federal Trade Commission, and by many State attorneys general. The Committee believes that its passage would materially enhance the efficiency and effectiveness of the Division's antitrust enforcement efforts.

The Antitrust Civil Process Act authorizes the Antitrust Division of the Department of Justice to issue compulsory process (called a "civil investigative demand" or "CID") to investigate violations of the antitrust laws prior to the filing of a case. Under present law, the Division may issue a civil investigative demand to obtain only documentary evidence and then only from non-natural persons (*e.g.*, corporations) suspected of committing an antitrust violation. Relevant evidence may not be obtained pursuant to a CID from natural persons or from third parties such as competitors, suppliers, customers, or employees. Nor may the Antitrust Division take oral testimony or written interrogatories in the course of such an investigation. Further, in *United States* v. *Union Oil Co.*, 343 F.2d 29 (9th Cir. 1965), the court held that the Antitrust Division may not issue a CID to investigate the legality of a proposed merger or acquisition until it is consummated—even though it may be publicly announced.

Title II rectifies these glaring deficiencies in the Division's investigatory powers by authorizing the Antitrust Division to:

(1) issue a civil investigative demand to investigate mergers and acquisitions prior to consummation;

(2) issue a civil investigative demand to obtain relevant evidence from natural persons and third parties;

(3) take oral testimony and written interrogatories, in addition to obtaining documentary evidence, pursuant to a CID; and

(4) issue a civil investigative demand to obtain relevant competitive evidence for use in on-going regulatory agency proceedings.

Section 202—Amendments to section 5 of the Clayton Act

Section 202 amends section 5 of the Clayton Act to provide that upon a written request from the Federal Trade Commission, the Attorney General shall permit the Commission to inspect and copy documentary materials and testimony furnished to a Federal grand jury after the termination of its investigation. During the time the grand jury testimony and documents are in the possession of the Commission, such testimony and documents are subject to the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, Title 18, United States Code. The Attorney General is given the discretion to refuse the Commission's request if he determines that access to the documentary material or testimony would not be in the public interest.

Section 202 also provides that a private plaintiff may inspect and copy documentary material and testimony furnished to a grand jury upon the payment of reasonable fees and after any civil or criminal proceeding arising out of the grand jury investigation has been completed. The private plaintiff shall file a petition seeking such access before the district court in which the grand jury was empaneled; and the district court may impose such conditions on the grant of access or protective orders, as the interests of justice may require.

Under existing case law, both the Federal Trade Commission and private treble damage plaintiffs may be permitted access to grand jury testimony and documentary material upon a showing of particularized and compelling need. The motion for leave to inspect grand jury evidence is addressed to the discretion of the district court where the grand jury is empaneled. The trend in recent court decisions is clearly in favor of more liberal disclosure of grand jury testimony and documentary materials.

Section 202 is a determination by the Committee that, generally, the reasons for grand jury secrecy are no longer relevant when either the Federal Trade Commission seeks access to grand jury testimony or documentary material or when a private plaintiff files a motion for leave to inspect such grand jury evidence after the Department has completed any civil or criminal case which arose out of the grand jury investigation. The Committee believes that disclosure, rather than suppression, of grand jury evidence generally promotes the proper and efficient administration of justice.

(c) Title III—Miscellaneous Amendments

Section 301—Affecting commerce

When Congress originally enacted the antitrust laws in 1890 and 1914, the full reach of the commerce clause was not as refined as it is today. Recent court decisions have construed some provisions of the antitrust laws as applying to activities "in commerce" and other provisions as applying to activities "in or affecting commerce." Section 301 substitutes the phrase "in or affecting commerce" or its equivalent for the phrase "in commerce" throughout the antitrust laws to assure

that the antitrust laws reach activities directly in the stream of interstate commerce as well as activities affecting interstate commerce. Legislation was enacted by the 93d Congress similarly extending the reach of the Federal Trade Commission Act to the fullest extent permitted by the commerce clause, *i.e.*, to activities in or affecting commerce.

Section 302—Complex cases

For a variety of reasons, antitrust cases take years and years to resolve. Section 302 is designed to provide the tools to expedite such cases by providing for the utilization of expedited procedures, special masters and economists, and other experts in complex antitrust cases.

Section 303—Foreign actions

An increasing number of antitrust cases are being filed against foreign companies, including multinationals. Problems have arisen with respect to such companies refusing to comply with subpoenas or discovery orders on the basis of foreign law; or, on the basis that the relevant data is in the foreign home office and cannot be produced in the United States. Section 303 makes it clear that foreign companies and multinationals who choose to do business in the United States must comply with valid U.S. judicial orders, just as a domestic company must comply with such an order. Section 303 confirms the power of a Federal court to take appropriate remedial action to enforce its orders compelling discovery, evidence, or testimony in those cases in which litigants refuse to comply with such orders on the ground that a foreign law or rule prohibits them from doing so.

Section 304—Attorneys' fees

Under the recent Supreme Court decision in *Alyeska Pipeline* v. *Wilderness Society*, 421 U.S. 240 (1975), in the absence of express statutory authority courts may not award attorneys' fees to prevailing plaintiffs. Section 304 provides such statutory authority for courts to award attorney's fees to a substantially prevailing plaintiff in equity actions under section 16 of the Clayton Act, just as section 4 of the Clayton Act authorizes the award of attorneys' fees to prevailing plaintiffs in damage actions.

Section 305—Severability

Section 305 is a standard severability provision.

Section 306—Effective date

Section 306 provides the effective dates for the several provisions of the Act.

(d) Title IV—Parens Patriae Amendments

Title IV amends the Clayton Act to permit State attorneys general to bring private treble damage actions, for violations of the Sherman Act, to secure redress for damage done to natural persons (consumers) residing in their State. The title is intended to provide compensation for the victims of antitrust offenses, to prevent antitrust violators from retaining the fruits of their illegal activities, and to deter antitrust violations.

Substantive standards as to what are or are not violations of the antitrust laws are not changed by Title IV. In other words, enactment

of Title IV would not make any conduct illegal which is not presently illegal under the antitrust laws. Title IV merely creates an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action against antitrust violators. The monetary relief which a State attorney general may recover is treble the total damage sustained by the consumers in his State, and he is required to pay such recoveries over to consumers in accordance with the procedures specified in Title IV.

The economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services. Frequently, such antitrust violations as price-fixing, group boycotts, division of markets, exclusive dealings, tie-in arrangements, fraud on the Patent Office, monopolization, attempts to monopolize, conspiracies to limit production, and other violations of the antitrust laws, damage thousands or even millions of consumers, each in relatively small amounts but often on a continuing basis. When everyday consumer purchases are involved (*e.g.*, bread, dairy products, gasoline, etc.), the individual dollar amounts are so small that, as a practical matter, an individual antitrust lawsuit is out of the question. Similarly, consumers have found little relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 and practical problems in the proof of individual consumers' damages under section 4 of the Clayton Act. Yet, if an antitrust violation results in an overcharge of but 10 cents on a relatively low-priced consumer item, and 500 million such items are sold, the aggregate impact of the conspiracy upon the consumers and the illegal profits of the conspirators are hardly insignificant—at least $50 million.

The very essence of Title IV is the provision authorizing proof of consumer damage in the aggregate, without separately proving the fact or amount of each consumer's individual injury or damage. The Committee believes that Title IV cannot work without this provision because of both the impracticability and impossibility of bringing before the court thousands or even millions of consumers to prove, individually and separately, the fact of his or her injury and the amount of his or her damage. A plaintiff still would have the burden of proving that:

(1) Defendants violated the Sherman Act;
(2) Consumers were damaged by such violation; and
(3) The approximate amount of consumer damage.

Instead of adding up thousands or millions of claims, however, the total amount of consumer damage could be proved in the aggregate based upon the records of defendants and other entities in the chain of distribution or by other evidence.

Upon establishing defendants' liability and the aggregate damage, distribution of the recovery would be made to consumers. If consumers did not file claims for the entire amount recovered, the court could determine that the unclaimed amount be used to advance the interests of the class damaged by the violation or disburse it in accordance with State law. As the Supreme Court stated in *Bigelow* v. *RKO Pictures*, 327 U.S. 251, 264–65 (1946):

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

The court concluded:

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery" for a proven invasion of the plaintiff's rights.

The Committee believes that this title provides a practicable remedy for consumers, and that it is necessary to deter antitrust violations, to take the profit out of white collar crime, and to dispense equal justice to the rich and poor alike. The predictions of ruinous liability made by opponents of this title are strikingly similar to the arguments made by business with respect to the probable consequences of the Sherman Act of 1890:

> Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and widespread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. (*Northern Securities Co.* v. *United States*, 193 U.S. 197, 351 (1904).)

(e) Title V—Premerger Notification and Stay Amendments

The essence of Title V is the creation of a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are consummated. Presently, the Government can stop few illegal mergers before they take place. Once a merger is consummated, the average case takes 5–6 years to resolve during which time the acquiring entity retains the illegal profits and other fruits of the transaction. Securing adequate relief after the assets, management and technology of the two merged firms have been commingled for that 5–6 year period is virtually impossible. Unfortunately, the original state of competition is rarely restored upon ultimate disposition of the judicial proceeding. In addressing the obstacles of preventing illegal mergers prior to consummation, and the problems of "unscrambling the eggs" and securing adequate post-acquisition

relief, the Committee believes it is significant that the Department of Justice ultimately prevails after trial on the merits in approximately 90 percent of the non-bank merger cases it files under section 7 of the Clayton Act.

Title V amends the Clayton Act to provide for a 30-day notification to the antitrust authorities prior to consummation of very large mergers and acquisitions (involving transactions between $100 million and $10 million companies). The title does not change the standards by which the legality of mergers is judged. Certain types of transactions (*e.g., de minimis* non-control investments, formation of subsidiary companies, real estate acquisitions for office space, regulated industry and bank mergers) are exempted from the notification requirements. Further authority—to waive the 30-day waiting period, to provide additional exemptions by rulemaking, to require additional information, and to extend the 30-day waiting period for an additional 20 days from receipt of such additional information—is conferred upon the antitrust authorities.

If the Attorney General or the Federal Trade Commission seeks to enjoin consummation of an illegal merger or acquisition and certifies that the public interest requires relief *pendente lite*, Title V also provides for expedited judicial handling of such motion, for a temporary restraining order to remain in effect until a decision is rendered on a preliminary injunction (but not to exceed 60 days except for good cause), and for the issuance of a preliminary injunction unless the Government does not have a reasonable probability of ultimately prevailing on the merits or the defendants will be irreparably injured by the entry of such an order.

II. Background, Need, and Explanation

The United States is committed to a private enterprise system and a free market economy in the belief that competition spurs innovation, promotes productivity, prevents the undue concentration of economic, social, and political power, and preserves a free democratic society. The success of this commitment is premised upon free and competitive markets, which can only be achieved through stringent enforcement of the antitrust laws. In *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1 (1958), the underlying principles of the antitrust laws were thus described:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

In June 1975, in an address commemorating the 85th anniversary of the Sherman Act, Attorney General Edward Levi made the following observations:

> The antitrust laws, in their basic theory, are built upon a view of enterprise and of choice, which property and access to the market give, and I would claim them as among the most important civil liberties. This is an older view, often in disrepute. Although often violated, this view has been sufficiently strongly held to give our country unusual diversity and creativity. This view and its manifestations in the Sherman Act have shaped and protected our democracy.

The people of the United States have been well served by the free enterprise system. Dynamic and aggressive American businessmen and women have set the pace for the rest of the world, and the U.S. economy, as a result of this enterprising leadership, has become the world's most efficient and creative. No other economic system has allocated resources and labor as effectively, or distributed the products of labor to the ultimate consumer as well.

Notwithstanding these ideals, reliance on free market forces to order our economic activity has been eroded significantly over recent decades. Private conspiratorial conduct, and monopolistic and oligopolistic conditions, have become increasingly prevalent. State and Federal regulatory policies, in some instances, have nurtured and immunized unnecessary and unjustified restraints on competition.

The Sherman and Clayton Acts represent the basic guardians of our free enterprise system. But they are not enough. For a variety of reasons, concentration in the American economy has rapidly increased and monopoly power exists in many industries. Two hundred corporations now control two-thirds of all manufacturing assets in the United States.

The lack of effective competition in important sectors of the economy has taken its toll on the American consumer. Traditional monetary and fiscal policies no longer seem to work, and it is difficult to check inflation and reduce unemployment no matter how hard the Government tries. Our basic industries have stagnated and no longer seem able to innovate.

In his fiscal 1976 budget request, Assistant Attorney General Thomas E. Kauper elaborated on the economic consequences of these artificial restraints:

> Undue concentration of industry and artificial restraints on normal market forces exerted by private combinations and conspiracies exacerbate the existing pressures for inflation. These influences can be restrained by effective antitrust enforcement. The higher prices achieved by concentrated industries or by such combinations and conspiracies provide profit margins which are the natural targets for wage demands which in turn foster still further price increases, and therefore have both a long-term and a short-run effect on inflation. A dynamic antitrust program must be geared to arrest these effects.
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> * * * * *
>
> The ultimate target of antitrust enforcement has been estimated in terms of billions of dollars of inflated prices. The precise costs of non-competitive market structure and per-

formance are elusive, but experts in the field of economic organization estimate the economic losses due to resource misallocation, inefficiency due to ineffective cost control, wasteful promotional efforts and excessive and inefficient capacity, at from 3 to 6.2 percent of GNP—or as much as $80 billion in terms of 1973 GNP.

The present economic conditions are to some extent the result of inadequate enforcement of the antitrust laws. For too many years, the allocation of necessary antitrust resources has been swallowed up by other priorities of Democratic and Republican administrations alike. Adequate funding and staff is a prerequisite to effective enforcement of the antitrust laws. Otherwise, the alternative will be ever-increasing Government economic regulation of vast segments of the economy, or, worse yet, private combinations of businessmen ordering our economic way of life.

The Committee agrees with the President's determination "to return to the vigorous enforcement of the antitrust laws" and with his statement that "vigorous antitrust action must be part of the effort to promote competition." Clearly the United States is at an economic crossroads. Free enterprise must be restored and enhanced if our nation is to prosper and maintain its leadership in the industrialized world. Curtailment of oppressive government regulation is possible only if it goes hand-in-hand with vigorous enforcement of the antitrust laws, so that free market forces—not conspiracies or other anticompetitive practices—determine the price and quality of our goods and services.

The Committee believes that S. 1136, passed by the Senate on December 12, 1975, will provide adequate funding and staff to the antitrust authorities. The Committee further believes that enactment of S. 1284 is necessary to make the antitrust laws work and will accomplish the objectives so often stated by the President.

(a) Title II—Antitrust Civil Process and Clayton Act Amendments

Section 201—Amendments to the Antitrust Civil Process Act—General

The purpose of section 201 is to amend the Antitrust Civil Process Act of 1962 (76 Stat. 548, 15 U.S.C. 1311) to expand the investigative authority of the Department of Justice to obtain information that is necessary or appropriate to the enforcement of the antitrust laws and to adequately represent our national policy favoring effective competition before certain Federal administrative and regulatory agency proceedings. It provides the Antitrust Division with the most basic of investigatory tools utilized by virtually every Federal regulatory agency, including the Federal Trade Commission, and many State attorneys general. The Committee believes that its passage would materially enhance the efficiency and effectiveness of the Division's antitrust enforcement efforts. The original Antitrust Civil Process Act authorizes the Division to issue compulsory process (called a "civil investigative demand" or "CID") to investigate violations of the antitrust laws prior to the filing of an action. Under the existing statute, the Attorney General or the Assistant Attorney General in

charge of the Antitrust Division may issue a civil investigative demand to obtain only documentary evidence, and then, only from non-natural persons (*e.g.*, corporations) when there is reasonable cause to believe that such non-natural persons are engaged or have been engaged in a violation of the antitrust laws. Relevant evidence may not be obtained pursuant to a CID from natural persons or from third parties such as customers, suppliers and competitors, nor may the Antitrust Division take oral testimony or written interrogatories in the course of such an investigation. Further, in *United States* v. *Union Oil Co.*, 343 F.2d 29 (9th Cir. 1965), the court held that the Antitrust Division may not issue a civil investigative demand to investigate the legality of a proposed merger or acquisition until it is consummated—even though it may be publicly announced.

Section 201 corrects these deficiencies in the Department's investigatory powers by authorizing the Antitrust Division to:

(1) Issue a civil investigative demand to investigate mergers and acquisitions prior to consummation;

(2) Issue a civil investigative demand to obtain relevant evidence from natural persons and third parties;

(3) Take oral testimony and written interrogatories, in addition to obtaining documentary evidence, pursuant to a CID; and

(4) Issue a civil investigative demand to obtain relevant competitive evidence for use in pending Federal administrative or regulatory agency proceedings.

The Committee believes that the authority granted by section 201 consists of basic investigatory powers which are essential to the effective enforcement of the antitrust laws. The Committee concurs with the statement of Attorney General Edward H. Levi in his transmittal of this proposed legislation to the Congress:

> No field of litigation involves facts more complex and records more extensive than are found in the Government's antitrust cases. The task of amassing the voluminous data essential to successful antitrust enforcement is of considerable magnitude. Insofar as it went, enactment in 1962 of the Antitrust Civil Process Act provided a signal benefit to the Government's civil investigations by authorizing production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation. But the limitations on the scope of the demand have left the Act far from meeting essential investigatory needs of the Department's Antitrust Division.
>
> The refusal of industry sometimes to cooperate voluntarily in antitrust investigations, which gave rise to the Antitrust Civil Process Act, is the reason today that more effective civil discovery means are needed.

In a letter dated March 31, 1976, to Chairman Peter W. Rodino, Jr., the Committee on the Judiciary, House of Representatives, from President Gerald R. Ford, the President states as follows:

> In October of 1974, I announced my support of amendments to the Antitrust Civil Process Act which would provide important tools to the Justice Department in enforcing

> our antitrust laws. My Administration reintroduced this legislation at the beginning of this Congress and I strongly urge its favorable consideration.

The Committee believes that section 201 carries out the President's recommendations.

The same public policy reasons which justified the enactment of the Antitrust Civil Process Act in 1962 support an extension and clarification of that statute now. Prior to that Act, when the Department had reason to believe that the antitrust laws were being violated and that a civil suit might be more appropriate than criminal prosecution, its ability to obtain additional facts upon which to decide whether or not to file suit, was quite limited. First, the Department could seek the voluntary cooperation of the prospective defendants. "This [was] an unsatisfactory method of enforcement since it [left] the public interest in the enforcement of the antitrust laws subject to the will of violators of those laws." (Report of the Committee on the Judiciary, United States Senate, 87th Cong., 1st Sess., S. Rept. No. 87–1090 (1961) at 7.) Second, the Department could attempt to secure the information through the use of a grand jury subpoena. The Supreme Court has indicated that the use of the grand jury, when the Department has no intention of bringing criminal charges, would flout the policy of 15 U.S.C. 30. *United States* v. *Procter and Gamble Corp.*, 356 U.S. 677 (1958). In addition, the Clayton Act is not a criminal statute; under it the Department can only proceed civilly. Third, the Department could request the Federal Trade Commission to conduct an investigation, pursuant to its powers under 15 U.S.C. 46, and thereby obtain the needed information. The broad use of the Commission's investigatory authority was regarded as unsatisfactory since it would unduly burden the Commission's resources and reduce the ability of the Department of Justice attorneys to maintain control over the investigation. Fourth, the Department could file a complaint and then utilize the compulsory discovery processes under the Federal Rules of Civil Procedure in order to ascertain whether the charges were warranted. This approach was universally condemned as a perversion of the Federal Rules of Civil Procedure. (*See* Judicial Conference of the United States. "Report on Procedure in Antitrust and Other Protracted Cases," 13 F.R.D. 62, 67 (1951); the Attorney General's National Committee to Study the Antitrust Laws, 344–345 (1955).)

Upon the recommendation of Presidents Eisenhower and Kennedy and the Attorney General's National Committee to Study the Antitrust Laws, the Antitrust Civil Process Act of 1962 was enacted to enable the Department of Justice to obtain documentary evidence during the course of an antitrust investigation. While the Antitrust Civil Process Act of 1962 was and is necessary to effective enforcement of the antitrust laws, it has not proved to be efficient. Assistant Attorney General Thomas E. Kauper testified:

> The limited scope of the Act substantially impairs our investigative effectiveness by limiting Civil Investigative Demands to current or past alleged violations, to legal entities not natural persons, to documentary material, and to parties under investigation.

In addition, Assistant Attorney General Kauper has documented the need for Section 201 with a list of case studies furnished to the House Monopolies and Commercial Law Subcommittee in which the Department's antitrust investigations have been hindered or thwarted by the absence of investigatory authority that this legislation would provide. A number of these case studies are set forth in the ensuing discussion of the specific provisions of Title II's amendments to the Antitrust Civil Process Act (hereinafter "ACPA").

The Committee agrees that with respect to information falling outside the scope of the original Antitrust Civil Process Act, the Department has still been forced to rely upon unsatisfactory methods for obtaining necessary facts. The importance of Title II's expanded investigatory authority is underscored by the fact that civil complaints account for approximately seventy percent of the Department's antitrust cases.

Section 201(a)—Federal Trade Commission Act

Section 201(a) amends section 2(a) of the ACPA by striking therefrom the authority of the Department of Justice to issue a CID with respect to violations of the Federal Trade Commission Act. This authority has never been used, and it is the Committee's judgment that under the 1974 Magnuson-Moss Federal Trade Commission Improvements Act the Federal Trade Commission now has adequate investigative authority so as to make this provision unnecessary.

Section 201(b)—Antitrust investigation—Mergers

Section 201(b) amends section 2(c) of the ACPA to expand the definition of the term "antitrust investigation" to include investigations into "any activities preparatory to a merger, acquisition, joint venture, or similar transaction which may lead to any antitrust violation." This section would clarify existing law by correcting the adverse effects of a Ninth Circuit Court of Appeals decision, which held that civil investigative demands may issue only to require the production of documents relating to current or past, but not incipient, violations. In *United States* v. *Union Oil Co.*, 343 F.2d 29 (9th Cir. 1965), the court concluded that the 1962 Act did not authorize the Department to issue a CID for the production of documents in connection with an investigation of a proposed acquisition of a fertilizer company by a petroleum company because no violation of section 7 of the Clayton Act occurred until the acquisition was actually made. The court held that a demand under the Antitrust Civil Process Act must be confined to the ascertainment of whether or not a person is or has been engaged in an antitrust violation. Under this interpretation, the Department is excluded from compelling documentary material to ascertain whether or not a proposed merger violates section 7 of the Clayton Act until such merger is consummated. With respect to this problem, Assistant Attorney General Kauper testified before the Antitrust and Monopoly Subcommittee as follows:

> S. 1284 clarifies and, to some extent, expands our authority to seek information on incipient violations, an area of some judicial confusion. [Citing *United States* v. *Union Oil Co.*, 343 F.2d 29 (9th Cir. 1965).] This is a highly desirable change, since investigations of yet to be consummated mergers will always involve incipient conduct.

Congress has clearly recognized the desirability of preventing violations of section 7 of the Clayton Act (*See* 15 U.S.C. 25) and the extension of civil investigative demand authority to reach investigations of mergers which are contemplated but not yet consummated is essential if force is to be given to this Congressional policy. Two of Assistant Attorney General Kauper's case studies supplied to the House Monopolies and Commercial Law Subcommittee demonstrate the need for the Department to have civil investigative demand authority which will reach incipient violations. They are as follows:

> 2. In 1975, two large industrial corporations informed the Antitrust Division that a joint venture between the two would be established by an agreement to be signed approximately six weeks later. The joint venture would manufacture products involving billions of dollars in sales in an already highly concentrated market. Antitrust counsel for the parties offered to provide us with selected documents containing relevant industry data. Some documents revealed positions taken by company personnel which appeared inconsistent with positions taken by the companies during negotiations. In addition, throughout the investigation, there was a concern that a comprehensive review of the parties' files would have produced important information not available in the selective documents provided by counsel. It would have been extremely helpful to have been able to obtain a broader file disclosure and to depose company personnel on crucial market issues. In short, we had to analyze this important and complex transaction almost entirely on the basis of documents selected by counsel with an assumed bias in the outcome of our evaluation.
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> 12. In 1972 we investigated a proposed acquisition involving agricultural products. The acquiring company declined to comply with a letter request. We then served a CID on it, and the company initially took the position that it would not comply in view of the ruling in *United States* v. *Union Oil Company of California*, 343 F.2d 29 (9th Cir. 1965). That case holds that parties to an unconsummated merger cannot be forced to comply with a CID because the statute does not apply to "future" violations. The reluctant company did eventually "voluntarily" produce some of the material we had demanded, but we were unable to put together the facts in time to make an intelligent decision on whether or not to sue before the merger was consummated. Thus, our ultimate decision not to challenge this acquisition was delayed until after consummation because of our inability to obtain necessary information quickly.

Section 201(c)—Documentary material—Natural persons

Section 201(c) amends section 2(f) of the ACPA by expanding the definition of the term "person" so as to include natural persons. Under the existing statute the term "person" is defined as any corporation,

association, partnership, or other legal entity not a natural person (15 U.S.C. 1311(f)). The Committee believes that this is a basic change which has been long overdue. An employee of a corporation subject to an antitrust investigation may possess informal, handwritten notes of a meeting or conversation relevant to an antitrust investigation. Such individuals may have received copies of early drafts or informal memoranda which are not part of a corporation's routinely-retained documentation. Other personal records such as telephone bills, expenses and calendars may be useful in fixing the approximate dates of events which are important to the investigation. In addition, the Department investigates corporations which are not publicly held, and in this situation the personal records of a sole shareholder or chief operating officer may contain relevant information not retained by the corporation. One of the purposes of section 201(c) is to enable the Antitrust Division to issue a civil investigative demand to obtain such information.

Section 201(c)—Color or authority of State law

Section 201(c) amends section 2(f) of the ACPA by adding to the definition of the term "person" the language "including any natural person or entity acting under color or authority of State law." This amendment is intended to clarify the authority of the Department to issue civil investigative demands to investigate conduct which may or may not fall within the scope of an exemption to the antitrust laws. Whether or not such conduct falls within the scope of an exemption or is immunized from antitrust prosecution is a question to be determined at trial or after an action has been filed. Section 201(c) should make it clear that an allegation that conduct falls within the scope of an exemption should not preclude the Department from conducting an investigation.

Section 201(e)—Documentary material—Third parties

Section 201(e) amends section 3(a) of the ACPA to, in conjunction with Section 201(c), grant the Antitrust Division the authority to compel the production of documentary material from natural persons and business entities who are not the subject of an antitrust investigation. The original statute precluded the issuance of civil investigative demands not only to natural persons, but also to business entities other than those who were the subject of the investigation. Section 201(e) grants the Antitrust Division the authority to obtain documents from natural persons or individuals who are not themselves the targets of the investigation. Customers, suppliers, competitors, former employees and trade associations often possess information that is vital to a particular investigation and it is important that the Division have a means of access to this information. Customers and suppliers, in whose interest it might ordinarily be to supply the Antitrust Division with such information, may be deterred from doing so because of fear of retaliation by companies under investigation. It seems reasonable to expect that these sources will be more willing to supply the Antitrust Division with such information providing they can rely upon the compulsion of a civil investigative demand as a justification for such cooperation.

The ability of the Department to compel the production of documentary material from third parties is particularly important in merger investigations. Under section 7 of the Clayton Act (15 U.S.C. 18), in order for the government to prove that the effect of a merger may be substantially to lessen competition, it must demonstrate relevant geographic and product markets. Customers, suppliers, competitors, and trade associations generally have market data essential to resolving the factual issues. For many product lines and geographic markets, this data will not be available from government or public sources. Two of the case studies supplied by Assistant Attorney General Kauper to the House Monopolies and Commercial Law Subcommittee demonstrate the need for the investigatory authority to get documents from third parties:

> 1. We are currently involved in an investigation of one of the largest mergers, in terms of dollar value, to date. An analysis of the competitive impact of the merger in several key markets will determine whether a suit under the Clayton Act will be filed. It is most important that this analysis take into account the most comprehensive and reliable data available. In one of these markets, information necessary for a definitive analysis is not available from public sources. However, there is an industry trade association which reportedly compiles detailed sales and market information annually from its members. We have requested the association to provide this information voluntarily but it has refused. Without this data the result may be a lawsuit based on potentially unreliable figures from some private sources in the industry or a decision not to proceed because of insufficient data.
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> 5. In mid-1975, the Division investigated an important acquisition involving large manufacturers of consumer products. The transaction was eventually terminated when the Division expressed its opposition. However, that decision was made without the benefit of industry data which three major competing manufacturers refused to provide voluntarily. This data was readily accessible and would not have unduly burdened the companies. Because of the lack of cooperation this investigation took far more time and effort than it would have if we could have obtained appropriate data, and our conclusions were reached without the benefit of all relevant information.

The absence of necessary product or market data is often a determinative factor in the Department's decision on whether or not to file a civil complaint. Furthermore, in many merger investigations, it is important that the Antitrust Division be able to move quickly in order to file suit and seek a preliminary injunction before the transaction is consummated. After the acquisition has taken place, it is difficult for the Department to secure adequate relief even if it is successful in establishing the illegality of the merger at trial. In such situations it is especially important that the Department be able to go directly to third parties that it knows possess the needed information.

Section 201(e)—Depositions and interrogatories—Targets of the investigation

Section 201(e) further amends section 3(a) of the ACPA to expand the authority of the Department to issue written interrogatories and take oral depositions whenever the Attorney General or the Assistant Attorney General has reason to believe that a person may have information relevant to a civil antitrust investigation or to the competitive issues in a regulatory proceeding. This authority would contribute significantly to the Department's ability to make a fully informed decision as to whether or not to file suit or intervene in a regulatory agency proceeding. Ordinarily, the first step in an antitrust investigation is for the Department to issue a civil investigative demand for documents. However, an examination of documents often produces an inconclusive or ambiguous picture of the transaction or policy under investigation. It then becomes necessary for antitrust investigators to question corporate officials in order to ascertain the relevant facts. In addition, deposition authority may be crucial with respect to corporate policies that are pursued but never reduced to writing.

The Department need for authority to take depositions may also arise in two more specific contexts. First, in some cases a company's policies as expressed in writing vary materially from practices actually followed. For example, a company frequently adopts and circulates to its executives a written directive condemning various anticompetitive practices, while at the same time informally encouraging such anticompetitive conduct by exerting strong pressures on employees to meet unrealistic sales quotas. There may also be occasions in which, to protect itself, a company feels compelled to assume a particular public position in writing but declines to follow that policy in reality. By authorizing the Department to obtain only written documents, restrictions in existing law create the possibility that decisions whether or not to bring suit may be based upon erroneous perceptions of the anticompetitive impact of particular business policies. The availability of deposition authority would significantly reduce this risk.

Second, deposition authority is needed when documents are simply not available for whatever reasons as, for example, if they have been destroyed. The specific prohibition against the destruction of documents, 18 U.S.C. 1505, applies only after a civil investigative demand has been issued.* If a firm which is a target learns of an investigation before the issuance of a CID and destroys incriminating documents, then an antitrust investigation may be completely thwarted. In this or other situations when documents do not exist, deposition authority may provide the only method for reconstructing the firm's policy or specific transaction and thus permit a meaningful investigation.

Several of Assistant Attorney General Kauper's case studies supplied to the House Monopolies and Commercial Law Subcommittee demonstrate the need for deposition authority with respect to firms which are the targets of an antitrust investigation. They are as follow:

*There is authority for the proposition that the provisions of 18 U.S.C. 1503, relating to the obstruction of the due administration of justice, apply when a person who knows that there is an investigation pending but has not formally been served with process destroys documents to prevent their production. *United States* v. *Solow*, 138 F. Supp. 812, 816–817 (S.D.N.Y. 1956).

3. Some time ago, the Division learned of a contract between two firms which seemed to involve an agreement by the companies not to compete. An investigation was opened and a CID was issued to both parties seeking documents concerning the possible anti-competitive agreement. One document suggested that officials of both companies had met privately, and it appeared that competitive concessions had possibly been made. No such meeting was recorded in any documents produced pursuant to the CID. The possibility of interviewing these officials has been considered but we have found in similar situations that the disadvantages of not having the parties under oath and the absence of a formal record of the interview limits the usefulness of this approach. A comprehensive analysis of this matter requires the ability to depose these two individuals under oath to determine the circumstances under which the contract was negotiated.

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4. We are currently investigating the acquisition by a foreign company of a domestic firm which manufactures certain chemical products. It appears that the acquisition may eliminate competition in several markets involving particular chemical products. One of these markets is very highly concentrated, *i.e.*, the top four firms may control as much as 90 percent of the market. However, analysis of the competitive impact of the transaction in that market has been very difficult because of the technical nature of the products involved. The companies argue that these products are easily produced by any company with a broad chemical product line. We have sought market data from the two companies to clarify the situation, but both companies have denied that the information exists in documentary form and have refused to have their officials interviewed. With the power to depose company officials or to propound interrogatories on these issues, we could properly evaluate the competitive issues.

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7. Several years ago, we issued a CID to a professional association to determine whether association members had compiled and utilized a fee schedule. Shortly before the CID was served but after the association learned of our investigation, it formally rescinded its fee schedule. Counsel for the association argued that the matter was moot and that the investigation therefore should be terminated. Because of the circumstances under which the schedule had been withdrawn, it was necessary to determine whether the members had in fact ceased using it. One member was interviewed by the staff, but the results were inconclusive since the interviewee was under no obligation to answer the questions fully and accurately. Authority to depose members would have allowed us to determine the motivation and effectiveness of the alleged repeal of the fee schedule.

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9. We have received complaints that a large service corporation has engaged in what may be a tying arrangement, *i.e.*, it sells its service only to customers that agree to purchase related products. A CID was issued to the company, and, after a court struggle, documents were submitted. However, the investigation is now stalled because the documents are inconclusive. If the oral testimony of persons who have negotiated the relevant contracts could be taken under oath, we could accurately determine whether there has been an anti-competitive effect or purpose. The parties have refused to cooperate voluntarily.

In many instances depositions and interrogatories may be less burdensome than requests for documents. Under section 201(e) the Department would be permitted to choose between requests for documentary material, interrogatories, or depositions. This more flexible authority would allow the Department to select the most direct and appropriate discovery device, thereby increasing the efficiency of its investigation while at the same time reducing the burden upon the recipient. The Committee believes that the authority conferred by this provision is essential to effective antitrust enforcement.

Section 201(e)—Depositions and interrogatories—Third parties

Section 201(e) further amends section 3(a) of the ACPA to expand the Department's authority to issue written interrogatories or take oral depositions not only of persons that are the targets of an investigation, but also of third parties as well. The authority to obtain such information would again contribute significantly to the Department's ability to make a fully informed decision to bring suit or intervene with respect to the competitive issues in a regulatory agency proceeding. Customers, suppliers and competitors may possess technological expertise which is simply not available elsewhere. Such individuals may be reluctant to supply relevant information or expert opinion voluntarily because of fear of retaliation by those firms under investigation. Former employees or other third parties may have been present during a transaction or meeting for which there are no records, but which may have constituted a violation. It is reasonable to expect that these sources would be more willing to supply the Antitrust Division with such information providing they can rely upon the compulsion of a CID as a justification for such cooperation.

Once again, several of Assistant Attorney General Kauper's case studies demonstrate the need for deposition authority with respect to third parties. They are as follow:

6. We are currently investigating the merger of two very large domestic corporations. One key issue is whether technology utilized to produce certain products is transferable from one product area to another. A large United States company manufactures products in both relevant areas but has refused to furnish us with information necessary to assess the technology transfer issue. The ability to depose technical personnel may be crucial here since documents alone may be insufficient to answer the complex technological questions raised.

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8. We are currently investigating a significant merger of two direct competitors in the plastics industry. Sales of the specific product involved amounted to $200 million a year. The top four firms that manufacture this product have approximately 80 percent of the market. Market analysis problems abound in this area due to complex product technology. Two firms that make the specific product involved have refused to allow their personnel to be interviewed. This lack of cooperation has largely frustrated this investigation.

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11. We are currently investigating a very important service industry to determine whether certain common practices in the industry are in effect disguised price fixing in violation of the Sherman Act. Because of the market power of the target of this investigation, its customers have been extremely reluctant to talk freely and fully with the staff. If we had the power to obtain the oral testimony under oath of officials of these purchasing companies, we would now be in a much better position to evaluate this complex matter.

The Committee carefully considered the rights to be accorded targets of an antitrust investigation during pre-complaint discovery proceedings involving third parties. It has been argued, for example, that counsel for targets should be permitted to be present during third party depositions. The Committee agrees with the views of Assistant Attorney General Kauper in this regard:

> The mere presence of representatives of target companies at depositions could itself produce counterproductive and anti-competitive consequences. When the Department investigates possible collusive conduct, many of the companies involved are competitors. Assuming they could be identified, if representatives of all targets are present during depositions, then an officer of one company may be divulging business strategies and policies not only to antitrust investigators but also to his chief business rivals. The Department is sensitive to the legitimate business interest in confidentiality of trade secrets and business practices and has therefore recommended that CIDs be specifically exempted from the Freedom of Information Act. Adoption of an adversary procedure for depositions is inconsistent with this legitimate interest. The presence of representatives of targets would also discourage third party witnesses from cooperating with antitrust investigators. An employee, customer, or supplier whose economic survival is dependent upon the target will be reluctant to divulge information if he fears retaliation.
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> The presence and participation of counsel for the targets at depositions of other parties would turn the investigatory process into an adversary proceeding and thereby delay and complicate every investigation. As Chief Justice Warren noted for the Supreme Court in 1960 in an analogous context, "The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were per-

> mitted to convert the investigation into a trial." *Hannah* v. *Larche*, 363 U.S. 420, 446. This applies equally well to antitrust investigations conducted by the Department of Justice.

