

# The 1992 Colorado Antitrust Act: *Per Se* Bidrigging and Key Issues

by Thomas P. McMahon

**T**his article addresses statute of limitations and monetary redress issues in the context of a hidden bidrigging conspiracy in which certain of the contracts involved, although objects of the conspiracy, were let beyond the facially applicable statutory limitations periods. In this situation, litigating in state court under the Colorado Antitrust Act of 1992<sup>1</sup> ("1992 Act") may be far more advantageous, especially for victimized governmental entities, than bringing a similar action in federal court under the Sherman and Clayton Acts.<sup>2</sup>

## Background

In 1927, Colorado's initial antitrust act<sup>3</sup> was called out on strikes by the U.S. Supreme Court.<sup>4</sup> After a thirty-year hiatus, the Colorado General Assembly scratched out an infield hit by enacting the Restraint of Trade and Commerce Act<sup>5</sup> ("1957 statute"). In practice, this second Colorado antitrust law was not much used for monetary redress because its actual damages provision<sup>6</sup> was deemed inferior to the federal treble damage remedy that included mandatory costs of suit and attorney fees.<sup>7</sup>

After another thirty-five years elapsed, the legislature finally hit a home run with the 1992 Act. Under this third Colorado antitrust statute, treble damages are available for *per se* offenses such as bidrigging and price fixing,<sup>8</sup> and various costs and fees may be awarded to pre-

vailing parties.<sup>9</sup> For these reasons alone, an increase can be expected in the overall number of civil antitrust actions filed in state court alleging *per se* violations. However, such offenses are also the very ones most likely to be carried out "under cover" over a long period of time,<sup>10</sup> thus causing large amounts of damages to be incurred<sup>11</sup> by victims before the injuries are discovered.<sup>12</sup> Accordingly, both the statute of limitations and remedies provisions applicable to state court suits alleging such violations will take on increased importance under the new law.

In view of the foregoing, prospective antitrust plaintiffs now must make careful choices regarding whether to file *per se* cases in federal or state court. In doing so, they must evaluate: (1) whether the 1992 Act, the 1957 statute or both govern the conduct alleged; (2) the relative merits of the respective federal and state statutes of limitations; and (3) how the various remedies possibly available under applicable Colorado antitrust law compare with the federal treble damage remedy.

## Applicable Colorado Law

The 1992 Act became effective on July 1 of that year and applies, *inter alia*, to civil causes of action accruing on or after that date.<sup>13</sup> In turn, "accrual" of such a cause of action is statutorily defined as taking place "when the circumstances giving rise to the cause of action are discovered or should have been discovered in the exercise of reasonable diligence."<sup>14</sup> Thus, where a plaintiff brings suit under the 1992 Act alleging a *per se* unlawful bidrigging conspiracy, it can be assumed that defendants will seek partial-

ly or wholly to avoid application of that law in an effort to gain a perceived advantage under the shorter three-year statute of limitations<sup>15</sup> or more limited actual damages remedy<sup>16</sup> of the 1957 statute.

More specifically, defendants likely will attempt to prove that the continuing offense alleged either actually was, or should have been, discovered by the plaintiff prior to July 1, 1992. If they succeed, the new law would not apply and the 1957 statute presumably would govern. Alternatively, there may be instances in which it is clear that actual discovery occurred on or after July 1, 1992, but defendants will seek to establish that, in the exercise of reasonable diligence, discovery of the ongoing violation should have been made before then. By its very terms, the 1992 Act would apply to the conduct occurring on or after July 1, 1992, but, if defendants are successful in their efforts, the 1957 statute seemingly would govern the activity preceding that date. Where there is no dispute that both actual and putative discovery of the lengthy conspiracy occurred only on or after the effective date of the 1992 Act, the Act would apply to all the conduct at issue.

