

Business Law Newsletter

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Colorado Antitrust Law Seven Years Later

by Thomas P. McMahon

Like "Brigadoon," the 17th-century Scottish village which supposedly reappears out of the Highland mists for one day every century, the Colorado Highway Legislation Review Committee ("HLRC") materializes out of the legislative ether for a few months every five years. According to fable, the mythical village of Brigadoon chanced to appear on the scene at the exact moment when two startled modern-day hunters were passing by. By a somewhat similar coincidence, the HLRC fortuitously convened in mid-1983 shortly after a federal grand jury began returning indictments, charging several Colorado construction firms and officials with engaging in bid-rigging on certain state highway construction projects in violation of federal antitrust law.¹ In the federal criminal proceedings, at least two companies and four individuals were found to have rigged bids on a minimum of two state highway construction projects valued at almost \$5 million.²

Under its statutory charge, the HLRC is responsible for reviewing legislation relative to the state highway system and for recommending additional legislation necessary to correct any deficiencies.³ Accordingly, because of the direct impact of the bid-rigging activity on Colorado's highway program and the failure of existing state antitrust sanctions to deter such conduct, the HLRC determined to strengthen the state's antitrust law. Subsequently, the HLRC sought the assistance of the Colorado Antitrust Unit in drafting such a proposal. Particular emphasis

was placed on increasing the criminal penalties in order better to deter future anti-competitive activity.

The resulting legislative proposal was adopted unanimously by the HLRC. Under the co-sponsorship of HLRC Chair Sen. Harold L. McCormick, Vice-Chair Rep. Jeanne Faatz and member Sen. James D. Beatty, the measure was introduced in the 1984 legislative session of the Colorado General Assembly as Senate Bill 23.⁴

On April 30, 1984, an amended version of that bill was signed into law by Governor Lamm. As finally passed, S.B. 23 impacts two key provisions of the Colorado Restraint of Trade and Commerce Act.⁵ The most significant change is that made to CRS 6-4-107, the criminal penalty section. Of lesser but still noteworthy effect is the change to CRS 6-4-105, the equitable relief provision.

The purpose of this article is to detail the impact and background of the amendments made by S.B. 23 and to assess the possibility of further modification to Colorado's antitrust law.

Criminal Antitrust Penalties

Until the enactment of S.B. 23, criminal violation of Colorado's antitrust statute had been classified as a misdemeanor punishable by a fine of only from \$1,000 to \$5,000 for both businesses and individuals and by incarceration in the county jail for up to one year.⁶ Pursuant to S.B. 23, however, state criminal antitrust violations have now been raised to the felony level (un-

classified for businesses, class 4 for individuals) and are punishable by fines of up to \$1 million for businesses and \$100,000 for individuals and by a presumptive range of imprisonment of from two to four years.⁷

The effect of the change in criminal antitrust penalties wrought by S.B. 23 is significant. Formerly, in terms of severity of sanctions, Colorado's antitrust statute ranked forty-eighth out of the forty-nine American jurisdictions having antitrust laws of general application.⁸ Much like a perennial cellar-dwelling team which reverses form to capture the pennant, Colorado arguably now has the most severe antitrust penalties in the nation, surpassing even those under the federal Sherman Act and New York's Donnelly Act.⁹

When Colorado's modern antitrust statute was enacted in 1957,¹⁰ federal criminal antitrust violations were only misdemeanors punishable by a maximum one-year term of imprisonment, and the maximum federal fine for corporations and individuals had just been raised from \$5,000 to \$50,000.¹¹ The Colorado statute originally paralleled

continued on page 1813

This newsletter is prepared by the Corporation, Banking and Business Law Section of the Colorado Bar Association to apprise members of the Bar of current information concerning substantive areas of business law. This month's column was written by Thomas P. McMahon, a first assistant attorney general and chief of the antitrust unit, Colorado Attorney General's Office.

and. *E.g.*, *Arab Petroleum Corp. v. Maurer*, 115 S.W.2d 994 (Tex.Civ.App. 1938); *See*, *Osborne, Real Estate Finance Law*, § 10.9 (1979) at 616.