That Title II confers investigative authority on the Attorney General may be a distinction, but the Committee believes it to be a distinction without a difference. *Hyster Co.* v. *United States*, 388 F.2d 183 (9th Cir. 1964).

The proposed participation of the target at the precomplaint stage is unprecedented in American jurisprudence whether one looks to civil or criminal analogies. Courts have consistently held that no such right exists at the investigatory stage. *See*, *e.g.*, *Hannah* v. *Larche*, 363 U.S. 420 (1960). It would transform the pre-complaint investigation into a mini-trial; the investigatory function would be converted into an adversary proceeding. For similar reasons, the Committee rejected an amendment which would have required notice to the target of an investigation and court approval prior to the issuance of a civil investigative demand involving a third party. The Committee does not believe that investigations involving third parties should be converted into adversary proceedings. *Accord*, *State* ex rel. *Londerholm* v. *American Oil Co.*, 202 Kan. 185, 446 P.2d 754 (1968).

Section 201(e)—Federal administrative and regulatory agency proceedings

Section 201(e) further amends section 3(a) of the ACPA to authorize the Department to utilize all of its civil investigative demand powers when it intervenes in Federal administrative or regulatory agency proceedings. This authority is appropriate because the Department is the principal spokesman for our national policy favoring effective competition before such proceedings. Section 201(e) limits the Department's discovery powers in such proceedings to information "relevant . . . to competition in a federal administrative or regulatory agency proceeding." The economic importance of the Department's participation in such proceedings is substantial; approximately 20 percent of the gross national product is currently subject to regulation.

The principal argument urged against granting the Department this authority is that it would be unfair for the Antitrust Division to have discovery powers that are not available to other parties in the proceedings. Assistant Attorney General Kauper addressed this issue in his testimony before the Antitrust and Monopoly Subcommittee as follows:

> The fairness argument, which is really a propriety issue, assumes that the law enforcement function of the Division is the only justification for compulsory process by the Division, although we certainly have access to the discovery procedures of any agency before which we are appearing. But I think it fails to comprehend the true role of the Division. True, we are primarily a law enforcement agency. But especially in recent years, subject to delegated authority from the Attorney General, the Division has become one of the prime advocates of competition policy before federal regulatory agencies. Our efforts in this field have been viewed as particularly impor-

> tant because of the potential impact of agency decisions giving appropriate weight to competition policy, and I believe we have been an affirmative influence in many areas. This activity is increasing and becoming ever more important. The ability to obtain more complete information for use in such proceedings would clearly be advantageous. Thus, we support that provision of Title II, although we would undoubtedly not use this authority in many agency proceedings.

The Committee is of the opinion that the Department does not participate on the same footing as other parties who are asserting their private interests in obtaining a benefit or protection from the regulatory agency involved. The Antitrust Division's interest is as an advocate, often the only one, of the public interest in maximizing competition in the determination of regulatory policy. If the Division's arguments are not persuasive because of a lack of adequate data available only in the files of private parties who do not have the incentive or duty to produce it, it is the public interest that suffers.

Section 201(f)—Contents of civil investigative demands

Section 201(f) amends Section 3(b) of the ACPA to specify the contents of CIDs issued for answers to written interrogatories or for the taking of oral depositions.

Section 201(f) also deletes one phrase from the existing statute. Under the 1962 Act, when the Department issues a civil investigative demand, it is required to "state the nature of the conduct constituting the alleged antitrust violation which is under investigation." Section 201(f) substitutes in lieu thereof the language "state the nature of the investigation." In *Matter of Gold Bond Stamp Co.*, 221 F.Supp. 391 (D.C. Minn., 1963), *aff'd per curiam* 325 F.2d 1018 (8th Cir., 1964), the district court considered the question of how specific a civil investigative demand must be as to conduct of the company being investigated. In holding that the content of that civil investigative demand was sufficient, the Court stated as follows:

> Necessarily, therefore, the nature of the conduct must be stated in general terms. To insist upon too much specificity with regard to the requirement of this section would defeat the purpose of the Act, and an overly strict interpretation of this section would only breed litigation and encourage everyone investigated to challenge the sufficiency of the notice.

Section 201(f) is intended to codify the standard set forth in *Matter of Gold Bond Stamp Co., supra*, and extend that standard to civil investigative demands for the taking of an oral deposition or for the answers to written interrogatories. The test is whether the statement in the civil investigative demand is sufficient (1) to adequately inform the person served of the nature of the conduct being investigated, and (2) to determine the relevancy of the documentary material, oral testimony, or answers to written interrogatories demanded. The test should be the same for civil investigative demands issued in connection with the Department's participation before a Federal administrative or regulatory agency proceeding, namely, whether the statement in the civil investigative demand is sufficient (1) to ade-

quately inform the person served of the nature of the competitive issues the Department intends to raise in such proceedings, and (2) to determine the relevancy of the information being sought.

Section 201(g)—Reasonableness, privilege

Section 201(g) amends section 3(c) of the ACPA to apply the safeguards of the existing statute with respect to the reasonableness of a demand and privileged information to the expanded investigatory powers authorized by this legislation.

The existing statute provides that no CID shall contain a requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a grand jury or require the production of any documentary material which would be privileged from disclosure if demanded by a grand jury subpoena. Section 201(g) expands these provisions to cover civil investigative demands for the taking of an oral deposition or for answers to written interrogatories. The amendment imposes an additional requirement with respect to a demand for answers to written interrogatories, namely, that such demand shall not impose an undue or oppressive burden on the person served.

Section 201(h)—Service

Section 201(h) amends section 3 of the ACPA by inserting two new subsections setting forth the procedures to be followed in making service of a CID or a petition to enforce, modify or set aside a CID on a natural person and on a person apparently not found within the territorial jurisdiction of the United States.

Section 201(i)—Certificate of compliance

Section 201(i) amends section 3 of the ACPA by adding 3 new subsections 3(i), 3(j), and 3(k), which set forth the manner in which compliance shall be made to CIDs compelling the production of documentary material, answers to written interrogatories, and oral depositions.

Subsection 3(k) sets forth in subparagraphs (1) through (5) the procedure to be followed for the taking of an oral deposition. The testimony shall be taken in the district where the witness lives, is found, or transacts business, unless the witness and the antitrust investigator agree otherwise. The witness will be under oath administered by the hearing officer. Generally, the stenographer taking the testimony will also serve as the hearing officer. The officer has no authority to compel answers or impose sanctions for non-cooperation.

The officer's function is a housekeeping one, much like that of the presiding official in a Federal Trade Commission investigative hearing. Only the witness, his counsel, the antitrust investigator, the hearing officer and the stenographer are permitted to be present during the taking of the deposition. This provision affords the witness the opportunity to keep his testimony confidential.

Subsection 3(k)(3) provides that after the testimony has been transcribed, the witness shall be given an opportunity to examine the transcript and correct any errors therein. The witness is also given the opportunity to clarify or complete any answers which are equivocal or otherwise incomplete on the record. Any corrections or clarifications shall be entered on the transcript by the hearing officer. These

provisions for the correction and signing of the transcript are similar to those of Rule 30(e) of the Federal Rules of Civil Procedure.

The witness is entitled to inspect and copy a transcript of his testimony to the extent that he would be permitted to do so if it were a transcript of testimony before a Federal grand jury. In other words, the witness must file a motion for leave to inspect and copy before the Federal district where the deposition was taken and make a showing of "particularized and compelling need" for such testimony. This provision is intended to prevent witnesses from circulating transcripts of their testimony among targets of the investigation.

During the hearings on this legislation, a number of witnesses expressed concern about those provisions of Title II, which grant the Department the authority to issue civil investigative demands for the taking of oral depositions. This precomplaint deposition authority has been analogized to a grand jury proceeding. Subsection 3(k)(4) provides that any person compelled to appear to give an oral deposition may be accompanied by counsel. This protection is not afforded to a grand jury witness. Counsel may intervene when he believes the questions propounded by the antitrust investigator violate his client's legal rights. Counsel may object on the record on the grounds of privilege, self-incrimination, or any other legal grounds. Counsel may also advise his client to refuse to answer any or all questions propounded. In that event, the Department attorney must file a petition in Federal District Court pursuant to section 5(a) of the Antitrust Civil Process Act (15 U.S.C. 1314(a)) for an order enforcing compliance with the demand. The filing of a petition for enforcement constitutes a proceeding before the district court and the court is required to determine whether or not the question propounded should be answered. Such a determination is a fully-adversary proceeding and the deponent, of course, would have the right to counsel. A petition to enforce a civil investigative demand is an original, summary proceeding in the district court. No other dispute is before the court in such a proceeding. The court's order resolving the dispute is thus necessarily final and appealable. Section 5(d) of the Antitrust Civil Process Act (15 U.S.C. 1314(d)) expressly provides that a final order enforcing, modifying or setting aside a civil investigative demand shall be appealable pursuant to 28 U.S.C. 1291.

Subsection 3(k)(4) further provides that if a witness refuses to answer a question on the basis of his privilege against self-incrimination, the Department may apply for a grant of immunity to compel his testimony in accordance with the provisions of 18 U.S.C. 6001–6003. If the court grants immunity to the witness pursuant to 18 U.S.C. 6002, the witness is required to answer. If the witness disobeys the court's order, subsection 3(k)(4) provides that the court may hold the witness in contempt. The witness would then have the right to seek appellate review of the courts action. The provisions of subsection 3(k)(4) are intended to limit the situation in which a person may be held in contempt to a continued refusal to answer after a grant of immunity pursuant to 18 U.S.C. 6002. In all other instances, a witness may appeal the court's order resolving a dispute before complying with the terms of the demand.

Subsection 3(k)(5) provides that any person examined pursuant to a civil investigative demand shall be entitled to the same fees and

mileage that are paid to witnesses in the courts of the United States. This applies to all natural persons, whether or not they are the subject of an antitrust investigation.

In addition to witness fees and mileage, firms and natural persons who are subject to compulsory process pursuant to this title and who are third parties or not the subject of the antitrust investigation shall receive reimbursement for the expenses incurred in complying with a civil investigative demand. It is the intent of the Committee that those firms and natural persons who are not suspected of wrongdoing suffer no financial loss as a result of their compliance with the Department's civil investigative demand. This is in contrast to the target of the investigation who should not have the government absorb the expenses and attorneys' fees necessary for its defense.

The expenses reimbursed by the Department for compliance with the CID shall be all those that are necessary to fulfill the terms of the demand, whether it be for the taking of an oral deposition, answers to written interrogatories, the production of documentary material, or any other information discoverable under this title. If a third party files a petition to modify or set aside a demand pursuant to section 5(b) of the Antitrust Civil Process Act, or if the Department files a petition to enforce compliance with a demand pursuant to section 5(a) against a third party, the court shall award expenses and attorneys' fees to the third party if it is successful in that proceeding or on an appeal therefrom. The court shall award expenses and attorneys' fees it considers reasonable in comparison with the cost of similar services in the community.

If a dispute should arise as to the reasonableness of expenses or attorneys' fees or any other matter concerning the amount of the award, the court shall not stay compliance with the civil investigative demand.

Sections 201(j), 201(k), 201(l), 201(n), 201(o), 201(p)—Antitrust custodian

Sections 201(j), 201(k), 201(l), 201(n), 201(o), and 201(p) each amend subsections (a), (b), (c), (e), (f) and (g) of section 4 of the Antitrust Civil Process Act. Sections 201(j), 201(k), 201(l) and 201(p) make conforming amendments as to the procedures the antitrust custodian is to follow while in the possession of documentary material, answers to written interrogatories, and transcripts of oral testimony. Sections 201(n) and 201(o) set forth the conditions under which documentary material may be returned.

Section 201(m)—Antitrust custodian—Use of documentary material, answers to written interrogatories, transcripts of oral testimony

Section 201(m) amends subsection (d) of Section 4 of the Antitrust Civil Process Act to provide that the custodian may deliver documentary material, answers to written interrogatories, and transcripts of oral testimony to an attorney of the Department of Justice for use before a court, grand jury, or Federal administrative or regulatory agency proceeding.

Section 201(m) adds a new subparagraph to section 4(d) which grants the antitrust custodian the authority to transmit to the Federal Trade Commission in response to a written request by the Commission,

copies of documentary material, answers to written interrogatories or transcripts of oral testimony for its use in any investigation or proceeding under its jurisdiction. The Assistant Attorney General in charge of the Antitrust Division is given the discretion to refuse such a request by the Commission if he determines it would not be in the pubic interest to do so. In this connection, the Commission is made subject to the same limitations on the use of such material as are imposed on the Department of Justice.

Section 201(q)—Judicial proceedings—Petition for enforcement

Section 201(q) amends section 5(a) of the Antitrust Civil Process Act by deleting language which would require the Department to serve a petition for enforcement for compliance with a demand on a person in the judicial district in which such person has his principal place of business, where he transacts business in more than one judicial district. Under section 201(q), the Department may serve the petition in the judicial district where the person resides, is found or transacts business. The Committee believes that the language being deleted has no practical utility, and that the amendment will not place any increased burden on the person being served.

Sections 201(r), 201(s) and 201(t)—Judicial proceedings—Petition to modify or set aside a demand

Section 201(r), 201(s) and 201(t) amend section 5(b) of the Antitrust Civil Process Act. Section 201(r) grants the antitrust investigator the authority to extend the time during which a person may file a petition with a Federal district court to modify or set-aside a civil investigative demand. Section 201(s) adds language requiring the person filing a petition to comply promptly with those portions of the demand which the petition does not seek to modify or set aside. Section 201(t) adds language stating that any ground not included in a petition to modify or set aside shall be deemed waived unless there is good cause shown for the failure to assert it.

Sections 201(u) and 201(v)—Conforming amendments

Section 201(u) amends section 5(c) of the Antitrust Civil Process Act to make that section conform to expanded investigative authority granted by this legislation. Section 201(v) amends 18 U.S.C. 1505 to make that section also conform to the expanded investigative authority granted by this legislation. 18 U.S.C. 1505, which makes it a crime to obstruct compliance with a demand under the Antitrust Civil Process Act for documentary material, is amended to include information obtained by written interrogatories or oral depositions. Upon conviction of a violation of 18 U.S.C. 1505, a person may be fined up to $5,000 or imprisoned for up to 5 years, or both.

Section 201—Safeguards

The Committee has carefully considered the issue of whether or not the safeguards contained in the Antitrust Civil Process Act as amended by section 201 are sufficient to protect the legitimate interests of the public against unreasonable government intrusion. The original Antitrust Civil Process Act of 1962 provided for a number of procedural safeguards to protect the public against the potential for abuse of the Department's precomplaint discovery process for

corporate documents. These procedural safeguards have been continued and expanded to cover the additional precomplaint discovery powers granted by this title. The provisions in the 1962 Act have been extended to protect natural persons against an unreasonable demand for documents. These procedural safeguards have also been expanded to accord the same protection to any person who receives a civil investigative demand for the taking of an oral deposition, or for answers to written interrogatories. The Committee is confident that the provisions of the amended Antitrust Civil Process Act strike a fair balance between the rights of persons under investigation and third parties against unreasonable government intrusion and the need for effective and efficient enforcement of the antitrust laws.

The Committee agrees with the following statements of Assistant Attorney General Thomas E. Kauper as to the sufficiency of the safeguards which have been incorporated into this legislation:

> Notwithstanding the fact that the bill authorizes no procedures that are not commonly employed by numerous federal agencies, careful safeguards have been incorporated in [Title II] to protect against even the appearance of governmental overreaching. Grounds for challenging requests, interrogatories, or questions are carefully enumerated. Procedural safeguards, including the right of a person to the assistance of counsel during the taking of depositions, are provided. Furthermore, the powers of Department attorneys are carefully circumscribed: in the event a dispute arises regarding the propriety of any demand or request, the government must petition a court in order to secure enforcement of the demand or request. These protections assure that the legitimate interests of persons under investigation or third parties with important information will not be compromised.
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> . . . A recipient of a CID may seek to quash the CID in court by showing that it is oppressive, unreasonable, irrelevant, or has been issued in bad faith. A witness has the right to the presence and advice of counsel during any deposition. He may refuse to answer any question on the grounds of privilege, self-incrimination, or other lawful grounds. All refusals to answer must be honored unless the government attorney can obtain a judicial order compelling an answer. The testimony of a witness must be transcribed, and he has a right to review and correct the transcript.
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> There is the intimation in some of the testimony that opposition to [Title II] stems not so much from serious concerns about the merits of the bill but rather from a generalized interest in confining or restricting meaningful antitrust enforcement by opposing enactment of modifications of our investigative authority. To be sure, broad discretionary powers should not be conferred unnecessarily upon law enforcement authorities, but history shows that antitrust enforcement

> agencies have not abused their investigative powers. The FTC currently has investigatory powers similar to those proposed in [Title II] and several state attorneys general possess investigative powers comparable to or greater than the proposed authority of the Department. No evidence has been presented to indicate that either federal or state authorities have abused existing investigative authority.

In the past 13 years, the Department of Justice has issued approximatelly 1700 civil investigative demands to business entities for documents. During the hearings on this legislation, there was opposition to granting the Department the additional precomplaint discovery authority contained in Title II. It is significant that no history of abuse under the 1962 Act—or even a single instance of abuse—was brought to the Committee's attention. Precomplaint discovery authority similar to that in Title II has been granted by statute to State attorneys general to enforce their respective State antitrust laws in nineteen different States. There was no history of abuse brought to the Committee's attention during the hearings arising out of that experience.

It is significant that after 13 years experience, there are only a handful of reported decisions involving a challenge to the Department's enforcement of a CID. The validity of the demand has been upheld in all but one of those decisions.

Section 5 of the Antitrust Civil Process Act invokes the full power and jurisdiction of the Federal district courts when either a petition for enforcement of a civil investigative demand is filed by the Department under section 5(a) or a petition to modify or set aside the civil investigative demand is filed by the person served under section 5(b). This basic protection is continued and expanded under Title II of S. 1284. Section 201(r) of Title II provides that any person served with a civil investigative demand for the production of documentary material or for the taking of an oral deposition or for answers to written interrogatories may file a petition to set aside or modify such demand in the Federal district court where he resides or does business. The grounds for which a petition to set aside or modify the demand may be filed are broad. They are: (1) any failure of the civil investigative demand to comply with the provisions of the amended Antitrust Civil Process Act; (2) any Constitutional right; or (3) any other legal right or privilege. When a petition to modify or set aside a demand is filed, the action before the Federal district court constitutes a proceeding in which the court is required to determine whether or not the civil investigative demand should be enforced. Existing case law establishes that the courts exercise great care in making a determination as to whether or not the demand is enforced. In *In the Matter of the Petition of the Cleveland Trust Company*, 1972 Trade Cases ¶ 73,991, the court stated as follows:

> * * * Such determination is an adversary proceeding and the Court must do more than rubber stamp the Attorney General's determination of the validity of its own demand.

Another example of the care that courts exercise in attempting to determine whether or not a civil investigative demand should be enforced is found in *Chattanooga Pharmaceutical Assn.* v. *United*

States, 1965 Trade Cases ¶ 71,524; *aff'd* in *Chattanooga Pharmaceutical Assn.* v. *United States*, 358 F.2d 864 (6th Cir. 1966). In that case the district court stated as follows:

> There must be a dead line somewhere that will preclude organized society, local and national, from authorization to disperse the private rights of individuals as protected in the first eight amendments and the Fourteenth Amendment. To give the chief prosecuting officer of the United States the authority to require an individual who he thinks should be investigated for violating a federal law by using coercion to produce documents that might be used against him as evidence in a criminal case is really going far.
>
> On the other hand, the attorney general is faced with many serious difficulties in his efforts to protect business and the people generally by a proper enforcement of the antitrust laws. (1965 Trade Cases ¶ 71,524 at 81, 314.)

Section 5(e) of the Antitrust Civil Process Act (15 U.S.C. 1413(c)) makes the Federal Rules of Civil Procedure applicable to any proceeding in a district court to modify or set aside a civil investigative demand. This provision is continued under Title II of S. 1284. This application of the Rules includes the right to discovery afforded by Rules 26–37. In *Hyster Co.* v. *United States*, 338 F.2d 183 (9th Cir. 1964), the court stated as follows:

> * * * The demand is enforceable only in a judicial proceeding brought either by the Attorney General or the person served (Section 5(a), (b), (d), 15 U.S.C. Section 1314(a), (b), (d)). Moreover Section 5(e) (15 U.S.C. Section 1314 (e)), makes the Federal Rules of Civil Procedure applicable to any petition under the Act. Thus there is available to Hyster, in a petition to modify or set aside the demand, the safeguards afforded by rules 34 and 30(b). The court has a broad discretion to protect Hyster from an unreasonable demand.

The use of discovery provisions under the Federal Rules of Civil Procedure has been permitted to determine whether or not the issuance of a civil investigative demand was improperly motivated. In *Matter of the Cleveland Trust Company*, 1972 Trade Cases ¶ 73,991, the Cleveland Trust Company filed a petition to set aside the civil investigative demand. The petition alleged that the demand was issued in aid of an "inquiry of a legislative and political nature being pursued by an individual Member of Congress" and that such issuance constituted an improper use of the statutory power afforded by the Antitrust Civil Process Act. Along with its petition, the Cleveland Trust Company filed interrogatories seeking information as to the identity of the persons who worked on the preparation of the demand and who participated in the decision to issue the demand. The Government objected to answering the interrogatories on a number of grounds. The court held against the Government, and stated as follows:

> * * * if the government has subverted the use of the civil investigative demand by reason of political interference and pressure, evidence relating to the decision to issue the demand

is relevant to the instant controversy and not subject to executive privilege.

For other cases in which courts have considered and rejected allegations that the issuance of a civil investigative demand was improperly motivated, *see In The Matter of a Petition of Emprise Corp.*, 1972 Trade Cases ¶ 73,979 and *American Pharmaceutical Assn.* v. *United States*, 344 F.Supp. 9 (E.D. Mich. 1971); *aff'd* 467 F.2d 1290 (6th Cir. 1972).

An appropriate objection to the enforcement of a civil investigative demand is that the information sought is not relevant. (*In The Matter of a Petition of Emprise Corp., supra; Material Handling Institute, Inc.* v. *McLaren*, 426 F. 2d 90 (3rd Cir. 1970) *In The Matter of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D.C. Minn. 1963); *aff'd per curiam* 325 F. 2d 1018 (8th Cir. 1964).)

Relevance continues to be legitimate grounds for objection under this title. This applies, of course, whether or not the civil investigative demand is for documentary material or for the taking of an oral deposition or answers to written interrogatories.

Section 3(a) of the Antitrust Civil Process Act (15 U.S.C. 1312(a)) requires that all civil investigative demands be issued by either the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. The authority to issue civil investigative demands is not further delegable. In practice, this means that all CIDs are reviewed and approved personally by the Assistant Attorney General in charge of the Antitrust Division. This is not the Antitrust Division's practice with respect to the issuance of grand jury subpoenas, which are usually approved only by the section or field office chief who supervises the investigating attorney. Thus, the statutory requirement of section 3(a) insures that CIDs receive closer scrutiny and more extensive review than grand jury subpoenas. This requirement is continued under the provisions of Title II.

Section 201—Confidentiality

The confidentiality of information received pursuant to a civil investigative demand is preserved by entrusting all documentary material, written interrogatories, or oral testimony into the care of a designated attorney of the Antitrust Division who is to serve as custodian. The custodian is responsible for the safety of the material and for the return of all documentary material that has not passed into the control of any court, grand jury, or federal administrative or regulatory agency. Except with regard to use of CID material by the Department, severe restrictions are placed upon the dissemination of information provided pursuant to a CID. No documentary material, answers to interrogatories, or transcripts of oral testimony may be made available by the custodian to any individual other than the Federal Trade Commission, without the consent of the party supplying such information. Upon a written request of the Federal Trade Commission, the custodian shall deliver copies of the CID materials to the Commission unless the Assistant Attorney General in charge of the Antitrust Division determines that it would not be in the public interest to do so. Thus, Title II is intended to aid the Antitrust Division in the performance of its investigatory duties while at the same time protecting

the rights of individuals and corporations who are made the subject of a civil investigative demand.

The confidentiality of the testimony of a person served with a CID for the taking of an oral deposition is further preserved by the provisions of section 201(i) which exclude from the place where the examination is held all persons except the witness, his counsel, the antitrust investigator, the hearing officer and the stenographer. This provision is intended to protect the witness against retaliation by those firms or individuals who are under investigation.

Section 202(j)—Plea of nolo contendere in antitrust cases

Section 202(j) adds a new subsection to section 5 of the Clayton Act (15 U.S.C. 16) which provides that a plea of *nolo contendere* in criminal antitrust cases shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effectiveness of the administration of justice. The language is similar to that contained in Rule 11(b) of the Federal Rules of Criminal Procedure. The Committee believes that a legitimate distinction can be made in criminal antitrust cases where widespread damage may have been caused to the public as a result of the violation. Absent the benefits of section 5(a) of the Clayton Act, the burdens of antitrust litigation may preclude private parties from filing suit for recovery. The Committee believes that pleas of *nolo contendere* ordinarily should not be accepted in cases in which it appears that widespread damage occurred to private parties as a result of the violation. A plea of *nolo contendere* may be appropriate in a case where it appears that damage was insignificant or where the defendant has agreed to make restitution to the victims of the crime. In the absence of section 202(l) of this title, a plea of *nolo contendere* may also be appropriate where it is accepted on the condition that private plaintiffs in subsequent civil suits shall have access to documentary material and the transcript of testimony produced before the grand jury.

Section 202(k)—Antitrust investigation—Federal Trade Commission access to grand jury testimony and documentary material

Section 202(k) provides that upon a written request from the Federal Trade Commission, the Attorney General shall permit the Commission to inspect and copy documentary materials and testimony furnished to a Federal grand jury after the termination of its investigation. During the time the grand jury testimony and documents are in the possession of the Commission, it is subject to the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, Title 18, United States Code. The Attorney General is given the discretion to refuse the Commission's request if he determines that access to the documentary material or testimony would not be in the public interest.

The proceedings before a grand jury are protected against disclosure by the common law policy of secrecy. This policy is continued in Rule 6(e) of the Federal Rules of Criminal Procedure, Title 18, United States Code, which is presently the measure of the Commission's privilege of access to grand jury documents and testimony. The first sentence of Rule 6(e) permits discolsure, without leave of the district court, "of matters occurring before the grand jury * * * to

the attorneys for the government for use in the performance of their duties." Rule 54(c) of the Federal Rules of Criminal Procedure, Title 18, United States Code, limits the term "attorneys for the Government" in its application to "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of the United States Attorney * * *" In *In Re Grand Jury Proceedings*, 309 F. 2d 440 (3rd Cir. 1962) the Department of Justice took the position that the Federal Trade Commission was entitled to the use of grand jury material because of its special relationship to the Attorney General, under whose direction the grand jury proceeding was conducted. The basis of this special relationship was that both the Attorney General and the Federal Trade Commission have the responsibility for the enforcement of the Clayton Act. The Third Circuit Court of Appeals held that the term "attorneys for the government" was restrictive in its application and did not include the attorneys for the Federal Trade Commission. In its opinion, the Third Circuit Court of Appeals went on to state as follows:

> "The Commission has plenary authority to investigate possible violation of its cease and desist orders and, under section 9 of the Act, the 'power to require by subpoena the attendance and testimony of witnesses and the production of all * * * documentary evidence relating to any matter under investigation.' (15 U.S.C.A. 49.) See *United States* v. *Morton Salt Company*, 338 U.S. 632, 643 (1960). The witnesses who appeared before the grand jury, and the documents there produced, are readily available to the Commission and subject to administrative subpoena."

Since the term "attorneys for the government" does not include the Federal Trade Commission, the Commission, like any other party, may only gain access to grand jury testimony and documents upon a showing of particularized need before the district court wherein the grand jury was empaneled. The burden is on the party seeking disclosure to show that a particularized need exists which outweighs the policy of secrecy. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959). The Supreme Court has consistently held that a petition for motion for leave to inspect grand jury evidence is addressed to the sound discretion of the district court, to be dealt with in the light of the facts and circumstances of the particular case. (*Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959); *United States* v. *Procter and Gamble*, 356 U.S. 677 (1958).

Section 202 is a determination that the policy of grand jury secrecy is outweighed by the interest of the public in the efficient and economic administration of justice when the Federal Trade Commission seeks access to grand jury testimony and documentary material. It seems contrary to the efficient administration of justice to require the Commission to make a showing of particularized need before a Federal District Court or, failing that, to issue its own process to develop facts which have already been developed by the Department before a grand jury. Such a requirement imposes a burden on the Commission and the witness which may involve significant time and expense which is simply not justified.

Section 202(l)—Antitrust investigation—Private plaintiff access to grand jury testimony and documentary material

Section 202(l) also provides that a private plaintiff may inspect and copy documentary material and testimony furnished to a grand jury upon the payment of reasonable fees and after any civil or criminal proceeding arising out of the grand jury investigation has been completed. The private plaintiff shall file a petition seeking such access before the district court in which the grand jury was empaneled. The district court may impose such conditions on the grant of access or protective orders, as the interests of justice may require.

If the grand jury investigation results in the filing of a criminal or civil case which goes to trial, the evidence developed before the grand jury is ordinarily again introduced by the Government during the trial. The private plaintiff thus gains access to this evidence whether or not the Department is successful in its suit. This provision would grant a private plaintiff a right of access where a criminal proceeding was terminated by a plea of guilty, *nolo contendere*, or dismissal of the indictment. This provision would also grant access where a civil proceeding was terminated by a consent decree or a dismissal of the complaint. Section 202 would not grant the private plaintiff a right of access to grand jury testimony or documentary materials unless a criminal or civil proceeding was instituted as a result of the grand jury's investigation.

Under existing law, a private plaintiff in a treble damage antitrust action may be permitted access to grand jury testimony and documentary material upon a showing of particularized and compelling need. *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir. 1963); *In re Cement-Concrete Block Chicago Area Grand Jury Proceedings*, 381 F. Supp. 1108 (N.D. Ill. 1974); *Consolidated Edison Co. of New York* v. *Allis-Chalmers Mfg. Co.*, 217 F. Supp. 36 (S.D.N.Y.). In *Atlantic City Electric Co.* v. *A. B. Chance Co.*, *supra*, the Second Circuit Court of Appeals stated as follows:

> The principles enunciated by the Supreme Court in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), and *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958), seem to us clearly to establish that a court may order the disclosure of grand jury minutes when there is a showing of special and compelling circumstances sufficient to overcome the policy against disclosure. See also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 231–34 (1940). Although in none of those cases was grand jury testimony released to a plaintiff in a civil action, there is nothing in either the policy favoring secrecy or the reasons underlying it, see *Procter & Gamble*, supra, at 681 n. 6, which suggests that a rigid rule of secrecy must be maintained in this one situation although not in others. We do not think it can be said that simply because disclosure is sought in aid of a recovery rather than to defend against recovery or criminal conviction, justice will never require disclosure to a civil plaintiff. This fact, in line with the principles of the cases cited, is relevant only in determining whether a sufficient need for disclosure has been shown in a particular case.

District courts generally weigh the policy considerations underlying grand jury secrecy against the request for disclosure to determine if those considerations are applicable. The reasons for grand jury secrecy are set forth in *United States* v. *Amazon Industrial Chemical Corps.*, 55 F. 2d 254 (D.C. Md. 1931) as follows:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

These reasons have been consistently quoted with approval. *United States* v. *Procter & Gamble*, *supra*, 681 n. 6 (1958). Upon examination, district courts generally find that the policy reasons for grand jury secrecy are not applicable to situations where private treble damage plaintiffs are seeking access to grand jury testimony or documentary materials. (*U.S. Industries, Inc.* v. *United States District Court for the Southern District of California, U.S. Central Division*, 345 F. 2d 18 (9th Cir., 1965); Cert. Den. 382 U.S. 814; *State of Washington* v. *American Pipe and Construction Co.*, 41 F. R. D. 59 (D.C. Cal., Hawaii, Ore. and Wash., 1966). In the latter case, *State of Washington* v. *American Pipe and Construction Co.*, *supra*, the district court analyzed the situation as follows:

> Of the five reasons for preserving inviolate the minutes of the grand jury set forth in *United States* v. *Amazon Ind. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931), and approved by the Ninth Circuit in *U.S. Industries*, *supra* note 2, 345 F.2d at 22, only the fourth: "to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes", has any possible application to the instant problem, and here, even it is no longer of much weight.
>
> Over two and one-half years have passed since the indictments were returned and pleas entered by the defendants. Over one year has passed since the government Memorandum was unsealed. From the *U.S. Industries* opinion it would appear that there is very little information now in the government files which was not heretofore disclosed to defendants and defendants' counsel, as well as certain competitor plaintiffs and their counsel (some of whom are counsel for certain plaintiffs in the end-user cases). In addition thereto, the government, the party most concerned, for the fourth reason, *supra*, with the effect of disclosure upon future antitrust and other criminal prosecutions, is here urging that it be per-

> mitted to make disclosures within the limits of the court's order of June 30, 1966, *supra*.

Later, in the same opinion, the court gave its view of existing law as follows :

> It is now well settled that disclosure rather than suppression of relevant materials in grand jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting disclosure of relevant testimony therein.

The trend in recent court decisions is clearly in favor of more liberal disclosure of grand jury testimony and documentary materials to private plaintiffs who have filed subsequent treble damage antitrust actions.

Section 202 is a determination that the reasons for grand jury secrecy are generally no longer relevant after the Department has completed the criminal or civil proceedings which arose out of the grand jury investigation. It is contrary to the efficient and economic administration of justice to require private plaintiffs to expend time and effort in developing facts which have already been developed before the grand jury.

Section 203—Effective date

Section 203 provides that the provisions of Title II shall be effective on the date of enactment and that the amendments to the Antitrust Civil Process Act and section 5 of the Clayton Act may be utilized with respect to acts, practices and conduct which occurred prior to the date of enactment.

(b) Title III—Miscellaneous Amendments

Section 301—Affecting commerce

Section 301 amends sections 2, 3, and 7 of the Clayton Act (15 U.S.C. 13, 14, and 18), section 3 of the Robinson-Patman Price Discrimination Act (15 U.S.C. 13a), and section 6 of the Sherman Antitrust Act (15 U.S.C. 6), to permit their application to the fullest reach of the commerce clause and to assure uniformity of application of the antitrust laws to all activities in or affecting commerce. Under section 301, decisions such as *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), and *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), construing the intent of Congress to limit the reach of the antitrust laws, no longer would be applicable.

When Congress originally enacted the antitrust laws in 1890 and 1914, the full reach of the commerce clause was not as refined as it is today. Recent court decisions have construed some provisions of the antitrust laws as applying to activities "in commerce" and other provisions as applying to activities "in or affecting commerce." Section 301 substitutes the phrase "in or affecting commerce" or its equivalent for the phrase "in commerce" throughout the antitrust laws to assure that the antitrust laws reach activities directly in the stream of interstate

commerce as well as activities affecting interstate commerce. Legislation was enacted by the 93d Congress similarly extending the reach of the Federal Trade Commission Act to the fullest extent permitted by the commerce clause, *i.e.*, to activities in or affecting commerce. During the 94th Congress, the Senate passed S. 642 and S. 2935 which contain provisions identical to section 301 as regards section 3 of the Robinson-Patman Act and sections 2 and 3 of the Clayton Act.

Section 302—Complex cases

Section 302 amends the Clayton Act (15 U.S.C. 12) by adding a new section 27, authorizing certain cases to be designated as a complex antitrust case. Cases so designated are to be expedited in every way, and special masters, economic experts, and other personnel may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters. Special masters, economic experts, and other personnel may be used by the court in all phases of the trial, including the preparation and analysis of plans for relief. They (1) may be furnished with all evidence introduced by any party; (2) may provide additional evidence subject to objection by any party; (3) may provide an analysis of issues with particular reference to proposed orders to restore effective competition; (4) may recommend provisions for proposed orders to restore effective competition; and (5) shall be subject to cross-examination and rebuttal. The provisions of section 604 of title 28, United States Code, providing for the payment of expenses and compensation, are made applicable to complex antitrust cases in order to provide compensation to such masters, experts or other personnel.

For a variety of reasons, antitrust cases take years and years to resolve. Section 302 is designed to provide the tools to expedite such cases.

Section 303—Foreign actions

Section 303 amends the Clayton Act (15 U.S.C. 12) by adding a new section 28. Section 28 provides that in any civil action or proceeding before any court of the United States, involving any Act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party (or any officer, director, employee, agent, subsidiary, or parent thereof within the jurisdiction of the court) to furnish discovery, evidence, or testimony in the custody, possession, or control of such party (or officer, director, employee, agent, subsidiary, or parent thereof) and such party (or officer, director, employee, agent, subsidiary, or parent thereof) refuses, declines, or fails to do so on the ground that a foreign statute, order regulation, decree, or other law prohibits compliance by such party (or officer, director, employee, agent, subsidiary, or parent thereof) with such order, the court may enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party. Section 28 further provides that where any such action or proceeding the court orders any party to furnish discovery, evidence, or testimony in the custody, possession, or control of any officer, director, employee, agent, subsidiary, or parent of such party not subject to the

jurisdiction of such court, and such party refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance by such person or entity with such order, the court shall order such party to make a good faith effort to secure a waiver from such law. If the court determines that such effort has been made and a waiver is not secured, it shall not on the basis of such refusal, declination, or failure enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party.