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*This newsletter is prepared by the 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, Denver, Of Counsel to Williams, Youle & Koenigs, P.C., (303) 572-6750, and former chief of the Colorado Attorney General's Antitrust Unit.*

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Whether and to what extent the 1992 Act, the 1957 statute or both govern the challenged activity will affect what, if any, statute of limitations applies and whether treble damages and recoupment of payments are available in the lawsuit. The remainder of this article focuses primarily on these issues.

## Federal and Colorado Statutes of Limitations

Federal antitrust law and the 1992 Act both provide four-year statutes of limitations for monetary redress in civil antitrust actions.<sup>17</sup> However, the running of those statutes is suspended during the pendency<sup>18</sup> of a respective federal or state "related" governmental antitrust case (that is, where the civil claims are based in whole or in part on the government's action), and for one year<sup>19</sup> thereafter (the "hiatus period").<sup>20</sup> Significantly, though, the running of the state antitrust statute of limitations is not suspended during the pendency of or hiatus period following a "related" federal governmental antitrust case,<sup>21</sup> and vice-versa.<sup>22</sup>

### Federal

Treble damages under federal antitrust law may be recovered only on claims which "accrue" within the four-year civil statutory limitations period.<sup>23</sup> A federal cause of action accrues and the statute begins to run each time the plaintiff is injured by an act of the defendant and the damages become determinable (non-speculative and provable).<sup>24</sup> This is significant because, as noted above, by their very nature most bidrigging conspiracies are lengthy.<sup>25</sup> Consequently, the four-year civil limitations period facially applicable to federal treble damage actions—even where suspended due to a related federal criminal action—ordinarily is insufficient to encompass all offending activity.

Thus, if an injured victim of bidrigging is to be able to sue under federal antitrust law for all damages suffered as a result of the ongoing conspiracy, it must find a way to "toll" the running of the Clayton Act statute of limitations. One means of doing so is pursuant to the equitable doctrine of fraudulent concealment. Under that doctrine, where the wrongdoers use "wrongful" or "fraudulent" means to conceal their violation, the federal statute of limitations is tolled until the victim actually discovers, or in the exercise of "due" or reasonable diligence could have dis-

covered, the fact of its injury.<sup>26</sup> The rationale for such rule is that violators should not be able to cause their unlawful conduct to be hidden and then, when it is finally discovered, raise the statute of limitations as a defense.<sup>27</sup>

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### Colorado

Under the 1992 Act, the Colorado antitrust limitations period also begins to run when the cause of action accrues.<sup>28</sup> As previously indicated, though, the 1992 Act expressly defines accrual as occurring when the underlying circumstances actually are, or in the exercise of reasonable diligence should have been, discovered<sup>29</sup>—the so-called "discovery" rule. Accordingly, the present Colorado statute of limitations is quite different in operation from the federal one. It is more akin to the federal fraudulent concealment doctrine, but without the necessity for having to establish the element of wrongful or fraudulent means of concealment by defendants.

Given the differences in when the federal and state limitations periods commence running, and the additional element necessary to toll the federal statute, proceeding in state court under the 1992 Act can be quite advantageous to the plaintiff in cases involving long-hidden *per se* violations. As noted above, the federal statute of limitations starts running at the time injury is suffered and damages become determinable, whether or not the plaintiff knows or could have known of the injury. Conversely, under the 1992 Act, the state statute does not begin to run until the injury is or should have been discovered, no matter when it occurred. Obviously, the latter affords a plaintiff far greater opportunity to file suit in a timely fashion, enabling it to seek monetary recoveries for all hidden injuries suffered over a long period.

The multi-year Colorado limitations period following actual or putative discovery of a continuing conspiracy ordinarily enables a bidrigging victim to pursue its full cause of action under state

law. For that very reason, however, defendants may argue that the plaintiff should have discovered its cause of action more than the requisite number of years prior to filing suit. Defendants in continuing antitrust conspiracy actions almost always take such a position, and it must be dealt with on the particular facts of each case.