6. *Stephens v. Clay*, 17 Colo. 489, 30 P. 43, 45 (1892); *Hooper v. Capitol Life Insurance Co.*, 92 Colo. 376, 20 P.2d 1011 (1933).

7. *Fassett*, *supra*, note 4 at 472.

8. *Radke v. Union Pacific Railroad Co.*, 138 Colo. 189, 334 P.2d 1077 (1959).

9. *See*, *Yarg Producing and Refining Corp. v. Iles Inv. Co.*, 88 Colo. 412, 297 P. 1001 (1931).

10. *See*, *Arab Petroleum Corp.*, *supra*, note 5.

11. *Stephens*, *supra*, note 6.

12. *Id.*; *Hooper*, *supra*, note 6.

13. *Osborne*, *supra*, note 5 at 625.

14. *See*, *Stephens*, *supra*, note 6, where the court considered language in the deed stating "the above subject to a total encumbrance of \$1,000 and accumulated interest." Although \$1,000 was the total mortgage indebtedness, the court found that the parcel conveyed was not primarily liable to the indebtedness.

15. *Skinner v. Harker*, 23 Colo. 333, 48 P. 648 (1896).

16. *Cooley v. Murray*, 25 Colo. 57, 52 P. 1108 (1898).

17. *See*, *Fassett*, *supra*, note 4.

18. *See*, Annot., "Sale in Inverse Order of Alienation," 131 A.L.R. 4, 88 (1941).

19. *Id.* at 83, 95.

20. *Id.* at 85, 102.

21. *Fassett v. supra*, note 4 at 471; *Legge v. Peterson*, 85 Colo. 462, 277 P. 786 (1929).

22. *Shedandy v. Beverly Surgical Supply Co.*, 100 Cal.App.3d 730, 161 Cal.Rptr. 164 (1980).

23. *Legge*, *supra*, note 21.

24. *Fassett*, *supra*, note 4.

25. *E.g.*, *Massachusetts Bonding and Insurance Co. v. Farmers & Merchants State Bank*, 139 Tex. 310, 162 S.W.2d 657 (1942); 53 Am.Jur.2d "Marshalling Assets," § 23.

26. *Fassett*, *supra*, note 4.

27. *Id.*; *See*, note 18, *supra* at 52.

28. *Monegan v. Pacific National Bank of Washington*, 16 Wash.App. 280, 556 P.2d 226 (1976).

29. *See*, *Ross v. Duggan*, 4 Colo. 85 (1879).

30. *Princeville Corp. v. Brooks*, 188 Colo. 37, 533 P.2d 916 (1975); C.R.C.P. Rule 120(d). C.R.C.P. 120(d) provides that the scope of the Rule 120 hearing shall not extend beyond the existence of a default or other circumstances authorizing the exercise of a power of sale in a deed of trust and issues under the Soldiers' and Sailors' Civil Relief Act of 1940. However, *Princeville*, which involved a request for marshalling asserted in the Rule 120 proceeding, holds that "the Rule 120 hearing may be used to determine if the circumstances warrant, whether there are factors in addition to mili-

tary status, which require the court to retain a supervisory jurisdiction." *Id.* at 918. This holding was upheld after the amendment of Rule 120 in *Dews v. District Court*, 648 P.2d 662 (Colo. 1982).

31. *See*, *Boulder Lumber Co. v. Alpine v. Nederland, Inc.*, 626 P.2d 724 (Colo.App. 1981).

32. *Platte Valley National Bank v. Kracl*, 185 Neb. 168, 174 N.W.2d 724 (1970).

33. *Victor Gruen Assoc., Inc. v. Glass*, 338 F.2d 826 (9th Cir. 1964).