An increasing number of antitrust cases are being filed against foreign companies, including multinationals. Problems have arisen with respect to such companies refusing to comply with subpoenas or discovery orders on the basis of foreign law; or, on the basis that the relevant data is in the foreign home office and cannot be produced in the United States. Section 303 makes it clear that foreign companies and multinationals who choose to do business in the United States must comply with valid U.S. judicial orders, just as a domestic company must comply with such orders. Section 303 confirms the power of a Federal court to take appropriate remedial action to enforce its orders compelling discovery, evidence, or testimony in those cases in which litigants refuse to comply with such orders on the ground that a foreign law or rule prohibits them from doing so.

The present state of the law tempts defense counsel in antitrust cases to protect their clients' interests by making overtures to foreign governments concerning the invocation of secrecy orders prohibiting compliance with valid U.S. discovery orders. See Note, 14 Va. J. Interna. L. 747, 763–64 (1974). The purpose of this provision is to ensure that the jurisdiction and administration of our court system, and the enforcement of our regulatory and antitrust laws, are not thwarted by foreign governments. Section 303 is patterned after section 282(d) of S. 2255, the Patent Revision bill, which passed the Senate on February 26, 1976, which, in turn, was predicated upon a provision contained in the Administration's patent reform bill (S. 1308). The provision also is patterned after Rule 37 of the Federal Rules of Civil Procedure. Due to the decision in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), it is uncertain when that Rule may be invoked in regard to foreign litigants. Section 303 is intended to supplement, and not replace, Rule 37 with respect to such litigants.

Section 304—Attorneys' fees

Section 304 amends section 16 of the Clayton Act (15 U.S.C. 26) by providing that in any action under this section in which a plaintiff substantially prevails, the court shall award to such plaintiff the cost of suit, including reasonable attorneys' fees and other expenses of litigation. Under the recent Supreme Court decision in *Alyeska Pipeline* v. *Wilderness Society*, 421 U.S. 240 (1975), in the absence of express statutory authority, courts may not award attorneys' fees to prevailing plaintiffs. Section 304 provides such statutory authority for courts to award attorneys' fees to a substantially prevailing plaintiff in equity actions under section 16 of the Clayton Act, just as section 4 of the Clayton Act authorizes the award of attorneys' fees to prevailing plaintiffs in damage actions.

In addition to reasonable attorneys' fees, section 304 provides for the award of other expenses associated with the litigation. The provision is intended to make substantially prevailing plaintiffs whole, and the phrase "other expenses of the litigation" is intended to encompass all other reasonable expenses associated with the litigation such as for expert witnesses, paralegals, transcript costs, necessary computer time, etc., in addition to the traditional awarding of costs.

The *Alyeska* decision creates a significant deterrent to potential plaintiffs' bringing and maintaining lawsuits to enjoin antitrust violations. Without the opportunity to recover attorneys' fees in the event of winning their cases, many persons and businesses would be unable to afford or unwilling to bring antitrust injunction cases.

The Committee believes that the need for the awarding of attorneys' fees in section 16 injunction cases is at least equal to and probably greater than the need in section 4 treble damage cases. In damage cases, at least a prevailing plaintiff recovers compensation. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect.

The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations. Litigation by "private attorneys general" for monetary relief and for injunctive relief has frequently proved to be an effective enforcement tool. In *Alyeska*, the Supreme Court noted that:

> It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damage awards under the antitrust laws is a prime example.

Section 304 is the Congressional response to the invitation of the Court to enact specific legislation authorizing the award of attorneys' fees when there is a strong public policy to be vindicated.

Section 305—Severability

Section 305 is a standard severability provision. It provides that if any provision of this Act, or the application of any such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Section 306—Effective date

Section 306 provides the effective dates for the several provisions of the Act. Under section 306, section 301 applies to acts, practices, and conduct occurring after the date of enactment of this Act; section 302 applies to all actions on file on the date of enactment of this Act or hereafter filed; section 303 applies to all actions on file on the date of enactment of this Act or hereafter filed, in respect of non-

compliance with discovery orders hereafter entered. Unless otherwise specified, the effective date of this Act is its date of enactment.

(c) Title IV—Parens Patriae Amendments

General

Title IV amends the Clayton Act to permit State attorneys general [1] to recover damages for violations of the Sherman Act to secure redress for damage done to natural persons (consumers) residing in their State. The title is intended to provide compensation for the victims of antitrust offenses, to prevent antitrust violators from retaining the fruits of their illegal activities, and to deter antitrust violations.

Substantive standards as to what are or are not violations of the antitrust laws are not changed by Title IV. In other words, enactment of Title IV would not make any conduct illegal which is not presently illegal under the antitrust laws. Title IV merely creates an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action against antitrust violators. The monetary relief which a State attorney general may recover is treble the total damage sustained by the consumers in his State, and he is required to pay such recoveries over to consumers in accordance with the procedures specified in Title IV.

The economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services. Frequently, such antitrust violations as price-fixing, group boycotts, division of markets, exclusive dealings, tie-in arrangements, fraud on the Patent Office, monopolization, attempts to monopolize, conspiracies to limit production, and other violations of the antitrust laws, injure thousands or even millions of consumers, each in relatively small amounts but often on a continuing basis. When everyday consumer purchases are involved (*e.g.*, bread, dairy products, gasoline, etc.), the individual dollar amounts are so small that, as a practical matter, an individual antitrust law suit is out of the question. Similarly, consumers have found little relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 and practical problems in the proof of individual consumers' damages under section 4 of the Clayton Act. Yet, if an antitrust violation results in an overcharge of but 10 cents on a relatively low-priced consumer item, and 500 million

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[1] The Committee is of the view that a State attorney general is an effective and ideal spokesman for the public in antitrust cases. A primary duty of the State is to protect the health and welfare of its citizens; and a State attorney general is normally an elected and accountable and responsible public officer whose duty it is to promote the public interest. In the words of Chief Judge John Sirica:

> The court is persuaded that the States, acting through their attorneys general, are the best representatives of the consumers residing within their jurisdictions. This court agrees that it is difficult to imagine a better representative of the retail consumers within a State than the State's attorney general. Historically, the common law powers of the attorney general include the right and the duty to take actions necessary to the maintenance of the general welfare, and his presence here is but a modern day application of that right and duty. *Ampicillin Antitrust Litigation*, 1972 Trade Cases ¶ 73,966 (D.D.C. 1972). *See also State of Illinois v. Bristol-Myers Co.*, 470 F.2d 1276 (2d Cir. 1973).

Similarly, in connection with the House counterpart to title IV (H.R. 8532), Rowland F. Kirks, Director of the Administrative Office of the United States Courts, wrote that "the control of litigation would be in the hands of government officials who may properly be expected to act responsibly in the screening of cases to be filed in the district courts."

such items are sold, the aggregate impact of the conspiracy upon the consumers and the illegal profits of the conspirators are hardly insignificant—at least $50 million.

In a September 25, 1975 letter, Assistant Attorney General Thomas E. Kauper wrote:

> The Administration has taken a position in support of the basic concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act. [Title IV] would establish a workable mechanism for assuring that those antitrust violations which have the broadest scope and perhaps the most direct impact on consumers do not escape civil liability.
>
> Antitrust violations that result in relatively small economic damage to each of a large number of people are very troublesome: the economic incentives for such conduct are made more alluring by the realization that no single consumer has a sufficient economic stake to bear the litigation burden necessary to maintain a private suit for recovery under Section 4. Although it was once thought that the 1966 liberalization of Federal Rule of Civil Procedure 23 might provide a satisfactory mechanism for effectuating the deterrent objectives of Section 4, the class action device is apparently of limited utility in securing relief for large classes of individual consumers, see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).
>
> The *parens patriae* concept, as embodied in [Title IV] is both desirable and useful from the perspective of better antitrust enforcement. Such a provision is also consistent with the enforcement goals of the Clayton Act.

Under the well established common law doctrine of *parens patriae*, States have successfully sued to halt continuing wrongs which injure or threaten to injure their citizens. The Clayton Act has been interpreted by the Supreme Court as authorizing States to maintain *parens patriae* lawsuits to enjoin violations of the antitrust laws when those violations are injuring the State's citizens. In *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 451 (1945), the Court said that the State "as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected."

However, when the State of California recently tried to sue to recover monetary damages on behalf of persons who had allegedly been injured by the price-fixing of snack foods, the Ninth Circuit Court of Appeals held that *parens patriae* damage actions were not authorized by the Clayton Act. Title IV is the legislative response to the restrictive judicial interpretations [2] of the notice and manageability provi-

[2] The Committee disapproves of such decisions as *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) and 417 U.S. 156 (1974); *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1975); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Mangano* v. *American Radiator and Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971); *Donson Stores, Inc.* v. *American Bakeries Co.*, 1973-1 Trade Cases, ¶ 74,387 (S.D.N.Y. 1973); and *United Egg Producers* v. *Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970). Compare Nannes, *Manageability of Notice and Damage Calculations in Consumer Class Actions*, 70 Mich. L. Rev. 338 (1971).

sions of Rule 23 of the Federal Rules of Civil Procedure and of the rights of consumers and States to recover damages under section 4 of the Clayton Act, and to the Ninth Circuit's invitation for legislative action:

> The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution.
>
> However, if the state is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf. *State of California* v. *Frito Lay*, 474 F.2d 774, 777 (1973).

In 1972, Federal district court judge Jack B. Weinstein wrote in the *New York Law Journal:*

> The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.
>
> When the organization of a modern society, such as ours, affords the possibility of illegal behavior acompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.

The Committee believes that title IV provides that remedy, particularly through the aggregation provisions of section 4C(c)(1) which responds to the issue of manageability posed by Federal district court judge Anthony T. Augelli in *City of Philadelphia* v. *American Oil Co.*, 1971 Trade Cases ¶ 73,625 (D.C.N.J. 1971):

> The manageability requirement of Rule 23 is a significant factor that must be given due weight in reaching a determination on the propriety of class representation in any given case. It is recognized, of course, that each case must turn on its own facts. Numbers alone would not necessarily be determinative as to whether a particular class should be certified. Methods of marketing, price structures, availability of records, economic data, and other considerations enter into the picture.

> In the cases pending in this Court, members of the public who purchased gasoline from retail outlets between 1955 and 1965 in the three state area are legion in number. The individual purchases made by them would run into astronomical figures. It is hardly to be expected that such individual members of the motoring public would have records or other supporting indicia of their many purchases. By any reasonable standard, it is difficult for this Court to believe that Rule 23, as presently written, was intended to reach the overly broad non-governmental class sought to be represented by Philadelphia-New Jersey in the pending actions. *This is not to say that guilty conspirators should not be compelled to disgorge their ill-gotten gains. The solution of the problem, however, lies not in imposing an increased burden on the federal courts over and above that which may or should normally be expected of judges in the discharge of their judicial duties, but rather in having the antitrust laws or rules amended to alleviate the problem of manageability inherent in class actions wherein millions of members of the consuming public are involved.* [Emphasis supplied]

Section 401—Clayton Act amendment

Section 401 amends the Clayton Act (15 U.S.C. 12, et seq.) by providing additional remedies to supplement the existing treble damage provisions of section 4 of that Act (15 U.S.C. 15).

Section 4C—State cause of action

New section 4C creates a new statutory cause of action for States. Each State would be entitled to recover monetary and other relief, whenever it could show that a defendant's Sherman Act violation caused damage to the natural persons residing in such State. The suit would be brought in the name of the State, in effect as trustee for the residents of the State. For example, if the defendants conspired to fix prices on bread, the State could recover on the basis of the overcharges paid by the consumers of bread in the State as a result of the violation. Damages recovered by the State are required to be distributed to the appropriate consumers within the State pursuant to section 4C(c)(2). Section 4C supplements present law, and is not meant to preclude any action that a State or its residents may take under present or subsequently enacted law, except as provided in section 4C(b)(3).

A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 of the Federal Rules of Civil Procedure, and of the rights of consumers to recover damages under section 4 of the Clayton Act. Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability, standing, privity, target area, remoteness, and the like. Section 4C rejects the rationale and result of the cases cited in footnote 2 and is patterned after such innovative decisions as *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (9th Cir. 1973); *In re Master Key Litigation*, 1973 Trade Cases ¶ 74,680 and 1975 Trade Cases ¶ 60,377 (D.C. Conn.);

State of Illinois v. *Ampress Brick Co.*, 1975 Trade Cases ¶ 60,295 (D.C. Ill).); *Carnivale Bag Co.* v. *Slide Rite Mfg.*, 1975 Trade Cases ¶ 60,370 (S.D.N.Y.); *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971); and *West Virginia* v. *Charles Pfizer & Co.*, 440 F. 2d 1079 (2d Cir. 1971). Of course, State Attorneys General still would be required to prove that defendants violated the antitrust laws; that consumers were damaged by such violation in the form of higher prices or otherwise; and the approximate amount of such damage.

Section 4C(a)(1)—Total Sherman Act liability

Section 4C(a)(1) authorizes the State to bring a suit under section 4C in the appropriate Federal district court. This automatically sweeps up, but is not limited to, the venue and service provisions of the present Clayton Act (*see* 15 U.S.C. 22). Although as originally proposed this section would have permitted such suits for any antitrust violation (*e.g.*, price discrimination under the Robinson-Patman Act, mergers under section 7 of the Clayton Act, etc.), as reported by the Committee only Sherman Act violations are actionable under section 4C (*e.g.*, price-fixing, boycotts, tie-ins, exclusive dealing, monopolizations, etc.). This limitation was included at the suggestion of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, Thomas E. Kauper, and others, who urged that non-Sherman Act liability would unduly expand the exposure of potential defendants.

The Committee concurs with the recommendation of the Assistant Attorney General that it would be inappropriate to further circumscribe the permitted actions under Section 4C and accordingly rejected an amendment to limit section 4C to willful price-fixing violations only. Section 1 of the Sherman Act prohibits "every contract, combination, or conspiracy in restraint of trade." Section 2 prohibits monopolizations and attempts to monopolize. Price-fixing is not even specifically mentioned in the Sherman Act because consumers and the economy are harmed equally by other Sherman Act violations. In fact, from its inception in 1890 the Sherman Act has permitted recovery of treble damages for *all* violations "in restraint of trade" without ever specifically enumerating such violations. As President Ford stated: "We must be concerned about the cost of monopoly however it is imposed and for what reasons."

Limiting section 4C to price-fixing only would leave consumers without a remedy for such pernicious violations as dividing up markets, allocating customers, engaging in group boycotts, limiting production, committing fraud on the Patent Office, et cetera—all having the same effect as price-fixing of artificially and illegally increasing prices to consumers. As to the risk of the legitimate businessman inadvertently violating the law and being subjected to substantial liability, Mr. Justice Brandeis' oft-quoted statement is instructive. The Committee believes that the line between legal and illegal activities under the Sherman Act is sufficiently clear, in contrast to the Clayton and Robinson-Patman Acts, and that the risk of inadvertent violation is minimal:

> I have been asked many times in regard to particular practices or agreements as to whether they were legal or illegal under the Sherman law. One gentleman said to me, "We do

> not know where we can go." To which I replied, "I think your lawyers or anyone else can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, you may slip, and go over; but anyone can tell you where you can walk perfectly safely within convenient distance of that precipice." The difficulty which men have felt generally in regard to the Sherman law has been rather that they have wanted to go the limit than that they have wanted to go safely. (Senate Committee on Interstate Commerce, Hearings on Control of Corporations, Persons and Firms Engaged in Interstate Commerce, 62d Cong., p. 1161 (1911).)

Section 4C(a)(1)—Duplicative liability

Section 4C(a)(1) also contains a proviso to assure that defendants are not subjected to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorbed all or part of the illegal overcharge. The Committee intention is to codify the holding of the 9th Circuit in *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973):[3]

> We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicitous awards. The short, four-year statute of limitations is another; later suits, after final judgment herein, are unlikely. 15 U.S.C. § 15b. In other cases, it may be that statutory interpleader, 28 U.S.C. § 1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally, there are the doctrines of res judicata and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages. See *Boshes*, *supra*, at 94, 147–48.
>
> We would prefer to place the burden of proving apportionment upon appellees, rather than deny all recovery to appellants. Such a burden would be the consequence of appellees' illegal acts, not appellants' suits. Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe*, *supra*. 392 U.S. at 494. So, too, between ultimate purchasers and defendants.

This is not to say that the total liability of a defendant cannot exceed his realized profits. Often, the damage sustained by various victims exceeds the pecuniary benefits realized by a defendant. Also, a single violation frequently victimizes multiple parties with each having a right to recover for the harm sustained. For example, a violation oc-

[3] See also *In re Master Key Litigation*, 1973–2 *Trade Cases* ¶ 74,680 (D.C. Conn. 1973).

curring at the retail level may, in addition to raising consumer prices, harm other retailers who compete with the violators. As between competing claimants within the chain of distribution, however, including consumers, the section 4C(a)(1) proviso is intended to assure that the monetary relief is properly allocated.

Section 4C(a)(2)—Treble damages

Section 4C(a)(2) establishes the monetary relief to which the State is entitled as treble the damage done to natural persons residing in such State. That is, the State may recover treble the "total damage sustained," whether directly or indirectly, as described in section 4C(a)(1). The terms "total damage sustained" and "monetary relief" are used in preference to the section 4 phrases "injured in his business or property" and "the damages by him sustained" to avoid the previously referred to problems associated with such concepts as remoteness, target area, privity of contract, passing on, etc.

Treble damages have been in the antitrust laws from the inception of the Sherman Act in 1890. The Committee believes that treble damages serve as the best deterrent [4] to antitrust violations and accordingly rejected an amendment to change the treble damage provision to single damages for actions under section 4C(a)(1). If a businessman faces the risk of losing only his illegal profit, it may be a risk worth taking. If, on the other hand, the risk is one of losing treble the illegal profit the Committee believes that such a risk will cause businessmen to act prudently and cautiously with respect to the activities proscribed by the antitrust laws. Additionally, limiting section 4C(a)(1) to single damages would lead to a very peculiar and inequitable situation. If a consumer's claim is included in the State cause of action, he could recover single damages only. If a different consumer opts out pursuant to section 4C(b)(2) and is represented individually by private counsel or is in a separate and private consumer class action, then that consumer could collect treble damages—from the same defendant and arising out of the same illegal conduct for which the first consumer collected only single damages. Moreover, if middlemen in the chain of distribution passed on only one-half the overcharge and absorbed the other one-half, they could collect treble damages for the one-half they absorbed but the consumer could collect only single damages for the passed on one-half.

Paragraph (2) also provides for non-monetary relief. Present section 16 of the Clayton Act allows private suitors "injunctive relief against threatened conduct that will cause loss or damage" by a violation of the antitrust laws (15 U.S.C. 26). Paragraph (2) is intended to insure the court's power to grant any kind of appropriate relief, including rescission, restitution and divestment, which may be appropriate remedies under certain circumstances, whether or not it fits within the traditional concept of "equitable relief" or "injunctive relief." Para-

[4] In an April 9, 1976 speech before the Antitrust Section of the American Bar Association, Assistant Attorney General Thomas E. Kauper stated that "there is substantial cause for grave concern that price-fixing agreements exist in a variety of forms on a large scale." He pointed to the indictment of over 80 individuals in each of the last 2 fiscal years, compared with an average of less than 30 over the preceding 5-year period, and lamented over the fact that the recently-enacted (1974) increased penalties for antitrust violations have been "greatly compromised by inappropriately mild treatment of convicted violators of the antitrust laws." The Committee urges the judiciary to clamp down with vigor on antitrust violators by imposing the full penalties authorized by the Antitrust Procedures and Penalties Act of 1974 (Public Law 93-528).

graph (2) permits the court to award the cost of suit, a reasonable attorney's fee, and other expenses of the litigation to the State, in injunction actions as well as in treble damage actions. The provision is intended to make the State whole if it prevails in the litigation, and the phrase "other expenses of the litigation" is intended to encompass all other reasonable expenses associated with the litigation, including salaries of State investigators, other employees working on the case, expert witnesses, paralegals, transcript costs, necessary computer time, etc., in addition to the traditional awarding of costs.

Section 4C(b)(1)—Notice

Section 4C(b)(1) requires the State attorney general to give notice of the State's bringing the action under section 4C(a)(1). Notice by publication is stated as the required form of notice, but the court may direct further notice, including individual notice, to prevent manifest injustice. The Committee envisions the court directing that a series of notices be given at different stages of the proceeding, varied in content, form and manner so as to be the most appropriate form for the specific purpose of the notice and the particular stage of the proceeding. The Committee notes with approval the innovative and successful series of notices given in the tetracycline litigation which resulted in more than 1 million consumers receiving a proportion of the States' recovery. The Committee believes that the notice provisions of paragraph (1) contain sufficient flexibility and are well within the ambit of the due process clause of the Constitution.

Paragraph (1) displaces the provisions of F.R.Civ.P. 23, as interpreted in the recent *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Kline* v. *Coldwell, Banker & Co.*, 1974-2 Trade Cases ¶ 75,436 (9th Cir. 1974) decisions, insofar as suits under section 4C are concerned. It is the Committee's judgment that this is necessary to avoid the virtually insurmountable obstacles placed in the way of consumer class actions by the actual notice requirements of Rule 23. An antitrust lawsuit filed under section 4C(a)(1) can seek monetary relief for damage sustained by thousands or even millions of consumers. Even if each consumer could be personally identified at the outset of such lawsuit, the cost of individual notices would be prohibitive. In *Eisen*, the postage cost alone—under the 8¢ stamp—would have been $315,000. To avoid unduly costly forms of notice, which have the effect of preventing relief to consumers victimized by price-fixing and other antitrust conspiracies, has been one of the goals of this legislation.

Section 4C(b)(2)—Opt-out authority

Section 4C(b)(2) permits any person who has attributable to him a "portion of the State claim for monetary relief" to exclude from adjudication in the section 4C(a)(1) proceeding the portion of such claim attributable to him. The Committee does not anticipate that the opt-out provisions frequently will be invoked because of previously discussed problems associated with individual and class action consumer lawsuits for antitrust violations. Although the cause of action is that of the State, and not that of the person who is a resident of the State, the Committee nonetheless concluded to exercise its discretion

and include the opt-out provisions of this paragraph as a matter of equity and fairness.

Section 4C(b)(3)—Estoppel by judgment

Section 4C(b)(3) provides that unless a person does "opt out" of the State action brought pursuant to section 4C(a)(1), any final action in such action will be *res judicata* and applicable to "any claim under section 4 of this Act." This provision is included as a matter of fairness to avoid the spectre of duplicative liability and repetitive litigation.

Section 4C(c)(1)—Aggregate damages

The very essence of Title IV is the provision in section 4C(c)(1) authorizing proof of consumer damage in the aggregate, without separately proving the fact or amount of each consumer's individual injury or damage. The Committee believes that Title IV cannot work without this provision because of both the impracticability and impossibility of bringing before the court thousands or even millions of consumers to prove, individually and separately, the fact of his or her injury and the amount of his or her damage. Plaintiff still would have the burden of proving that:

(1) Defendants violated the Sherman Act;
(2) Consumers were damaged by such violation; and
(3) The approximate amount of consumer damage.

Instead of adding up thousands or millons of claims, however, the total amount of consumer damage could be proved in the aggregate from the records of defendants and other entities in the chain of distribution or by other evidence. After the violation by defendants and the fact of some damage to consumers have been proved,[5] the aggregation provisions of section 4C(c)(1) would be utilized to determine the amount of defendant's liability.

The aggregation provisions of section 4C(c)(1) are necessary to make cases involving large numbers of consumers manageable and to deter and render unprofitable antitrust violations affecting consumers. Without it, antitrust violators would be able to continue to damage consumers with impunity. Consumers rarely keep receipts each time they purchase daily goods, such as milk, bread, or gasoline. Thus, the aggregation provisions of section 4C(c)(1) are made applicable both to actions filed under section 4C(a)(1) and to consumer class actions filed under section 4 of the Clayton Act.[6] The Committee believes that aggregation of consumer class actions under section 4 is essential to make consumer class actions manageable, and to protect and afford the opportunity to obtain redress to consumers in those States in which a State attorney general may not file an action under Section 4C(a)(1).

Section 4C(c)(1) acknowledges the obvious reality that "it is far simpler to prove the amount of damages to the members of the class

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[5] In *Zenith Radio* v. *Hazeltine*, 89 S. Ct. 1562, 1571 (1969), the Supreme Court stated:

> Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling its burden of proving compensable injury under § 4.

[6] The Committee further intends that individual consumer damage may be aggregated to satisfy the jurisdictional amount in class actions on behalf of natural persons under section 4.

by establishing their total damages than by collecting and aggregating individual claims as a sum to be assessed against the defendants."[7] In a price-fixing case, for example, frequently the only method of determining the total impact of the conspiracy will be to measure total overcharges during the relevant period to members of the damaged class. Once this figure has been computed and assessed against the defendants, their real interest in the case is at an end. The question of how the sum assessed as damages should be distributed and employed is one in which the defendants have no legitimate interest. Their only proper remaining interest—their *res judicata* rights—are fully protected by section 4C(b)(3). The Committee concludes that defendants have no constitutional right to retain the profits of their illegal activities; nor do they have any legal or moral right to participate in determining how the damages properly assessed against them are to be distributed to damaged consumers.

Section 4C(c)(1) is patterned after the landmark procedures used in the *Tetracycline* litigation, in which Federal District Court Judge Miles Lord stated:

> The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.
>
> The court's tentative conclusions concerning the trial of the damage issue eases management problems considerably. Damages would be awarded on a class-wide basis, if and when liability was established, and individual claims could then be processed administratively after entry of judgment. *In re Antibiotics Antitrust Litigation*, 333 F. Supp. 278, 282–83 (S.D.N.Y. 1971).

The section is fully consistent with long-standing Supreme Court precedent permitting damages to be proved in antitrust cases by a "just and reasonable estimate of the damages based on relevant data."[8] As the Supreme Court put it in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562–63 (1930):

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.
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[7] *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278, 281 (S.D.N.Y. 1971); *see e.g.*, *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *Hartford Hospital* v. *Chas. Pfizer & Co.*, 1971 Trade Cases ¶ 73,561 (S.D.N.Y. 1971).

[8] *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946).

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Section 4C(c)(2)—Distribution of damages

Section 4C(c)(2) provides that in any action brought under subsection (a)(1), the court shall distribute, or direct the distribution of, any monetary relief awarded to the State either in accordance with State law or as the district court may in its discretion authorize. In either case, any distribution procedure adopted shall afford each person in respect of damage to whom the relief was awarded a reasonable opportunity to secure his appropriate portion of the net monetary relief. The Committee believes that these distribution procedures coupled with the aggregation provisions of Section 4C(c)(1) will provide the predicate for substantial recoveries by consumers for violations of the antitrust laws, and will provide the long-sought effective deterrent to antitrust violations.

Upon establishing the fact of defendants' liability and the total monetary relief awarded to the State, distribution would be made to consumers. To the extent that consumers do not claim the entire amount of the award, the district court is authorized to distribute the unclaimed portion either in accordance with State law or in such manner as the court may in its discretion authorize. Such excess should be used for some public purpose benefiting, as closely as possible, the class of damaged consumers. This *cy pres* approach was utilized by Judge Inzer Wyatt in the *Tetracycline* litigation.[9] Other judicial antecedents include cases in which recoveries for illegal overcharges on bus and taxi fares were applied to reduce those fares in future years.[10]

In the *Tetracycline* litigation, more than $28 million was distributed directly to more than 1 million consumers. The average consumer recovery amounted to $200, with some claimants receiving as much as $12,000. The first settlement resulted in $8 million being distributed to 36,000 consumers. The second settlement by the remaining States in *Tetracycline* benefited from the experience and experimentation of the first distribution effort. In settlement number 2, improved techniques resulted in $20 million being distributed to 1 million consumers in 6

[9] The unclaimed funds were used for expansion of State-sponsored health programs, medical research, the training of nurses and paramedical personnel, the staffing of medical and rehabilitation clinics and other similar programs.

[10] See *Bebchick* v. *Public Utilities Comm'n.* 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); *Daar* v. *Yellow Cab Co.*, 67 Cal.2d 695, 433 F.2d 732, 63 Cal. Rptr. 224 (1967).

States.[11] The Committee believes that through additional experience further improvements will be made in distribution techniques, and that it should be possible for many victims of white collar crime to share in the distribution of the States' recovery if district court judges remain committed to finding the innovations necessary to dispense equal justice to the rich and poor alike. In the words of the special master:

> It is well understood that the numerical size of consumer response, regardless of its magnitude, is not by itself the sole and definitive test of manageability. It is important as well that the response be meaningful, i.e., that there be some assurances that the claims were not fraudulently filed and were reasonably based upon actual purchases.

Special Master David Lebedoff concluded:

> The administrative procedures described above permitted this distribution to be successfully completed. Each of the five goals described at the outset was achieved. The total administrative costs involved were only slightly greater than the monies earned in interest by the settlement fund.
>
> The success of this project illustrates that the distribution of refunds to very large numbers of consumers following true class action settlements is a "manageable" enterprise and that neither fairness nor due process nor economy need be sacrified in the effort to reach very substantial numbers of consumers. When a court is willing to make available to such a task the resources and encouragement necessary to support it, the task can be done.

In his June 25, 1975 order approving the Special Master's distribution, Judge Miles Lord stated:

> In approving the plan of distribution and allowance and disallowance of claims, the Court takes note of the on-going argument on manageability of fluid class actions. The Court has been hearing for years that this type of settlement, and this type of class action, are unmanageable and will not work. It has strenuously been argued for years that the consumers were not interested in such litigation and that they would not come forward to "lay claim" to the proceeds.
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> At the hearing to approve the fairness and adequacy of this settlement, counsel for the defendants suggested that a distribution of such magnitude was not manageable:
>
> "If, for example, California can come into Court against us with the weight of possibly 10,000,000 purchasers, and in fact it turns out that the active, interested members of the class consist of 30,000 or 40,000 people, it seems to me that the author ought to consider the question of public policy of whether the scales of the adversary contest have not been

[11] Each of 12 million households in the 6 states received a notification and claim form, and an extensive public relations campaign was conducted advising consumers of their right to share in the recovery. As previously noted, 1 million claims were honored. Claims were checked and verified on 2 bases: small claims were checked on a random sample and large claims (in excess of $150) required additional and specific proof.

unfairly weighed on the side of the plaintiff in that sort of suit. The real hard question between us, I think, and these negotiations and the question that kept us, at least this defense counsel, awake at night was not trying to assess the odds on liability, that lawyers do all of the time, but this great unknown mass of consumers. T. p. 51, February 13, 1974; 4–71 Civ. 435, 4–71 Civ. 392, et al."

This prediction of 30,000 or 40,000 consumers has been proven wrong. The question was removed from the arena of judges', lawyers' and scholars' minds and put to the test in the only practical way possible. The consumers themselves were asked to come forward and express their interest. Instead of 30,000 or 40,000; nearly 1,000,000 showed their interest by filing a claim. Claims were filed even though the amount to be recovered was small and known to be small. Speculation and conjecture need no longer cloud our thoughts on this question. The consumer is in fact interested. Fluid class actions on behalf of consumers insofar as the interest of the class is concerned are as viable and "real" as any other type of litigation and should be treated accordingly.

With the use of computers and the other disciplines, along with the assistance of very capable lawyers, this class action has proven to be not only manageable but a great benefit to the consumers involved. The Court again states that this case has always been and continues to be manageable. (*State of Washington* v. *Chas. Pfizer & Co.*, 4–71 Civ. 395 (June 25, 1975), pp. 30–32).

Section 4C(d)—Settlements

Section 4C(d) provides that cases filed under section 4C(a)(1) may not be dismissed or compromised without approval of the court. Under Rule 41 of the Federal Rules of Civil Procedure, parties to litigation are ordinarily allowed to dismiss or compromise the actions without court approval. In Rule 23 class actions, however, settlements require court approval, which is intended to offer protection to the class members. Under section 4C(d), dismissal or compromise of an action without the approval of the court is likewise prohibited. Moreover, where an action is dismissed or compromised, notice must be given, thus allowing dissatisfied claimants to object to the proposed settlement.

The Committee views this section as an important safeguard for consumers in the event an attorney general seeks to terminate a section 4C action by settlement. Cases should only be settled if the full interests of justice—and the interests and rights of any persons affected—are fully protected. Pursuant to section 4C(b)(3), such a settlement could have *res judicata* effects, perhaps denying a State citizen of any future opportunity to recover the harm sustained.

Section 4C(e)—Plaintiffs' attorneys' fees

Section 4C(e) requires court approval of plaintiffs' attorneys' fees awarded under section 4C(a)(2). The Committee included this provision to assure both the reasonableness of the fees and that the bulk of the State recovery would be distributed to consumers—not lawyers. Both section 4 of the Clayton Act and Rule 23 of the Federal Rules

of Civil Procedure require court approval of attorneys' fees under generally accepted standards articulated in *Lindy Bros.* v. *American Radiator and Standard Sanitary*, 487 F.2d 161 (3d Cir. 1973) and *City of Detroit* v. *Grinnell*, 495 F.2d 468 (2d Cir. 1974). It is the Committee's intention that attorneys' fees in section 4C cases be approved under the same criteria, and the court is directed to look behind any fee arrangements which may be made between the State and its counsel. The criteria established by the court in *Lindy Brothers* for approving attorneys' fees are as follows:

> In awarding attorneys' fees. the district judge is empowered to exercise his informed discretion.
>
> * * * * *
>
> In detailing the standards that should guide the award of fees to attorneys successfully concluding class suits, by judgment or settlement, we must start from the purpose of the award: to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant. Before the value of the attorney's services can be determined, the district court must ascertain just what were those services. To this end the first inquiry of the court should be into the hours spent by the attorneys.* * * After determining, as above, the services performed by the attorneys, the district court must attempt to value those services.* * * A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate of compensation differs for different activities. * * * While the amount thus found to constitute reasonable compensation should be the lodestar of the court's fee determination, there are at least two other factors that must be taken into account in computing the value of attorneys' services. The first of these is the contingent nature of success.* * * In assessing the extent to which attorneys' compensation should be increased to reflect the unlikelihood of success, the district court should consider any information that may help to establish the probability of success.* * * The second additional factor the district court must consider is the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled. In evaluating the quality of an attorney's work in a case, the district court should consider the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained.* * * The value to be placed on these additional factors will, of course, vary from case to case." (487 F.2d at 166–169.)

These standards should, of course, be applied creatively and with flexibility to accommodate the circumstances of particular cases.

The Committee believes that this provision is fair and equitable to all concerned parties. It considered and rejected an amendment to prohibit all contingency fees. Such a prohibition would severely limit the usefulness of Title IV for several reasons. First, most States have a small attorney general's office, and an even smaller antitrust staff.[12] States simply do not have the in-house capability of sustaining a complex multi-year antitrust trial. Nor do many State attorneys general's offices have the budget to advance upwards of several hundred thousand or even million dollars in attorneys' fees to outside counsel, or to pay such fees if judgment is rendered for the defendant.

The Committee emphatically rejects the notion that a court approved contingency fee is either immoral or unethical, particularly when, as is the case here, the amount is subject to court approval upon prescribed criteria. To the contrary, it is often the only way to secure effective representation. As put by Virginia attorney general Andrew P. Miller:

> Another way to cripple the effectiveness of this bill would be to deny the Attorneys General, the right every other citizen enjoys, to contract for legal services on whatever basis, in his judgment, suits the needs of a particular case. At this point, substantial antitrust staff are not widespread at the State level. Furthermore, undertaking one major *parens patriae* suit can absorb the time of numerous staff persons for several years. Accordingly, this bill will go unused, and the rights created unenforced to the fullest extent possible, if the Attorneys General are not permitted to contract for expert antitrust counsel whose fees will be paid out of subsequent settlement or judgment, if any. We share the concerns of those who believe that attorneys' fees should be kept within reasonable limits. Therefore, we would support an amendment which would require the approval of the district court for any attorney fee arrangement according to standard attorney fee criteria.

Those who advocate prohibiting contingent fees contend that a contingency arrangement will encourage the filing of frivolous suits and unnecessarily subject defendants to harassment and to substantial legal and other fees incident to defending suits filed in bad faith. The Committee finds the contrary to be the case, particularly in view of section 4C(f) which provides for the award of reasonable attorneys' fees to a prevailing defendant if the defendant establishes that the State attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons. The Committee concurs with the eloquent separate views of Congresswoman Barbara Jordan (D.-Tex.), contained at page 27 of House Report No. 94–499 (94th Congress, 1st Sess.):

> I am concerned that a flat ban on "contingency fees" will effectively place the services of perfectly ethical and highly knowledgeable attorneys beyond the reach of the States.

* * * * *

[12] A total of 77 attorneys throughout the fifty States are assigned full-time to antitrust matters, and this includes enforcement of State antitrust statutes. Nine States assign no attorneys and 13 assign one on a part-time basis to antitrust matters.

There is another vital point at stake. The contingent fee is not merely an honorable means of financing litigation for those who would otherwise be unable to afford it until the award of final judgment. It is also recognized as an important tool for weeding out the frivolous and unmeritorious case on the basis of expert assessment. It is highly unlikely that a lawyer knowledgeable in any field will be prepared to invest large quantities of his own time and effort in a case on the basis that he will be uncompensated unless he obtains a successful result for the client, unless he believes after careful examination that the case has serious merit.

This point is responsive to two concerns which have been expressed by opponents and critics of the bill. Business interests have argued that the enactment of this legislation will bring a plethora of unfounded lawsuits for enormous sums of money, which they will have to defend at great expense. And members of the committee have on several occasions questioned whether the law might not present irresistible temptations to politically ambitious state officials bent on making a reputation without regard to the ultimate disposition of the cases they bring.

Neither of these unfortunate predictions is remotely likely to come true if the economic judgment of the legal experts is invoked in the evaluation of cases through the use of the contingent fee.