In particular, defendants are likely to raise as an affirmative defense under C.R.C.P. 8(c) that their conduct occurring prior to July 1, 1992, should have been discovered more than three years prior to filing suit. Accordingly, they may argue that the action is therefore barred by the general three-year state limitations period applicable to antitrust offenses under the 1957 statute.<sup>30</sup> Colorado law is clear that the controlling statute of limitations is the one in effect at the time the cause of action accrues, not when the activity occurred.<sup>31</sup> The three-year statute defined accrual in virtually the same "discovery" fashion as does the 1992 Act.<sup>32</sup> Thus, the determinative question will be which statute of limitations was in effect on the date that the plaintiff actually discovered, or in exercise of reasonable diligence should have discovered, the facts forming the basis of its claim for relief<sup>33</sup> regarding the hidden, ongoing conspiracy.

No matter which statute applies, if suit were filed within the applicable three- or four-year period following actual or imputed discovery, the action would be timely as to all conduct encompassed by the entire lengthy conspiracy.<sup>34</sup> Otherwise, it is timely only as to the conspiratorial activity that falls within the applicable limitations period.<sup>35</sup> In any event, as discussed below, if the defendants succeed in establishing that the 1957 statute's limitations period is the one that governs, they may have won the game but lost the series insofar as actions brought by governmental entities are concerned.

## Colorado Monetary Remedies

### Treble or Single Damages

In addition to a statute of limitations defense, it is likely that defendants in *per se* cases will raise as an avoidance under C.R.C.P. 8(c) that the 1992 Act's treble damage remedy does not apply to conduct occurring before July 1, 1992. The clearest situation is where it is shown that the continuing conspiratorial activity was actually discovered after that date but defendants fail to prove that, in the exercise

of reasonable diligence, it should have been discovered prior thereto. In those circumstances, by the very terms of its "Effective Date - Applicability" clause, the 1992 Act—with its treble damage remedy—applies.<sup>36</sup> The courts have routinely upheld such retroactive application of remedial provisions (provisions that neither affect pre-existing rights or obligations nor impose new duties and so do not expand the scope of proscribed activity) to conduct that occurred before the remedy was enacted.<sup>37</sup>

The more difficult situation is where *per se* defendants succeed in showing that their pre-July 1, 1992 conduct should have been discovered before that date. By negative implication, the Act, with its treble damage remedy, would not apply to such prior activity.<sup>38</sup> However, there may be some situations where (1) the conspiratorial conduct should have been discovered before July 1, 1992, but nonetheless continued thereafter, and (2) it is established that such conduct was actually discovered later.

In such circumstances, it seems the 1957 statute and the 1992 Act would apply *seriatim*, so that the latter's treble damage remedy applies to the post-July 1, 1992 activity. Moreover, unless precluded on statute of limitations grounds, as explained below, plaintiffs nonetheless have available to them the option of pursuing "recoupment"—the return of all monies paid—which is an identical remedy under both the 1992 Act and the 1957 statute.<sup>39</sup>

### Governmental Entity Suits

**Sovereign Immunity.** As to state antitrust claims on behalf of governmental victims, suspension or tolling of the federal and state statutes of limitations, and those statutes themselves, may be irrelevant. The old English common law principle of *nullum tempus occurrit regi* ("time does not run against the king"<sup>40</sup>) is the majority rule in this country,<sup>41</sup> and it applies in Colorado as well.<sup>42</sup> Under that doctrine, the government is generally immune from statutes of limitations.<sup>43</sup> More specifically, state statutes of limitations ordinarily do not run against the state itself unless they expressly so provide<sup>44</sup> or necessarily carry such implication.<sup>45</sup>

Absent express language, a necessary implication exists only where the state is the sole party that may bring suit on the underlying statute and to which the limitations provision could apply.<sup>46</sup> The

rule constitutes a recognition of the fact that, unlike their private counterparts, public officials are not motivated by a profit incentive and are charged with duties and responsibilities in the public interest. Accordingly, the doctrine is designed to protect the rights, revenues and properties of the taxpayers from injury or loss due to negligence by such officials.<sup>47</sup>