34. The normal rule that a party must redeem the entire property may be modified on equitable grounds. *E.g.*, *Arnold v. Gebhardt*, 43 Colo.App. 387, 604 P.2d 1192 (1979); *Osborn Hardware Co. v. Colorado Corp.*, 32 Colo.App. 254, 510 P.2d 461 (1973).

35. A junior lienor or subsequent grantee has the right to redeem the whole property, even though they hold an interest in only part, although this right is not absolute. *First National Bank v. Energy Fuels Corp.*, 200 Colo. 540, 618 P.2d 1115 (1980).

36. *Legge*, *supra*, note 21; *Ross*, *supra*, note 29.

37. *Home Unity Savings & Loan Assoc. v. Balnus*, 192 Pa.Super. 542, 162 A.2d 244 (1960).

38. *E.g.*, *Storke & Sears*, *supra*, note 3; *Osborne*, *supra*, note 5 at §§ 10.9-10.15.

Business Law Newsletter continued from page 1808

the Sherman Act's categorization of antitrust offenses as misdemeanors, adopted its one-year maximum term of imprisonment and prescribed the same criminal fines which had been assessed under the Sherman Act until 1955.

In 1974, Congress significantly toughened the federal criminal provisions by upgrading antitrust offenses to the felony level, again increasing the maximum fines (to \$1 million for corporations and \$100,000 for individuals) and extending the maximum term of imprisonment to three years.¹² However, no equivalent strengthening of the Colorado antitrust statute took place. Consequently, for the past ten years a disparity has existed between Colorado law and the Sherman Act in the categorization of antitrust violations and the maximum term of imprisonment. The maximum fines were even further out of balance than they had been when the Colorado law was originally enacted.

It is apparent that Colorado's 1957 antitrust penalty provision was out of step with the antitrust sanctions of most other American jurisdictions. More significantly, it was out of step

with the times—the \$5,000 maximum fine constituted a mere "slap on the wrist," which might well have been viewed by potential antitrust violators as nothing more than a "license fee" for doing business in the state.

Moreover, in view of the minimal nature of the potential fine and the legislative classification of such offenses as mere misdemeanors, there was no realistic possibility that judges would sentence individual defendants to any jail time whatever. Consequently, the criminal penalty provision constituted neither an adequate deterrent to anti-competitive criminal activity nor an adequate punitive measure for such conduct when it occurred.

The inadequacy of the old Colorado criminal penalty provision is best demonstrated by two recent situations. In one of the federal highway bid-rigging prosecutions noted above, five defendants (including one highway construction company and its president and three officers of another highway construction firm) pled guilty to bid-rigging on a \$4.47 million highway construction project at the Eisenhower Tunnel.¹³ The apparent overcharge to the state of Colorado in that instance alone was \$800,000, and the five defendants were sentenced under the Sherman Act

to a total of \$750,000 in fines and three years and three months imprisonment.¹⁴ Yet, under Colorado's then-existing criminal antitrust penalties, the five defendants could have been fined a total of only \$25,000 with no realistic possibility that any of the individual defendants would have been sentenced to confinement.¹⁵

A second illustration is presented by the Colorado Antitrust Unit's criminal prosecution of a stereo loudspeaker manufacturer for resale price maintenance (vertical price fixing).¹⁶ Upon entry of a *nolo contendere* plea, the defendant was fined the maximum \$5,000 and assessed \$1,000 in costs of prosecution. In a subsequent antitrust civil damage action in state court on essentially the same facts, the private plaintiff obtained a jury verdict for single damages in the amount of \$225,000.¹⁷

A number of other prosecutions and subsequent civil recoveries by the Antitrust Unit similarly evidenced the imbalance between the old criminal penalties and the economic injuries suffered.¹⁸ S.B. 23 has remedied this disparity.