Section 4C(f)—Defendants' attorneys' fees

Section 4C(f) provides that in any action brought under this section, the court may in its discretion award reasonable attorneys' fees to a prevailing defendant in the rare case where a State attorney general may have acted in bad faith, vexatiously, wantonly, or for oppressive reasons. This provision accomplishes the dual objective of minimizing the risk of State attorneys general being deterred from filing legitimate antitrust suits out of fear of being assessed huge attorneys' fees if a defendant prevails, while at the same time providing a deterrent against State attorneys general's filing bad faith or vexatious lawsuits. The provision is identical to and is intended to codify the standard articulated by the Supreme Court in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 258–59 (1975). Where plaintiffs' proceeding is brought in good faith or on the advice of competent counsel, fees would be denied to a prevailing defendant. As put by the third circuit:

> Our conclusion is based on policy considerations reflected in the Clayton Act. It is well known that a primary objective of the private treble damage suit is to provide a means for enforcement of the anti-trust laws in addition to Government prosecutions. The incentive which the prospect of treble damages provides for instituting private anti-trust actions would be dampened by the threat of assessment of defendant's attorneys' fees and other costs as a penalty for failure. We thus agree with the second ground for the court's decision in Gillam: "* * * free access to the courts must neither be denied

nor penalized." 205 F. Supp. 534, 536. Where it has been thought that the cost of instituting a lawsuit is not a sufficient deterrent against vexatious or oppressive litigation, Congress has enacted provisions allowing the courts in exceptional cases to award attorneys' fees and other extraordinary costs to the prevailing party. *Byram Concretanks* v. *Warren Concrete Products*, 1967 Trade Cases ¶ 72,020 (3d Cir. 1967).

The standard for awarding fees and expenses to a prevailing defendant is not the same as for a plaintiff because, if it were, the risk of bringing suit under this section would be so great as to significantly impair the usefulness of Title IV. Virginia attorney general Andrew Miller wrote the Committee:

> We understand that some are proposing that attorneys' fees be allowed against either side. The result of this is that no Attorney General will be able to afford the risk of initiating a lawsuit since the attorney fees in such case would possibly exceed his own appropriated budget and open the tax dollars for which he is the trustee to a contingent liability inconsistent with his duty as a law enforcement officer. Furthermore, reciprocal attorney fee provisions have never been a part of the American system but find expression only in the British experience. I believe that it would be very unwise to adopt any such arrangement.

Section 4D—Notice by United States

Section 4D requires the United States Attorney General to give notice to State attorneys general, when the United States has brought an antitrust suit, and the Attorney General believes that any State may be entitled to bring a suit under section 4C(a)(1) based on substantially the same grounds as the suit by the United States. It is anticipated that this notice provision should help the States keep aware of anticompetitive activities affecting them.

Section 4E—Federally funded programs

Section 4E provides that in any action under section 4 or 4C of this Act, the State or any other plaintiff shall be entitled to recover treble damages in respect of the full amount of overcharges incurred or other monetary damages sustained in connection with expenditures under a federally funded program, notwithstanding the fact that the United States funded portions of the amounts claimed. Out of any damages recovered, the United States is entitled to the portion of the overcharges or other monetary damages, untrebled, that it sustained or funded. Whenever another Federal statute or law provides a specified method of settlement of accounts between the State and Federal Governments, in respect of such recovery, such method is to be used. Otherwise, the court before which the action is pending is to determine the method.

If, for example, there is a $1 overcharge on a welfare program that is on a 50–50 State-Federal basis, due to an antitrust violation, section 4E allows a State to collect $3, out of which it would have to pay to the United States 50 cents, and it would retain the remaining $2.50.

If there are price-fixing or other overcharges on a federally funded program, such as that for Medicare, it is unrealistic to expect the

States to act as a collection agent for the Federal Government if they have to do so at their own expense and to their own possible detriment.[13] Moreover, the States are the persons most directly and immediately injured by overcharges on such programs, and the Federal Government is only the indirect victim of such practices. For these and the reasons advanced by Assistant Attorney General Kauper, therefore, the Committee believes that States should be entitled to recover at least treble their overcharges, regardless of the fact that the United States has funded a portion of the program and thus of the overcharge in question. Section 4E is structured for the States to file suit to recover for their overcharges, in regard to federally-funded programs, and then to pay over to the United States its equitable share of the recovery. This is the same procedure contemplated by existing law, such as that governing welfare legislation.[14]

Section 4E(b) authorizes the Attorney General of the United States to intervene, if necessary, to protect the interests of the United States.

Section 4E(c) provides that the United States is entitled only to the part of the overcharge that it funded, untrebled. In the previous example, concerning a $1 overcharge on a 50–50 program, the Federal share of recovery would be 50 cents. Section 4E(c) further provides that existing law should be used, if it provides a mechanism for settlement of accounts between the State and Federal Governments. In the absence of such a statue, or an applicable regulation, however, the district court is authorized to determine the mechanism to be utilized, which could include use of a special master or such other procedures as the court may devise.

Section 4E(d) limits the liability of defendants against multiple recoveries in matters concerning federally funded programs. It provides that the defendant is liable for treble damages, but no more than that. If both the State and Federal Government sue separately, therefore, the defendant would be entitled to set off one recovery against the other to prevent recovery in excess of treble damages. Thus, in the previous example, the defendant would not be obliged to pay the State $3 and the Federal Government 50 cents, for a total of $3.50—liability would be limited to $3.

Section 4F—Definitions

Section 4F defines the terms used in Title IV. The term "State attorney general" is defined to mean the chief legal officer of a State, or any other person authorized by State law to bring actions under section 4C of this Act, and includes the Corporation Counsel of the District of Columbia. The term "State" is defined to mean a State, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. The term "Sherman Act" is defined as the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (15 U.S.C. 1), as amended or as may be hereafter amended.

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[13] For example, when a group of States settle a major antitrust case (including, *e.g.*, direct purchases, those of county hospitals, consumer class purchases, and welfare overpayments) for $100 million, it is unlikely that the settlement value of the case to the States is significantly raised or lowered by the inclusion or exclusion of the Federal portion of welfare program funding. Hence, the State may well net less by including, and then paying over to the Federal Government, the overcharges on the Federal share of the program.

[14] See, *e.g.*, 42 U.S.C. 303(b)(2)(B); 603(b)(2)(B); 1203(b)(2)(B); 1353(b)(2)(B); 1383(b)(3); and 1396b(d)(3).

Sections 402, 403, and 404—Technical amendments

Section 402 amends section 4B of the Clayton Act (15 U.S.C. 15b) to make reference to new section 4C. This provision includes section 4C actions under the Clayton Act's statute of limitations provisions.

Section 403 amends section 5(i) if the Clayton Act (15 U.S.C. 16(i)) to make reference to new section 4C and the State's right of action created thereby. This provision includes section 4C actions under the Clayton Act's tolling provisions.

Section 404 is a standard severability provision and provides that if any provision of this title, or the application of any such provision to any person or circumstance, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected by such holding.

Section 405—Effective date

Section 405 provides an effective date for Title IV. Title IV is made applicable to all civil actions filed under the antitrust laws in which a person representing a class of natural persons (consumers) or a State is plaintiff, including those in which the cause of action accrued before the date of enactment of Title IV, but it does not apply to any civil action alleging the same violation previously alleged in any other civil action brought on behalf of a class of consumers against the same defendants.

Title IV does not change substantive standards as to what are or are not violations of the antitrust laws. Title IV does not make any conduct illegal which is not already illegal under the existing antitrust laws. It creates an effective mechanism to permit consumer recovery for antitrust violations. For this reason, section 405 follows the usual practice of applying Title IV to existing causes of action. See, *United States v. Gianoulis*, 183 F.2d 378 (3d Cir. 1950). The Committee considered applying Title IV to prospective causes of action only. Such an approach would preclude consumers from utilizing the newly created procedural remedies for many years. It is the history of antitrust cases that violations are discovered many years after their first occurrence. The Committee believes it manifestly unjust to permit price fixers and other antitrust violators to keep their ill-gotten gains, which would be the result of giving Title IV prospective effect only, because of the lack of an effective procedural remedy to obtain redress for existing antitrust violations.

The Committee was concerned, however, about the inequity of changing the rules of the game in mid-litigation if a defendant already was subjected to litigation by consumers for the same violation. Section 405 strikes a fair balance by providing that Title IV shall not apply to violations which are or already were the subject of litigation against the same defendants by persons representing or seeking to represent a class of consumers.

Constitutional issues

Opponents of Title IV contend that several of its provisions are unconstitutional. Primarily, they rely on the severely criticized *dictum* of Judge Medina in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973).[15] The Committee notes that of the 10 judges participating

[15] Vacated and remanded, 417 U.S. 156 (1974).

in the *Eisen* decision and the subsequent denial of a petition for rehearing *en banc*, only one judge concurred with the rationale of Judge Medina's opinion. Three judges specifically disagreed with Judge Medina's constitutional conclusions. One judge concurred in result only. The remaining 4 judges were silent on the merits, but voted against an *en banc* hearing "to speed this case on its way to the Supreme Court." (479 F.2d at 1021)[15a]. As the Library of Congress advised the Committee:

> The [Supreme] Court then vacated the judgment of the Court of Appeals and remanded the case for further proceedings. *Id.*, 179. The Supreme Court therefore did not endorse, even obliquely, the lower court's conclusion as to "fluid recovery" and it seems reasonably clear that its notice conclusion is founded solely on the "unambiguous requirement of Rule 23." *Id.*, 176. The lower court's decision having been superseded by a more authoritative Supreme Court opinion and its judgment vacated, the lower court's constitutional conclusions have no precedential value. They do have what value is to be accorded them on the basis of the persuasiveness of the arguments under girding them.[16]

The Committee has carefully considered the constitutional issue underlying Title IV and is of the opinion that Title IV does not encroach upon the Constitution. The Committee has been so advised by Assistant Attorney General Thomas E. Kauper, Professor John J. Flynn of the University of Utah College of Law, Professor Jonathan Rose of the Arizona State University College of Law, Harvard Constitutional Law Professor Arthur Miller, and the Library of Congress.

[15a] Relying primarily on the second circuit decision in *Eisen*, the individual views of Senator Burdick (pages 163–166) express the opinion that one aspect of Title IV is unconstitutional, namely, that portion of the aggregate damages awarded a State which is not claimed by individual consumers damaged by the antitrust violation, because it is "a taking of property from the defendant without the necessary showing of injury to an actual person, required under a theory of damages." Our colleague states that *Eisen* "was appealed to the United States Supreme Court, and remanded upon the question of notice. That part of the decision dealing with the question of 'fluid damages' was not appealed nor disturbed."

In vacating and remanding *Eisen*, however, the Supreme Court specifically stated that "we therefore have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction." 417 U.S. at 172 n. 10. A review of the "solid weight of [additional] judicial authority" rejecting the fluid-class theory of recovery, cited in the individual views, establishes that those cases were decided not on constitutional grounds but as a matter of statutory construction of the existing class action provisions of Rule 23 of the Federal Rules of Civil Procedure. Before settlement of the *Tetracycline* litigation, the court, in the context of whether or not to certify the consumer class, considered and rejected the constitutional arguments of defendants that the procedures involved are unconstitutional. It stated: "the court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages." *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (1971). Similarly, the second circuit, in affirming a settlement of the *Tetracycline* litigation, rejected the contention of plaintiff wholesalers and retailers as to the impropriety "of permitting the states to recover through their attorneys general damages on behalf of individual consumers who have not themselves filed any claims." The court concluded: "To require those who wish to authorize the state to recover for them to affirmatively notify the court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum." *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 440 F.2d 1079 (2d Cir. 1971). In the *Daar* case, the court permitted the fluid recovery theory with respect to that portion of the total illegal overcharge not claimed by individual users of taxicabs by reducing future year taxicab rate increases for the benefit of all taxicab users. "No appearance by the individual members of the class [was] required to recover the full amount of the overcharges." *Daar* v. *Yellow Cab Co.*, 63 Cal. Rptr. 724, 433 P.2d 732 (1967).

[16] The Committee notes that a leading treatise on federal practice, *Federal Practice and Procedure*, by Charles Alan Wright, Professor of Law, The University of Texas and Arthur R. Miller, Professor of Law, University of Michigan (1972), criticized the *Eisen* decision as follows:

"This decision is unnecessarily restrictive and demands more than is traditionally required to satisfy due process and more than seems necessary in Rule 23(b)(3) actions." (Sec. 1786, at 148.)

Two law review articles [17] confirm the conclusion that Title IV is constitutional, and the Committee notes that Congressman Charles Wiggins (R-Cal.), a leading opponent of the House companion measure (H.R. 8532), testified before this Committee that "if individuals are brought forward to prove their damages as representative of a class or as members of a sample for purpose of aggregation of damages, then the Constitutional requirements would be met." Additionally, the Committee notes the following judicial precedents for the procedures contained in Title IV: *Bebchick* v. *Public Utility Comm.*, 318 F. 2d 187 (D.C. Cir.), *cert. den.*, 373 U.S. 913 (1963); *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 433 P. 2d 732, 63 Cal. Rptr. 724 (1967); *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (2d Cir.), *cert. den.*, 404 U.S. 1005 (1971); *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D. N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971); and *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971).

As to the type of notice constitutionally required, the previously referred to Oregon Law Review comment concluded that Judge Medina's opinion was erroneous in light of two earlier Supreme Court decisions which held that "in situations in which personal notice can be given only with great difficulty, notice by publication was adequate and due process did not require efforts which went beyond the value of the right involved." [18] The Hastings Constitutional Law Quarterly article concluded that "[i]n reading *Mullane* and *Hansberry* together there seems to be no authorization for a rigid standard of individual notice, but rather a balancing of interests with adequacy of representation playing an important role in determining what type of notice, if any, is required." [19] Finally, Harvard Law School Constitutional Law Professor Arthur Miller wrote the Committee:

> . . . Personally, I think, that the proposed legislation, especially as revised by the Committee staff, should survive any such attack.
>
> As to the question of notice by publication, it is very important to understand that the doctrine of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is completely unaffected by the Supreme Court's recent decision in *Eisen* v. *Carlise & Jacquelin*, 417 U.S. 156 (1974). The latter desion was based entirely on the construction of the special language in Federal Rule 23(c)(2) regarding giving individual notice to reasonably identifiable members of Rule 23(b)(3) classes. The holding therefore is a very limited one and cannot be said to raise the constitutional notice standard higher than that set out in *Mullane*.
>
> *Mullane* itself stands for the proposition that "notice reasonably calculated, under all the circumstances to apprise interested parties" should be used. A careful reading of the facts of that case suggests that many of the contingent beneficiaries of the trust fund involved in the litigation were identifiable and locatable, but the Supreme Court declined to direct personal service to them because of the economics of the situation and the likelihood that their rights would be adequately pro-

[17] Hartman, *Due Process and Fluid Class Recovery*, 53 Oregon L. Rev. 225 (1974); and Cole, *Parens Patriae in Antitrust: A Blessing for Consumer or an Affront to the Fourteenth Amendment?*, 2 Hastings Con. Law. Q. 1128 (1975).
[18] *Op. cit.*, at 233.
[19] *Op. cit.*, at 1146.

tected by others. Extrapolating from *Mullane*, the question under S. 1284 is what is reasonable under the special circumstances presented by litigation brought by a State attorney general on behalf of numerous consumers within that State. Given the adequacy of the attorney general's representation, my own judgment is that publication-plus should suffice—the real question being what form should the "plus" take.

I think that the decision to provide expressly in Section 4C(b)(1) of Title IV that the court may direct further notice in appropriate cases is very sound. There is a counterpart for this type of authorization in Federal Rule 4(i)(1)(E) and I believe that this power in the district judge plus notice by publication will solve any constitutional problem. . . .

With respect to the issue of aggregate damages, the same Oregon Law Review article concluded:

> The examination of the due process issues inherent in fluid recovery has shown that the use of fluid recoveries in consumer class actions is not prohibited by the Constitution. Fluid recoveries can be devised which safeguard the due process rights of all the parties to a class action. The courts should recognize the constitutional validity of the fluid class recovery and address the important policy issues inherent in maintaining consumer class actions.[20]

The Hasting Constitutional Law Quarterly article concluded:

> Indeed, to disallow the *parens patriae* suit would be a far greater denial of due process, because it would deprive the consumer of his one realistic opportunity to recover his property.[21]

Finally, Professor Arthur Miller advised the Committee:

> As to the aggregate damage procedure, I tend to agree with Professor Rose's analysis. I start with the premise that the proposed statute establishes a new statutory cause of action that augments the existing statutory and common law remedies available to those injured by improper competitive conduct. Certainly Congress has the power to shape or implement any cause of action it creates by prescribing any mode of proof it believes desirable as a policy matter so long as due process notions and other fundamental procedural rights (such as avoiding double liability) are not violated. I find an aggregate damages procedure—pejoratively called by some the pot-of-gold approach—even when it is based on statistical or sampling techniques, to be no more offensive constitutionally than a federal no-fault statute, the elimination of certain common law defenses by the Federal Employers' Liability Act, or the enactment of a statute that would create absolute liability without fault or a limited wrongful death action. Nor could a constitutional attack be successful on a decision by Congress that circumstances warranted modifying common law notions of burdens of proof or evidentiary presumptions, which I think are proper analogies to the techniques of

[20] *Op. cit.*, at 242.
[21] *Op. cit.*, at 1149.

proof that would be validated by S. 1284. In any event, statistical methods and proof by sample are becoming acceptable methodologies. *See* Manual for Complex Litigation § 2.172 (1973).

But this does not directly meet an objection based on violation of the jury trial guarantee. Under the recent Supreme Court decisions in *Curtis* v. *Loether*, 415 U.S. 189 (1974), and *Pernell* v. *Southall Realty Corp.*, 416 U.S. 363 (1974), it seems to me that the Seventh Amendment jury trial guarantee would be fully applicable to actions under S. 1284. This would raise a question as to whether actions under Title IV would violate the constitutional mandate because it provides that a single jury may award damages in a lump sum and does not require individual jury awards for each of the individual damage claims. My own opinion is that in light of the congressional judgment and policy that will be reflected by S. 1284 and given the special exigencies of complex and multiparty litigation, the jury trial guarantee is satisfied by enabling one jury to sit as the finder of facts and assessor of a single damage award in a mass representative action. Any objection to the practice really goes to the fairness of the individual proceeding and the techniques of proof permitted by a particular judge—matters that can be taken up as typical issues on appeal. To insist upon the incredibly cumbersome and mind-boggling procedure of having a separate jury deliberation on each and every consumer's claim in the antitrust context, would be to strike through the substance of the jury right and wallow in its form.

Finally, with respect to the contention that *Warth* v. *Seldin*, 422 U.S. 490 (1975), stands for the proposition that the issue of standing is a constitutional bar to Title IV, we note the Court expressly held that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." 422 U.S. at 501.

(d) Title V—Premerger Notification and Stay Amendments

General

The essence of Title V is the creation of a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are consummated. Presently, the Government can stop few illegal mergers before they take place. Once a merger is consummated, the average case takes 5–6 years to resolve, during which time the acquiring entity retains the illegal profits and other fruits of the transaction. Securing adequate relief after the assets, management, and technology of the two merged firms have been together for that 5–6 year period is virtually impossible. As a result, the original state of competition is rarely restored upon ultimate disposition of the judicial proceeding. In addressing the obstacles to preventing illegal mergers prior to consummation and the problems of "unscrambling the eggs" and securing adequate post-acquisition relief, the Committee believes it is significant that the Department of Justice ultimately prevails after trial on the merits in approximately 90

percent of the non-bank merger cases it files under Section 7 of the Clayton Act.

Title V amends the Clayton Act to provide for a 30-day notification to the antitrust authorities prior to consummation of very large mergers and acquisitions (involving transactions between $100 million and $10 million companies). The title does not change the standards by which the legality of mergers is judged. Certain types of transactions (*e.g., de minimis* non-control investments, formation of subsidiary companies, real estate acquisitions for office space, and regulated industry and bank mergers) are exempted from the notification requirements. Further authority—to waive the 30-day waiting period, to provide additional exemptions by rulemaking, to require additional information, and to extend the 30-day waiting period for an additional 20 days from receipt of such additional information—is conferred upon the antitrust authorities.

If the Assistant Attorney General or the Federal Trade Commission seeks to enjoin consummation of an illegal merger or acquisition and certifies that the public interest requires relief *pendente lite*, Title V also provides for expedited judicial handling of such motion, for a temporary restraining order to prevent consummation until the court reaches a decision on the motion for the preliminary injunction (but not to exceed 60 days except for good cause), and for the issuance of a preliminary injunction unless the defendant shows that the Government does not have a reasonable probability of ultimately prevailing on the merits or that the defendants will be irreparably injured by the entry of such an order.

Section 7 of the Clayton Act (15 U.S.C. 18), prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce in any section of the country. The Supreme Court has stated that "[t]he dominant theme pervading congressional consideration of the 1950 [Celler-Kefauver] amendments [to section 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . ." *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962). The House Report on the Celler-Kefauver amendments states that "while the 200 largest non-banking corporations owned about one-third of all corporation assets in 1909, by 1928 they owned 49 percent of the total, and by the early thirties the proportion had increased to 54 percent." H.R. Rep. No. 1191, 81st Cong., 1st Sess. (August 4, 1949) at 2.[22] The Senate Report accompanying the Celler-Kefauver amendments echoes the findings contained in the House version:

> . . . [F]igures show that in 1946, the latest year for which such data are available, one-tenth of one percent of the total number of all American corporations—the giant firms with assets of $100,000,000 and over—own 49 percent of the assets of all American corporations; 2 percent of the number of corporations owned 78 percent; 8 percent of the number owned 89 percent of the assets; and 12 percent owned 92 percent of the assets. At the other end of the scale 45 percent

[22] The report continues that "316 large manufacturing corporations increased their proportion of the total working capital of all manufacturing corporations from 35 percent in 1926 to 47 percent in 1938." *Id.* The long-term rise in concentration was attributed in considerable part to the external expansion of business through mergers, acquisitions, and consolidation.

of the number of corporations—the small firms with assets of $50,000 or less—own less than 1 percent of the assets.

The figures presented . . . also show that in the field of manufacturing alone, the 25 largest corporations in 1948 owned 27 percent of the total assets of all manufacturing corporations, or a little more than an average of 1 percent of the assets for each of the 25 corporations. (S. Rep. No. 1775, 81st Cong., 2d Sess. (June 2, 1950) at 3).

The Committee concurs with the following summary of the underlying purposes of the merger provisions of the Clayton Act, as recounted by Mr. Justice Black in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 274–76 (1966):

From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few. On the basis of this fear, Congress in 1890, when many of the Nation's industries were already concentrated into what it deemed too few hands, passed the Sherman Act in an attempt to prevent further concentration and to preserve competition among a large number of sellers. Several years later, in 1897, this Court emphasized this policy of the Sherman Act by calling attention to the tendency of powerful business combinations to restrain competition "by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves in their altered surroundings." *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 323. The Sherman Act failed to protect the smaller businessmen from elimination through the monopolistic pressures of large combinations which used mergers to grow ever more powerful. As a result in 1914 Congress, viewing mergers as a continuous, pervasive threat to small business, passed § 7 of the Clayton Act which prohibited corporations under most circumstances from merging by purchasing the stock of their competitors. Ingenious businessmen, however, soon found a way to avoid § 7. * * *

Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. * * * To arrest this "rising tide" toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers.

Ironically, the pace of merger activity has greatly accelerated subsequent to enactment of the Celler-Kefauver amendments to section 7. The present concentrated structure of American industry—approximately 200 corporations control ⅔ of all manufacturing assets—in major part stems from mergers and acquisitions. Amended section 7 has failed to achieve its objectives—not because of its substantive standards, but because of the lack of an effective mechanism to detect and prevent illegal mergers prior to consummation. Recently, the Senate Special Subcommittee on Integrated Oil Operations of the

Committee on Interior and Insular Affairs recommended enactment of premerger notification and advance approval legislation for certain mergers.[23] The Subcommittee, chaired by Senator Floyd Haskell (D-Colo.), concluded that the lack of an effective procedural mechanism resulted in the consummation of a number of significant oil industry mergers [24] because—

> The expected Government opposition to the merger would not be likely to prevail in the near term. Once the two firms were amalgamated, the final outcome of any further litigation could, at worst, be pushed many years into the future. At best, Amoco could expect a settlement in which it would simply be divested of those few Occidental assets in which it really had little or no interest anyway, such as the Permian Corp. and Oxy's European marketing facilities.[25]

The Subcommittee further stated that the proposed Standard Oil-Occidental merger—

> illustrates how vulnerable, not how effective, our Federal antitrust machinery truly is. For had Occidental not mounted its own massive antimerger effort, the 12th and 32nd largest petroleum companies would have combined to form the 8th largest such firm; competition would have been eliminated in several key areas of both energy and chemical production.
>
> * * * * * * *
>
> The conclusion is inescapable that when the seller is as willing as the buyer, Federal antitrust agencies are powerless to block the transaction. The resources available to them are grossly inadequate. But even if these resources were significantly increased, the procedural barriers to antitrust enforcement would still be insurmountable.[26]

Assistant Attorney General Thomas E. Kauper testified on behalf of the Administration that "we strongly support the premerger notification procedure and enhancement of our ability to obtain relief *pendente lite*." [27] Assistant Attorney General Kauper elaborated in subsequent testimony before the House Subcommittee on Monopolies and Commercial Law, as follows:

> The first would require substantial companies to provide pre-merger notification to the Department. Such notification would provide us with time to develop the information

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[23] Report of the Special Subcommittee on Integrated Oil Operations, Committee on Interior and Insular Affairs, United States Senate, 94th Cong., 1st Sess., *An Analysis of the Proposed Standard-Occidental Merger* (Committee Print No. 94–20, 1975); and Report of the Special Subcommittee on Integrated Oil Operations, Committee on Interior and Insular Affairs, United States Senate, 93rd Cong., 2d Sess., *The Burmah-Signal Merger* (Committee Print, unnumbered, 1974).

[24] *Id.*

[25] Report No. 94–20, at 5.

[26] Report No. 94–20, at 9.

[27] On February 19, 1976, Deputy Attorney General Harold R. Tyler, Jr., advised the Committee that "although the Administration adheres to its previously expressed position on other provisions of S. 1284, and particularly Title II of the bill, this letter is to inform you that the Administration does not now support" Title V's premerger injunction provisions (Section 501(d)). Both Deputy Attorney General Tyler and Secretary of the Treasury William E. Simon expressed support for the premerger notification and waiting periods of Title V, as reported by the Committee. On March 10, 1976, in testimony before the House Subcommittee on Monopolies and Commercial Law, Assistant Attorney General Kauper reaffirmed his previous support for both the premerger notification and injunction provisions of S. 1284.

needed to insure a thorough evaluation of whether the proposed merger should be challenged. It would thus provide us with a meaningful opportunity to seek a preliminary injunction before a questionable merger is consummated. This is of great practical importance because divestiture of stock or assets after an illegal merger is consummated is frequently an inadequate remedy for a variety of reasons.

Assets may be scrambled, making re-creation of the acquired firm impossible. Key employees may be lost. The goodwill of the acquired firm may be dissipated, making it a weaker competitive force after divestiture.

Moreover, divestiture is normally a painfully slow process, and in some cases might never occur. Locating an appropriate buyer willing to purchase at a reasonable price is frequently difficult. Firms under divestiture orders may deliberately delay to reap the benefits of the unlawful merger. During these delays, anticompetitive consequences grow.

Pre-merger notification will also advance the legitimate interests of the business community in planning and predictability. It will enable firms to make post-acquisition changes with much more confidence than they can at present.

Lastly, pre-merger notification will prevent the consummation of so-called "midnight" mergers designed to subvert the Department's authority to seek preliminary relief.

The Committee agrees with the assessment of Assistant Attorney General Kauper that both the premerger notification and injunction provisions are essential in order to carry out the underlying purpose of section 7, and with the statement of Deputy Assistant Attorney General Joe Sims that enactment of Title V, and particularly the premerger injunction provision, "is crucial to an effective enforcement program in order to avoid consummation of transactions which are ultimately adjudged to violate section 7 of the Clayton Act." [28]

The Committee believes that Title V represents a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays. To this end, the Committee adopted a number of amendments offered by the sponsors of the legislation, including a clarification and expansion of exemptions, a reduction of the notification and waiting periods, a reduction in the number of transactions subject to the notification and waiting provisions, a confidentiality provision, a modification of several provisions to provide the court with greater discretion, and a modification of the automatic injunction provision (subsection (d)) to an automatic temporary restraining order not to exceed 60 days (except on a showing of good cause) upon a certification of the Assistant Attorney General or the Federal Trade Commission. The Committee agrees with the state-

[28] Premerger notification and related provisions were passed by the House of Representatives during the 84th Congress, by the Senate Judiciary Committee during the 84th Congress, by the House Judiciary Committee during the 85th Congress, and by the Senate Antitrust and Monopoly Subcommittee on three prior occasions. In five successive messages to Congress, President Eisenhower urged adoption of the legislation. The concept also had the support of former Attorneys General Herbert Brownell and Robert F. Kennedy. In 1969, the Neal Commission report went even further and recommended the complete prohibition of acquisitions by any large firm of any leading firm. The Committee believes that the purposes underlying enactment of Section 7 of the Clayton Act could have been accomplished if such legislation had been enacted when proposed, and that if it had the economy of the United States today would be considerably less concentrated.

ment of the American Life Insurance Association that Title V, as reported, will "not adversely affect the capital markets." For the reasons more fully set forth below in the discussion of subsection (d), the Committee further believes that those provisions will neither deter nor impede consummation of the vast majority of mergers and acquisitions.

Section 501—Clayton Act amendment

Section 501 amends the Clayton Act (15 U.S.C. 12, *et seq.*) by adding a new section 7A.

Section 7A (a)—Jurisdictional transactions

Section 7A(a) provides that except for the transactions exempted under subsection (b)(4), jurisdictional transactions may not be consummated until expiration of the notification and waiting period prescribed in subsection (b)(1). Section 7A(a) prohibits acquisitions until expiration of such period if the acquiring person or the acquired person, or both, are engaged in commerce or in any activity affecting commerce, and

(1) stock or assets of a manufacturing company with annual net sales or total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

(2) stock or assets of a non-manufacturing company with total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

(3) stock or assets of a person or persons with annual net sales or total assets of $100,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $10,000,000 or more.

Approximately the largest 700 U.S. companies meet the $100 million jurisdictional requirement. Although $100 million companies account for roughly 40 percent of mergers and acquisitions, Title V's *dual* requirement of (i) a $100 million acquiring company, and (ii) a $10 million acquired company would have required such 30-day notification, over the past 5 years, in less than 100 transactions per annum. With this limitation, the Committee sought to include within the ambit of the premerger notification provision primarily those mergers or acquisitions that were most likely to have a substantial effect on competition. That is not to say that smaller mergers may not run afoul of the Clayton Act. To include the bulk of the approximately 3,000 mergers that have occurred annually in the course of the past several years would, however, in the Committee's judgment, impose an undue and unnecessary burden on business. Complex mergers or acquisitions of the kind encompassed within this subsection generally require a great deal of prior planning, and this provision will provide the Government appropriate opportunity to evaluate the legality of significant business behavior at the most propitious moment for all parties, with the least possible disaccommodation.

Section 7A (b)(1)—Notification and waiting period

This section contains the basic premerger notification and waiting period. Transactions not exempted pursuant to subsection (b)(4), or authorized pursuant to subsection (c)(4), may not be consummated until expiration of the 30-day period following the filing of the required notification.

Section 7A (b) (2)—Additional transactions

This section authorizes the antitrust authorities, by general regulation, to subject additional transactions to the 30-day notification and waiting period. This section reflects the Committee's recognition that the public interest and the purposes underlying section 7 of the Clayton Act could, in certain sectors of the economy, require advance notification of transactions by companies not meeting the $100/$10 million jurisdictional test. Subsection (b) (2) provides such authority with respect to those particular industries or particular companies.

Section 7A (b) (3) (A)—Form and content of notification

This subsection provides that the notification required by this section shall be in such form and contain such information and documentary material as the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall by general regulation prescribe, after notice and submission of views, pursuant to section 553 of title 5, United States Code. This provision, together with the authority contained in subsection (b) (4), authorizes the antitrust authorities to obtain the information and documentary material they believe necessary or appropriate to carry out the purposes of Title V.

Section 7A (b) (3) (B)—Confidentiality

This subsection provides that the fact of the filing of the notification required by this section and all information and documentary material contained therein shall be considered confidential under section 1905, title 18, United States Code, until the fact of such filing or of the proposed merger or acquisition is public knowledge, at which time such notification, information, and documentary material shall be subject to the provisions of section 552 (b), title 5, United States Code. Nothing in this section is intended to prevent disclosure to any duly authorized committee or subcommittee of the Congress, to other officers or employees concerned with carrying out this section or in connection with any proceeding under this section.

Section 7A (b) (4)—Rulemaking, exemptions, definitions, and reports

Subsection (b) (4) (A) provides that the Federal Trade Commission, with the concurrence of the Assistant Attorney General, is authorized and directed to define the terms used in this section, to prescribe the content and form of reports, to except classes of persons and transactions from the notification requirements thereunder by general regulation, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

The general purpose underlying this provision is to assure that the procedures established by this section are administered in a flexible and effective way. Business methods may change, or experience may suggest that certain kinds of mergers or acquisitions should be exempted from the applicability of parts of this section, and the antitrust authorities should have the flexibility to adapt to changed circumstances. A proper balance should exist between the needs of effective enforcement of the law and the need to avoid burdensome notification requirements or fruitless delays. To this end, authorization to define terms should be interpreted broadly in order to allow the Commission

to make a specific exemption narrow or broad, or to redefine the exemptions to include or exclude specific kinds of businesses or transactions, as experience dictates. Likewise, the authorization to promulgate rules of general or special applicability should be interpreted so as to permit additional specific exceptions, designed to deal with particular or general types of economic situations.

Subsection (b)(4)(B) provides a general listing of statutory exemptions. Many transactions that are literally subject to the reporting requirements are not within the intent of Section 7 or already are subject to the notification requirements of other agencies. The precise breadth and particulars of the general exemptions, of course, are left to a determination by the antitrust authorities through the rulemaking authority conferred upon them. The exemptions include: goods or realty transferred in the ordinary course of business; bonds, mortgages, deeds of trust, or other obligations which are not voting securities; interests in a corporation at least 50 per centum of the stock of which already is owned by the acquiring person or a wholly owned subsidiary thereof; transactions subject to approval of other agencies; acquisitions, solely for the purpose of investment, of voting securities, if, at the time of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer; acquisitions of voting securities if, at the time of such acquisition, the securities acquired do not increase, directly or indirectly, the acquiring person's share of outstanding voting securities of the issuer; and acquisitions, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolution, or of assets, other than voting securities or other voting share capital, by any bank, banking association, trust company, investment company, or insurance company. in the ordinary course of its business. The Committee recognizes that it often will be difficult, if not impossible, to determine at a precise point in time the exact amount of an issuer's outstanding voting securities for purposes of the 10 per centum calculation. It is the Committee's intention that the rules promulgated by the antitrust authorities permit reliance on such authoritative sources as reports to shareholders, reports to the Securities and Exchange Commission and recognized financial manuals.

Section 7A (c)(1) and (c)(2)—Additional waiting period

These subsections provide that either the Federal Trade Commission or the Assistant Attorney General may, before the expiration of the 30-day notification and waiting period, require the submission of additional information and documentary material and may extend the waiting period for an additional period of up to 20 days after the receipt of such additional information and material. This provision reflects the Committee's judgment that many merger transactions are quite complex and require particularized, detailed information to permit a meaningful evaluation. As Assistant Attorney General Kauper stated to the House Subcommittee on Monopolies and Commercial Law:

> Sound analysis of a pending merger requires assembly of reliable market data. We must formulate relevant product markets, taking into consideration cross-elasticity of demand among functionally related products. We must define a section or sections of the country in which measurement of com-

petitive effects is appropriate. We need data not only from the parties to the pending merger but also from other competitors in order to construct a realistic universe in which effects on concentration may be measured. Published data is often unavailable or insufficient.

To speed the process and assure prompt compliance and cooperation, the additional 20-day period starts to run from the time of compliance with the request for additional information and material. The Committee reduced the additional time period from 45 to 20 days in recognition of the possible adverse effect of a longer time period on tender offers under the Williams Act (15 U.S.C. 78n(d)(5)).[29]

Section 7A(c)(3)—Other statutes

This subsection provides that no provisions of this section shall limit the power of the Federal Trade Commission or the Assistant Attorney General to secure, at any time, information or documentary material from any person, including third parties, pursuant to the Federal Trade Commission Act or the Antitrust Civil Process Act.

Section 7A(c)(4)—Waiver of waiting period

This subsection provides that the Federal Trade Commission and the Assistant Attorney General may waive the waiting periods provided in this section or the remaining portions thereof, in particular cases, by publishing in the Federal Register a notice that neither intends to take any action within such periods in respect of the acquisition.