In most jurisdictions, the *nullum tempus* rule also applies to state subdivisions or other arms of the sovereign power when exercising or acting under that power in their public or governmental, as opposed to corporate or private, capac-

ities.<sup>48</sup> This is true, at least, where some state funds are directly involved or have been passed through the subordinate entities.<sup>49</sup> Whether the principle would apply where no state right or money is at issue, but only municipal rights and funds are involved, is less clear.<sup>50</sup> However, the public interest rationale of protecting the taxpayers' dollars from the negligence of public officials would seem to be equally applicable in either situation.

Until lately, the majority rule had applied uniformly to political subdivisions in Colorado.<sup>51</sup> However, the Colorado Supreme Court recently stated that stat-

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utes of limitations run against local governments except where the legislature expressly provides to the contrary.<sup>52</sup> The rationale is that, in view of the abrogation of sovereign immunity,<sup>53</sup> political subdivisions now subject to being sued should file their own cases in a timely manner.<sup>54</sup>

That result was reached in a case where a local government, through its own error, for several years failed to collect charges contractually due it and then compounded the situation by failing timely to sue for collection. However, it remains to be seen whether the same result would ensue in a situation where a political subdivision incurred a tortious-type injury as a result of the defendants' hidden fraudulent conduct.<sup>55</sup>

**Damage and Recoupment Actions.** Application of the *nullum tempus* principle to hidden continuing conspiracies can be quite significant in the state antitrust law context. For example, Colorado's 1957 statute contained no provision relating to the single damage remedy making any limitations period applicable—whether expressly or by necessary implication<sup>56</sup>—to claims brought by governmental entities. The same holds true for *per se* treble damage actions brought by governmental entities under the general civil damages provision of the 1992 Act.<sup>57</sup>

In neither situation are governmental entities expressly singled out as potential damage plaintiffs, nor are they the only ones authorized to sue therefor. Rather, they may simply sue for damages just as any other person does.<sup>58</sup>

Likewise, neither the 1957 statute nor the 1992 Act contains any provision relating to the recoupment remedy making any limitations period applicable—whether expressly or by necessary implication—to such claims brought by governmental entities. Here, again, governmental entities are not expressly authorized under either law to bring a recoupment action, and they are by no means the only ones that may do so. Anyone injured by a violation of either state law may bring such an action to recover all consideration paid.<sup>59</sup>

In view of the preceding, it would seem that—as to antitrust civil damage and recoupment claims brought under the 1957 statute and the 1992 Act by the state and, possibly, by local governmental entities—no statute of limitations applies.<sup>60</sup> Thus, in such litigation under either state antitrust law, when hidden conspiracies finally are uncovered, there

is then no need to (1) establish suspension of the statute or actual discovery of the wrong, or (2) contest whether the violation should have been discovered earlier in the exercise of reasonable diligence.

Recoupment actions in *per se* cases may be attractive for other reasons as well. Experiential data indicate that single damages in continuing bidrigging-type conspiracy cases tend to range from less than 10 percent to upwards of 20 percent of the purchase price.<sup>61</sup> Even when trebled, recovery of those damages amounts to only 30 to 60 percent of the price, whereas recoupment consists of a 100 percent recovery. Thus, recoupment is virtually always superior to treble damages in terms of monetary redress.