Civil Injunctive Relief

The second provision of the state antitrust law amended by S.B. 23 is CRS

6-4-105, the equitable relief section. The bill adds to the existing section an express provision authorizing private parties to seek injunctive relief under the antitrust statute.¹⁹ Since 1977, § 6-4-105 had provided:

The Attorney General shall have exclusive authority to institute such actions or proceedings as he deems necessary to prevent or restrain a violation of the provisions of this article. . . .²⁰

In recent years, two state trial courts had interpreted this language as precluding private parties from proceeding even under C.R.C.P. Rule 65 to seek injunctive relief for violations of the state antitrust law.²¹ The intent of the change worked by S.B. 23 in this regard is to restore to private parties the injunctive right they formerly enjoyed from the time the statute was first enacted until they were inadvertently stripped of that right by the 1977 amendment.

As initially passed in 1957, the injunctive section of the antitrust statute stated:

The district attorneys shall, upon the advice of the attorney general who may appear as counsel in any such case, institute such actions or proceedings as they deem necessary to prevent or restrain a violation of the provisions of this article. . . .²²

It was possible to read this provision literally as empowering only district attorneys to proceed independently and as restricting the attorney general's role to that of advising and assisting the district attorneys in antitrust cases. At the very least, the provision was ambiguous.²³

Nevertheless, in practice the section had been treated as conferring on the attorney general separate authority concurrent with that of the district attorneys. In fact, it was the attorney general rather than the district attorneys who had initiated and litigated virtually all civil injunctive proceedings and criminal prosecutions brought by a governmental entity under the modern state antitrust law.²⁴ Accordingly, by 1977 a legislative clarification of the attorney general's independent civil injunctive and criminal enforcement authority under the antitrust statute was thought to be desirable.²⁵

Upon reflection, the district attorneys determined that removal of their responsibilities under the statute was desirable because they did not have the expertise or resources to handle anti-

trust matters. An additional consideration which militated in favor of both changes was the fact that antitrust violations frequently cross the boundaries of numerous judicial districts and so could better be handled by the attorney general alone, without the involvement of numerous district attorneys.²⁶

In light of all this, the antitrust statute was amended in 1977 to consolidate public antitrust enforcement authority in the attorney general, thus codifying what had been the consistent practice up to that point.²⁷ In so amending the statute, the legislature used the word "exclusive" to refer both to the attorney general's criminal prosecutorial authority and his authority to institute injunctive proceedings.²⁸ It was this choice of terminology in amending the injunctive provision that led to the aforementioned rulings of the two state trial courts.²⁹

Prior to 1977, although the injunctive section was silent in that regard, private parties apparently had the same general right to seek injunctive relief under C.R.C.P. Rule 65 for antitrust violations as for any other legal injuries.³⁰ However, the Colorado trial courts in essence held that because the 1977 amendment expressly provided for exclusive injunctive authority in the attorney general, it impliedly repealed the common law, thereby rendering C.R.C.P. Rule 65 inapplicable.³¹

The legislative history of that amendment makes clear, however, that use of the term "exclusive" in both the criminal enforcement and civil injunctive provisions meant only as between the attorney general and the district attorneys.³² Clearly, no impact on the previously existing right of private parties to proceed under Rule 65 to seek injunctive relief for antitrust violations was either intended or foreseen by the legislature.³³

Section 1 of S.B. 23 was designed to remedy the inadvertent effect of the 1977 amendment by expressly clarifying the rights of private parties to seek equitable relief for violations of the state antitrust law. Arguably, the provision goes beyond reinstatement of the pre-1977 *status quo* because such a private injunctive right then existed only under Rule 65 and not affirmatively under the statute itself. However, the standard followed by Colorado courts for injunctive relief under Rule 65—that threatened *injury* must be *immediate and imminent*³⁴—is virtually synonymous with that adopted by

the statute—that the threat must be of *impending loss or damage*.