Section 7A(d)—Temporary restraining order and preliminary injunction

If the Assistant Attorney General or the Federal Trade Commission seeks to enjoin consummation of an illegal merger or acquisition and certifies that the public interest requires relief *pendente lite*, subsection (d) provides for:

(1) a temporary restraining order to prevent consummation until a decision is rendered on the motion for the preliminary injunction (subsection (d)(2));

(2) expedited judicial handling of such motion (subsections (d)(1) and (d)(2));

(3) the issuance of a preliminary injunction until a final decision on the merits is made as to the legality of the proposed merger or acquisition unless the defendant establishes that the government does not have a reasonable probability of ultimately prevailing on the merits or that the defendant will be irreparably injured by the entry of such an order (subsection (d)(3)); and

(4) a limitation of the temporary restraining order to 60 days, unless extended for good cause by the chief judge of the United

[29] In the case of a tender offer, the Williams Act 60-day time period will be met under this subsection if the recipient of a request for additional information and material complies with such request within 10 days. It is the Committee's intention that the Department of Justice promptly seek such additional information and material, and not routinely wait for the thirtieth day. The Committee considered but rejected as unwise and unnecessary the inclusion of a total exemption for tender offers. The surprise element of a tender offer will not be prejudiced by title V. Under the title, notification to the antitrust authorities need not be made until the tender offer is publicly announced. Of course, the notification may be made prior to such time, and, in cases where time is of the essence, it may be wise to provide early notification. Over the past several years, less than 10 percent of the jurisdictional transactions were by way of tender offer. The jurisdictional transactions made by tender offer, however, were virtually all made by companies with assets or sales in excess of $500 million—the very transactions which, in the Committee's judgment, should be reported to the antitrust authorities.

States Court of Appeals for the circuit within which the action is brought (subsection (d)(4)).

The Committee believes that in addition to premerger notification, the revised procedures contained in subsection (d) are necessary to afford the Government a reasonable opportunity to stop illegal mergers and acquisitions prior to consummation. As put by Assistant Attorney General Kauper before the House Subcommittee on Monopolies and Commercial Law on March 10, 1976:

> I believe quite strongly that divestiture is a wholly inadequate remedy in a merger case, and we seek to avoid that problem whenever we can.
>
> This is an important point, and cannot be overemphasized. Our investigatory process is designed to obtain what is necessary to make a litigation decision before consummation. Experience clearly shows that divestiture very often does not, and frequently cannot, result in a return to the competitive *status quo ante*. There is almost always a change in circumstances caused by a consummated merger that can never be undone. As a practical matter, divestiture is slow and unwieldy, and experience proves what can be expected—a company that loses a section 7 case after consummation has little incentive to assist in rapid divestiture. Horror stories abound, with the approximately 17-year history of the *El Paso Natural Gas* case one of the most visible. Unfortunately, the interminable problems and delay involved in obtaining divestiture are the rule, not the exception. There is every reason for the parties to delay an ordered divestiture, as both we and the FTC are only too painfully aware. . . .

Subsection (d) derives from the experience of the antitrust enforcement authorities and the private bar after more than a half-century of enforcement of the Clayton Act. This experience teaches that in cases in which preliminary injunctions have issued, the defendant's incentive to hasten the court's consideration of the case on the merits has contributed markedly to the expeditious resolution of the lawsuit.[30] Contrariwise, in cases in which preliminary relief is denied, the incentive works in the opposite direction—to drag the proceedings out so that if the merger is eventually declared illegal, the defendant will have wrought maximum benefit from the company before divestiture is ordered. Expeditious resolution of the suit also saves litigation costs and helps ease crowded court dockets. Once mergers take place they are impossible to pull apart and litigation drags on for many years. The incentive is to delay because every day of delay means another day of illegal profits. Thus, the *El Paso* case referred to by Assistant Attorney General Kauper took 17 years and six Supreme Court decisions to obtain divestiture. It is estimated that El Paso derived profits of $10 million for every year it retained the illegally acquired company.

[30] Assistant Attorney General Thomas E. Kauper testified before the House Subcommittee on Monopolies and Commercial Law, as follows:

> In addition, our failure to obtain preliminary injunctive relief creates an incentive for defendants to delay rather than expedite the litigation. Our experience in bank merger cases, where there is an automatic statutory stay, is that those cases move significantly faster than merger cases challenging a consummated transaction. I am convinced that preliminary relief is necessary to expedited litigation and that, with preliminary relief, these matters can be disposed of fairly rapidly, as was the recent *Copper Range-Amax* case, which was disposed of in 60 days.

Careful studies, which have been published only in the last few years, confirm the conclusion of Assistant Attorney General Kauper and reveal that the remedial provisions of the merger decrees have almost invariably failed to restore the competitive conditions existing before the merger.[31] The result of a final divestiture decree usually is the divestiture of a stripped down and empty shell—truncated assets that never were and never could be a viable firm—or the sale to a buyer who, had he sought to acquire the divested firm at the outset, would himself have violated section 7. Furthermore, in a surprising number of cases, the court orders no divestiture at all. Relief, when given, has been tardy and long-delayed. Thus, Professor Elzinga, in his study of 39 merger cases in which relief was given, concluded that the decree could be viewed as truly successful in only three instances. He found that the government obtained unsuccessful or deficient relief in 90 percent of the cases.

It is startling to contrast the language of the Supreme Court in some of its leading merger cases with the decree finally entered. In *United States* v. *Continental Can Company*, 378 U.S. 441, 463 (1964), the Court struck down a merger between a leading producer of metal containers and a leading producer of glass containers in part because the latter had been removed "as an independent factor in the glass industry." Eight years later, the final decree permitted the sale of most of the acquired assets of the glass container producer to the third largest glass container producer in the United States.

In *United States* v. *Von's Grocery Company*, 384 U.S. 270, 278 (1966), the Supreme Court, in holding unlawful the acquisition of the sixth largest grocery chain in Los Angeles by the third largest chain, characterized the merger as that of "two already powerful companies merging in a way which makes them even more powerful than they were before." Far from restoring the acquired firm, the final decree simply permitted Von's to sell any 35 of its 108 stores, thereby permitting it to choose its least profitable outlets, scarcely a diminution of its power.

Lower court decisions fare no better. In one instance, the acquiring firm refused to offer the acquired company for sale except at an unrealistically high price, and when no buyer was forthcoming, the acquiring firm was relieved of its obligation to divest. In another case, the acquiring firm sold off most of the assets of the acquired firm, and the court found nothing left to be divested except some obsolete machinery for which no buyers could be found. And in yet another, involving an important trademarked product, the court limited divestiture to the physical plants, without the right to use the all-important trademark, which the acquiring firm retained.

In the face of this bleak record it is not too much to say, as has Professor Donald Dewey, that while "the government wins the opinions . . . the defendants win the decrees." (Dewey, *Romance and Realism in Antitrust Policy*, 63 J. Pol. Econ. 93 (1955).) The difficulty of securing injunctive relief to block illegal mergers in advance and the inadequacy of subsequent remedies have resulted in a situation in which the disincentives to unlawful mergers are insufficient. As an economist has aptly described the situation:

> . . . [i]f there is no way of preventing a particular act before it is committed, and if there is no punishment [*i.e.*, cost] for

[31] *See, e.g.*, the excellent presentation by Joseph F. Brodley, Professor of Law, Indiana University, Hearings at 505, from which much of the accompanying text is drawn.

committing this act, if caught, and if it is profitable, then the act will continue to be practiced. (Elzinga, *Mergers, Their Causes and Cures*, 2 Antitrust Law and Econ. R. 53, 82 (1968).)

The only significant exception to this barren remedial picture occurs in those relatively few cases in which the government has been able to obtain advance injunctive relief staying the merger pending resolution of the case. However, in the period of heavy merger enforcement, beginning in 1955 and extending to 1971, the Department of Justice obtained a preliminary injunction in only 15 cases, while the FTC obtained such an injunction in only one case. The district courts have varied in their receptivity to injunctive petitions by the government, but on balance have not been hospitable. The government has been put to a standard of proof akin to what it must meet at full trial. In addition, the court has often required it to prove that irreparable injury would result if the merger were allowed to be consummated.

Over the 20-year period from 1955 to 1975, the Department of Justice has sought only 62 full or partial preliminary injunctions against consummations of mergers. (FTC has had injunction authority only since 1973 and has used it in only three merger cases.) In the limited number of cases in which the Government sought a preliminary injunction, it was successful in obtaining it in less than one-third of the cases. After a court ruling on the merits, however, judgment for defendant was granted in only 10 instances—or in 16 percent of the cases. Of the 39 contested cases, the Department was ultimately successful on the merits in 31.[32]

Despite the Department's impressive record after trial on the merits, the record reflects that the underlying purposes of section 7 have not been vindicated because of the lack of an effective mechanism to enjoin illegal mergers *before* they occur. The Committee believes that subsection (d) provides that mechanism. In testimony on an earlier version of this provision, Herbert Brownell, President Eisenhower's Attorney General, stated that such a provision would benefit the business community. Representatives of some merging companies had advised him that disruption of business plans is lessened by agency action before merger consummation. In fact, some companies take the position that if the agencies are to proceed at all, they should sue before consummation.

The basic argument against subsection (d) is the fear that if the government were allowed to delay consummation of a merger or tender offer for an extended period, the transaction would fall apart. It is contended that, through delay, subsection (d) would prevent all mergers—the good and the bad alike—and would wreck the capital markets.[33]

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[32] Of the 23 cases in which the defendant contested the motion for a preliminary injunction, the Division was ultimately successful in 16 of those cases which proceeded to a final judgment.

[33] For the reasons set forth in the accompanying text, the Committee disagrees with these contentions in respect of subsection (d), as reported. The Committee notes that the core of the opposition to subsection (d) is centered in a segment of the New York investment banking community, including such firms as Lazard Frères & Co.; Goldman Sachs & Co.; Lehman Brothers Incorporated; and Lasker, Stone & Stern. These and other investment banking firms derive substantial revenues from finding suitable merger partners and from otherwise assisting in the consummation of mergers and acquisitions. For example, the March 10, 1973 issue of *Business Week* reported that "although Lazard is not a giant in underwriting, it has earned some of the biggest fees in the history of investment banking on acquisition deals." Lazard's senior partner, André Meyer, is quoted as

As originally drafted, the bill provided for an automatic court-ordered injunction barring consummation of mergers that would endure until the court reached its decision on the merits after trial which could take many months or even years. Under this formulation, the court had no discretionary power to lift the stay. As reported by the Committee, however, subsection (d) provides for a temporary restraining order until a decision is reached on the Government's motion for a preliminary injunction. The order expires after 60 days unless extended, for good cause, by the chief judge of the court of appeals. The Committee does not agree that such a delay will frustrate legitimate business plans and decisions, particularly in light of the Antitrust Division's judicious and impressive performance. The Committee expects utilization of this provision to be the exception—not the rule—and notes that of the approximately 3,000 mergers that take place annually, the Department challenges about 10 and seeks preliminary relief in about 3 cases. Moreover, under the Bank Merger Act, proposed mergers are automatically enjoined upon the filing of a lawsuit by the Government—without any time limitation—until a final decision on the merits is rendered.[34] Yet bank mergers are continually consummated and are not frustrated by this procedural safeguard. Additionally, most regulatory agency statutes require prior approval by the agency before mergers or acquisitions may be consummated.[35] Regrettably, some of these decisions take years—not the 60 days contemplated under subsection (d). Yet mergers continue in the regulated sector of the economy.

The Committee believes that 60 days will in the majority of cases permit courts to come to grips with the multitude of complexities presented in a merger case.[36] An analysis of the time periods taken by judges in preliminary injunction merger cases shows that a period less than 60 days will, in many cases, be inadequate. Over the past 20 years, there have been 24 cases in which a temporary restraining order was followed by a decision on a motion for a preliminary injunction. Only 8 were decided in 30 days or less. Six were decided in from 30 to 50 days; 5 in from 50 to 70 days; and 5 in from 103 to 149 days. The average time period amounted to 55 days. Of course, these

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stating that Lazard's merger and acquisition services have been built into "the most spectacular and sometimes most profitable part of our business." From ITT-related acquisitions alone, Lazard earned $2.4 million in fees between 1966 and 1969. In 1969, Lazard received $1 million from Loew's Theaters for services relating to the acquisition of Lorillard Corporation; $1,500,000 from the Kinney National Service-Warner Bros. acquisition; and $750,000 from the Ebasco-Boise Cascade acquisition. In 1970, Lazard received fees and other income associated with the ITT-Hartford Fire and Casualty Company acquisition amounting to more than $2.4 million. In 1971, Lazard received more than $2,150,000 in fees from only three companies—ITT, RCA, and Pfizer—for putting together five mergers. In 1975 Lazard Frères received from the United Technologies-Otis Elevator tender offer fees between $250,000 and $750,000, dependent upon the number of shares tendered. Also in 1975, Goldman-Sachs received from the Standard Oil-Pasco asset acquisition fees of $200,000 plus 1 percent of the amount of proceeds from the sale of assets, which would amount to $2[illegible],000 if Studebaker-Worthington is the purchaser.

[34] 12 U.S.C. 1828(c)(7).

[35] *See, e.g.*, 12 U.S.C. 1842 (bank holding company acquisitions); 15 U.S.C. 79(i) (gas and electric holding companies); 15 U.S.C. 717(f) (natural gas companies); 16 U.S.C. 824b (electric utilities); 47 U.S.C. 221–222 (telephone and communications companies); 49 U.S.C. 5 (railroads); and 49 U.S.C. 1378 (airlines).

[36] The Committee notes that Senator Charles McC. Mathias (R-Md.) expressed the opinion that the 60-day temporary restraining order, with an indefinite extension for good cause, was too long. Consequently, he offered an amendment retaining the expedition and injunction provisions of subsection (d), but reducing the temporary restraining order to 30 days with an additional 30 days for good cause. Senator Mathias withdrew his amendment in response to representations by the sponsors of the legislation, Senators Philip A. Hart (D-Mich.) and Hugh Scott (R-Pa.), that the appropriate time period for the temporary restraining order would be given careful attention during their forthcoming negotiations with the White House over the scope of subsection (d). Senator Mathias reserved his right to offer an amendment on the floor with respect to the duration of the temporary restraining order, depending on the outcome of these negotiations.

time periods frequently were for a decision *without* opinion; that is to say, either an oral statement from the bench or a written order (without opinion) granting or denying the motion for a preliminary injunction. Under amendments to the Expediting Act enacted last Congress, decisions on merger injunction motions are appealable.[37] Thus, a written opinion now will be necessary for review by the appeals court. It is the Committee's intention that the court's decision be expedited, in accordance with the provisions of subsection (d), and that 60 days be considered the outside limit, subject to the good cause extension.

Sections 7A (d) (1) and (d) (4)—Temporary restraining order

These sections provide for the issuance of a temporary restraining order until the decision on the Government's motion for the preliminary injunction by the chief judge of the district court within which the action is brought (but not to exceed 60 days unless extended for good cause by the chief judge of the court of appeals), upon certification by the Assistant Attorney General or the Federal Trade Commission that the public interest requires relief *pendente lite.*

Sections 7A (d) (1) and (d) (2)—Expedited consideration

These sections direct that upon the issuance of the temporary restraining order, the chief judge of the district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; that the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time; that it shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code; and that it shall be in every way expedited.

The Committee intends that the chief judge of the circuit should examine the calendars of all eligible district judges before assigning the case to the judge best able to provide expeditious action.

Section 7A (d) (3)—Preliminary injunction standards

This section provides that a preliminary injunction shall issue restraining consummation of the proposed acquisition or merger until the order of the Commission in respect thereof or the judgment entered in such action has become final unless the defendants show that the Commission or the United States does not have a reasonable probability of ultimately prevailing on the merits, or that they will be irreparably injured by the entry of such an order, in which case the court may deny, modify, or subject such preliminary injunction to such conditions as the court shall deem just in the premises: *Provided*, That a showing of loss of anticipated financial benefits from the proposed acquisition or merger shall not be sufficient to warrant denial, modification, or conditioning of such an injunction.

Under present law, a preliminary injunction can only be obtained upon a showing by the Government of substantial probability of success on the merits. The courts have unreasonably demanded the Government to adduce evidence akin to that required to show a violation of section 7 in a trial on the merits. Often, the courts have considered the probable loss of financial benefits and have weighed the likelihood of irreparable injury resulting from the issuance of a preliminary

[37] Pub. Law 93–528.

injunction. The proviso clause is intended to make clear the Committee's intention that only the legality of the proposed transaction is to be considered—not anticipated financial benefits to shareholders or others, nor lost profits, tax benefits, business opportunities, or the like, to the participants in the transaction. Irreparable injury might occur when the acquired firm is in a failing condition. The Committee believes that by shifting the burden to defendants on the motion for a preliminary injunction, this subsection strikes a fair balance between the inadequate existing law and the advance approval required by most regulatory agency statutes.

Section 7A (e)—Future actions

This section provides that the failure of the Federal Trade Commission or the Assistant Attorney General to request additional information or documentary material pursuant to this section, or failure to interpose objection to a transaction within the periods specified in subsections (b)(1) and (b)(2) of this section, shall not bar the institution of any proceeding or action, or the obtaining of any information or documentary material, with respect to such transaction, at any time under any provision of law.

Section 7A (f)—Civil penalties

This section provides that whenever any person violates or fails to comply with the provisions of subsection (a) of this section, which incorporates by reference the 30-day waiting period of subsection (b)(1) and the additional 20-day period of subsection (c)(2), such person shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each day during which such person directly or indirectly holds stock or assets, in violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought by the United States. Whenever any person fails to furnish information required to be submitted, pursuant to subsection (c)(1) of this section, such person shall be liable for the penalties provided for noncompliance with the provisions of the Federal Trade Commission Act or the Antitrust Civil Process Act, as the case may be.

Section 7A (g)—Hold-separate provision

This section provides that in any proceeding instituted or action brought by the Federal Trade Commission or the United States alleging that an acquisition violates section 7 of this Act, or sections 1 or 2 of the Sherman Act, upon application of the Federal Trade Commission or the Assistant Attorney General to the United States district court within which the respondent resides or carries on business, or in which the action is filed, such court shall, as soon as practicable, enter an order establishing the purchase price of the acquired stock or assets, requiring the acquiring person or persons to maintain the personnel, assets, stock or firm being acquired as a separate entity unless the interests of justice require otherwise, and may enter an order requiring the profits of the acquired firm, stock, or assets to be placed in an escrow account, pending the outcome of the proceeding or action. Upon entry of a final order or judgment of divestiture under section 7 of this Act, or sections 1 or 2 of the Sherman Act, the court shall order that the divestiture be accomplished expeditiously. To the extent practicable,

the court may deprive the violator of all benefits of the violation including tax benefits.

Although largely declaratory of existing law, this section is intended to serve as an exhortation to the court to use the powers at its disposal to facilitate ultimate divestiture and to remove the present incentive to merge and then engage in lengthy legal maneuvering to reap profits during protracted litigation.

Section 502—Effective date

This section provides that the provisions of this title shall be effective one hundred and twenty days after the date of enactment of this Act. Effective upon the date of enactment of this Act, the Federal Trade Commission is authorized and directed to carry out the requirements of sections 7A(b)(3) and (b)(4) of the Clayton Act, as amended by this Act.

III. Committee Deliberations

On March 21, 1975, Antitrust and Monopoly Subcommittee Chairman Philip A. Hart and Minority Leader Hugh Scott introduced S. 1284. The legislation was referred to the Committee on the Judiciary. The Antitrust and Monopoly Subcommittee held hearings on May 7 and 8 and June 3, 4, and 12, 1975, at which more than 30 witnesses testified.

On July 28, 1975, the Antitrust and Monopoly Subcommittee met in open executive session at which time the bill was reported without recommendation to the full Committee on the Judiciary with amendments.

At the direction of the Committee on the Judiciary, additional hearings on S. 1284, as reported by the Antitrust and Monopoly Subcommittee, were held on February 3 and March 2 and 3, 1976, for the purpose of taking additional testimony from persons opposing the bill. Of the nine witnesses heard, all were designated by Senators Roman Hruska and Strom Thurmond.

On February 19, as modified by the Committee on March 4, the following procedures were adopted by the Committee without objection for the purpose of processing S. 1284:

"Judiciary Committee Agreement on S. 1284

1. Two days of hearings—March 2 and 3.

2. Not more than 16 hours of markup; time evenly divided between Senators Hart and Hruska.

3. Markup to be scheduled in advance, with an agenda.

4. Markup to commence March 4; and to thereafter occur 2 days a week, 2 hours a day.

5. A quorum shall consist of a minimum of six Senators for purposes of markup and voting on amendments, unless Senators Hart and Hruska agree to a lesser number. Each side shall make a good faith effort to provide the quorum.

6. (a) Of the 16 hours of markup, the final 2 hours shall take place no earlier than 1 week after preparation by the staff of a clean bill reflecting changes made during the 14 hours or less of markup.

(b) A quorum shall consist of a minimum of eight Senators at this 2-hour markup session.

(c) During the final 2 hours of markup, amendments adding to or striking from the clean bill will be permitted provided they are circulated to all members of the Committee at least 48 hours in advance. Debate will be limited to 10 minutes on each amendment, time evenly divided between the sponsor of the amendment and the opponents of the amendment. If any amendments still remain at the expiration of the 2 hours, debate on such remaining amendments will be limited to 2 minutes each (time evenly divided between the sponsor of the amendment and the opponents of the amendment).

Upon expiration of the 2 hours or completion of the remaining amendments, whichever occurs later, a final vote shall take place on reporting S. 1284, as amended.

7. Regardless of the number of hours or days of markup, a final vote on a motion to report S. 1284, as amended, shall take place no later than April 6. Such vote may take place earlier than April 6 by unanimous consent.

8. The majority report shall be filed no later than one week after April 6.

9. Any minority report shall be filed no later than April 26."

On March 4, 9, 10, 17, 18, 23, and 24, and April 6, 1976, the Committee on the Judiciary met in open executive session and marked up the bill; and on April 6, 1976, S. 1284 was ordered favorably reported to the full Senate with amendments.

IV. Record Votes in Committee

a. Subcommittee on Antitrust and Monopoly

On July 28, 1975, the Antitrust and Monopoly Subcommittee met in open executive session at which time:

(1) The Subcommittee adopted an amendment in the nature of a substitute text offered by Senator Philip A. Hart. On a motion to adopt the amendment:

Yeas	*Nays*
Philip A. Hart	Hruska
Kennedy	
Tunney	
Bayh	
Abourezk	
Fong	
Thurmond	
Mathias	

(2) The Subcommittee adopted an amendment offered by Senator Edward M. Kennedy providing for the payment of attorneys' fees to substantially prevailing plaintiffs in Clayton Act section 16 cases. On a motion to adopt the amendment:

Yeas	*Nays*
Philip A. Hart	Hruska
Kennedy	Fong
Bayh	Thurmond
Abourezk	
Mathias	

(3) The Subcommittee reported S. 1284, as thus amended, to the full Committee without recommendation. On a motion to report the bill to the full Committee on the Judiciary:

Yeas	*Nays*
Philip A. Hart	Hruska
Kennedy	Fong
Tunney	
Bayh	
Abourezk	
Thurmond	
Mathias	

b. Committee on the Judiciary

On April 6, 1976, the Committee on the Judiciary met in open executive session at which time:

(1) The Committee accepted without objection an amendment in the nature of a substitute text offered on behalf of Senators Philip A. Hart and Hugh Scott by Committee Chairman James O. Eastland. The amendment incorporated the amendments adopted by the Antitrust and Monopoly Subcommittee and the amendments tentatively adopted by the Committee on the Judiciary, prior to its April 6, 1976 meeting, in accordance with the procedures adopted by the Committee for the purpose of processing S. 1284.

(2) The Committee adopted an amendment offered by Senator Roman Hruska, striking from Title IV the provision authorizing a State to recover damages for violations of the antitrust laws resulting in damage to the States' general economy. On a motion to adopt the amendment:

Yeas	*Nays*
Eastland	Abourezk
McClellan	
Philip A. Hart	
Kennedy	
Bayh	
Burdick	
Tunney	
Hruska	
Fong	
Hugh Scott	
Thurmond	
Mathias	
William L. Scott	

(3) The Committee adopted an amendment in the nature of a substitute offered by Senator Philip A. Hart (for himself and Senator Hugh Scott) providing for court approval of attorneys' fees in Title IV *parens patriae* actions. On a motion to adopt the amendment:

Yeas	*Nays*
Philip A. Hart	Eastland
Kennedy	McClellan
Bayh	Burdick
Robert C. Byrd	Hruska
Tunney	Thurmond
Abourezk	William L. Scott
Fong	
Hugh Scott	
Mathias	

(4) The Committee accepted without objection an amendment offered by Senator Fong providing for the application of Title IV to causes of action accruing prior to the date of enactment of Title IV, but not to any civil action alleging a violation previously alleged in any civil action brought on behalf of a class of consumers.

(5) The Committee adopted an amendment in the nature of a substitute offered by Senator Philip A. Hart (for himself and Senator Hugh Scott) authorizing the award of reasonable attorneys' fees to defendants in *parens patriae* cases filed under Title IV in bad faith. On a motion to adopt the amendment:

Yeas	*Nays*
Eastland	William L. Scott
McClellan	
Philip A. Hart	
Kennedy	
Bayh	
Burdick	
Robert C. Byrd	
Tunney	
Abourezk	
Hruska	
Fong	
Hugh Scott	
Thurmond	
Mathias	

(6) The Committee adopted an amendment offered by Senator Burdick requiring the payment of reasonable expenses and attorneys' fees to third party recipients of a civil investigative demand issued by the Department of Justice under Title II. On a motion to adopt the amendment:

Yeas	*Nays*
Eastland	Philip A. Hart
McClellan	Kennedy
Bayh	Tunney
Burdick	Abourezk
Robert C. Byrd	Fong
Hruska	Mathias
Hugh Scott	
Thurmond	
William L. Scott	

(7) The Committee adopted an amendment offered by Senator Abourezk modifying the provisions of Title III respecting the production of documents maintained in foreign countries. On a motion to adopt the amendment:

Yeas	*Nays*
Philip A. Hart	Eastland
Kennedy	McClellan
Bayh	Hruska
Tunney	Thurmond
Abourezk	William L. Scott
Fong	
Hugh Scott	
Mathias	

(8) The Committee ordered S. 1284, as amended, favorably reported. On a motion to report the bill to the full Senate:

Yeas	*Nays*
Philip A. Hart	Eastland
Kennedy	McClellan
Bayh	Hruska
Burdick	Thurmond
Robert C. Byrd	William L. Scott
Tunney	
Abourezk	
Fong	
Hugh Scott	
Mathias	

V. Estimated Costs

In accordance with section 252(a) of the Legislative Reorganization Act of 1970 (2 U.S.C. 190(j)), the Committee estimates that the cost of this Act will be minimal. The Administration has not submitted a cost estimate but agrees generally with this analysis. Precise estimates of cost are impracticable to make because of the general nature of the legislation and its multiple additions and modifications to existing law.

The Committee believes, however, that the provisions of this Act will significantly increase the efficiency and effectiveness of antitrust enforcement by both Federal authorities and the private sector. The net benefit from the improvements contained in this Act should be significantly greater than any increased cost associated with its implementation. The improved procedures in the Act also should provide a substantial deterrent to future antitrust violations, thereby producing additional cost benefits.

The Committee further believes that any increased funds expended for antitrust activities are anti-inflationary. Their entire effect is directed toward reducing the costs of monopoly and conspiracy, thus providing significant but unquantifiable benefits to the economy of the United States in the form of lower prices and increased technological proficiency.

VI. Text of Adopted Amendments

a. Subcommittee on Antitrust and Monopoly

Amendments adopted by the Subcommittee on Antitrust and Monopoly on July 28, 1975:

1. Amendment in the nature of a substitute text offered by Subcommittee Chairman Philip A. Hart:

SHORT TITLE

SEC. 101. This Act may be cited as the "Hart-Scott Antitrust Improvements Act of 1975".

TITLE I—DECLARATION OF POLICY

SEC. 102(a). It is the purpose of the Congress in this Act to support and invigorate effective and expeditious enforcement of the antitrust laws, to improve and modernize antitrust investigation and enforcement mechanisms, to facilitate the restoration and maintenance of competition in the marketplace, and to prevent and eliminate monopoly and oligopoly power in the economy.

SEC. 103. The Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1), as amended, is amended by inserting immediately before section 1 the following preamble:

"DECLARATION OF POLICY

"The Congress finds and declares that—

"(1) this Nation is founded upon and committed to a private enterprise system and a free market economy, in the belief that competition spurs innovation, promotes productivity, prevents the undue concentration of economic, social, and political power, and preserves a free, democratic society;

"(2) the decline of competition in industries in which oligopoly or monopoly power exists, and the decline of competition caused by State and Federal regulatory policies, have contributed significantly to unemployment, inflation, inefficiency, underutilization of economic capacity, a reduction in exports, and an adverse effect on the balance of payments;

"(3) diminished competition and increased concentration in the marketplace have been important factors in the ineffectiveness of monetary and fiscal policies in reducing the high rates of inflation and unemployment;

"(4) the near record rates of inflation and unemployment have caused extreme hardship and dislocation to the American consumer, worker, farmer, and businessman;

"(5) investigations by the Federal Trade Commission, the Department of Justice, and the National Commission on Food Marketing, as well as other independent studies, have identified conditions of excessive concentration and anticompetitive behavior in various industries; and

"(6) vigorous and effective enforcement of the antitrust laws, and reduction of monopoly and oligopoly power in the economy, can contribute significantly to reducing prices, unemployment, and inflation, and to preservation of our democratic institutions and personal freedoms.".

TITLE II—ANTITRUST CIVIL PROCESS ACT AMENDMENTS

SEC. 201. The Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311) is amended as follows:

(a) Subsection (c) of section 2 is amended to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities preparatory to a merger, acquisition, joint venture, or similar transaction, which may lead to any antitrust violation;".

(b) Subsection (f) of section 2 is amended by striking out the words "not a natural person", by inserting immediately after the word "means" the words "any natural person or", and by inserting immediately after the word "entity" the words ", including any natural person or entity acting or purporting to act under color or authority of State law".

(c) Subsection (h) of section 2 is amended by striking out the words "antitrust document".

(d) Subsection (a) of section 3 is amended to read as follows:

"(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of, any documentary material, or may have any information, relevant to a civil antitrust investigation or Federal administrative or regulatory agency proceeding, he may, prior to the institution of a civil or criminal proceeding thereon or during the pendency of an agency proceeding, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, or to answer in writing written interrogatories concerning such information, or to give oral testimony concerning such information, or to furnish any combination thereof.".

(e) Subsection (b) of section 3 is amended to read as follows:

"(b) Each such demand shall—

"(1) state the nature of the investigation and the provision of law applicable thereto or the Federal administrative or regulatory agency proceeding involved; and

"(2)(A) if it is a demand for production of documentary material—

"(i) describe the class or classes of documentary material to be produced thereunder, with such definiteness and certainty as to permit such material to be fairly identified; and

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

"(iii) identify the custodian to whom such material shall be made available; or

"(B) if it is a demand for answers to written interrogatories—

"(i) propound with definiteness and certainty the written interrogatories to be answered; and

"(ii) prescribe a date or dates at which time answers to the written interrogatories shall be made; and

"(iii) identify the custodian to whom such answers shall be made; or

"(C) if it is a demand for the giving of oral testimony—

"(i) prescribe a date, time, and place at which oral testimony shall be commenced; and

"(ii) identify the antitrust investigator or investigators who shall conduct the examination, and the custodian to whom the transcript of such examination shall be given.".

(f) Subsection (c) of section 3 is amended to read as follows:

"(c) Such demand shall—

"(1) not require the production of any information that would be privileged from disclosure if demanded by, or pursuant to, a subpena issued by a court of the United States in aid of a grand jury investigation; and

"(2)(A) if it is a demand for production of documentary material, not contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation; or

"(B) if it is a demand for answers to written interrogatories, not impose an undue or oppressive burden on the person required to furnish answers.".

(g) Subsection (f) of section 3 is redesignated subsection (h) and the following new subsections are inserted immediately following subsection (e):

"(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served; or

"(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to such person at his residence or principal office or place of business.

"(g) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any person who appears to the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, not to be found within the territorial jurisdiction of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. If such person has had contacts with the United States that were sufficient to, or if the conduct of such person has so affected the trade and commerce of the United States as to, permit the courts of the United States to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that it would have if such person were personally within the jurisdiction of such court.".

(h) Section 3 is further amended by inserting the following new subsections immediately after subsection (h), as redesignated:

"(i) The production of documentary material in response to a demand for production thereof shall be made under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed or, if the person to which the demand is directed is not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed, has been produced and made available to the custodian.

"(j) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer, and the answers shall be submitted under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed, or if the person to which the demand is directed is not a natural person, by a person or persons responsible for the answers, to the effect that all information required by the demand and in the possession, custody, or control of the person to whom the demand is directed, or within the knowledge of such person, has been furnished.

"(k) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the custodian. The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all persons other than the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (Ch. 114, 37 Stat. 731; 15 U.S.C. 30) shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) When the testimony is fully transcribed, the witness shall be afforded an opportunity to examine the transcript, in the presence of the officer, for errors in transcription. Any corrections of transcription errors which the witness desires to make shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The witness also may

clarify or complete answers otherwise equivocal or incomplete on the record, which shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded an opportunity to examine it, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor. The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the custodian. Upon payment of reasonable charges therefor, the witness shall be permitted to inspect and copy the transcript of his testimony to the extent and in the circumstances that he would be entitled to do so if it were a transcript of his testimony before a grand jury; and there may be imposed on such inspection and copying such conditions as the interests of justice require.

"(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. Such person or counsel may object on the record, briefly stating the reason therefor, whenever it is claimed that such person is entitled to refuse to answer any question on grounds of privilege or other lawful grounds; but he shall not otherwise interrupt the examination. If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code. If such person refuses to answer any question, the antitrust investigator or investigators conducting the examination may request the district court of the United States for the judicial district within which the examination is conducted to order such person to answer, in the same manner as if such person had refused to answer such question after having been subpenaed to testify thereto before a grand jury, and upon disobedience to any such order of such court, such court may punish such person for contempt thereof.".

(i) Subsection (a) of section 4 is amended by striking the words "antitrust document", and by inserting immediately after the word "custodian" the words "of documentary material demanded, answers to written interrogatories served, or transcripts of oral testimony taken, pursuant to this Act.".

(j) Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the words "for the production of documents", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute true copies for originals of all or any part of such material.".

(k) Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "any" the word "such", by inserting in the first sentence immediately after the word "material" the words ", answers to interrogatories, or transcripts of oral testimony", by inserting in the second sentence immediately after the word "mate-

rial" the words ", answers to interrogatories, or transcripts of oral testimony", by inserting in the third sentence immediately after the word "material", in both places where it appears, the words "or information", by inserting in the fourth sentence immediately before the word "documentary" the word "such", and by adding after the fourth sentence the following new sentence: "Such documentary material and answers to interrogatories may be used in connection with any oral testimony taken pursuant to this Act.".

(l) Subsection (d) of section 4 is amended to read as follows:

"(d) (1) Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding such attorney shall return to the custodian any such materials so delivered that have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The custodian of any documentary material, answer to interrogatories, or transcripts of oral testimony may deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any investigation or proceeding under its jurisdiction. Upon the completion of any such investigation or proceeding, the Commission shall return to the custodian any such materials so delivered that have not been introduced into the record of such case or proceeding before the Commission. While such materials are in the possession of the Commission, it shall be subject to any and all restrictions and obligations which this Act places upon the custodian of such materials while in the possession of the Antitrust Division of the Department of Justice.".

(m) Subsection (e) of section 4 is amended to read as follows:

"(e) Upon the completion of—(1) the antitrust investigation for which any documentary material was produced pursuant to this Act, and (2) any such case or proceeding—the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or proceeding.".

(n) Subsection (f) of section 4 is amended to read as follows:

"(f) When any documentary material has been produced by any person pursuant to this Act, and no case or proceeding as to which the documents are usable has been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in

charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.".

(o) Subsection (g) of section 4 is amended to read as follows:

"(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, produced answers to written interrogatories served, or transcripts of oral testimony taken, under any demand issued pursuant to this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material, answers to interrogatories, or transcripts of oral testimony, and (2) transmit in writing to the person who submitted the documentary material notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".

(p) Subsection (a) of section 5 is amended by striking out all the words following the word "Act", and by striking out the comma after the word "Act" and inserting in lieu thereof a period.

(q) The first sentence of subsection (b) of section 5 is amended to read as follows:

"(b) Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigators named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the antitrust investigator or investigators named in the demand a petition for an order of such court modifying or setting aside such demand.".

(r) The second sentence of subsection (b) of section 5 is amended by striking out the final period and inserting a colon in lieu thereof, and by inserting immediately after the colon the words: "Provided, That such person shall promptly comply with such portions of the demand not sought to be modified or set aside.".

(s) Subsection (b) of section 5 is amended by inserting the following sentence at the end thereof: "Any such ground not specified in such a petition shall be deemed waived unless good cause is shown for the failure to assert it in such a petition.".

(t) Subsection (c) of section 5 is amended by striking out the word "delivered", and by inserting immediately after the word "material" the words "or answers to interrogatories delivered, or transcripts of oral testimony given, by".

(u) The third paragraph of section 1505 of title 18, United States Code, is amended by inserting between the words "any" and "docu-

mentary" the words "oral or written information or any", and by inserting between the third and fourth paragraphs the following:

"Whoever knowingly and willfully withholds, falsifies, or misrepresents, or by any trick, fraud, scheme, or device conceals or covers up, a material part of any oral or written information or documentary material which is the subject of a demand pursuant to the Antitrust Civil Process Act, or attempts to or solicits another to do so; or".

SEC. 202. The provisions of this title shall be effective on the date of enactment of this Act, and the provisions providing for the production of documents or information may be employed in respect of acts, practices, and conduct that occurred prior to the date of enactment thereof.