Antitrust defendants facing such a remedy are likely to raise as defenses both constitutional challenges and equitable considerations. Significantly, the Wisconsin antitrust recoupment provision<sup>62</sup> on which Colorado's statutory section is based<sup>63</sup> has been upheld against constitutional attack.<sup>64</sup> Moreover, that statute's omission of a setoff provision pertaining to consideration given by the wrongdoer has also been upheld as constitutional under principles of equity.<sup>65</sup> These interpretations should be decisive for Colorado courts in construing this state's recoupment provision under either the 1992 Act or the 1957 statute.<sup>66</sup>

Accordingly, recoupment actions by governmental entities relating to long-hidden bidrigging conspiracies may well become an increasingly significant remedy under Colorado antitrust law. This is particularly true where, for whatever reason, it is questionable whether the cause of action should have been discovered prior to July 1, 1992. In that situation, application of the 1992 Act, with its four-year statute of limitations and treble damages, costs and fees provisions—as opposed to the 1957 statute, with its three-year limitations period and actual damages provision—is uncertain. Resort to the more extensive recoupment remedy, which is identical under the two laws, could well resolve the difficulty.

## Conclusion

In the past, state antitrust claims were routinely appended to federal claims and either retained or dismissed by federal courts on a discretionary, case-by-case basis. Under the new "supplemental" federal jurisdiction, such claims may still be declined if they raise "novel or complex issues of State law."<sup>67</sup> There are many

new provisions in the 1992 Act that arguably are novel.<sup>68</sup> Moreover, certain provisions that did exist under the 1957 statute, such as the recoupment remedy, have not been construed by Colorado courts and so also arguably could be considered novel or complex.<sup>69</sup> Now that treble damages for *per se* violations are available under the 1992 Act, and in view of the more favorable Colorado statute of limitations for suits against hidden continuing conspiracies, plaintiffs in bidrigging cases may seek to avoid any dispute over supplemental jurisdiction by filing directly in state court.

In light of all of the preceding, more suits alleging *per se* antitrust offenses such as bidrigging likely will be filed in state rather than federal court. In such cases, however, even where defendants are able to establish that a particular cause of action should have been discovered prior to July 1, 1992, that will be of small consolation. For the state, and possibly local governmental entities, no statute of limitations would apply to actions for either or both actual damages and recoupment. In effect, the ballgame will be over.

## NOTES

1. CRS §§ 6-4-101 through 122.
2. Respectively, 15 U.S.C. §§ 1 through 7 and 15 U.S.C. §§ 12 through 27, as amended.
3. Colorado Antitrust Act, 1913 Colo. Sess. Laws, ch. 161, §§ 1 through 8 at 613-16.
4. See *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (statute held unconstitutionally vague).
5. CRS §§ 6-4-101 through 108.
6. 1954 statute, CRS § 6-4-108.
7. See McMahon, "Colorado Antitrust Act of 1992: An Overview" at 3, *The New Colorado Antitrust Act of 1992* (Continuing Legal Education in Colorado, Inc., March 1993). See also McMahon, "Colorado Antitrust Law Seven Years Later," 13 *The Colorado Lawyer* 1808, 1814-15 (text accompanying n.37 and 41), 1816 n.37 and 41 (Oct. 1984).
8. CRS §§ 6-4-111(2) and (3)(a), 114(1). Price fixing is a *per se* violation. *State v. Colorado Spgs. Bd. of Realtors*, 692 P.2d 1055, 1062 (Colo. 1984) (citing *Northern Pacific Ry. v. U.S.*, 356 U.S. 1, 5 (1958)). Bidrigging is the simplest form of price fixing. *U.S. v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970).
9. See, e.g., CRS §§ 6-4-111(4), 113(2), 114(2).
10. E.g., *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1531 (5th Cir. 1988); *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1084 (2nd Cir. 1988). Bidrigging is, of necessity, kept secret by the participants. *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019, 1030 (5th Cir. 1983); *Ingram Corp. v. J. Ray*

McDermott & Co., 698 F.2d 1295, 1314 (5th Cir. 1983).

11. For example, during the period from 1984-88, approximately \$9 million was recovered by the Colorado Attorney General's Office from contractors charged with rigging bids on highway construction projects in the state. See McMahon, *Historical Outline of Colorado Antitrust Unit Activities*, 5-7 (Sept. 30, 1989) (unpublished memorandum, on file with Business Regulation Unit of Colorado Attorney General's Office).