The net result is that S.B. 23 remedies the imbalance which has existed since 1977 between the rights of the state of Colorado, which all along has been able to obtain equitable relief for antitrust violations through civil actions by the attorney general, and the rights of private parties, who were unable to do so through their own attorneys.³⁵

Assessment

S.B. 23, therefore, remedies two disparate types of imbalances which previously had existed under Colorado's antitrust law. In so doing, the bill has made the state statute a far more effective tool than it previously had been. To go along with Colorado's recent history of active criminal enforcement, criminal penalties adequate to fit the crime now exist.³⁶ In addition, aggrieved private parties may now seek relief from antitrust violations through state injunctive actions.

Still missing from the statute, however, is the third facet of antitrust enforcement—a provision for civil treble damage actions and mandatory costs and attorneys' fees. Currently, unlike federal antitrust law, the state statute provides only for the recovery of single damages and does not include a provision for mandatory costs and attorneys' fees for prevailing plaintiffs.³⁷

As originally drafted, S.B. 23 contained provisions for mandatory recovery by a prevailing plaintiff of both treble damages and costs of suit, including reasonable attorneys' fees. In view of strong opposition in the state Senate, however, when the bill reached the Senate floor treble damages were reduced to single damages. On the House side, treble damages were restored by the Judiciary Committee. Conversely, the mandatory award of costs and attorneys' fees to a prevailing plaintiff was deleted by the House committee in favor of a provision mandating the award of costs and attorneys' fees to the prevailing party where the court found that the losing party had acted in *bad faith*, vexatiously, wantonly or for oppressive reasons.³⁸

When the bill reached Conference Committee, virtually the only point of contention was the disparity in the respective damages-attorneys' fees provisions, together with a dispute as to the inclusion of a local government exemption.³⁹ Because of wide divergence in

views regarding inclusion or exclusion of treble damages, mandatory or discretionary awards of costs and attorneys' fees, and broad or limited local government immunity from the statute, this entire section of the bill was jettisoned to enable the Conference Committee to reach agreement.

In discussing this section of the bill, House Minority Leader Ron Strable, one of the Conference Committee members, noted that what was really needed was a comprehensive redrafting of Colorado antitrust law involving representatives of the plaintiff and defense bars and local government interests.⁴⁰

Conclusion

It remains to be seen whether a more wide-ranging revision of the Colorado antitrust law will be enacted and, if so, whether a treble damage provision will be incorporated. Nevertheless, because most commercial activities today impact interstate commerce sufficiently to invoke federal antitrust jurisdiction,⁴¹ this deficiency in the state statute can more easily be lived with than inadequate criminal penalties or the absence of private civil injunctive relief.

The 1984 amendments ensure that Colorado's antitrust law will become an effective competition-preservation vehicle in a way that has not previously been the case. The changes bring the remedies provisions of the state statute much more closely into line with those of federal antitrust law. This in turn comports with the substantive interpretation recently given the state law by the Colorado Supreme Court. In *People v. North Avenue Furniture and Appliance, Inc.*,⁴² the court held that since the state and federal antitrust laws are substantially similar in text, serve complementary purposes and have common goals, the state statute is to be construed in light of federal judicial decisions interpreting the Sherman and Clayton Acts.⁴³

Colorado now is more than two-thirds of the way toward the "big time" in terms of its antitrust law and, in criminal penalties, it apparently leads the league.

NOTES

1. In the fall of 1981 the Colorado Attorney General's Antitrust Unit began an investigation into potential bid-rigging in the highway construction industry in Colorado. Due to the woeful inadequacy of the state's then-existing criminal antitrust penalties,

and in view of the much more significant sanctions available under the federal Sherman Act, in late 1982 the matter was turned over to the Antitrust Division of the U.S. Department of Justice for pursuit. Thereafter, the Division's San Francisco field office commenced the federal grand jury investigation which led to the indictments. See, *U.S. v. Flatiron Paving Co., d/b/a Flatiron Paving Co. of Greeley*, No. 83-CR-187 (D. Colo.), *U.S. v. Corn Construction Co.*, No. 83-CR-186, and *U.S. v. Ramsour Bros., Inc.*, No. 83-CR-188 (D. Colo.) (June 14, 1983, indictments).