TITLE III—FEDERAL TRADE COMMISSION ACT AMENDMENTS

SEC. 301. Section 10 of the Federal Trade Commission Act (38 Stat. 724; 15 U.S.C. 50) is amended as follows:

(a) The first sentence of the third paragraph is amended to read as follows:

"If any person, partnership, or corporation required by this Act to file any annual or special report or to obey any subpena or order requiring access to documentary evidence shall fail so to do within the time fixed by the commission for filing or obeying the same, and such failure shall continue for fifteen days after notice of such default, the person, partnership, or corporation shall forfeit and pay to the United States a civil penalty of not less than $1,000 nor more than $5,000 as the court may determine, for each and every day of the continuance of such failure. Such forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the Commission, brought in the case of a corporation or partnership, in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and, in the case of any other person, in the district where such person resides or has his principal place of business.".

(b) Immediately following the third paragraph, insert the following new paragraph:

"No action to stay accumulation of any of the penalties provided by the preceding paragraph of this section or to enjoin the Commission or the United States from enforcement of any subpoena or any Commission order to file any annual or special report or order requiring access to documentary evidence may be commenced until after the service of a notice of default by the Commission as provided in the preceding paragraph. No court shall issue any order staying the accumulation of such penalties unless the party seeking such relief shall have first demonstrated:

"(1) a substantial probability of ultimate success on the merits;

"(2) that such party will be irreparably injured unless the accumulation of such penalties is stayed; and

"(3) that the equities clearly favor such stay.

No court shall issue an order enjoining the Commission or the United States from enforcement of any subpoena or any order to file an annual or special report or order requiring access to documentary evidence unless the plaintiff shall have first demonstrated:

"(1) that such subpoena or order to file a special or annual report or order requiring access to documentary evidence is unduly burdensome; or

"(2) that the information sought by such subpoena or order to file a special or annual report or order requiring access to documentary evidence is not reasonably revelant to the inquiry being conducted by the Commission.

The Commission shall have authority to determine its own jurisdiction to conduct investigations or to adjudicate complaints in the first instance, unless such investigation or adjudication is expressly prohibited by this Act.".

TITLE IV—PARENS PATRIAE AMENDMENTS

SEC. 401. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by inserting immediately following section 4B the following new sections:

"ACTIONS BY STATE ATTORNEYS GENERAL

"SEC. 4C. (a) (1) Any attorney general of a State may bring a civil action in the name of such State in any district court of the United States having jurisdiction of the defendant, to secure monetary and other relief as provided in this section in respect of any damage sustained, by reason of the defendant's having done anything forbidden in the Sherman Act, by—

"(A) the natural persons residing in such State, or any of them; or

"(B) the general economy of such State or the political subdivisions thereof, or any of them, as measured by any decrease in revenues or increase in expenditures, or both, of such State or political subdivision, that may with reasonable probability be causally related to the antitrust violation: *Provided*, That no monetary relief shall be awarded to the State in respect of such damage that duplicates any monetary relief awarded to the State pursuant to subsection (a) (1) of this section.

"(2) The court shall award the State as monetary relief threefold the total damage sustained as described in subsection (a) (1) of this section; such other relief as is just in the circumstances to prevent or remedy the violation of the Sherman Act; and the cost of suit, including a reasonable attorney's fee and other expenses of the litigation.

"(b) (1) In any action brought under subsection (a) (1) (A) of this section, the State attorney general shall, at such times, in such manner and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice by publication only would be manifestly unjust as to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

"(2) Any person may elect to exclude from adjudication in an action brought under subsection (a) (1) (A) of this section the portion of the State claim for monetary relief attributable to him. He shall do so by filing a notice of such election with the court within

such time as specified in the notice prescribed pursuant to subsection (b)(1) of this section.

"(3) The final judgment in the action brought by the State shall be *res judicata* as to any claim under section 4 of this Act by any person in respect of damage to whom such action was brought unless such person has filed the notice prescribed in subsection (b)(2) of this section.

"(c)(1) In any action brought under subsection (a)(1) of this section, and in any class action on behalf of natural persons under section 4 of this Act, damages may be proved and assessed in the aggregate on the basis of statistical or sampling methods, or such other reasonable method of estimation as the court in its discretion may permit, without separately proving the fact or amount of individual injury or damage to such natural persons.

"(2) In any action brought under subsection (a)(1)(A) of this section, the court shall distribute, or direct the distribution of, any monetary relief awarded to the State either in accordance with State law or as the district court may in its discretion authorize. In either case, any distribution procedure adopted shall afford each person in respect of damage to whom the relief was awarded a reasonable opportunity to secure his appropriate portion of the net monetary relief.

"(d) An action brought under this section shall not be dismissed or compromised without approval of the court after providing such notice to persons affected thereby as the court shall direct in the interests of justice.

"SEC. 4D. Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give writtten notification thereof to such State attorney general.

"SEC. 4E. (a) In any action under section 4 or 4C of this Act, the State or any other plaintiff shall be entitled to recover treble damages in respect to the full amount of overcharges incurred or other monetary damages sustained in connection with expenditures under a federally funded program, notwithstanding the fact that the United States funded portions of the amounts claimed.

"(b) The Attorney General of the United States shall have the right to intervene in any such action to protect the interests of the United States.

"(c) Out of any damages recovered pursuant to this section, the United States shall be entitled to the portion of the overcharges or other monetary damages, untrebled, that it sustained or funded. Whenever another Federal statute or law provides a specified method of settlement of accounts between the State and Federal governments, in respect of such recovery, such method shall be used. Otherwise, the court before which the action is pending shall determine the method.

"(d) In the event of multiple actions in respect of the same alleged overcharges or other damages relating to a federally funded program, the defendant shall not be assessed, in total, more than threefold such damages.

"SEC. 4F. For the purposes of sections 4C, 4D, and 4E of this Act:

"(1) The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 4C of this Act, and shall include the Corporation Counsel of the District of Columbia.

"(2) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(3) The term 'Sherman Act' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890 (15 U.S.C. 1), as amended or as may be hereafter amended.".

SEC. 402. Section 4B of such Act is amended by striking out the words "sections 4 or 4A" and inserting in lieu thereof the words "sections 4, 4A, or 4C".

SEC. 403. Section 5(b) of such Act is amended by striking out the words "private right of action" and inserting in lieu thereof the words "private or State right of action"; and by striking out the words "section 4" and inserting in lieu thereof the words "sections 4 or 4C".

SEC. 404. If any provision of this title, or the application of any such provision to any person or circumstance, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected by such holding.

SEC. 405. This title shall apply to all civil actions filed under the antitrust laws, in which a person representing a class of natural persons or a State is plaintiff, that are pending on the date of enactment of this title or that are hereafter filed or refiled, including those in which the cause of action accrued before the date of enactment of this title.

TITLE V—PREMERGER NOTIFICATION AND STAY AMENDMENTS

SEC. 501. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by adding a new section 7A to read as follows:

"PREMERGER NOTIFICATION AND STAY

SEC. 7A. (a) Notwithstanding any other provision of law, except as exempted pursuant to subsection (b)(4) of this section, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce, and—

"(1)(A) the acquiring person or persons have total assets or annual net sales in excess of $100,000,000; and

"(B) the person or persons the stock or assets of which is being acquired have total assets or annual net sales in excess of $10,000,000; or

"(2)(A) the acquiring person or persons have total assets or annual net sales in excess of $10,000,000; and

"(B) the person or persons the stock or assets of which is being acquired have total assets or annual net sales in excess of $100,000,000; or

"(3) the combined total assets or annual net sales of the acquiring person or persons and the person or persons the stock or assets of which is being acquired are in excess of $100,000,000: *Provided*, That both the acquiring person or persons and the persons or persons the stock or assets of which is being acquired have total assets or annual net sales in excess of $10,000,000—

until expiration of the notification and waiting period specified in subsection (b)(1) of this section.

"(b)(1) The notification and waiting period required by this section shall expire thirty days after the persons subject to subsection (a) of this section each file with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to in this section as the 'Assistant Attorney General') duplicate originals of the notification specified in paragraph (3) of this subsection, or until expiration of any extension of such period pursuant to subsection (c)(2) of this section, whichever is later, except as the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section.

"(2) Notwithstanding any other provision of law or the applicability of subsection (a) of this section, except as exempted pursuant to subsection (b)(4) of this section no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if—

"(A) the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce; and

"(B) the Federal Trade Commission by general regulation requires, after consultation with the Assistant Attorney General and after notice and submission of views, pursuant to section 553 of title 5, United States Code, that such person or persons, or any class or category thereof, shall not do so until the expiration of thirty days following the filing of a notification (specified pursuant to paragraph (3) of this subsection), or until the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section, whichever occurs first.

"(3) The notification required by this section shall be in such form and contain such information and documentary material as the Federal Trade Commission shall by general regulation prescribe, after consultation with the Assistant Attorney General, and after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(4)(A) The Federal Trade Commission, after consultation with the Assistant Attorney General, is authorized and directed to define the terms used in this section, prescribe the content and form of reports, by general regulation except classes of persons and transactions

from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(B) The regulations excepting classes of persons and transactions shall include, but need not be limited to, the following exceptions—

"(A) goods or realty transferred in the ordinary course of business;

"(B) bonds, mortgages, deeds of trust, or other obligations without voting rights;

"(C) interests in a corporation at least 50 per centum of the stock of which is already owned by the acquiring person or a wholly-owned subsidiary thereof;

"(D) transfers to or from a Federal agency or a State or political subdivision thereof;

"(E) transactions exempted from collateral attack under section 7 of this Act if approved by a Federal administrative or regulatory agency: *Provided*, That duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(F) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), as amended, or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), as amended;

"(G) acquisitions, solely for the purpose of investment, of stock when the stock acquired or held does not exceed 10 per centum of the voting rights;

"(H) acquisitions of stock when the stock acquired does not increase, directly or indirectly, the acquiring person's or persons' share of voting rights; and

"(I) acquisitions, solely for the purpose of investment, of assets, other than voting stock or other voting share capital, by any bank, banking association, trust company, or insurance company, in the ordinary course of its business.

"(c)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the periods specified in subsection (b)(1) of this section, require the submission of additional information and documentary material relating to the acquisition by any person or persons subject to the provisions of this section, or by any officer, director, or partner of such person or persons.

"(2) The Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the periods specified in subsection (b)(1) of this section for an additional period of up to forty-five days after receipt of the information and documentary material submitted pursuant to subsection (c)(1) of this section.

"(3) No provisions of this section shall limit the power of the Federal Trade Commission or the Assistant Attorney General to secure, at any time, information or documentary material from any person, including third parties, pursuant to the Federal Trade Commission Act or the Antitrust Civil Process Act.

"(4) The Federal Trade Commission and the Assistant Attorney General may waive the waiting periods provided in this section or the remaining portions thereof, in particular cases, by publishing in the Federal Register a notice that neither intends to take any action within such periods in respect to the acquisition.

"(d) If a proceeding is instituted by the Federal Trade Commission or an action is filed by the United States, alleging that an acquisition violates section 7 of this Act, or section 1 or 2 of the Sherman Act (15 U.S.C. 1–2), and either the Federal Trade Commission or the Assistant Attorney General certifies to the United States district court within which the respondent resides or carries on business, or in which the action is filed, that it or he believes that the public interest requires relief *pendente lite* pursuant to this subsection, the court shall enter an order that such acquisition shall not be consummated until the order of the Commission in respect thereof or the judgment entered in such action has become final, and that the proceeding or action shall be in every way expedited. The court may thereafter modify such order, or subject it to conditions, upon a showing that the action brought by the Commission or the Assistant Attorney General is without merit and frivolous, or that the respondent or defendant will be irreparably injured unless the order is modified or conditioned. A showing of loss of anticipated benefits from the proposed transaction shall not be sufficient to modify or condition such order.

"(e) Failure of the Federal Trade Commission or the Assistant Attorney General to request additional information or documentary material pursuant to this section, or failure to interpose objection to an acquisition within the periods specified in subsections (b)(1) and (b)(2) of this section, shall not bar the institution of any proceeding or action, or the obtaining of any information or documentary material, with respect to such acquisition, at any time under any provision of law.

"(f)(1) Whenever any person violates or fails to comply with the provisions of subsection (a) of this section, such person shall forfeit and pay to the United State a civil penalty of not more than $10,000 for each day during which such person directly or indirectly holds stock or assets, in violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(2) Whenever any person fails to furnish information required to be submitted, pursuant to subsection (c)(1) of this section, such person shall be liable for the penalties provided for noncompliance with the provisions of the Federal Trade Commission Act or the Antitrust Civil Process Act, as the case may be.

"(g) In any proceeding instituted or action brought by the Federal Trade Commission or the United States alleging that an acquisition violates section 7 of this Act, or sections 1 or 2 of the Sherman Act, upon application of the Federal Trade Commission or the Assistant Attorney General to the United States district court within which the respondent resides or carries on business, or in which the action is filed, such court shall, as soon as practicable, enter an order establishing the purchase price of the acquired stock or assets, requiring the acquiring person or persons to maintain the personnel, assets, stock or

firm being acquired as a separate entity unless the interests of justice require otherwise, and may enter an order requiring the profits of the acquired firm, stock, or assets to be placed in an escrow account, pending the outcome of the proceeding or action. Upon entry of a final order or judgment of divestiture under section 7 of this Act, or sections 1 or 2 of the Sherman Act, the court shall order that the divestiture be accomplished expeditiously. To the extent practicable, the court shall deprive the violator of all benefits of the violation including tax benefits.".

SEC. 502. The provisions of this title shall be effective one hundred and twenty days after the date of enactment of this Act. Effective upon the date of enactment of this Act, the Federal Trade Commission is authorized and directed to carry out the requirements of sections 7A (b) (3) and (b) (4) of the Clayton Act, as amended by this Act.

TITLE VI—NOLO CONTENDERE AMENDMENTS

SEC. 601. Section 5(a) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16(a)), is amended to read as follows:

"5(a)(1) A final judgment heretofore or hereafter entered in any civil action or criminal proceeding brought by the United States under the antitrust laws, finding or concluding that a defendant has violated said laws, or is guilty of an offense under said laws, shall be at least prima facie evidence against such defendant in any civil action brought by any person against such defendant under said laws, as to all matters respecting which said judgment would be an estoppel as between the parties thereto, except as provided in paragraph (3) of this subsection.

"(2)(A) A plea of nolo contendere hereafter entered in a criminal proceeding under the antitrust laws shall be at least prima facie evidence against such defendant in any civil action brought by any person against such defendant under said laws, as to all matters in the indictment necessary to sustain a judgment of conviction upon a jury verdict that the defendant was guilty of the offenso charged in the indictment.

"(B) When a plea of nolo contendere is used as provided by subparagraph (A) of this paragraph, the bill of particulars filed in the proceeding may be used to interpret or construe the indictment, and any statement made in court on behalf of the defendant in connection with the entry of such plea may thereafter be received in evidence against the defendant as an admission.

"(C) A plea of nolo contendere shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

"(3) The provisions of subsection (a)(1) of this section shall not apply to a consent judgment entered before any testimony has been taken.

"(4) Nothing contained in this section shall diminish the effect of any estoppel against a defendant which may otherwise exist.".

SEC. 602. The provisions of section 5(a)(2) of the Clayton Act, as amended by this title, shall apply to all criminal proceedings that are pending on the date of enactment of this Act or that are hereafter

filed, including those in which the offense was committed before the date of enactment of this Act.

SEC. 603. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16), is amended by adding at the end thereof the following new subsections:

"(c) Any person that institutes a civil action under this Act may, upon payment of reasonable charges therefor and after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding, inspect and copy any documentary material produced in and the transcript of such grand jury proceeding, concerning the subject matter of such person's civil action. Any action or proceeding to compel the grant of access under this subsection shall be brought in the United States district court for the district in which the grand jury proceeding occurred. The court may impose conditions upon the grant of access and protective orders that are required by the interests of justice.

"(d) The Attorney General may, upon written request from the Federal Trade Commission, after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding or after the termination of any grand jury proceeding which does not result in the institution of such a proceeding, permit the Commission to inspect and copy any documentary material produced in and the transcripts of such grand jury proceeding. While such materials are in the possession of the Commission, the Commission shall be subject to any and all restrictions and obligations placed upon the Attorney General with respect to the secrecy of such materials.".

TITLE VII—MISCELLANEOUS AMENDMENTS

AFFECTING COMMERCE

SEC. 701. (a) Sections 2, 2a, and 3 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 13, 13a, and 14), are amended by striking out the words "in commerce" wherever the term appears and inserting in lieu thereof the words "in or affecting commerce".

(b) Section 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 18), is amended by striking out in the first sentence thereof the words "engaged in commerce" and "engaged also in commerce,"; by striking out in the second sentence thereof the words "engaged in commerce,"; by inserting in the first sentence thereof after the word "corporation", third appearance, the words ", where the activities of either corporation are in or affect commerce and"; by inserting in the first sentence thereof a comma between the words "where" and "in"; by inserting in the second sentence thereof after the word "corporations" the words ", where the activities of either corporation are in or affect commerce and"; and by inserting in the second sentence thereof a comma between the words "where" and "in".

(c) Section 6 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 6), as amended, is amended by striking the words "and being in the course of transportation from one State to another, or to a foreign country", and inserting in lieu thereof the words "and being in or affecting commerce among the several States, or with foreign nations,".

COMPLEX CASES

SEC. 702. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding a new section 21 as follows:

"COMPLEX CASES

"SEC. 21. (a) In any civil action brought in any district court of the United States under the antitrust laws, or any other Acts having like purpose that have been or hereafter may be enacted, the chief judge of the district court or the trial judge assigned to hear and determine the case—

"(1) may, upon application of either party to the proceeding, or upon his own motion, designate the case as a complex antitrust case; and

"(2) shall, upon the filing of a certificate by the Attorney General that, in his opinion, the case is a complex antitrust case, designate the case as a complex antitrust case.

It shall be the duty of the chief judge, and the trial judge designated to hear and determine any case designated as a complex antitrust case, to set the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. Special masters, economic experts, and other personnel may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters.

"(b) Such special masters, economic experts, and other personnel as may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters, also may serve as expert witnesses. They may be used by the court in all phases of the trial, including the preparation and analysis of plans for relief. They (1) may be furnished with all evidence introduced by any party; (2) may provide additional evidence subject to objection by any party; (3) may provide an analysis of issues with particular reference to proposed orders to restore effective competition; (4) may recommend provisions for proposed orders to restore effective competition; and (5) shall be subject to cross-examination and rebuttal.

"(c) In any case designated as a complex antitrust case, the provisions of section 604 of title 28, United States Code, providing for the payment of expenses and compensation shall apply in order to provide compensation to such master, expert or other personnel that may be appointed.".

FOREIGN ACTIONS

SEC. 703. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding a new section 22 as follows:

"FOREIGN ACTIONS

"SEC. 22. In any civil action or proceeding before any court of the United States, involving any act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party thereto or any person in privity with such party to furnish discovery, evidence, or testimony and such party or person refuses, declines, or fails to do so on the ground that a foreign, statute, order, regulation, decree, or other law prohibits compliance with such order, the court may enter an order forthwith against such party, dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party.".

SHERMAN ACT AMENDMENT

SEC. 704. Section 2 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 2), as amended, is amended by inserting at the end thereof the following new sentence: "In any proceeding or action brought under this section alleging an attempt or conspiracy to monopolize, proof of a relevant market or of a dangerous probability of success in monopolizing any part of interstate or foreign commerce shall not be required.".

SEVERABILITY

SEC. 705. If any provision of this Act, or the application of any such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 706. (a) Section 701 of this title shall apply to acts, practices, and conduct occurring after the date of enactment of this Act.

(b) Section 702 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed.

(c) Section 703 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed, in respect of noncompliance with discovery orders hereafter entered. Nothing contained in this subsection shall be deemed to limit the authority of any court to reenter any discovery order heretofore entered, and thereby make such section 703 applicable thereto.

(d) Unless otherwise specified, the effective date of this Act shall be the date of enactment thereof.

2. Amendment offered to Title VII by Senator Edward M. Kennedy:

ATTORNEYS' FEES

Section 16 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 16, 1914 (15 U.S.C. 26), is amended by adding at the end thereof the following new sentence: "In any action under this

section in which the plaintiff substantially prevails, the court shall award the cost of suit, including reasonable attorneys' fees."

b. Committee on the Judiciary

1. Amendment in the nature of a substitute text offered on behalf of Senators Philip A. Hart and Hugh Scott by Committee Chairman James O. Eastland:

SHORT TITLE

SEC. 101. This Act may be cited as the "Hart-Scott Antitrust Improvements Act of 1976".

TITLE I—DECLARATION OF POLICY

SEC. 102(a) It is the purpose of the Congress in this Act to support and invigorate effective and expeditious enforcement of the antitrust laws, to improve and modernize antitrust investigation and enforcement mechanisms, to facilitate the restoration and maintenance of competition in the marketplace, and to prevent and eliminate monopoly and oligopoly power in the economy.

(b) The Congress finds and declares that—

(1) this Nation is founded upon and committed to a private enterprise system and a free market economy, in the belief that competition spurs innovation, promotes productivity, prevents the undue concentration of economic, social, and political power, and preserves a free, democratic society;

(2) the decline of competition in the economy could contribute to unemployment, inefficiency, underutilization of economic capacity, a reduction in exports, and an adverse effect on the balance of payments;

(3) diminished competition and increased concentration in the marketplace have been important factors in the ineffectiveness of monetary and fiscal policies in reducing the high rates of inflation and unemployment;

(4) investigations by the Federal Trade Commission, the Department of Justice, and the National Commission on Food Marketing, as well as other independent studies, have identified conditions of excessive concentration and anticompetitive behavior in various industries; and

(5) vigorous and effective enforcement of the antitrust laws, and reduction of anticompetitive practices in the economy, can contribute to reducing prices, unemployment, and inflation, and to preservation of our democratic institutions and personal freedoms.

TITLE II—ANTITRUST CIVIL PROCESS ACT AMENDMENTS

SEC. 201. The Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311) is amended as follows:

(a) Subsection (a) of section 2 is amended by striking subparagraph (2) thereof, and by renumbering subparagraph (3) and striking therefrom "(A)" after the words "with respect to," substituting a period for the comma after the words "trade or commerce" and striking the remainder of the subparagraph.

(b) Subsection (c) of section 2 is amended to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities preparatory to a merger, acquisition, joint venture, or similar transaction, which may lead to any antitrust violation;".

(c) Subsection (f) of section 2 is amended by striking out the words "not a natural person", by inserting immediately after the word "means" the words "any natural person or", and by inserting immediately after the word "entity" the words ", including any natural person or entity acting under color or authority of State law;".

(d) Subsection (h) of section 2 is amended by striking out the words "antitrust document".

(e) Subsection (a) of section 3 is amended to read as follows:

"(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation or to competition in a Federal administrative or regulatory agency proceeding, he may, prior to the institution of a civil or criminal proceeding thereon or during the pendency of an agency proceeding, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, or to answer in writing written interrogatories concerning such information, or to give oral testimony concerning such information, or to furnish any combination thereof.". [Hruska key amdt. 2]

(f) Subsection (b) of section 3 is amended to read as follows: [Hruska key amdt. 5]

"(b) Each such demand shall—

"(1) state the nature of the investigation and the provision of law applicable thereto or the Federal administrative or regulatory agency proceeding involved; and

"(2)(A) if it is a demand for production of documentary material—

"(i) describe the class or classes of documentary material to be produced thereunder, with such definiteness and certainty as to permit such material to be fairly identified; and

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

"(iii) identify the custodian to whom such material shall be made available; or

"(B) if it is a demand for answers to written interrogatories—

"(i) propound with definiteness and certainty the written interrogatories to be answered; and

"(ii) prescribe a date or dates at which time answers to the written interrogatories shall be made; and

"(iii) identify the custodian to whom such answers shall be made; or

"(C) if it is a demand for the giving of oral testimony—

"(i) prescribe a date, time, and place at which oral testimony shall be commenced; and

"(ii) identify the antitrust investigator or investigators who shall conduct the examination, and the custodian to whom the transcript of such examination shall be given.".

(g) Subsection (c) of section 3 is amended to read as follows:

"(c) Such demand shall—

"(1) not require the production of any information that would be privileged from disclosure if demanded by, or pursuant to, a subpena issued by a court of the United States in aid of a grand jury investigation; and

"(2) (A) if it is a demand for production of documentary material, not contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation; or

"(B) if it is a demand for answers to written interrogatories, not impose an undue or oppressive burden on the person required to furnish answers.".

(h) Subsection (f) of section 3 is redesignated subsection (h) and the following new subsections are inserted immediately following subsection (e):

"(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served; or

"(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to such person at his residence or principal office or place of business.

"(g) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any person who,

in the opinion of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, is not to be found within the territorial jurisdiction of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. If such person has had contacts with the United States that were sufficient to, or if the conduct of such person has so affected the trade and commerce of the United States as to, permit the courts of the United States to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that it would have if such person were personally within the jurisdiction of such court.".

(i) Section 3 is further amended by inserting the following new subsections immediately after subsection (h), as redesignated:

"(i) The production of documentary material in response to a demand for production thereof shall be made under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed or, if the person to which the demand is directed is not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(j) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer, and the answers shall be submitted under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed, or if the person to which the demand is directed is not a natural person, by a person or persons responsible for the answers, to the effect that all information required by the demand and in the possession, custody, or control of the person to whom the demand is directed, or within the knowledge of such person, has been furnished. [Hruska key amdt. 5]

"(k)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the

officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the custodian. The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all persons other than the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (Ch 114, 37 Stat. 731; 15 U.S.C. 30) shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts personal business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) When the testimony is fully transcribed, the witness shall be afforded an opportunity to examine the transcript, in the presence of the officer, for errors in transcription. Any corrections of transcription errors which the witness desires to make shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The witness also may clarify or complete answers otherwise equivocal or incomplete on the record, which shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded an opportunity to examine it, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor. The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the custodian. Upon payment of reasonable charges therefor, the witness shall be permitted to inspect and copy the transcript of his testimony to the extent and in the circumstances that he would be entitled to do so if it were a transcript of his testimony before a grand jury; and there may be imposed on such inspection and copying such conditions as the interests of justice require.

"(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. Such person or counsel may object on the record, briefly stating the reason therefor, whenever it is claimed that such person is entitled to refuse to answer any question on grounds of privilege or other lawful grounds; but he shall

not otherwise interrupt the examination. If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title18, United States Code. If such person refuses to answer any question, the antitrust investigator or investigators conducting the examination may request the district court of the United States for the judicial district within which the examination is conducted to order such person to answer, in the same manner as if such person had refused to answer such question after having been subpenaed to testify thereto before a grand jury, and upon disobedience to any such order of such court, such court may punish such person for contempt thereof. [Hruska key amdt. 2]

"(5) Any person examined pursuant to a demand under this section shall be entitled to the same fees and mileage that are paid to witnesses in the courts of the United States. The court shall, if the interests of justice require, award any person, not the subject of an antitrust investigation (nor an officer, director, employee, or agent thereof), who shall respond to or be examined pursuant to a demand under this section, reasonable expenses incurred by such person in preparing and producing documentary material or in appearing for examination, including reasonable attorney's fees. This paragraph (5) shall apply only to the extent that Congress separately authorizes and appropriates funds specifically for such purpose. A determination made pursuant to this paragraph (5) shall be made subsequent to compliance by such person with such demand.".

(j) Subsection (a) of section 4 is amended by striking the words "antitrust document", and by inserting immediately after the word "custodian" the words "of documentary material demanded, answers to written interrogatories served, or transcripts of oral testimony taken, pursuant to this Act".

(k) Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the words "for the production of documents", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute true copies for originals of all or any part of such material.".

(l) Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "any" the word "such", by inserting in the first sentence immediately after the word "material" the words ", answers to interrogatories, or transcripts of oral testimony", by inserting in the second sentence immediately after the word "material" the words ", answers to interrogatories, or transcripts of oral testimony", by inserting in the third sentence immediately after the word "material", in both places where it appears, the words "or information", by inserting in the fourth sentence immediately before the word "documentary" the word "such", and

by adding after the fourth sentence the following new sentence: "Such documentary material and answers to interrogatories may be used in connection with any oral testimony taken pursuant to this Act.".

(m) Subsection (d) of section 4 is amended to read as follows:

"(d) (1) Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding such attorney shall return to the custodian any such materials so delivered that have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony shall deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any investigation or proceeding under its jurisdiction unless the Assistant Attorney General in charge of the Antitrust Division determines that it would not be in the public interest to provide such material to the Commission. Upon the completion of any such investigation or proceeding, the Commission shall return to the custodian any such materials so delivered that have not been introduced into the record of such case or proceeding before the Commission. While such materials are in the possession of the Commission, it shall be subject to any and all restrictions and obligations which this Act places upon the custodian of such materials while in the possession of the Antitrust Division of the Department of Justice.".

(n) Subsection (e) of section 4 is amended to read as follows:

"(e) Upon the completion of—

"(1) the antitrust investigation for which any documentary material was produced pursuant to this Act; and

"(2) any such case or proceeding,

the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or proceeding."

(o) Subsection (f) of section 4 is amended to read as follows:

"(f) When any documentary material has been produced by any person pursuant to this Act, and no case or proceeding as to which the documents are usable has been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.". [Hruska key amdt. 7]

(p) Subsection (g) of section 4 is amended to read as follows:

"(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced, answers to written interrogatories served, or transcripts of oral testimony taken, under any demand issued pursuant to this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material, answers to interrogatories, or transcripts of oral testimony, and (2) transmit in writing to the person who submitted the documentary material notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".

(q) Subsection (a) of section 5 is amended by striking out all the words following the word "Act", and by striking out the comma after the word "Act" and inserting in lieu thereof a period.

(r) The first sentence of subsection (b) of section 5 is amended to read as follows:

"(b) Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigators named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the antitrust

investigator or investigators named in the demand a petition for an order of such court modifying or setting aside such demand.".

(s) The second sentence of subsection (b) of section 5 is amended by striking out the final period and inserting a colon in lieu thereof, and by inserting immediately after the colon the words: "*Provided*, That such person shall promptly comply with such portions of the demand not sought to be modified or set aside.".

(t) Subsection (b) of section 5 is amended by inserting the following sentence at the end thereof: "Any such ground not specified in such a petition shall be deemed waived unless good cause is shown for the failure to assert it in such a petition.".

(u) Subsection (c) of section 5 is amended by striking out the word "delivered", and by inserting immediately after the word "material" the words "or answers to interrogatories delivered, or transcripts of oral testimony given".

(v) The third paragraph of section 1505 of title 18, United States Code, is amended by inserting between the words "any" and "documentary" the words "oral or written information or any", and by inserting between the third and fourth paragraphs the following:

"Whoever knowingly and willfully withholds, falsifies, or misrepresents, or by any trick, fraud, scheme, or device conceals or covers up, a material part of any oral or written information or documentary material which is the subject of a demand pursuant to the Antitrust Civil Process Act, or attempts to or solicits another to do so; or".

SEC. 202. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16), is amended by adding at the end thereof the following new subsections:

"(j) A plea of nolo contendere in a criminal proceeding under the antitrust laws shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

"(k) The Attorney General, unless he determines it would be contrary to the public interest, shall upon written request from the Federal Trade Commission, after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding or after the termination of any grand jury proceeding which does not result in the institution of such a proceeding, permit the Commission to inspect and copy any documentary material produced in and the transcripts of such grand jury proceeding. While such materials are in the possession of the Commission, the Commission shall be subject to any and all restrictions and obligations placed upon the Attorney General with respect to the secrecy of such materials.

"(1) Any person that institutes a civil action under this Act may, upon payment of reasonable charges therefor and after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding, inspect and copy any documentary material produced in and the transcript of such grand jury proceeding concerning the subject matter of such person's civil action. Any action or proceeding to compel the grant of access under this subsection shall be brought in the United States district court for the district in which the grand jury proceeding occurred. The court may impose conditions upon the grant of access and protective orders that are required by the interests of justice.".

SEC. 203. The provisions of this title shall be effective on the date of enactment of this Act, and the provisions providing for the production of documents or information may be employed in respect of acts, practices, and conduct that occurred prior to the date of enactment thereof.

TITLE III—PARENS PATRIAE AMENDMENTS

SEC. 301. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by inserting immediately following section 4B the following new sections:

ACTIONS BY STATE ATTORNEYS GENERAL

"SEC. 4C. (a) (1) Any attorney general of a State may bring a civil action, in the name of such State in any district court of the United States having jurisdiction of the defendant, to secure monetary and other relief as provided in this section in respect of any damage sustained, by reason of the defendant's having done anything forbidden in the Sherman Act, by— [Hruska key amdt. 10]

"(A) the natural persons residing in such State, or any of them: *Provided*, That no monetary relief shall be awarded in respect of such damage that duplicates any monetary relief that has been awarded or is properly allocable to (i) such natural persons who have excluded their claims pursuant to subsection (b) (2) of this section, and (ii) any business entity; or

"(B) the general economy of such State or the political subdivisions thereof, or any of them, as measured by any decrease in revenues or increase in expenditures, or both, of such State or political subdivision, that may with reasonable probability be causally related to the antitrust violation: *Provided*, That no monetary relief shall be awarded to the State in respect of such damage that duplicates any monetary relief awarded to the State pursuant to subsection (a) (1) of this section. [Hruska key amdt. 12 and Burdick key amdt. 2]

"(2) The court shall award the State as monetary relief threefold the total damage sustained as described in subsection (a)(1) of this section; such other relief as is just in the circumstances to prevent or remedy the violation of the Sherman Act; and the cost of suit, including a reasonable attorney's fee and other expenses of the litigation. [Hruska key amdts. 13 and 14]

"(b)(1) In any action brought under subsection (a)(1)(A) of this section, the State attorney general shall, at such times, in such manner and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice by publication only would be manifestly unjust as to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case. [Hruska key amdt. 15]

"(2) Any person may elect to exclude from adjudication in an action brought under subsection (a)(1)(A) of this section the portion of the State claim for monetary relief attributable to him. He shall do so by filing a notice of such election with the court within such time as specified in the notice prescribed pursuant to subsection (b)(1) of this section.

"(3) The final judgment in the action brought by the State shall be *res judicata* as to any claim under section 4 of this Act by any person in respect of damage to whom such action was brought unless such person has filed the notice prescribed in subsection (b)(2) of this section.

"(c)(1) In any action brought under subsection (a)(1) of this section, and in any class action on behalf of natural persons under section 4 of this Act, damages may be proved and assessed in the aggregate on the basis of statistical or sampling methods, or such other reasonable method of estimation as the court in its discretion may permit, without separately proving the fact or amount of individual injury or damage to such natural persons. [Hruska key amdts. 17, 16, and 18]

"(2) In any action brought under subsection (a)(1)(A) of this section, the court shall distribute, or direct the distribution of, any monetary relief awarded to the State either in accordance with State law or as the district court may in its discretion authorize. In either case, any distribution procedure adopted shall afford each person in respect of damage to whom the relief was awarded a reasonable opportunity to secure his appropriate portion of the net monetary relief. [Hruska key amdt. 19]

"(d) An action brought under this section shall not be dismissed or compromised without approval of the court after providing such notice to persons affected thereby as the court shall direct in the interests of justice.

"SEC. 4D. Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general

would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

"SEC. 4E. (a) In any action under section 4 or 4C of this Act, the State or any other plaintiff shall be entitled to recover treble damages in respect to the full amount of overcharges incurred or other monetary damages sustained in connection with expenditures under a federally funded program, notwithstanding the fact that the United States funded portions of the amounts claimed.

"(b) The Attorney General of the United States shall have the right to intervene in any such action to protect the interests of the United States.

"(c) Out of any damages recovered pursuant to this section, the United States shall be entitled to the portion of the overcharges or other monetary damages, untrebled, that it sustained or funded. Whenever another Federal statute or law provides a specified method of settlement of accounts between the State and Federal governments, in respect of such recovery, such method shall be used. Otherwise, the court before which the action is pending shall determine the method.

"(d) In the event of multiple actions in respect of the same alleged overcharges or other damages relating to a federally funded program, the defendant shall not be assessed, in total, more than threefold such damages.

"SEC. 4F. For the purposes of sections 4C, 4D, and 4E of this Act:

"(1) The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 4C of this Act, and shall include the Corporation Counsel of the District of Columbia. [Hruska key amdt. 20]

"(2) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(3) The term 'Sherman Act' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890 (15 U.S.C. 1), as amended or as may be hereafter amended.".

SEC. 302. Section 4B of such Act is amended by striking out the words "sections 4 or 4A" and inserting in lieu thereof the words "sections 4, 4A, or 4C".

SEC. 303. Section 5(b) of such Act is amended by striking out the words "private right of action" and inserting in lieu thereof the words "private or State right of action"; and by striking out the words "section 4" and inserting in lieu thereof the words "sections 4 or 4C".

SEC. 304. If any provision of this title, or the application of any such provision to any person or circumstance, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected by such holding.

SEC. 305. This title shall apply to all civil actions filed under the antitrust laws, in which a person representing a class of natural persons or a State is plaintiff, that are pending on the date of enactment of this title or that are hereafter filed or refiled, including those in which the cause of action accrued before the date of enactment of this title.

TITLE IV—PREMERGER NOTIFICATION AND STAY AMENDMENTS [Hruska key amdt. 21]

SEC. 401. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by adding a new section 7A to read as follows:

"PREMERGER NOTIFICATION AND STAY

"SEC. 7A. (a) Notwithstanding any other provision of law, except as exempted pursuant to subsection (b)(4) of this section, until expiration of the notification and waiting period specified in subsection (b)(1) of this section, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce, and—

"(1) stock or assets of a manufacturing company with annual net sales or total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

"(2) stock or assets of a non-manufacturing company with total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

"(3) stock or assets of a person or persons with annual net sales or total assets of $100,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $10,000,000 or more.

"(b)(1) The notification and waiting period required by this section shall expire thirty days after the persons subject to subsection (a) of this section each file with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to in this section as the 'Assistant Attorney General') duplicate originals of the notification specified in paragraph (3) of this subsection, or until expiration of any extension of such period pursuant to subsection (c)(2) of this section, whichever is later, except as the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section.