12. See, e.g., *Colorado v. Western Paving Constr. Co.*, 630 F.Supp. 206 (D.Colo. 1986) (dismissing suit on grounds that statutory limitations period had run as to all bid-lettings at issue), *rev'd*, 833 F.2d 867 (10th Cir. 1987), *panel decision vacated (per curiam) by an equally divided court*, 841 F.2d 1025 (10th Cir. 1988) (*en banc*) (reinstating district court judgment).

13. 1992 Colo. Sess. Laws, ch. 45, § 4 at 244 ("Effective Date—Applicability" clause).

14. CRS § 6-4-118(1).

15. CRS § 13-80-101(1)(d).

16. CRS § 6-4-108.

17. Clayton Act § 4B, 15 U.S.C. § 15b, as amended; CRS § 6-4-118.

18. *I.e.*, from the time of return of an indictment. *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 871 (9th Cir. 1978).

19. *I.e.*, one year from the entry of judgment of conviction relative to the last remaining defendant. *Marine Fireman's Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 249 (9th Cir. 1974).

20. Clayton Act Section 5(i), 15 U.S.C. § 16(i), as amended; CRS § 6-4-118(3).

21. See Clayton Act § 1(a), 15 U.S.C. § 12(a) (defining "antitrust laws," to which federal suspension provision applies, to mean federal antitrust laws only). See also *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958); *New Jersey Wood Finishing Co. v. 3-M Co.*, 332 F.2d 346, 350 (3rd Cir. 1964).

22. See CRS § 6-4-119 (declaring legislative intent "that, in construing [the 1992 Act, Colorado] courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws").

23. E.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

24. *Id.* at 338-39.

25. See *supra*, note 10 and accompanying text.

26. See, e.g., *Holmberg v. Armbricht*, 327 U.S. 392, 397 (1946); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347-50 (1875); *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154-55 (10th Cir. 1981); *Colorado v. Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) ¶ 67,473, at 59,984 (D.Colo. Feb. 11, 1987).

27. See, e.g., *Bailey*, *supra*, note 26 at 349; *Kansas City v. Federal Pac. Elec. Co.*, 310 F.2d 271, 284 (8th Cir. 1962).

28. CRS § 6-4-118(1).

29. *Id.* See *supra*, text accompanying note 14.

30. See *supra*, note 14 and accompanying text.

31. *Callahan v. First Amer. Title Ins. Co.*, 837 P.2d 769 (Colo.App. 1992) (citing, *inter alia*, *First Interst. Bank v. Piper Aircraft Corp.*, 744 P.2d 1197 (Colo. 1987)).

32. Compare CRS § 6-4-118(1), with CRS § 13-80-108(3) (fraud statute of limitations accrual provision). The *per se* antitrust violation of bidrigging constitutes fraud. See, e.g., *United States v. Washita Constr. Co.*, 789 F.2d 809, 818 (10th Cir. 1986); *United States v. Azzarelli Constr. Co.*, 612 F.2d 292, 298 (7th Cir. 1979).

33. *Callahan*, *supra*, note 31 at 771 (citing *Piper*, *supra*, note 31).

34. See, e.g., *King & King Enters.*, *supra*, note 26 at 1154; *de Haas v. Empire Petroleum Co.*, 435 F.2d 1223, 1226 (10th Cir. 1970); *Board of Educ. v. Admiral Heating & Ventilation, Inc.*, 94 F.R.D. 300, 301-03 (N.D.Ill. 1982).

35. See, e.g., *Admiral Heating & Ventilation, Inc.*, *supra*, note 34 at 301.

36. See *supra*, notes 13 & 14 and accompanying text.

37. See, e.g., *Robinson v. Lynmar Racquet Club*, 851 P.2d 274 (Colo.App. 1993). *Accord Bailes v. United States*, 942 F.2d 1555, 1560 (11th Cir. 1991), *vacated on other grounds*, 112 S.Ct. 1755 (1992); *Arnold v. Maynard*, 942 F.2d 761, 762 n.2 (10th Cir. 1991).