2. *Flatiron, supra*, note 1; *Corn, supra*, note 1 (Sept. 16, 1983, judgments and probation/commitment orders). The two highway construction projects, both for paving approaches to the Eisenhower Tunnel on I-70 at the Continental Divide, were won by Flatiron with bids of over \$457,000 and \$4.47 million in 1978 and 1979, respectively.

3. CRS § 43-2-145.

4. Senate Bill 23, 54th Gen. Ass., 2d Reg. Sess. (1984).

5. CRS § 6-4-101 *et seq.*

6. CRS § 6-4-107.

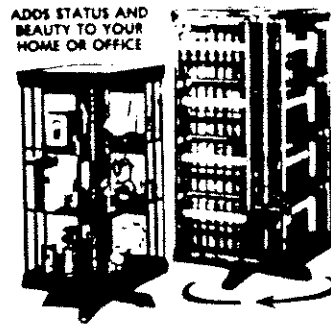
7. See, S.B. 23, § 2. See also, CRS § 18-1-105 (Supp. 1983). The new criminal penalties apply to antitrust offenses where any act in furtherance thereof occurs on or after the April 30, 1984, date of enactment. S.B. 23, § 4.

8. See generally, Trade Reg. Rep. (CCH) Para. 30,201 *et seq.* At the present time, the federal government, forty-six of the fifty states (all except Georgia, Pennsylvania, Vermont and Wyoming) and the territories of Puerto Rico and the Virgin Islands have enacted antitrust statutes of general application. At the least, such statutes ordinarily prohibit (1) contracts, combinations and conspiracies in restraint of trade; and (2) monopolization and attempts to monopolize. Violators are subject to criminal penalties under forty-one of those statutes and to civil penalties under thirty-two of them (Colorado is one of the states which does not have civil penalties).

9. The most severe antitrust sanctions in the country are those contained in the federal Sherman Act and in the laws of California, Florida, Hawaii, New York, Rhode Island and, now, Colorado. In those jurisdictions, antitrust violations constitute felonies subjecting businesses to fines of up to \$1 million and individuals to fines of up to \$100,000. In all such jurisdictions except New York and Colorado, the maximum period of imprisonment for individuals is three years. Under New York's Donnelly Act, the maximum period is four years. Colorado's presumptive minimum of two years imprisonment, however, together with its maximum period of four years imprisonment, apparently surpasses even the incarceration provision of the Donnelly Act. See generally, Sherman Act, § 1, 15 U.S.C. § 1 (Supp. 1983); Trade Reg. Rep. (CCH) Paras.

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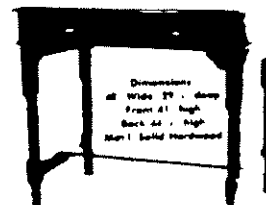
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30,601.16A (California); 31,201.07 (Florida); 31.401.14 (Hawaii); 33,501.02 (New York); 34,301.16 (Rhode Island); and S.B. 23, § 2 (Colorado).

10. Colorado's original antitrust law was passed in 1913. See, C.S.A. 1935, ch. 167, §§ 1-8. That statute ultimately was declared unconstitutionally vague by the U.S. Supreme Court in *Foster Cline v. Frink Dairy Co.*, 274 U.S. 455 (1927), thirty years before enactment of the present law.

11. July 7, 1955, 69 Stat. 282; 15 U.S.C. § 1.

12. Pub. L. 93-528, § 3, 88 Stat. 1708 (1974).

13. The pleading defendants were Corn and its president, the president of Flatiron (which had won the contract in question), the president of the Greeley operating division of Flatiron and the vice-president of Flatiron. See, *Corn*, supra, note 1 (Sept. 16, 1983, judgments and probation/commitment orders). Flatiron itself was indicted for, and subsequently pled guilty to, rigging a \$457,000 job, also at the Eisenhower Tunnel. See, *Flatiron*, supra, note 1 (June 14, 1983 indictment and Sept. 16, 1983, judgment and probation/commitment order).