"(2) Notwithstanding any other provision of law or the applicability of subsection (a) of this section, except as exempted pursuant to subsection (b)(4) of this section no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if—

"(A) the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce; and

"(B) the Federal Trade Commission, with the concurrence of the Assistant Attorney General, by general regulation requires, after notice and submission of views, pursuant to section 553 of title 5, United States Code, that such person or persons, or any class or category thereof, shall not do so until the expiration of thirty days following the filing of a notification (specified pursuant to paragraph (3) of this subsection), or until the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section, whichever occurs first.

"(3)(A) The notification required by this section shall be in such form and contain such information and documentary material as the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall by general regulation prescribe, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(B) The fact of the filing of the notification required by this section and all information and documentary material contained therein shall be considered confidential under section 1905, title 18, United States Code, until the fact of such filing or of the proposed merger or acquisition is public knowledge, at which time such notification, information, and documentary material shall be subject to the provisions of section 552(b), title 5, United States Code. Nothing in this section is intended to prevent disclosure to any duly authorized committee or subcommittee of the Congress, to other officers or employees concerned with carrying out this section or in connection with any proceeding under this section.

"(4)(A) The Federal Trade Commission, with the concurrence of the Assistant Attorney General, is authorized and directed to define the terms used in this section, to prescribe the content and form of reports, by general regulation to except classes of persons and transactions from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(B) The following classes of transactions are exempt from the notification requirements of this section:

"(i) goods or realty transferred in the ordinary course of business;

"(ii) bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

"(iii) interests in a corporation at least 50 per centum of the stock of which already is owned by the acquiring person or a wholly owned subsidiary thereof;

"(iv) transfers to or from a Federal agency or a State or political subdivision thereof;

"(v) transactions exempted from collateral attack under section 7 of this Act if approved by a Federal administrative or regulatory agency: *Provided*, That duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(vi) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), as amended, or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), as amended;

"(vii) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), as amended, section 403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a), as amended, or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), as amended: *Provided*, That duplicate originals of the information and documentary material filed with such agencies shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least thirty days prior to consummation of the proposed transaction;

"(viii) acquisitions, solely for the purpose of investment, of voting securities, if, at the time of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

"(ix) acquisitions of voting securities if, at the time of such acquisition, the securities acquired do not increase, directly or indirectly, the acquiring person's share of outstanding voting securities of the issuer; and

"(x) acquisitions, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolution, or of assets, other than voting securities or other voting share capital, by any bank, banking association, trust company, investment company, or insurance company, in the ordinary course of its business.

"(C) For the purpose of subsection (b)(4)(B) of this section, 'voting security' means any security presently entitling the owner or holder thereof to vote for the election of directors of a company or, with respect to unincorporated issuers, persons exercising similar functions.

"(c)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the periods specified in subsection (b)(1) of this section, require the submission of additional information and documentary material relating to the acquisition by any person or persons subject to the provisions of this section, or by any officer, director, or partner of such person or persons.

"(2) The Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the periods specified in subsection (b)(1) of this section for an additional period of up to twenty days after receipt of the information and documentary material submitted pursuant to subsection (c)(1) of this section.

"(3) No provisions of this section shall limit the power of the Federal Trade Commission or the Assistant Attorney General to secure, at any time, information or documentary material from any person, including third parties, pursuant to the Federal Trade Commission Act or the Antitrust Civil Process Act.

"(4) The Federal Trade Commission and the Assistant Attorney General may waive the waiting periods provided in this section or the remaining portions therof, in particular cases, by publishing in the Federal Register a notice that neither intends to take any action within such periods in respect of the acquisition.

"(d) If a proceeding is instituted by the Federal Trade Commission or an action is filed by the United States, alleging that a proposed acquisition or merger violates section 7 of this Act, or section 1 or 2 of the Sherman Act (15 U.S.C. 1–2), and the Commission or the Assistant Attorney General (i) files a motion for a preliminary injunction against consummation of such acquisition or merger *pendente lite*, and (ii) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief *pendente lite* pursuant to this subsection—[Hruska key amdt. 26]

"(1) upon the filing of such certification the chief judge of such district court shall enter an order temporarily restraining consummation of such proposed acquisition or merger until final disposition of the motion for a preliminary injunction; and shall immediately notify the chief judge of the United States court of appeals for the circuit in which such court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes;

"(2) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited;

"(3) a preliminary injunction shall issue restraining consummation of such proposed acquisition or merger until the order of the Commission in respect thereof or the judgment entered in such action has become final unless the defendants show that the Commission or the United States does not have a reasonable probability of ultimately prevailing on the merits, or that they will be irreparably injured by the entry of such an order, in which case the court may deny, modify, or subject such preliminary injunction to such conditions as the court shall deem just in the premises: *Provided*, That a showing of loss of anticipated financial benefits from the proposed acquisition or merger shall not be sufficient to warrant denial, modification, or conditioning of such an injunction; and

"(4) if a decision by the district court on such motion for a preliminary injunction is not issued within sixty days after issuance of the order temporarily restraining consummation of such proposed acquisition or merger, under paragraph (1) of this subsection, such order shall be vacated unless, for good cause, the chief judge of the United States court of appeals for such circuit extends such order.

"(e) Failure of the Federal Trade Commission or the Assistant Attorney General to request additional information or documentary material pursuant to this section, or failure to interpose objection to an acquisition within the periods specified in subsections (b)(1) and (b)(2) of this section, shall not bar the institution of any proceeding or action, or the obtaining of any information or documentary material, with respect to such acquisition, at any time under any provision of law.

"(f)(1) Whenever any person violates or fails to comply with the provisions of subsection (a) of this section, such person shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each day during which such person directly or indirectly holds stock or assets, in violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(2) Whenever any person fails to furnish information required to be submitted, pursuant to subsection (c)(1) of this section, such person shall be liable for the penalties provided for noncompliance with the provisions of the Federal Trade Commission Act or the Antitrust Civil Process Act, as the case may be.

"(g) In any proceeding instituted or action brought by the Federal Trade Commission or the United States alleging that an acquisition violates section 7 of this Act, or sections 1 or 2 of the Sherman Act, upon application of the Federal Trade Commission or the Assistant Attorney General to the United States district court within which the respondent resides or

carries on business, or in which the action is filed, such court shall, as soon as practicable, enter an order establishing the purchase price of the acquired stock or assets, requiring the acquiring person or persons to maintain the personnel, assets, stock or firm being acquired as a separate entity unless the interests of justice require otherwise, and may enter an order requiring the profits of the acquired firm, stock, or assets to be placed in an escrow account, pending the outcome of the proceeding or action. Upon entry of a final order or judgment of divestiture under section 7 of this Act, or sections 1 or 2 of the Sherman Act, the court shall order that the divestiture be accomplished expeditiously. To the extent practicable, the court may deprive the violator of all benefits of the violation including tax benefits.".

SEC. 402. The provisions of this title shall be effective one hundred and twenty days after the date of enactment of this Act. Effective upon the date of enactment of this Act, the Federal Trade Commission is authorized and directed to carry out the requirements of sections 7A (b) (3) and (b) (4) of the Clayton Act, as amended by this Act.

TITLE V—MISCELLANEOUS AMENDMENTS

AFFECTING COMMERCE [Hruska key amdt. 28]

SEC. 501. (a) Sections 2 and 3 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 13 and 14) and section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 15, sec. 13) and for other purposes", approved June 19, 1936 (15 U.S.C. 13a), are amended by striking out the words "in commerce" wherever the term appears and inserting in lieu thereof the words "in or affecting commerce".

(b) Section 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 18), is amended by striking out in the first sentence thereof the words "engaged in commerce" and "engaged also in commerce,"; by striking out in the second sentence thereof the words "engaged in commerce,"; by inserting in the first sentence thereof after the word "corporation", third appearance, the words ", where the activities of either corporation are in or affect commerce and"; by inserting in the first sentence thereof a comma between the words "where" and "in"; by inserting in the second sentence thereof after the word "corporations" the words ", where the activities of either corporation are in or affect commerce and"; and by inserting in the second sentence thereof a comma between the words "where" and "in".

(c) Section 6 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 6), as amended, is amended by striking the words "and being in the course of transportation from one State to another, or to a foreign country", and inserting in lieu thereof the words "and being in or affecting commerce among the several States, or with foreign nations".

COMPLEX CASES

SEC. 502. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding a new section 27 as follows:

"COMPLEX CASES

"SEC. 27. (a) In any civil action brought in any district court of the United States under the antitrust laws, or any other Acts having like purpose that have been or hereafter may be enacted, the chief judge of the district court or the trial judge assigned to hear and determine the case—

"(1) may, upon application of either party to the proceeding, or upon his own motion, designate the case as a complex antitrust case; and

"(2) shall, upon the filing of a certificate by the Attorney General that, in his opinion, the case is a complex antitrust case, designate the case as a complex antitrust case.

It shall be the duty of the chief judge, and the trial judge designated to hear and determine any case designated as a complex antitrust case, to set the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. Special masters, economic experts, and other personnel may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters.

"(b) Such special masters, economic experts, and other personnel as may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters, also may serve as expert witnesses. They may be used by the court in all phases of the trial, including the preparation and analysis of plans for relief. They (1) may be furnished with all evidence introduced by any party; (2) may provide additional evidence subject to objection by any party; (3) may provide an analysis of issues with particular reference to proposed orders to restore effective competition; (4) may recommend provisions for proposed orders to restore effective competition; and (5) shall be subject to cross-examination and rebuttal.

"(c) In any case designated as a complex antitrust case, the provisions of section 604 of title 28, United States Code, providing for the payment of expenses and compensation shall

apply in order to provide compensation to such master, expert or other personnel that may be appointed.".

FOREIGN ACTIONS

SEC. 503. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding a new section 28 as follows:

"FOREIGN ACTIONS

"SEC. 28. In any civil action or proceeding before any court of the United States, involving any act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party thereto or any person in privity with such party to furnish discovery, evidence, or testimony and such party or person refuses, declines, or fails to do so on the ground that a foreign, statute, order, regulation, decree, or other law prohibits compliance with such order, the court may enter an order forthwith against such party, dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party.".

ATTORNEYS' FEES

SEC. 504. Section 16 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 16, 1914 (15 U.S.C. 26), is amended by adding at the end thereof the following new sentence: "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including reasonable attorneys' fees and other expenses of the litigation.". [Hruska key amdt. 32]

SEVERABILITY

SEC. 505. If any provision of this Act, or the application of any such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 506. (a) Section 501 of this title shall apply to acts, practices, and conduct occurring after the date of enactment of this Act.

(b) Section 502 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed.

(c) Section 503 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed, in re-

spect of noncompliance with discovery orders hereafter entered. Nothing contained in this subsection shall be deemed to limit the authority of any court to reenter any discovery order heretofore entered, and thereby make such section 503 applicable thereto.

(d) Unless otherwise specified, the effective date of this Act shall be the date of enactment thereof.

2. Amendment offered to Title IV by Senator Roman Hruska:

On page 56, line 8, strike out the dash, and on line 9, strike out "(A)"; on line 15, substitute a period for the semicolon, and strike out the word "or"; and strike out lines 16 through 25.

CONFORMING AMENDMENT

Strike out the "(A)" on page 57, lines 8 and 16, and on page 58, line 10.

[This amendment strikes the general economy damage provision from Title IV.]

3. Amendment offered to Title IV by Senator Philip A. Hart (for himself and Senator Hugh Scott):

In any action brought under this section, the amount of plaintiffs' attorneys' fees, if any, shall be determined by the court.

4. Amendment offered to Title IV by Senator Hiram Fong:

This title shall apply to all civil actions filed under the antitrust laws in which a person representing a class of natural persons or a State is plaintiff, including those in which the cause of action accrued before the date of enactment of this title, but shall not apply to any civil action alleging a violation previously alleged in any civil action filed on behalf of a class of consumers.

5. Amendment offered to Title IV by Senator Philip A. Hart (for himself and Senator Hugh Scott):

In any action brought under this section, the court may in its discretion award reasonable attorneys' fees to a prevailing defendant upon a finding that the State attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

6. Amendment offered to Title II by Senator Quentin Burdick:

Any person examined pursuant to a demand under this section shall be entitled to the same fees and mileage that are paid to witnesses in the courts of the United States. The court shall award any person, not the subject of an antitrust investigation (or an officer, director, employee or agent thereof), who shall respond to, or be examined pursuant to a demand under this section, reasonable expenses incurred by him in preparing and producing documentary material or in appearing for examination, including reasonable attorney's fees. A determination made pursuant to this paragraph (5) shall be made subsequent to compliance by such person with such demand.

7. Amendment offered to Title III by Senator James Abourezk:

FOREIGN ACTIONS

The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding a new section 28 as follows:

"FOREIGN ACTIONS

"SEC. 28. In any civil action or proceeding before any court of the United States, involving any Act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party (or any officer, director, employee, agent, subsidiary, or parent thereof within the jurisdiction of the court) to furnish discovery, evidence, or testimony in the custody, possession, or control of such party (or officer, director, employee, agent, subsidiary, or parent thereof) and such party (or officer, director, employee, agent, subsidiary, or parent thereof) refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance by such party (or officer, director, employee, agent, subsidiary, or parent thereof) with such order, the court may enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party: *Provided*, That where in any such action or proceeding the court orders any party to furnish discovery, evidence, or testimony in the custody, possession, or control of any officer, director, employee, agent, subsidiary, or parent of such party not subject to the jurisdiction of such court, and such party refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance by such person or entity with such order, the court shall order such party to make a good faith effort to secure a waiver from such law. If the court determines that such effort has been made and a waiver is not secured, it shall not on the basis of such refusal, declination, or failure enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party."

VII. CHANGES IN EXISTING LAW

In compliance with subsection (4) of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, S. 1284 as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

An act to protect trade and commerce against unlawful restraints and monopolies (§ 6, 26 Stat. 209, 210).

* * * * * * *

(SHERMAN ACT)

(15 U.S.C. 6)

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof)

mentioned in section one of this Act, [and being in the course of transportation from one State to another, or to a foreign country] *and being in or affecting commerce among the several States, or with foreign nations*, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

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An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes (38 Stat. 730).

* * * * * * *

(CLAYTON ACT)

(15 U.S.C. 13)

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SEC. 2. (a) That it shall be unlawful for any person engaged [in commerce] *in or affecting 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] *in or affecting 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: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And *Provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise [in commerce] *in or affecting commerce* from selecting their own customers in bona fide transactions and not in restraint of trade: And *Provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court

process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged [in commerce] *in or affecting commerce*, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) That it shall be unlawful for any person engaged [in commerce] *in or affecting commerce* to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * * * *

(f) That it shall be unlawful for any person engaged [in commerce] *in or affecting commerce*, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

* * * * * * *

(ROBINSON-PATMAN ACT)

(15 U.S.C. 13a)

* * * * * * *

SEC. 3. It shall be unlawful for any person engaged [in commerce] *in or affecting commerce*, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which dis-

criminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

* * * * * * *

(CLAYTON ACT)

(15 U.S.C. 14)

SEC. 3. That it shall be unlawful for any person engaged [in commerce] *in or affecting commerce*, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, 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, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

* * * * * * *

(CLAYTON ACT)

(15 U.S.C. 15)

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SEC. 4B. Any action to enforce any cause of action under [sections 4 or 4A] *sections 4, 4A, or 4C* shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

SEC. 4C. (a) (1) Any attorney general of a State may bring a civil action, in the name of such State in any district court of the United States having jurisdiction of the defendant, to secure monetary and other relief as provided in this section in respect of any damage sustained, by reason of the defendant's having done anything forbidden in the Sherman Act, by the natural persons residing in such State, or any of them: Provided, That no monetary relief shall be awarded in

respect of such damage that duplicates any monetary relief that has been awarded or is properly allocable to (i) such natural persons who have excluded their claims pursuant to subsection (b) (2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in subsection (a) (1) of this section; such other relief as is just in the circumstances to prevent or remedy the violation of the Sherman Act; and the cost of suit, including a reasonable attorney's fee and other expenses of the litigation.

(b) (1) In any action brought under subsection (a) (1) of this section, the State attorney general shall, at such times, in such manner and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice by publication only would be manifestly unjust as to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

(2) Any person may elect to exclude from adjudication in an action brought under subsection (a) (1) of this section the portion of the State claim for monetary relief attributable to him. He shall do so by filing a notice of such election with the court within such time as specified in the notice prescribed pursuant to subsection (b) (1) of this section.

(3) The final judgment in the action brought by the State shall be res judicata as to any claim under section 4 of this Act by any person in respect of damage to whom such action was brought unless such person has filed the notice prescribed in subsection (b) (2) of this section.

(c) (1) In any action brought under subsection (a) (1) of this section, and in any class action on behalf of natural persons under section 4 of this Act, damages may be proved and assessed in the aggregate on the basis of statistical or sampling methods, or such other reasonable method of estimation as the court in its discretion may permit, without separately proving the fact or amount of individual injury or damage to such natural persons.

(2) In any action brought under subsection (a) (1) of this section, the court shall distribute, or direct the distribution of, any monetary relief awarded to the State either in accordance with State law or as the district court may in its discretion authorize. In either case, any distribution procedure adopted shall afford each person in respect of damage to whom the relief was awarded a reasonable opportunity to secure his appropriate portion of the net monetary relief.

(d) An action brought under this section shall not be dismissed or compromised without approval of the court after providing such notice to persons affected thereby as the court shall direct in the interests of justice.

(e) In any action brought under this section, the amount of plaintiffs' attorneys' fees, if any, shall be determined by the court.

(f) In any action brought under this section, the court may in its discretion award reasonable attorneys' fees to a prevailing defendant upon a finding that the State attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

SEC. 4D. Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe

that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

SEC. 4E. (a) In any action under section 4 or 4C of this Act, the State or any other plaintiff shall be entitled to recover treble damages in respect to the full amount of overcharges incurred or other monetary damages sustained in connection with expenditures under a federally funded program, notwithstanding the fact that the United States funded portions of the amounts claimed.

(b) The Attorney General of the United States shall have the right to intervene in any such action to protect the interests of the United States.

(c) Out of any damages recovered pursuant to this section, the United States shall be entitled to the portion of the overcharges or other monetary damages, untrebled, that it sustained or funded. Whenever another Federal statute or law provides a specified method of settlement of accounts between the State and Federal governments, in respect of such recovery, such method shall be used. Otherwise, the court before which the action is pending shall determine the method.

(d) In the event of multiple actions in respect of the same alleged overcharges or other damages relating to a federally funded program, the defendant shall not be assessed, in total, more than threefold such damages.

SEC. 4F. For the purposes of sections 4C, 4D, and 4E of this Act:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 4C of this Act, and shall include the Corporation Counsel of the District of Columbia.

(2) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(3) The term "Sherman Act" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (15 U.S.C. 1), as amended or as may be hereafter amended.

(CLAYTON ACT)

(15 U.S.C. 16)

Sec. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

* * * * * * *

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every [private right of action] *private or State right of action* arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under [section 4] *sections 4 or 4C* is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

(j) A plea of nolo contendere in a criminal proceeding under the antitrust laws shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(k) The Attorney General, unless he determines it would be contrary to the public interest, shall upon written request from the Federal Trade Commission, after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding or after the termination of any grand jury proceeding which does not result in the institution of such a proceeding, permit the Commission to inspect and copy any documentary material produced in and the transcripts of such grand jury proceeding. While such materials are in the possession of the Commission, the Commission shall be subject to any and all restrictions and obligations placed upon the Attorney General with respect to the secrecy of such materials.

(l) Any person that institutes a civil action under this Act may, upon payment of reasonable charges therefor and after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding, inspect and copy any documentary material produced in and the transcript of such grand jury proceeding concerning the subject matter of such person's civil action. Any action or proceeding to compel the grant of access under this subsection shall be brought in the United States district court for the district in which the grand jury proceeding occurred. The court may impose conditions upon the grant of access and protective orders that are required by the interests of justice.

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(CLAYTON ACT)
(15 U.S.C. 18)

SEC. 7. That no corporation [engaged in commerce] shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation [engaged also in commerce,] , *where the activities of either corporation are in or affect commerce and* where, in any line of commerce in any section of the country, the effect of such acquisition

may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations [engaged in commerce,] , *where the activities of either corporation are in or affect commerce and* where, in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * * * * * *

SEC. 7A. (a) Notwithstanding any other provision of law, except as exempted pursuant to subsection (b)(4) of this section, until expiration of the notification and waiting period specified in subsection (b)(1) of this section, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce, and—

(1) stock or assets of a manufacturing company with annual net sales or total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

(2) stock or assets of a non-manufacturing company with total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

(3) stock or assets of a person or persons with annual net sales or total assets of $100,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $10,000,000 or more.

(b)(1) The notification and waiting period required by this section shall expire thirty days after the persons subject to subsection (a) of this section each file with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to in this section as the "Assistant Attorney General") duplicate originals of the notification specified in paragraph (3) of this subsection, or until expiration of any extension of such period pursuant to subsection (c)(2) of this section, whichever is later, except as the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section.

(2) Notwithstanding any other provision of law or the applicability of subsection (a) of this section, except as exempted pursuant to subsection (b)(4) of this section, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if—

(A) the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are en-

gaged in commerce or in any activity affecting commerce; and

(B) the Federal Trade Commission, with the concurrence of the Assistant Attorney General, by general regulation requires, after notice and submission of views, pursuant to section 553 of title 5, United States Code, that such person or persons, or any class or category thereof, shall not do so until the expiration of thirty days following the filing of a notification (specified pursuant to paragraph (3) of this subsection), or until the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section, whichever occurs first.

(3)(A) The notification required by this section shall be in such form and contain such information and documentary material as the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall by general regulation prescribe, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

(B) The fact of the filing of the notification required by this section and all information and documentary material contained therein shall be considered confidential under section 1905, title 18, United States Code, until the fact of such filing or of the proposed merger or acquisition is public knowledge, at which time such notification, information, and documentary material shall be subject to the provisions of section 552(b), title 5, United States Code. Nothing in this section is intended to prevent disclosure to any duly authorized committee or subcommittee of the Congress, to other officers or employees concerned with carrying out this section or in connection with any proceeding under this section.

(4)(A) The Federal Trade Commission, with the concurrence of the Assistant Attorney General, is authorized and directed to define the terms used in this section, to prescribe the content and form of reports, by general regulation to except classes of persons and transactions from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

(B) The following classes of transactions are exempt from the notification requirements of this section:

(i) goods or realty transferred in the ordinary course of business;

(ii) bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(iii) interests in a corporation at least 50 per centum of the stock of which already is owned by the acquiring person or a wholly owned subsidiary thereof;

(iv) transfers to or from a Federal agency or a State or political subdivision thereof;

(v) transactions exempted from collateral attack under section 7 of this Act if approved by a Federal administrative or regulatory agency: Provided, That duplicate originals of the infor-

mation and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(vi) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), as amended, or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), as amended;

(vii) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), as amended, section 403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a) as amended, or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), as amended: Provided, That duplicate originals of the information and documentary material filed with such agencies shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least thirty days prior to consummation of the proposed transaction;

(viii) acquisitions, solely for the purpose of investment, of voting securities, if, at the time of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

(ix) acquisitions of voting securities, if, at the time of such acquisition, the securities acquired do not increase, directly or indirectly, the acquiring person's share of outstanding voting securities of the issuer; and

(x) acquisitions, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolution, or of assets, other than voting securities or other voting share capital, by any bank, banking association, trust company, investment company, or insurance company, in the ordinary course of its business.

(C) For the purpose of subsection (b)(4)(B) of this section, "voting security" means any security presently entitling the owner or holder thereof to vote for the election of directors of a company or, with respect to unincorporated issuers, persons exercising similar functions.

(c)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the periods specified in subsection (b)(1) of this section, require the submission of additional information and documentary material relating to the acquisition by any person or persons subject to the provisions of this section, or by any officer, director, or partner of such person or persons.

(2) The Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the periods specified in subsection (b)(1) of this section for an additional period of up to twenty days after receipt of the information and documentary material submitted pursuant to subsection (c)(1) of this section.

(3) No provisions of this section shall limit the power of the Federal Trade Commission or the Assistant Attorney General to secure, at any time, information or documentary material from any person, including third parties, pursuant to the Federal Trade Commission Act or the Antitrust Civil Process Act.

(4) The Federal Trade Commission and the Assistant Attorney General may waive the waiting periods provided in this section or the

remaining portions thereof, in particular cases, by publishing in the Federal Register a notice that neither intends to take any action within such periods in respect of the acquisition.

(d) If a proceeding is instituted by the Federal Trade Commission or an action is filed by the United States, alleging that a proposed acquisition or merger violates section 7 of this Act, or section 1 or 2 of the Sherman Act (15 U.S.C. 1–2), and the Federal Trade Commission or the Assistant Attorney General (i) files a motion for a preliminary injunction against consummation of such acquisition or merger pendente lite, and (ii) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection—

(1) upon the filing of such certification the chief judge of such district court shall enter an order temporarily restraining consummation of such proposed acquisition or merger until final disposition of the motion for a preliminary injunction; and shall immediately notify the chief judge of the United States court of appeals for the circuit in which such court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes;

(2) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited;

(3) a preliminary injunction shall issue restraining consummation of such proposed acquisition or merger until the order of the Federal Trade Commission in respect thereof or the judgment entered in such action has become final unless the defendants show that the Federal Trade Commission or the United States does not have a reasonable probability of ultimately prevailing on the merits, or that they will be irreparably injured by the entry of such an order, in which case the court may deny, modify, or subject such preliminary injunction to such conditions as the court shall deem just in the premises: Provided, That a showing of loss of anticipated financial benefits from the proposed acquisition or merger shall not be sufficient to warrant denial, modification, or conditioning of such an injunction; and

(4) if a decision by the district court on such motion for a preliminary injunction is not issued within sixty days after issuance of the order temporarily restraining consummation of such proposed acquisition or merger, under paragraph (1) of this subsection, such order shall be vacated unless, for good cause, the chief judge of the United States court of appeals for such circuit extends such order.

(e) Failure of the Federal Trade Commission or the Assistant Attorney General to request additional information or documentary material pursuant to this section, or failure to interpose objection to an acquisition within the periods specified in subsections (b)(1)

and (b)(2) of this section, shall not bar the institution of any proceeding or action, or the obtaining of any information or documentary material, with respect to such acquisition, at any time under any provision of law.

(f)(1) Whenever any person violates or fails to comply with the provisions of subsection (a) of this section, such person shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each day during which such person directly or indirectly holds stock or assets, in violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought by the United States.

(2) Whenever any person fails to furnish information required to be submitted, pursuant to subsection (c)(1) of this section, such person shall be liable for the penalties provided for noncompliance with the provisions of the Federal Trade Commission Act or the Antitrust Civil Process Act, as the case may be.

(g) In any proceeding instituted or action brought by the Federal Trade Commission or the United States alleging that an acquisition violates section 7 of this Act, or sections 1 or 2 of the Sherman Act (15 U.S.C. 1–2), upon application of the Federal Trade Commission or the Assistant Attorney General to the United States district court within which the respondent resides or carries on business, or in which the action is filed, such court shall, as soon as practicable, enter an order establishing the purchase price of the acquired stock or assets, requiring the acquiring person or persons to maintain the personnel, assets, stock or firm being acquired as a separate entity unless the interests of justice require otherwise, and may enter an order requiring the profits of the acquired firm, stock, or assets to be placed in an escrow account, pending the outcome of the proceeding or action. Upon entry of a final order or judgment of divestiture under section 7 of this Act, or sections 1 or 2 of the Sherman Act (15 U.S.C. 1–2), the court shall order that the divestiture be accomplished expeditiously. To the extent practicable, the court may deprive the violator of all benefits of the violation including tax benefits.

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(CLAYTON ACT)

(15 U.S.C. 26)

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SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein

contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. *In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including reasonable attorneys' fees and other expenses of the litigation.*

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(CLAYTON ACT)

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SEC. 27. (a) In any civil action brought in any district court of the United States under the antitrust laws, or any other Acts having like purpose that have been or hereafter may be enacted, the chief judge of the district court or the trial judge assigned to hear and determine the case—

(1) may, upon application of either party to the proceeding, or upon his own motion, designate the case as a complex antitrust case; and

(2) shall, upon the filing of a certificate by the Attorney General that, in his opinion, the case is a complex antitrust case, designate the case as a complex antitrust case.

It shall be the duty of the chief judge, and the trial judge designated to hear and determine any case designated as a complex antitrust case, to set the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. Special masters, economic experts, and other personnel may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters.

(b) Such special masters, economic experts, and other personnel as may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters, also may serve as expert witnesses. They may be used by the court in all phases of the trial, including the preparation and analysis of plans for relief. They (1) may be furnished with all evidence introduced by any party; (2) may provide additional evidence subject to objection by any party; (3) may provide an analysis of issues with particular reference to proposed orders to restore effective competition; (4) may recommend provisions for proposed orders to restore effective competition; and (5) shall be subject to cross-examination and rebuttal.

(c) In any case designated as a complex antitrust case, the provisions of section 604 of title 28, United States Code, providing for the payment of expenses and compensation shall apply in order to provide compensation to such master, expert or other personnel that may be appointed.

SEC. 28. In any civil action or proceeding before any court of the United States, involving any Act to regulate interstate or for-

eign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party (or any officer, director, employee, agent, subsidiary, or parent thereof within the jurisdiction of the court) to furnish discovery, evidence, or testimony in the custody, possession, or control of such party (or officer, director, employee, agent, subsidiary, or parent thereof) and such party (or officer, director, employee, agent, subsidiary, or parent thereof) refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance by such party (or officer, director, employee, agent, subsidiary, or parent thereof) with such order, the court may enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party: Provided, That where in any such action or proceeding the court orders any party to furnish discovery, evidence, or testimony in the custody, possession, or control of any officer, director, employee, agent, subsidiary, or parent of such party not subject to the jurisdiction of such court, and such party refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance by such person or entity with such order, the court shall order such party to make a good faith effort to secure a waiver from such law. If the court determines that such effort has been made and a waiver is not secured, it shall not on the basis of such refusal, declination, or failure enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party.

ANTITRUST CIVIL PROCESS ACT
(15 U.S.C. 1311)

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SEC. 2. For the purposes of this Act—

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), commonly known as the Clayton Act; *and*

[(2) The Federal Trade Commission Act (15 U.S.C. 41 and the following); and]

[(3)] (2) Any statute enacted on and after September 19, 1962, by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to [(A)] any restraint upon or monopolization of interstate or foreign trade or commerce [,] ; [or (B) any unfair trade practice in or affecting such commerce;]

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[(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascer-

taining whether any person is or has been engaged in any antitrust violation;]

(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities preparatory to a merger, acquisition, joint venture, or similar transaction, which may lead to any antitrust violation;

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(f) The term "person" means *any natural person or* any corporation, association, partnership, or other legal entity [not a natural person;], *including any natural person or entity acting under color or authority of State law;*

* * * * * * *

(h) The term "custodian" means the [antitrust document] custodian or any deputy custodian designated under section 4(a) of this Act.

SEC. 3. (a) [Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.] *Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation or to competition in a Federal administrative or regulatory agency proceeding, he may, prior to the institution of a civil or criminal proceeding thereon or during the pendency of an agency proceeding, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, or to answer in writing written interrogatories concerning such information, or to give oral testimony concerning such information, or to furnish any combination thereof.*

(b) [Each such demand shall—

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

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

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

(4) identify the custodian to whom such material shall be made available.]

Each such demand shall—

(1) state the nature of the investigation and the provision of law applicable thereto or the Federal administrative or regulatory agency proceeding involved; and

(2)(A) if it is a demand for production of documentary material—

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

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

(iii) identify the custodian to whom such material shall be made available; or

(B) if it is a demand for answers to written interrogatories—

(i) propound with definiteness and certainty the written interrogatories to be answered; and

(ii) prescribe a date or dates at which time answers to the written interrogatories shall be made; and

(iii) identify the custodian to whom such answers shall be made; or

(C) if it is a demand for the giving of oral testimony—

(i) prescribe a date, time, and place at which oral testimony shall be commenced; and

(ii) identify the antitrust investigator or investigators who shall conduct the examination, and the custodian to whom the transcript of such examination shall be given.

(c) [No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.]

Such demand shall—

(1) not require the production of any information that would be privileged from disclosure if demanded by, or pursuant to, a subpena issued by a court of the United States in aid of a grand jury investigation; and

(2)(A) if it is a demand for production of documentary material, not contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation; or

(B) if it is a demand for answers to written interrogatories, not impose an undue or oppressive burden on the person required to furnish answers.

* * * * * * *

(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

(1) delivering a duly executed copy thereof to the person to be served; or

(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to such person at his residence or principal office or place of business.

(g) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any person who, in the opinion of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, is not to be found within the territorial jurisdiction of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. If such person has had contacts with the United States that were sufficient to, or if the conduct of such person has so affected the trade and commerce of the United States as to, permit the courts of the United States to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that it would have if such person were personally within the jurisdiction of such court.

[(f)] *(h)* A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(i) The production of documentary material in response to a demand for production thereof shall be made under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed or, if the person to which the demand is directed is not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(j) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer, and the answers shall be submitted under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed, or if the person to which the demand is directed is not a natural person, by a person or persons responsible for the answers, to the effect that all information required by the demand and in the possession, custody, or control of the person to whom the demand is directed, or within the knowledge of such person, has been furnished.

(k)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and

transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the custodian. The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all persons other than the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (Ch. 114, 37 Stat. 731; 15 U.S.C. 30) shall not apply to such examinations.

(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts personal business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

(3) When the testimony is fully transcribed, the witness shall be afforded an opportunity to examine the transcript, in the presence of the officer, for errors in transcription. Any corrections of transcription errors which the witness desires to make shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The witness also may clarify or complete answers otherwise equivocal or incomplete on the record, which shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded an opportunity to examine it, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor. The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the custodian. Upon payment of reasonable charges therefor, the witness shall be permitted to inspect and copy the transcript of his testimony to the extent and in the circumstances that he would be entitled to do so if it were a transcript of his testimony before a grand jury; and there may be imposed on such inspection and copying such conditions as the interests of justice require.

(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. Such person or counsel may object on the record, briefly stating the reason therefor, whenever it is claimed that such person is entitled to refuse to answer any question on grounds of privilege or other lawful grounds; but he shall not otherwise interrupt the examination. If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code. If such person refuses to answer any question, the antitrust investigator or investigators conducting the examination may request the district court of the United States for the judicial district

within which the examination is conducted to order such person to answer, in the same manner as if such person had refused to answer such question after having been subpenaed to testify thereto before a grand jury, and upon disobedience to any such order of such court, such court may punish such person for contempt thereof.

(5) Any person examined pursuant to a demand under this section shall be entitled to the same fees and mileage that are paid to witnesses in the courts of the United States. The court shall award any person, not the subject of an antitrust investigation (or an officer, director, employee or agent thereof), who shall respond to, or be examined, pursuant to a demand under this section, reasonable expenses incurred by him in preparing and producing documentary material or in appearing for examination, including reasonable attorneys' fees. A determination made pursuant to this paragraph (5) shall be made subsequent to compliance by such person with such demand.

SEC. 4. (a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as [antitrust document] custodian *of documentary material demanded, answers to written interrogatories served, or transcripts of oral testimony taken, pursuant to this Act*, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(b) Any person upon whom any demand *for the production of documents* issued under section 1312 of this title has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 5(d) of this Act) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). [Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.] *Such person may upon written agreement between such person and the custodian substitute true copies for originals of all or any part of such material.*

(c) The custodian to whom any *such* documentary material, *answers to interrogatories, or transcripts of oral testimony* is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this Act. The custodian may cause the preparation of such copies of such documentary material, *answers to interrogatories, or transcripts of oral testimony* as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material *or information* so produced shall be available for examination, without the consent of the person who produced such material *or information*, by any individual other than a duly authorized officer, member, or employee of the Department of Justice. Under such reasonable terms and conditions as the Attorney General shall prescribe, *such* documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person. *Such documentary material and*

answers to interrogatories may be used in connection with any oral testimony taken pursuant to this Act.

(d) [Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.] *(1) Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding such attorney shall return to the custodian any such materials so delivered that have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.*

(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony shall deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any investigation or proceeding under its jurisdiction unless the Assistant Attorney General in charge of the Antitrust Division determines that it would not be in the public interest to provide such material to the Commission. Upon the completion of any such investigation or proceeding, the Commission shall return to the custodian any such materials so delivered that have not been introduced into the record of such case or proceeding before the Commission. While such materials are in the possession of the Commission, it shall be subject to any and all restrictions and obligations which this Act places upon the custodian of such materials while in the possession of the Antitrust Division of the Department of Justice.

(e) [Upon the completion of (1) the antitrust investigation for which any documentary material was produced under this Act, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice pursuant to subsection (c)) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.] *Upon the completion of—*

(1) the antitrust investigation for which any documentary material was produced pursuant to this Act; and

(2) any such case or proceeding,

the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or proceeding.

(f) [When any documentary material has been produced by any person under this Act for use in any antitrust investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice pursuant to subsection (c)) so produced by such person.] *When any documentary material has been produced by any person pursuant to this Act, and no case or proceeding as to which the documents are usable has been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice to subsection (c) of this section) so produced by such person.*

(g) [In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.] *In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced, answers to written interrogatories served, or transcripts of oral testimony taken, under any demand issued pursuant to this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material, answers to interrogatories, or transcripts of oral testimony, and (2) transmit in writing to the person who submitted the documentary material notice as to the identity and address of the*

successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.

SEC. 5. (a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 3 or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this Act [, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.].