38. See *supra*, notes 13 & 14 and accompanying text.

39. Compare 1992 Act, CRS § 6-4-121 (1992 Repl. Vol.), with 1957 statute, CRS § 6-4-106 (1973). See also Zavislan, "The Colorado Antitrust Act of 1992," 22 *The Colorado Lawyer* 695, 702 (Apr. 1993) [*hereinafter*, "Zavislan"] (section added back by floor amendment). Indeed, the recoupment provision traces its lineage all the way back to Colorado's 1913 antitrust law. See Colo. Sess. Laws 1913 ch. 161, § 6, at 615.

40. *Black's Law Dictionary* at 1069 (6th ed. 1990). See *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1937); *United States v. Thompson*, 98 U.S. 486, 489 (1878); *United States v. Hoar*, 26 F.Cas. 329, 330 (C.C.D.Mass. 1821) (No. 15,373).

41. *New Jersey Educ. Facilities Auth. v. Conditioning Co.*, 567 A.2d 1013, 1016 (N.J. 1989).

42. See, e.g., *Dietemann v. People ex rel. Blackman*, 232 P. 676, 678 (Colo. 1925); *People v. Miller*, 8 P.2d 269, 269-70 (Colo. 1932), and authorities cited therein; *Styers v. Mara*, 631 P.2d 1138, 1140 (Colo.App. 1981).

43. *Id.* See, e.g., 51 Am.Jur.2d, *Limitation of Actions*, §§ 409-12, 416-19 (1970 & 1993 Supp.), and cases cited therein. *Accord State Hwy. Comm'n v. Steele*, 528 P.2d 1242, 1244 (Kan. 1974); *State ex rel. Schlegel v. Munn*, 250 N.W. 471, 473 (Ia. 1933); *Herndon v. Board of Comm'rs*, 11 P.2d 939, 940-41 (Okla. 1932).

44. For an example of a statute of limitations expressly made applicable against the State of Colorado itself, see CRS § 13-80-103.8(1).

45. *City of Colorado Spgs. v. Timberlane Assoc.*, 824 P.2d 776, 780 (Colo. 1992), citing

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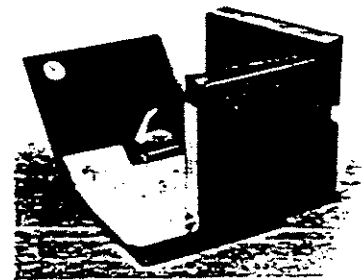
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46. *Dietemann*, *supra*, note 42 at 678.

47. *Guaranty Trust Co.*, *supra*, note 40 at 132; *Thompson*, *supra*, note 40 at 489; *Hoar*, *supra*, note 40 at 330; *Timberlane Assoc.*, *supra*, note 45 at 780 (quoting *Estate of Griffiths*, *supra*, note 45 at 948).

48. *Timberlane Assoc.*, *supra*, note 45 at 778 and n.5-6 (and cases cited therein).

49. See, e.g., *Estate of Griffiths*, *supra*, note 45 at 947; *Hinshaw v. Department of Welfare*, 403 P.2d 206, 208-10 (Colo. 1965); *Massachusetts Bonding & Ins. Co. v. Board of County Comm'rs*, 68 P.2d 555, 557 (Colo. 1937).

50. *Compare Bowen v. Turgoose*, 314 P.2d 694, 696 (Colo. 1957) (applying *Dietemann*, *supra*, note 42), with *Styers*, *supra*, note 42 at 1140 (rejecting application of *Dietemann-Miller-Griffiths* rule).