14. *Corn*, supra, note 1 [June 14, 1983, indictment at Para. 14(c) and Sept. 16, 1983, judgments and probation/commitment orders]. Upon pleading guilty pursuant to a pre-indictment plea agreement in its case, Flatiron was fined \$900,000. *Flatiron*, supra, note 1 (Sept. 16, 1983, judgment and probation/commitment order).

15. In subsequent antitrust civil damage actions by the Colorado Antitrust Unit, Flatiron, two corporate affiliates and the three individuals, on the one hand, and Corn and its president, on the other hand, agreed to settle bid-rigging claims for a total of \$2.3 million and \$250,000, respectively. See *Colorado v. Flatiron Paving Co.*, No. 84-F-902 (D. Colo.) (filed April 30, 1984); *Colorado v. Corn Construction Co.*, No. 84-F-10 (D. Colo.) (filed Jan. 4, 1984).

16. *People v. Bose Corp.*, No. 82-CR-167 (Den. Dist. Ct.) (Jan. 20, 1982 indictment).

17. Compare, *Bose Corp.*, supra, note 16 (Feb. 5, 1982, judgment of conviction and sentence) and *The Luden Corp., d/b/a Crisman Audiovision v. Bose Corp.*, No. 81-CV-1745-3 (Boulder Dist. Ct.) (April 30, 1984, jury verdict).

18. E.g., the *Trash* (\$60,000 in criminal fines, suspended, almost \$250,000 in civil recoveries); *Snowmass* (\$26,500 in criminal fines and costs, over \$130,000 in civil settlement); *Bus* (\$17,500 in criminal fines, \$285,000 in civil recoveries); and *Gas* (\$17,000 in criminal fines, \$150,000 in civil recoveries) cases. See, *Historical Outline of Colorado Antitrust Unit Activities* (unpublished May 15, 1984, internal memorandum of Colorado Antitrust Unit) (hereafter, "Historical Outline") at 3-6.

19. S.B. 23, § 1. This private right to seek injunctive relief became effective upon signature of the bill on April 30, 1984. See,

S.B. 23, § 4.

20. CRS § 6-4-105 (Supp. 1983) (*emphasis added*).

21. See, *The Luden Corp.*, supra, note 17 (Mar. 9, 1982, order); *Johnson v. Colorado Vision Servs.*, No. 81-CV-1559 (Golden Dist. Ct.) (June 19, 1981, order).

22. See, Laws at 57, 370, § 5 (*emphasis added*).

23. The ambiguity revolved around the word "they," which could be intended to encompass just district attorneys or both district attorneys and the attorney general.

24. See, Jan. 10, 1977 hearing on S.B. 34, 51st Gen. Ass., 1st Reg. Sess. (1977) (proposed amendments to CRS §§ 6-4-104 and 105) before Senate Judiciary Committee (hereafter, "1977 Committee hearing") (statements of the Honorable Jean Dubofsky, then-Deputy Attorney General and Andrew Vogt, then-Executive Director, Colorado District Attorneys Council).

25. If anything, clarification of the attorney general's criminal prosecutorial authority, on which the state antitrust law was totally silent (see, CRS § 6-4-101 *et seq.*), was the prime motivation for the 1977 statutory amendments contained in S.B. 34. See, *Colorado Legislative Council Research Publication No. 218* (December, 1976) at 131 (hereafter, "Pub. No. 218"); 1977 Committee hearing (statements of Jean Dubofsky and Andrew Vogt).

