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## ANTITRUST VIOLATIONS<sup>1</sup>

### § 30.1. Introduction

This chapter provides general information concerning Maine antitrust law. It contains the following sections:

#### § 30.2. Why We Have Antitrust Laws

#### § 30.3. Examples of Antitrust Violations

#### § 30.4. Our Antitrust Laws

#### § 30.5 Enforcement

### § 30.2. Why We Have Antitrust Laws

Antitrust laws have been enforced in Maine and on the federal level since the 1890's. These laws are designed to protect and encourage open competition between businesses. Free and fair competition lies at the heart of our economic and political system. Modeled on federal statutory provisions, Maine antitrust laws prohibit:

- A. Contracts, combinations or conspiracies in restraint of trade;<sup>2</sup>
- B. Monopolization offenses;<sup>3</sup>
- C. Mergers and acquisitions which tend to substantially reduce competition;<sup>4</sup> and
- D. Unfair methods of competition, as well as unfair acts and practices in the conduct of trade or commerce.<sup>5</sup>

Competition provides a powerful incentive for businesses to find ways to increase efficiency, lower prices and improve the quality of their products or services. Businesses which can offer the highest quality product or service at the lowest prices will thrive in a competitive environment. The ultimate beneficiary of enhanced quality at a reduced price is, of course, the consuming public. In a healthy competitive marketplace, consumers have the widest choice of products and services at the lowest prices.

When businesses restrict competition by agreeing to fix prices, allocating markets, merging to monopoly, abusing monopoly power or engaging in other anticompetitive activity, the benefits of competition (lower prices and increased quality of products and services) are eroded and, ultimately, disappear.

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<sup>1</sup> This Chapter was written by Assistant Attorney General Francis Ackerman.

<sup>2</sup> 10 M.R.S.A. § 1101 (1997).

<sup>3</sup> 10 M.R.S.A. § 1102 (1997).

<sup>4</sup> 10 M.R.S.A. § 1102-A (1997).

<sup>5</sup> 5 M.R.S.A. § 207 (2002).

## § 30.3. Examples Of Antitrust Violations

### A. Price-Fixing

Agreements between competing businesses to fix, stabilize, raise, or lower prices constitute illegal price-fixing in restraint of trade. All forms of price-fixing have been declared illegal for one basic reason. Price-fixing agreements destroy the ability of each business to independently determine the prices of its goods or services. Moreover, price-fixing often leads to higher prices for consumers. If businesses do not have to worry about being underpriced by competitors, the incentive to reduce prices disappears.

#### *Illustration:*

Smith Company and Jones Company sell vacuum cleaners in the same geographic area. The presidents of Smith Company and Jones Company (Mr. Smith and Mr. Jones) are on friendly terms and often meet for lunch. At one meeting Mr. Smith comments that there is enough business for both companies without the need for competition. Mr. Smith then suggests that the two companies agree not to charge less than \$300 for their vacuum cleaners. Mr. Jones agrees to Mr. Smith's suggestion.

#### *Legal Conclusion:*

Mr. Smith and Mr. Jones (and their companies) have entered into an illegal price-fixing agreement establishing a minimum price for vacuum cleaners.<sup>6</sup>

#### *Tip:*

Mr. Jones would have done well to tell Mr. Smith that because they were competitors, he could not discuss price. In a group setting, such as a trade association, when the topic of price is brought up, a party who wishes to avoid being the target of an antitrust investigation would be well-advised to leave the room, and to do so in a memorable way, for example, by dropping a glass or plate on the floor.

### B. Bid-Rigging

Bid-rigging is a type of price-fixing in which businesses interfere with the integrity of the bidding process. State and local governments, as well as many private firms, purchase products by inviting businesses to submit competitive bids. The business with the lowest, or most advantageous bid will obtain the right to sell to the buyer. When businesses agree upon who will submit the winning bid or agree to submit the same price bid, the bidding process breaks down and the buyer often pays a higher price for goods and services.

#### *Illustration:*

Several companies are invited by Utility Company to submit competing bids for a complicated construction project. Utility Company offers to give the job jointly to the two lowest bids. Prior to submitting their respective bids, and unknown to Utility Company, the presidents of Company A and Company B share with each other the prices they intend to bid for the job. Company B had been preparing a bid with lower prices, but raises its prices to meet those of Company A. Of the many bids received by Utility Company for the project, Company A and Company B are the lowest, and are identical across 27 price categories.

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<sup>6</sup> 10 M.R.S.A. § 1101 (1997); *State v. Randy's, Inc.*, 1988-2 Trade Cas. (CCH) ¶ 68, 366 (Me. Super. Ct. 1988).