51. See, e.g., *Berkeley Metro. Dist. v. Poland*, 705 P.2d 1004, 1007 (Colo.App. 1985).

52. *Timberlane Assoc.*, *supra*, note 45 at 777.

53. See *Evans v. Board of County Comm'rs*, 482 P.2d 968 (Colo. 1971) (abrogating sovereign immunity from suit as, *inter alia*, inequitable and untenable).

54. *Timberlane Assoc.*, *supra*, note 45 at 777, 780 (citing *New Jersey Educ. Facilities Auth. v. Gruzen Partnership*, 592 A.2d 559, 561 (N.J. 1991)).

55. Both *Timberlane* and the *Gruzen Partnership* case upon which it principally relies

involved what were essentially contract claims. See *Timberlane*, *supra*, note 45 at 776; *Gruzen*, *supra*; note 54 at 564. Accord *Altoona Area School Dist. v. Campbell*, 618 A.2d 1129, 1132-33 (Pa. 1992).

56. See CRS § 6-4-108 (embodying no statute of limitations); CRS § 13-80-101(1)(d) (three-year statute of limitations only generally applicable to "all actions for restraint of trade" under 1957 statute [emphasis added]).

57. CRS § 6-4-114(1). See § 6-4-118(1) (four-year statute of limitations only generally applicable to "any civil action commenced pursuant to" the 1992 Act [emphasis added]). But see CRS § 6-4-111(2), specifically authorizing the Colorado Attorney General to bring, *inter alia*, indirect purchaser civil damage actions on behalf of state or subordinate governmental entities with their written consent. Because only the Attorney General is authorized to bring the latter type of action on behalf of those entities, the statute of limitations provision arguably may apply thereto.

58. See 1957 statute, CRS § 6-4-108; 1992 Act, CRS § 6-4-114(1).

59. See 1992 Act, CRS § 6-4-121; 1957 statute, CRS § 6-4-106.

60. This conclusion is further buttressed by Colo. Const. Art. V, § 38 (liability to state or city may not be released, diminished or extinguished except by payment). See *Hinshaw*, *supra*, note 49 at 209.

61. See, e.g., *Colorado v. Goodell Bros.*, 1987-1 Trade Cas. (CCH) ¶ 67,476, at 59,992 (D.Colo. Feb. 17, 1987) (estimated damages of 8-10 percent in highway bidrigging case);

*Henriques and Baquet*, "Investigators Say Bidrigging is Common in Milk Industry," *N.Y. Times*, May 23, 1993 (Nat'l ed.), at A1 (typical overcharge estimated at 14 percent in milk bidrigging cases).

62. Wis. Stat. Ann. § 133.14 (1974 & 1982 Cum. Supp.).

63. See *People v. North Avenue Furniture & Appliance, Inc.*, 645 P.2d 1291, 1294 & n. 4 (Colo. 1982).

64. E.g., *City of Madison v. Hyland, Hall & Co.*, 243 N.W.2d 422, 424 (Wis. 1976). See also *Open Pantry Food Marts, Inc. v. Falcone*, 286 N.W.2d 149, 152 (Wis.App. 1979).

65. *City of Madison*, *supra*, note 64 at 434. Accord *Shafer v. Bulk Petroleum Corp.*, 569 F.Supp. 621, 629-30 (E.D.Wis. 1983).

66. See *Colorado Spgs. Bd. of Rec'ors*, *supra*, note 8 at 1061. Accord *People v. Stevens*, 517 P.2d 1336, 1340 (Colo. 1973); *Vandermeer v. District Ct.*, 433 P.2d 335, 337 (Colo. 1967), 67, 28 U.S.C. § 1367(c)(1).

68. Nevertheless, many if not most of those provisions originated in other Colorado laws, or in other antitrust laws, which have been construed. See *Zavislan*, *supra*, note 39.

69. The recoupment provision has been construed in Wisconsin, the state from which it was "borrowed." See *supra*, n.62-65 and accompanying text.



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