(b) [Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand.] *Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigtors named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the antitrust investigator or investigators named in the demand a petition for an order of such court modifying or setting aside such demand.* The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court [.] *: Provided, That such person shall promptly comply with such portions of the demand not sought to be modified or set aside.* Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this Act, or upon any constitutional or other legal right or privilege of such person. *Any such ground not specified in such a petition shall be deemed waived unless good cause is shown for the failure to assert it in such a petition.*

(c) At any time during which any custodian is in custody or control of any documentary material [delivered] *or answers to interrogatories delivered, or transcripts of oral testimony given* by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a

petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this Act.

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TITLE 18, UNITED STATES CODE

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CHAPTER 73.—OBSTRUCTION OF JUSTICE

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(ANTITRUST CIVIL PROCESS ACT (76 STAT. 548, 551))

§ 1505. Obstruction of proceedings before departments, agencies, and committees.

* * * * * * *

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any *oral or written information or any* documentary material which is the subject of such demand; or

Whoever knowingly and willfully withholds, falsifies, or misrepresents, or by any trick, fraud, scheme, or device conceals or covers up, a material part of any oral or written information or documentary material which is the subject of a demand pursuant to the Antitrust Civil Process Act, or attempts to or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

* * * * * * *

VIII. TEXT OF S. 1284, AS REPORTED

To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 101. This Act may be cited as the "Hart-Scott Antitrust Improvements Act of 1976".

TITLE I—DECLARATION OF POLICY

SEC. 102. (a) It is the purpose of the Congress in this Act to support and invigorate effective and expeditious enforcement of the antitrust laws, to improve and modernize antitrust investigation and enforcement mechanisms, to facilitate the restoration and maintenance of competition in the marketplace, and to prevent and eliminate monopoly and oligopoly power in the economy.

(b) The Congress finds and declares that—

(1) this Nation is founded upon and committed to a private enterprise system and a free market economy, in the belief that competition spurs innovation, promotes productivity, prevents the undue concentration of economic, social, and political power, and preserves a free, democratic society;

(2) the decline of competition in the economy could contribute to unemployment, inefficiency, underutilization of economic capacity, a reduction in exports, and an adverse effect on the balance of payments;

(3) diminished competition and increased concentration in the marketplace have been important factors in the ineffectiveness of monetary and fiscal policies in reducing the high rates of inflation and unemployment;

(4) investigations by the Federal Trade Commission, the Department of Justice, and the National Commission on Food Marketing, as well as other independent studies, have identified conditions of excessive concentration and anticompetitive behavior in various industries; and

(5) vigorous and effective enforcement of the antitrust laws, and reduction of anticompetitive practices in the economy, can contribute to reducing prices, unemployment, and inflation, and to preservation of our democratic institutions and personal freedoms.

TITLE II—ANTITRUST CIVIL PROCESS ACT AMENDMENTS

SEC. 201. The Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311) is amended as follows:

(a) Subsection (a) of section 2 is amended by inserting "and" after the semicolon at the end of subparagraph (1), by striking subparagraph (2) thereof, and by renumbering subparagraph (3) and striking therefrom "(A)" after the words "with respect to," substituting a semicolon for the comma after the words "trade or commerce" and striking the remainder of the subparagraph.

(b) Subsection (c) of section 2 is amended to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities preparatory to a merger, acquisition, joint venture, or similar transaction, which may lead to any antitrust violation;".

(c) Subsection (f) of section 2 is amended by striking out the words "not a natural person", by inserting immediately after the word "means" the words "any natural person or", and by inserting immedi-

ately after the word "entity" the words ", including any natural person or entity acting under color or authority of State law;".

(d) Subsection (h) of section 2 is amended by striking out the words "antitrust document".

(e) Subsection (a) of section 3 is amended to read as follows:

"(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation or to competition in a Federal administrative or regulatory agency proceeding, he may, prior to the institution of a civil or criminal proceeding thereon or during the pendency of an agency proceeding, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, or to answer in writing written interrogatories concerning such information, or to give oral testimony concerning such information, or to furnish any combination thereof.".

(f) Subsection (b) of section 3 is amended to read as follows:

"(b) Each such demand shall—

"(1) state the nature of the investigation and the provision of law applicable thereto or the Federal administrative or regulatory agency proceeding involved; and

"(2)(A) if it is a demand for production of documentary material—

"(i) describe the class or classes of documentary material to be produced thereunder, with such definiteness and certainty as to permit such material to be fairly identified; and

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

"(iii) identify the custodian to whom such material shall be made available; or

"(B) if it is a demand for answers to written interrogatories—

"(i) propound with definiteness and certainty the written interrogatories to be answered; and

"(ii) prescribe a date or dates at which time answers to the written interrogatories shall be made; and

"(iii) identify the custodian to whom such answers shall be made; or

"(C) if it is a demand for the giving of oral testimony—

"(i) prescribe a date, time, and place at which oral testimony shall be commenced; and

"(ii) identify the antitrust investigator or investigators who shall conduct the examination, and the custodian to whom the transcript of such examination shall be given.".

(g) Subsection (c) of section 3 is amended to read as follows:

"(c) Such demand shall—

"(1) not require the production of any information that would be privileged from disclosure if demanded by, or pursuant to, a subpena issued by a court of the United States in aid of a grand jury investigation; and

"(2) (A) if it is a demand for production of documentary material, not contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation; or

"(B) if it is a demand for answers to written interrogatories, not impose an undue or oppressive burden on the person required to furnish answers.".

(h) Subsection (f) of section 3 is redesignated subsection (h) and the following new subsections are inserted immediately following subsection (e):

"(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served; or

"(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to such person at his residence or principal office or place of business.

"(g) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any person who, in the opinion of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, is not to be found within the territorial jurisdiction of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. If such person has had contacts with the United States that were sufficient to, or if the conduct of such person has so affected the trade and commerce of the United States as to, permit the courts of the United States to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that it would have if such person were personally within the jurisdiction of such court.".

(i) Section 3 is further amended by inserting the following new subsections immediately after subsection (h), as redesignated:

"(i) The production of documentary material in response to a demand for production thereof shall be made under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed or, if the person to which the demand is directed is not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(j) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer, and the answers shall be submitted under a certificate, in such form as the demand designates, sworn to by the person, if a natural person, to whom the demand is directed, or if the person to which the demand is directed is not a natural person, by a person or persons responsible for the answers, to the effect that all information required by the demand and in the possession, custody,

or control of the person to whom the demand is directed, or within the knowledge of such person, has been furnished.

"(k)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the custodian. The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all persons other than the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (Ch. 114, 37 Stat. 731; 15 U.S.C. 30) shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts personal business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) When the testimony is fully transcribed, the witness shall be afforded an opportunity to examine the transcript, in the presence of the officer, for errors in transcription. Any corrections of transcription errors which the witness desires to make shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The witness also may clarify or complete answers otherwise equivocal or incomplete on the record, which shall be entered and identified upon the transcript by the officer, with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded an opportunity to examine it, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor. The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the custodian. Upon payment of reasonable charges therefor, the witness shall be permitted to inspect and copy the transcript of his testimony to the extent and in the circumstances that he would be entitled to do so if it were a transcript of his testimony before a grand jury; and there may be imposed on such inspection and copying such conditions as the interests of justice require.

"(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel.

Such person or counsel may object on the record, briefly stating the reason therefor, whenever it is claimed that such person is entitled to refuse to answer any question on grounds of privilege or other lawful grounds; but he shall not otherwise interrupt the examination. If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code. If such person refuses to answer any question, the antitrust investigator or investigators conducting the examination may request the district court of the United States for the judicial district within which the examintion is conducted to order such person to answer, in the same manner as if such person had refused to answer such question after having been subpenaed to testify thereto before a grand jury, and upon disobedience to any such order of such court, such court may punish such person for contempt thereof.

"(5) Any person examined pursuant to a demand under this section shall be entitled to the same fees and mileage that are paid to witnesses in the courts of the United States. The court shall award any person, not the subject of an antitrust investigation (or an officer, director, employee or agent thereof), who shall respond to, or be examined pursuant to a demand under this section, reasonable expenses incurred by him in preparing and producing documentary material or in appearing for examination, including reasonable attorneys' fees. A determination made pursuant to this paragraph (5) shall be made subsequent to compliance by such person with such demand.".

(j) Subsection (a) of section 4 is amended by striking the words "antitrust document", and by inserting immediately after the word "custodian" the words "of documentary material demanded, answers to written interrogatories served, or transcripts of oral testimony taken, pursuant to this Act".

(k) Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the words "for the production of documents", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute true copies for originals of all or any part of such material.".

(l) Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "any" the word "such", by inserting in the first sentence immediately after the word "material" the words ", answers to interrogatories, or transcripts of oral testimony", by inserting in the second sentence immediately after the word "material" the words ", answers to interrogatories, or transcripts of oral testimony", by inserting in the third sentence immediately after the word "material", in both places where it appears, the words "or information", by inserting in the fourth sentence immediately before the word "documentary" the word "such", and by adding after the fourth sentence the following new sentence: "Such documentary material and answers to interrogatories may be used in connection with any oral testimony taken pursuant to this Act.".

(m) Subsection (d) of section 4 is amended to read as follows:

"(d) (1) Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court,

grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding such attorney shall return to the custodian any such materials so delivered that have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony shall deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with any investigation or proceeding under its jurisdiction unless the Assistant Attorney General in charge of the Antitrust Division determines that it would not be in the public interest to provide such material to the Commission. Upon the completion of any such investigation or proceeding, the Commission shall return to the custodian any such materials so delivered that have not been introduced into the record of such case or proceeding before the Commission. While such materials are in the possession of the Commission, it shall be subject to any and all restrictions and obligations which this Act places upon the custodian of such materials while in the possession of the Antitrust Division of the Department of Justice.".

(n) Subsection (e) of section 4 is amended to read as follows:

"(e) Upon the completion of—

"(1) the antitrust investigation for which any documentary material was produced pursuant to this Act; and

"(2) any such case or proceeding,

the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or proceeding.".

(o) Subsection (f) of section 4 is amended to read as follows:

"(f) When any documentary material has been produced by any person pursuant to this Act, and no case or proceeding as to which the documents are usable has been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.".

(p) Subsection (g) of section 4 is amended to read as follows:

"(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced, answers to written interrogatories served, or transcripts of oral testimony taken, under any demand issued pursuant to this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material, answers to interrogatories, or transcripts of oral testimony, and (2) transmit in writing to the person who submitted the documentary material notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".

(q) Subsection (a) of section 5 is amended by striking out all the words following the word "Act", and by striking out the comma after the word "Act" and inserting in lieu thereof a period.

(r) The first sentence of subsection (b) of section 5 is amended to read as follows:

"(b) Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigators named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the antitrust investigator or investigators named in the demand a petition for an order of such court modifying or setting aside such demand.".

(s) The second sentence of subsection (b) of section 5 is amended by striking out the final period and inserting a colon in lieu thereof, and by inserting immediately after the colon the words: "*Provided*, That such person shall promptly comply with such portions of the demand not sought to be modified or set aside.".

(t) Subsection (b) of section 5 is amended by inserting the following sentence at the end thereof: "Any such ground not specified in such a petition shall be deemed waived unless good cause is shown for the failure to assert it in such a petition.".

(u) Subsection (c) of section 5 is amended by striking out the word "delivered", and by inserting immediately after the word "material" the words "or answers to interrogatories delivered, or transcripts of oral testimony given".

(v) The third paragraph of section 1505 of title 18, United States Code, is amended by inserting between the words "any" and "documentary" the words "oral or written information or any", and by inserting between the third and fourth paragraphs the following:

"Whoever knowingly and willfully withholds, falsifies, or misrepresents, or by any trick, fraud, scheme, or device conceals or covers

up, a material part of any oral or written information or documentary material which is the subject of a demand pursuant to the Antitrust Civil Process Act, or attempts to or solicits another to do so; or".

SEC. 202. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16), is amended by adding at the end thereof the following new subsections:

"(j) A plea of *nolo contendere* in a criminal proceeding under the antitrust laws shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

"(k) The Attorney General, unless he determines it would be contrary to the public interest, shall upon written request from the Federal Trade Commission, after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding or after the termination of any grand jury proceeding which does not result in the institution of such a proceeding, permit the Commission to inspect and copy any documentary material produced in and the transcripts of such grand jury proceeding. While such materials are in the possession of the Commission, the Commission shall be subject to any and all restrictions and obligations placed upon the Attorney General with respect to the secrecy of such materials.

"(l) Any person that institutes a civil action under this Act may, upon payment of reasonable charges therefor and after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding, inspect and copy any documentary material produced in and the transcript of such grand jury proceeding concerning the subject matter of such person's civil action. Any action or proceeding to compel the grant of access under this subsection shall be brought in the United States district court for the district in which the grand jury proceeding occurred. The court may impose conditions upon the grant of access and protective orders that are required by the interests of justice.".

SEC. 203. The provisions of this title shall be effective on the date of enactment of this Act, and the provisions providing for the production of documents or information may be employed in respect of acts, practices, and conduct that occurred prior to the date of enactment thereof.

TITLE III—MISCELLANEOUS AMENDMENTS

AFFECTING COMMERCE

SEC. 301. (a) Sections 2 and 3 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 13 and 14) and section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes", approved June 19, 1936 (15 U.S.C. 13a), are amended by

striking out the words "in commerce" wherever the term appears and inserting in lieu thereof the words "in or affecting commerce".

(b) Section 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 18), is amended by striking out in the first sentence thereof the words "engaged in commerce" and "engaged also in commerce,"; by striking out in the second sentence thereof the words "engaged in commerce,"; by inserting in the first sentence thereof after the word "corporation", third appearance, the words ", where the activities of either corporation are in or affect commerce and"; by inserting in the first sentence thereof a comma between the words "where" and "in"; by inserting in the second sentence thereof after the word "corporations" the words ", where the activities of either corporation are in or affect commerce and"; and by inserting in the second sentence thereof a comma between the words "where" and "in".

(c) Section 6 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 6), as amended, is amended by striking the words "and being in the course of transportation from one State to another, or to a foreign country", and inserting in lieu thereof the words "and being in or affecting commerce among the several States, or with foreign nations".

COMPLEX CASES

SEC. 302. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding at the end thereof the following new section:

"SEC. 27. (a) In any civil action brought in any district court of the United States under the antitrust laws, or any other Acts having like purpose that have been or hereafter may be enacted, the chief judge of the district court or the trial judge assigned to hear and determine the case—

"(1) may, upon application of either party to the proceeding, or upon his own motion, designate the case as a complex antitrust case; and

"(2) shall, upon the filing of a certificate by the Attorney General that, in his opinion, the case is a complex antitrust case, designate the case as a complex antitrust case.

It shall be the duty of the chief judge, and the trial judge designated to hear and determine any case designated as a complex antitrust case, to set the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. Special masters, economic experts, and other personnel may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters.

"(b) Such special masters, economic experts, and other personnel as may be appointed to assist in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters, also may serve as expert witnesses. They may be used by the court in all phases of the trial, including the preparation and analysis of plans for relief, They (1) may be furnished with all evidence introduced by any party; (2)

may provide additional evidence subject to objection by any party; (3) may provide an analysis of issues with particular reference to proposed orders to restore effective competition; (4) may recommend provisions for proposed orders to restore effective competition; and (5) shall be subject to cross-examination and rebuttal.

"(c) In any case designated as a complex antitrust case, the provisions of section 604 of title 28, United States Code, providing for the payment of expenses and compensation shall apply in order to provide compensation to such master, expert or other personnel that may be appointed."

FOREIGN ACTIONS

SEC. 303. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding at the end thereof the following new section:

"SEC. 28. In any civil action or proceeding before any court of the United States, involving any Act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party (or any officer, director, employee, agent, subsidiary, or parent thereof within the jurisdiction of the court) to furnish discovery, evidence, or testimony in the custody, possession, or control of such party (or officer, director, employee, agent, subsidiary, or parent thereof) and such party (or officer, director, employee, agent, subsidiary, or parent thereof) refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance by such party (or officer, director, employee, agent, subsidiary, or parent thereof) with such order, the court may enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party: *Provided*, That where in any such action or proceeding the court orders any party to furnish discovery, evidence, or testimony in the custody, possession, or control of any officer, director, employee, agent, subsidiary, or parent of such party not subject to the jurisdiction of such court, and such party refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree, or other law prohibits compliance by such person or entity with such order, the court shall order such party to make a good faith effort to secure a waiver from such law. If the court determines that such effort has been made and a waiver is not secured, it shall not on the basis of such refusal, declination, or failure enter an order against such party dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party.".

ATTORNEYS' FEES

SEC. 304. Section 16 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 16, 1914 (15 U.S.C. 26), is amended by adding at the end thereof the following new sentence: "In any action under this section in which the plaintiff substantially prevails,

the court shall award the cost of suit, including reasonable attorneys' fees and other expenses of the litigation.".

SEVERABILITY

SEC. 305. If any provision of this Act, or the application of any such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 306. (a) Section 301 of this title shall apply to acts, practices, and conduct occurring after the date of enactment of this Act.

(b) Section 302 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed.

(c) Section 303 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed, in respect of noncompliance with discovery orders hereafter entered. Nothing contained in this subsection shall be deemed to limit the authority of any court to reenter any discovery order heretofore entered, and thereby make such section 303 applicable thereto.

(d) Unless otherwise specified, the effective date of this Act shall be the date of enactment thereof.

TITLE IV—PARENS PATRIAE AMENDMENTS

SEC. 401. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by inserting immediately following section 4B the following new sections:

"SEC. 4C. (a)(1) Any attorney general of a State may bring a civil action, in the name of such State in any district court of the United States having jurisdiction of the defendant, to secure monetary and other relief as provided in this section in respect of any damage sustained, by reason of the defendant's having done anything forbidden in the Sherman Act, by the natural persons residing in such State, or any of them: *Provided*, That no monetary relief shall be awarded in respect of such damage that duplicates any monetary relief that has been awarded or is properly allocable to (i) such natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

"(2) The court shall award the State as monetary relief threefold the total damage sustained as described in subsection (a)(1) of this section; such other relief as is just in the circumstances to prevent or remedy the violation of the Sherman Act; and the cost of suit, including a reasonable attorney's fee and other expenses of the litigation.

"(b)(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner and with such content as the court may direct, cause notice thereof to

be given by publication. If the court finds that notice by publication only would be manifestly unjust as to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

"(2) Any person may elect to exclude from adjudication in an action brought under subsection (a)(1) of this section the portion of the State claim for monetary relief attributable to him. He shall do so by filing a notice of such election with the court within such time as specified in the notice prescribed pursuant to subsection (b)(1) of this section.

"(3) The final judgment in the action brought by the State shall be *res judicata* as to any claim under section 4 of this Act by any person in respect of damage to whom such action was brought unless such person has filed the notice prescribed in subsection (b)(2) of this section.

"(c)(1) In any action brought under subsection (a)(1) of this section, and in any class action on behalf of natural persons under section 4 of this Act, damages may be proved and assessed in the aggregate on the basis of statistical or sampling methods, or such other reasonable method of estimation as the court in its discretion may permit, without separately proving the fact or amount of individual injury or damage to such natural persons.

"(2) In any action brought under subsection (a)(1) of this section, the court shall distribute, or direct the distribution of, any monetary relief awarded to the State either in accordance with State law or as the district court may in its discretion authorize. In either case, any distribution procedure adopted shall afford each person in respect of damage to whom the relief was awarded a reasonable opportunity to secure his appropriate portion of the net monetary relief.

"(d) An action brought under this section shall not be dismissed or compromised without approval of the court after providing such notice to persons affected thereby as the court shall direct in the interests of justice.

"(e) In any action brought under this section, the amount of plaintiffs' attorneys' fees, if any, shall be determined by the court.

"(f) In any action brought under this section, the court may in its discretion award reasonable attorneys' fees to a prevailing defendant upon a finding that the State attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

"SEC. 4D. Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

"SEC. 4E. (a) In any action under section 4 or 4C of this Act, the State or any other plaintiff shall be entitled to recover treble damages in respect to the full amount of overcharges incurred or other monetary damages sustained in connection with expenditures under a federally funded program, notwithstanding the fact that the United States funded portions of the amounts claimed.

"(b) The Attorney General of the United States shall have the right to intervene in any such action to protect the interests of the United States.

"(c) Out of any damages recovered pursuant to this section, the United States shall be entitled to the portion of the overcharges or other monetary damages, untrebled, that it sustained or funded. Whenever another Federal statute or law provides a specified method of settlement of accounts between the State and Federal governments, in respect of such recovery, such method shall be used. Otherwise, the court before which the action is pending shall determine the method.

"(d) In the event of multiple actions in respect of the same alleged overcharges or other damages relating to a federally funded program, the defendant shall not be assessed, in total, more than threefold such damages.

"SEC. 4F. For the purposes of sections 4C, 4D, and 4E of this Act:

"(1) The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 4C of this Act, and shall include the Corporation Counsel of the District of Columbia.

"(2) The term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

"(3) The term 'Sherman Act' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890 (15 U.S.C. 1), as amended or as may be hereafter amended.".

SEC. 402. Section 4B of such Act is amended by striking out the words "sections 4 or 4A" and inserting in lieu thereof the words "sections 4, 4A, or 4C".

SEC. 403. Section 5(i) of such Act is amended by striking out the words "private right of action" and inserting in lieu thereof the words "private or State right of action"; and by striking out the words "section 4" and inserting in lieu thereof the words "sections 4 or 4C".

SEC. 404. If any provision of this title, or the application of any such provision to any person or circumstance, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected by such holding.

SEC. 405. This title shall apply to all civil actions filed under the antitrust laws in which a person representing a class of natural persons or a State is plaintiff, including those in which the cause of action accrued before the date of enactment of this title, but shall not apply to any civil action alleging a violation previously alleged in any civil action filed on behalf of a class of consumers.

TITLE V—PREMERGER NOTIFICATION AND STAY AMENDMENTS

SEC. 501. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by adding a new section 7A to read as follows:

"SEC. 7A. (a) Notwithstanding any other provision of law, except as exempted pursuant to subsection (b)(4) of this section, until expiration of the notification and waiting period specified in subsection (b)(1) of this section, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce, and—

"(1) stock or assets of a manufacturing company with annual net sales or total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

"(2) stock or assets of a non-manufacturing company with total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

"(3) stock or assets of a person or persons with annual net sales or total assets of $100,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $10,000,000 or more.

"(b)(1) The notification and waiting period required by this section shall expire thirty days after the persons subject to subsection (a) of this section each file with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to in this section as the 'Assistant Attorney General') duplicate originals of the notification specified in paragraph (3) of this subsection, or until expiration of any extension of such period pursuant to subsection (c)(2) of this section, whichever is later, except as the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section.

"(2) Notwithstanding any other provision of law or the applicability of subsection (a) of this section, except as exempted pursuant to subsection (b)(4) of this section, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if—

"(A) the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce; and

"(B) the Federal Trade Commission, with the concurrence of the Assistant Attorney General, by general regulation requires, after notice and submission of views, pursuant to section 553 of title 5, United States Code, that such person or persons, or any class or category thereof, shall not do so until the expiration of thirty days following the filing of a notification (specified pursuant to paragraph (3) of this subsection), or until the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section, whichever occurs first.

"(3)(A) The notification required by this section shall be in such form and contain such information and documentary material as the Federal Trade Commission, with the concurrence of the Assistant At-

torney General, shall by general regulation prescribe, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(B) The fact of the filing of the notification required by this section and all information and documentary material contained therein shall be considered confidential under section 1905, title 18, United States Code, until the fact of such filing or of the proposed merger or acquisition is public knowledge, at which time such notification, information, and documentary material shall be subject to the provisions of section 552(b), title 5, United States Code. Nothing in this section is intended to prevent disclosure to any duly authorized committee or subcommittee of the Congress, to other officers or employees concerned with carrying out this section or in connection with any proceeding under this section.

"(4)(A) The Federal Trade Commission, with the concurrence of the Assistant Attorney General, is authorized and directed to define the terms used in this section, to prescribe the content and form of reports, by general regulation to except classes of persons and transactions from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(B) The following classes of transactions are exempt from the notification requirements of this section:

"(i) goods or realty transferred in the ordinary course of business;

"(ii) bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

"(iii) interests in a corporation at least 50 per centum of the stock of which already is owned by the acquiring person or a wholly owned subsidiary thereof;

"(iv) transfers to or from a Federal agency or a State or political subdivision thereof;

"(v) transactions exempted from collateral attack under section 7 of this Act if approved by a Federal administrative or regulatory agency: *Provided*, That duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(vi) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), as amended, or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), as amended;

"(vii) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), as amended, section 403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a), as amended, or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), as amended: *Provided*, That duplicate originals of the information and documentary material filed with such agencies shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least thirty days prior to consummation of the proposed transaction;

"(viii) acquisitions, solely for the purpose of investment, of voting securities, if, at the time of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

"(ix) acquisitions of voting securities, if, at the time of such acquisition, the securities acquired do not increase, directly or indirectly, the acquiring person's share of outstanding voting securities of the issuer; and

"(x) acquisitions, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolution, or of assets, other than voting securities or other voting share capital, by any bank, banking association, trust company, investment company, or insurance company, in the ordinary course of its business.

"(C) For the purpose of subsection (b)(4)(B) of this section, 'voting security' means any security presently entitling the owner or holder thereof to vote for the election of directors of a company or, with respect to unincorporated issuers, persons exercising similar functions.

"(c)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the periods specified in subsection (b)(1) of this section, require the submission of additional information and documentary material relating to the acquisition by any person or persons subject to the provisions of this section, or by any officer, director, or partner of such person or persons.

"(2) The Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the periods specified in subsection (b)(1) of this section for an additional period of up to twenty days after receipt of the information and documentary material submitted pursuant to subsection (c)(1) of this section.

"(3) No provisions of this section shall limit the power of the Federal Trade Commission or the Assistant Attorney General to secure, at any time, information or documentary material from any person, including third parties, pursuant to the Federal Trade Commission Act or the Antitrust Civil Process Act.

"(4) The Federal Trade Commission and the Assistant Attorney General may waive the waiting periods provided in this section or the remaining portions thereof, in particular cases, by publishing in the Federal Register a notice that neither intends to take any action within such periods in respect of the acquisition.

"(d) If a proceeding is instituted by the Federal Trade Commission or an action is filed by the United States, alleging that a proposed acquisition or merger violates section 7 of this Act, or section 1 or 2 of the Sherman Act (15 U.S.C. 1–2), and the Federal Trade Commission or the Assistant Attorney General (i) files a motion for a preliminary injunction against consummation of such acquisition or merger *pendente lite*, and (ii) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief *pendente lite* pursuant to this subsection—

"(1) upon the filing of such certification the chief judge of such district court shall enter an order temporarily restraining consum-

mation of such proposed acquisition or merger until final disposition of the motion for a preliminary injunction; and shall immediately notify the chief judge of the United States court of appeals for the circuit in which such court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes;

"(2) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited;

"(3) a preliminary injunction shall issue restraining consummation of such proposed acquisition or merger until the order of the Federal Trade Commission in respect thereof or the judgment entered in such action has become final unless the defendants show that the Federal Trade Commission or the United States does not have a reasonable probability of ultimately prevailing on the merits, or that they will be irreparably injured by the entry of such an order, in which case the court may deny, modify, or subject such preliminary injunction to such conditions as the court shall deem just in the premises: *Provided*, That a showing of loss of anticipated financial benefits from the proposed acquisition or merger shall not be sufficient to warrant denial, modification, or conditioning of such an injunction; and

"(4) if a decision by the district court on such motion for a preliminary injunction is not issued within sixty days after issuance of the order temporarily restraining consummation of such proposed acquisition or merger, under paragraph (1) of this subsection, such order shall be vacated unless, for good cause, the chief judge of the United States court of appeals for such circuit extends such order.

"(e) Failure of the Federal Trade Commission or the Assistant Attorney General to request additional information or documentary material pursuant to this section, or failure to interpose objection to an acquisition within the periods specified in subsections (b)(1) and (b)(2) of this section, shall not bar the institution of any proceeding or action, or the obtaining of any information or documentary material, with respect to such acquisition, at any time under any provision of law.

"(f)(1) Whenever any person violates or fails to comply with the provisions of subsection (a) of this section, such person shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each day during which such person directly or indirectly holds stock or assets, in violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(2) Whenever any person fails to furnish information required to be submitted, pursuant to subsection (c)(1) of this section, such person shall be liable for the penalties provided for noncompliance with the provisions of the Federal Trade Commission Act or the Antitrust Civil Process Act, as the case may be.

"(g) In any proceeding instituted or action brought by the Federal Trade Commission or the United States alleging that an acquisition violates section 7 of this Act, or sections 1 or 2 of the Sherman Act (15 U.S.C. 1–2), upon application of the Federal Trade Commission or the Assistant Attorney General to the United States district court within which the respondent resides or carries on business, or in which the action is filed, such court shall, as soon as practicable, enter an order establishing the purchase price of the acquired stock or assets, requiring the acquiring person or persons to maintain the personnel, assets, stock or firm being acquired as a separate entity unless the interests of justice require otherwise, and may enter an order requiring the profits of the acquired firm, stock, or assets to be placed in an escrow account, pending the outcome of the proceeding or action. Upon entry of a final order or judgment of divestiture under section 7 of this Act, or sections 1 or 2 of the Sherman Act (15 U.S.C. 1–2), the court shall order that the divestiture be accomplished expeditiously. To the extent practicable, the court may deprive the violator of all benefits of the violation including tax benefits.".

SEC. 502. The provisions of this title shall be effective one hundred and twenty days after the date of enactment of this Act. Effective upon the date of enactment of this Act, the Federal Trade Commission is authorized and directed to carry out the requirements of sections 7A (b)(3) and (b)(4) of the Clayton Act, as amended by this Act.

IX. Additional Views of Senator Quentin N. Burdick

Title IV introduces a new concept for the recovery of damages in antitrust enforcement. It is intended that this procedural device, termed "fluid recovery", will allow plaintiffs to recover damages in the case of a minor overcharge on a mass scale.

I am in agreement with the majority in seeking a solution to the problem. However, the means by which Title IV proposes to remedy the matter is constitutionally unacceptable. It would authorize "damages" in a *parens patriae* suit brought by the Attorney General to be "proved and assessed in the aggregate" on the basis of sampling or statistical estimates without separately proving the fact or amount of individual injury or damage to natural persons.

I am in agreement that a violator of our antitrust laws should not profit from his wrongdoing. However, I find the provisions of Title IV, which would award damages to a "fluid class" of undetermined and unidentified persons, the members of which may or may not be the same consumers who actually suffered injury, unacceptable and legally defective. Adding to my concern over this provision is the fact that the fluid portion of the award is treated exactly like damages to consumers who have proven their claims; the fluid portion is also trebled, thereby magnifying the potential for taking of property without actual proof.

This theory flies in the face of the due process clause of the Constitution, and repudiates a legal system that awards damages only upon adequate proof (a) that the defendant committed a legal wrong; (b) that the wrong actually injured the plaintiff; and (c) that the plaintiff suffered damages in a reasonably ascertained amount. The court in the case of *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d. Cir. 1973), termed "fluid recovery" a "fantastic procedure". It is indeed a fantastic departure from the fundamental guarantees of due process that we have known through the years, *and in every case where it has been contested by the defendant, "fluid recovery" has been rejected by the court.*[1] These decisions should operate as a red flag to those who seize upon this method in order to prevent a wrongdoer from becoming unjustly enriched. I have no quarrel with the good intentions of the proponents, but there still must be compliance with the law of the land. There are other ways to prevent unjust enrichment, without infringing on due process.

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[1] *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973); In re *Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974); *Kline* v. *Caldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974); *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971); *Windham* v. *American Brands, Inc.* —F. Supp. — (D.S.C. 1975) (CCH Trade Case ¶ 60,530).

Both the Second and Ninth Circuits have also found "fluid class recovery" unacceptable, and rejected it. The court stated in *Eisen III*, the leading case on this subject:

> Even if amended Rule 23 could be read so as to permit any such *fantastic procedure, the Courts would have to reject it as an unconstitutional violation of the requirement of due process of law.* But as it now reads, amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. *We hold* the "fluid recovery" concept and practice to be illegal, inadmissable as a solution of the manageability problems of class actions and wholly improper. (Emphasis added). *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005, 1018 (2d Cir. 1973).

This case was appealed to the United States Supreme Court, and remanded upon the question of notice. That part of the decision dealing with the question of "fluid damages" was not appealed nor disturbed. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Ninth Circuit Courts have echoed the *Eisen* opinion. It is stated in *In re Hotel Telephone Charges*, 500 F. 2d 86, 89 (9th Cir. 1974).

> The antitrust laws focus on the compensation of parties *actually injured*, presupposing that a *plaintiff can prove that he was in fact injured* as a proximate result of an antitrust violation, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). The fact that the injured plaintiff is allowed treble damages does not change the basic nature of the private antitrust action as an action intended to compensate. When, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind boggling manageability problems should be rejected. (Emphasis added.)

Another panel of the Ninth Circuit rejected the fluid recovery concept in *Kline* v. *Caldwell, Banker & Co.*, 508 F. 2d 226 (9th Cir. 1974). In that massive class-action case, the court noted that "plaintiffs must prove both that the defendants' conduct contravened section 1 [of the Sherman Act] *and* that the plaintiffs suffered injury as a direct result of the illegal conduct." p. 230–31 (emphasis in original). The court held that, because "[p]roof of injury is an essential substantive element of the successful treble damage action", each class member would have to prove to a jury that he had sustained actual injury resulting from a particular defendant's violation. p. 233. Judge Duniway in a concurring opinion expressed alarm at the practical consequences of such a "judicial juggernaut". He went on to explain:

> It is inconceivable to me that such a case can ever be tried, unless the court is willing to deprive each defendant of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence in his defense. The same applies, if he is found liable, to proof of the damage of each "plaintiff". p. 236.

The most recent case to repudiate the "fluid class recovery" theory embodied in Title IV is *Windham* v. *American Brands, Inc.*, — F.

Supp. — (D.S.C. 1975) (CCH Trade Case ¶ 60,530). The court there refused to accept a theory of fluid recovery damages similar to that used in the settlement of the *Tetracycline Antibiotic Drug Litigation*, noting that such an approach "has been rejected by subsequent opinions, the reasoning of which the court adopts (referring to *Eisen III*) p. 67,345. The court further states, "aside from proof of liability, determining the amount of damages and a proper distribution thereof would result in an unfair trial if a fluid recovery approach were utilized. . . ." p. 67,346.

The most troublesome aspect of the fluid class recovery scheme is that those who are injured by the defendants wrongdoing will often times go uncompensated while others who did not suffer from the defendant's act will be blessed with a windfall because they have become a member of the fluid class after the fact of injury. It is for this reason that the fluid class device was rejected in *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45, 72 (D.N.J. 1971) which found that "the composition of the motoring public which purchased from retail stations has changed considerably during and since the alleged conspiracy ended."

This lack of direct compensation to the injured party is especially disturbing in light of the fact that antitrust law has traditionally been based upon compensatory theory. The Clayton Act (15 U.S.C. § 15) provides that a person injured by reason of an antitrust violation may recover threefold the damages he sustained. Treble damages were intended by Congress to compensate victims and to encourage them to come forward and bring suit. There is nothing to suggest it was not the plaintiff's injury but the defendant's illegal profits that is the basis for treble damages.

In keeping with this theory and due process considerations, I contended in Committee that Title IV should be amended to allow compensation and treble damages only to those consumers who come forward with proof of loss as a result of the antitrust violation. This is in accordance with the procedure outlined in *Darr* v. *Yellow Cab Co.*, 433 P. 2d. 732 (1967). At page 740 the court states:

> The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of the taxicabs within the prior 4 years. *However, no one may recover his separate damages until he comes forward, identifies himself and proves* the amount thereof. (Emphasis added.)

The amount of the total injury not claimed should be then labeled exactly what it is intended to be, a penalty to prevent unjust enrichment of the wrongdoer.

Any procedure that would rely upon a theory of damages, treble or single, to exact from the defendant the difference between the total injury and that actually claimed by individuals would be an unconstitutional taking of defendant's property without due process of law. I would not contend that the defendant has a constitutional right to

retain his illegal profits. The court, by way of penalty, should deprive him of these profits in order to discourage and deter further violations.

However, if this unclaimed difference is to be labeled damages, and then trebled, the result is simply a taking of property from the defendant without the necessary showing of injury to an actual person, required under a theory of damages. The trebling of this amount serves to make the "fluid recovery" concept even more constitutionally repugnant.

Those who would support the fluid recovery theory as a method to deprive a wrongdoer of his ill-gotten gains have the wrong method. As suggested by the witnesses appearing for the American Bar Association, "this objective should be accomplished by the direct means of increased corporate and individual fines pursuant to the recently enacted Antitrust and Penalties Act. If experience shows that these new penalties are insufficient, Congress has the authority to create more severe punitive measures. Title IV of S. 1284 cannot be expected to do the job."

I support the compensatory theory of present antitrust law and treble damages to parties who have proven injury. I also support a plan which would deter further violations by depriving wrongdoers of their ill-gotten gains. But when a theory of damages, and not a penalty, is used to divest the defendant of his ill-gotten profits, even though there is no known injured party, the defendant is deprived of his property without due process of law as prohibited by the fifth amendment of the Constitution.

Therefore, I accept the solid weight of judicial authority which rejects the fluid recovery mechanism embodied in Title IV of S. 1284 as an unconstitutional expedient whose defects cannot be cured by inclusion in a statute. It is for these reasons I cannot support Title IV in its present form.

QUENTIN N. BURDICK.

X. MINORITY VIEWS—SEE PART II

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