*Legal Conclusion:*

The presidents of Company A and Company B have entered into an illegal bid-rigging scheme.<sup>7</sup>

*Tip:*

The two CEOs should have consulted antitrust counsel prior to sharing price information.

**C. Customer or Territorial Allocation**

The prohibition against agreements in restraint of trade also bars competing businesses from dividing customer or geographic markets between them. An agreement by businesses to allocate customers or territories eliminates competition between businesses, and thus also eliminates the incentive to reduce prices or improve quality in order to gain more business.

*Illustration:*

Ice Brothers Corp., located in Bangor, sells ice products throughout the state. Cool Sisters Corp. also sells ice products throughout the state, but is located in Portland. The owner of Ice Brothers meets the owner of Cool Sisters at a trade association convention and tells his colleague that there is no need for them to compete with each other. The owners of the two corporations then agree that Ice Brothers will sell ice products only in the northern part of the state and Cool Sisters will sell only in the southern part.

*Legal Conclusion:*

Ice Brothers and Cool Sisters have violated antitrust laws by agreeing to allocate geographical selling areas.<sup>8</sup>

*Tip:*

Ice Brothers and Cool Sisters, or their association, should have conducted antitrust compliance training for management, preferably on an annual basis.

**D. Resale Price Maintenance**

Resale price maintenance is another form of price-fixing in which a manufacturer, distributor, or wholesaler enters into an agreement with or requires retail dealers to sell products at a specific retail price, or sets limitations on the retailers' ability to determine their own price. It is permissible for a manufacturer or distributor to suggest retail prices as long as he or she does not coerce retailers to sell at those prices. When manufacturers or distributors maintain required retail prices, often by threatening to refuse to sell goods to retailers who discount their products, the result is that consumers pay higher prices.

*Illustration:*

Zero, Inc., which manufactures expensive men's dress shirts, sells shirts to Mr. Buttondown with its suggested retail price attached. To attract more customers into his store to purchase other products with a higher profit margin, Mr. Buttondown marks the Zero shirts down 10% from the manufacturer's suggested retail price. When Zero learns of the markdown, it threatens to raise the price on Mr. Buttondown's shirt purchases unless he sells at its suggested retail price. Mr. Buttondown reluctantly agrees.

<sup>7</sup> 10 M.R.S.A. § 1101 (1997); *State of Maine v. Coutts Bros., Inc.*, No. CV-00-88 (Ken. C'ty Super. Ct., June 28, 2001).

<sup>8</sup> 10 M.R.S.A. § 1101 (1997); *State of Maine v. Getchell Bros.*, 1989-2 Trade Cas. (CCH) ¶¶ 68, 757, 758 (Me. Super. Ct. 1989); *See also State of Maine v. Bridgton Hospital*, No. CV-00-87 (Ken. C'ty Super. Ct., May 9, 2000).

*Legal Conclusion:*

Zero, Inc. and Mr. Buttondown have unlawfully agreed to the price at which Zero's shirts would be sold by Buttondown.<sup>9</sup>

*Tip:*

Zero should have attempted to persuade Mr. Buttondown to use the suggested price instead of employing coercive measures.

### **E. Tying**

When a seller conditions (or ties) the sale of a product wanted by a buyer (the tying product) upon the purchase by the buyer of another product (the tied product) the seller has engaged in tying. Tying the purchase of one product to the sale of another product is known as "reciprocal dealing." Tying and reciprocal dealing are illegal if the seller possesses market power in the tying product and is successful in conditioning the sale of the tying product upon the purchase of the tied product. Tying arrangements are anticompetitive in that the seller is able to require the purchase of the tied product without regard to its price or quality but solely because the buyer wants to purchase (or sell) the tying product. By engaging in tying, the seller is able to increase its sales at the expense of firms competing for sales of the tied product. Tying may also directly harm consumers by requiring them to buy an unwanted product as a condition of purchasing a desirable product.

*Illustration:*

National Spuds, Ltd., a processor of french fries and other potato products, contracts to purchase potatoes from Maine farmers at the start of each growing season, and also markets farm equipment and fertilizer to these same farmers. Farmers prize National Spuds contracts because they offer a secure return on investment, and a valuable hedge against the volatility of the spot market for potatoes. National Spuds, Ltd. is the sole potato processor in the State. However, National Spuds fertilizers and farm equipment have not been selling well because Maine farmers consider them expensive and ineffective. National Spuds instructs its potato buyers to only contract with those farmers who use their fertilizer and farm equipment.