26. See, 1977 Committee hearing (statements of Andrew Vogt and Jean Dubofsky), supra, note 24.

27. See, Sess. Laws at 352, §§ 1 and 2; 1977 Committee hearing (statement of Jean Dubofsky), supra, note 24.

28. Sess. Laws, 77 at 352, §§ 1 and 2.

29. See, *The Luden Corp.*, supra, note 17; *Johnson*, supra, note 21.

30. See, CRS § 6-4-105.

31. See, e.g., *The Luden Corp.*, supra, note 17.

32. In the former instance, no ambiguity was possible because the district attorneys and the attorney general are the only entities that could possibly engage in criminal enforcement of the state antitrust statute. Unfortunately, the same could not be said with respect to the equitable relief provision, under which aggrieved private parties conceivably could have proceeded.

33. See, *Pub. No. 218*, supra, note 25; 1977 Committee hearing (statements of Jean Dubofsky and Andrew Vogt), supra, note 24.

34. See, *Board of County Comm'rs v. Penobscot, Inc.*, 662 P.2d 1091 (Colo. 1983).

35. Although the attorney general was free to seek equitable relief on behalf of aggrieved private parties, because of funding and staffing limitations it simply was not possible to do so in all, or even most, meritorious cases. Since 1977, the Attorney General's Antitrust Unit has filed only three injunctive cases under § 6-4-105, while from 1975 to 1977 it filed eight such cases. See, *Historical Outline*, supra, note 18 at 1-5.

36. In the eight years since initiating the

first criminal prosecution under the modern Colorado antitrust law, the Attorney General's Antitrust Unit has successfully completed all thirteen prosecutions which it has undertaken. Those cases have resulted in the conviction of over forty corporate and individual defendants and the imposition of fines and court costs totalling almost \$400,000. See, *Historical Outline*, supra, note 18 at 6.

37. Compare, § 4 of the Clayton Act, 15 U.S.C. § 15, as amended, with CRS § 6-4-108.

38. This provision was similar to a portion of the Hart-Scott Rodino *parens patriae* statute which allows a court, in its discretion, to award costs and attorneys' fees to a prevailing defendant where the aforementioned conditions are met. See, 15 U.S.C. § 15c(d)(2)(Supp. 1983). See also, Hall, "Attorneys' Fees Against Parties and Attorneys," 13 *The Colorado Lawyer* 1202 (July 1984); Isom, "Attorney Fees: The English Rule in Colorado," 13 *The Colorado Lawyer* 1642 (Sept. 1984), relating to CRS § 13-17-101 *et seq.*

39. Local government interests, fearing treble damage exposure, had succeeded in obtaining a broad exemption from the bill in the Senate prior to the time treble damages were deleted there. In the House, however, the committee action which restored the treble damage provision to the bill also removed that local government exemption. Thus, local governments were placed in the anomalous position of having an exemption from that version of the bill which presented no new threat of exposure, while not having an exemption from that version which they perceived as potentially harmful to their interests. In the latter regard, local governments presently have potential treble damage exposure under the federal antitrust laws anyway. See, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). To avoid being "home-towned," potential antitrust plaintiffs would virtually always choose to file treble damage suits in federal court in Denver rather than in state court in the local government defendant's backyard. Consequently, even if a treble damage provision were incorporated in Colorado antitrust law without any corresponding local government exemption, there is little likelihood this would make any practical difference to local governmental entities sued as defendants for antitrust violations.

40. April 12, 1984 Conference Committee meeting on S.B. 23.

41. *McLain v. Real Estate Board of New Orleans, Inc.*, 100 S.Ct. 502 (1980).

42. 645 P.2d 1291 (Colo. 1982).

43. See, *id.* at 1293, n.3, 1295-96, 1299. A contrary ruling by a federal district court in *QT Markets, Inc. v. Fleming Cos.*, 394 F.Supp. 1102 (D. Colo. 1975), focusing on minor differences in wording between the state and federal laws, was rejected. *Id.* at 1293, n.3.