*Legal Conclusion:*

National Spuds Ltd. has illegally tied the contract purchase of potatoes from Maine farmers to the sale of fertilizer and farm equipment.<sup>10</sup>

*Tip:*

National Spuds, too, would have benefited by instituting an antitrust training program for management.

### **F. Group Boycotts**

An agreement among two or more competing firms not to buy from or sell to another firm, or to deny the excluded firm access to a business advantage such as source of supplies, credit or advertising, is an illegal group boycott, provided the agreement is at least partially motivated by the prospect of economic benefit.

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<sup>9</sup> 10 M.R.S.A. § 1101 (1997); *State of Florida v. Nine West Group, Inc.*, No. 00-CIV-1707 (U.S. Dist. Ct. S.D.N.Y., March 6, 2000) (see Complaint ¶¶ 67-68, charging violations of Maine law).

<sup>10</sup> 10 M.R.S.A. § 1101 (1997); *State of Maine v. McCain Foods Ltd.*, 1987-2 Trade Case. (CCH) ¶¶ 67, 798 (Me. Super. Ct. 1987).

*Illustration:*

A trade association of retail lumber dealers circulates to its dealer members the names of wholesalers who bypass dealers by selling directly to consumers, thereby reducing dealer sales and profits. The newsletter circulating the list discourages dealers from buying from the named wholesalers and many dealers stop doing business with the listed wholesalers.

*Legal Conclusion:*

The trade association solicited, and some of its members agreed to, an illegal group boycott.<sup>11</sup>

*Tip:*

A savvy dealer would immediately contact the trade association to flag its error, and would carefully maintain its book of business with the target companies.

### **G. Monopolization**

Contrary to popular belief, possession of monopoly power in a given market does not in and of itself constitute an antitrust violation. Monopoly power is the power to control market prices or exclude competition. Monopoly power may be acquired through entirely legitimate means, as a result of a superior product, business acumen or historic accident.<sup>12</sup> However, a monopolist who obtains or maintains such power through unfair or predatory means, or who abuses that power,<sup>13</sup> crosses the line into an antitrust violation. An attempt to monopolize can also constitute an antitrust offense in circumstances where (1) the Defendant engages in predatory or anticompetitive conduct; (2) with specific intent to monopolize; and (3) a dangerous probability of success.

*Illustration:*

Company A, with a monopoly in aluminum ingot and a lesser share in aluminum sheet processing overcharges competing sheet processors for ingot.

*Legal Conclusion:*

Company A has abused its monopoly power in violation of antitrust laws.<sup>14</sup>

*Tip:*

Company A should have recognized that, as a monopolist in aluminum ingot, it had a responsibility to maintain a level playing field in competing with other sheet processors.

### **H. Anticompetitive Mergers and Acquisitions**

When one business entity engaged in a line of commerce merges with or acquires the stock or assets of another entity that is also engaged in that line of commerce, the transaction is prohibited if it will substantially lessen competition or tend to create a monopoly. The Maine Attorney General applies federal and multistate guidelines in determining whether a proposed transaction will substantially reduce competition. Anticompetitive mergers leave consumers with fewer choices and the prospect of paying higher prices for a lower quality product or service.

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<sup>11</sup> 10 M.R.S.A. § 1101 (1997); *Eastern States Retail Lumber Dealer's Association v. U.S.* 234 U.S. 600 (1914); *See also State of Maine v. Anesthesia Professional Association*, 1984-2 Trade Case. (CCH) ¶¶ 66, 081 (Me. Super. Ct. 1984).

<sup>12</sup> *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

<sup>13</sup> 3 & 3A P. Areeda & H. Hovenkamp *Antitrust Law* Ch. 7.

<sup>14</sup> *See, e.g., State of Maine v. Trainor*, No. CV-87-260 (Ken. Cty. Superior Ct., July 1987).

*Illustration:*

Two hospitals exist in the same city in central Maine. Both are financially healthy. While each has certain special areas of expertise that the other does not, the hospitals compete for most of the city's inpatient business. To lower overhead, the two hospitals decide to merge.

*Legal Conclusion:*

The hospitals' proposed merger is barred under the state merger statute.<sup>15</sup>

*Tip:*

The two hospitals should approach the Attorney General to inform him of their plans prior to consummating the merger. The further the parties proceed with their plans, the more costly it will become for them to unscramble the eggs.

## § 30.4. Our Antitrust Laws

The basic federal and state antitrust laws are as follows:

### A. Federal Trade Regulation Laws<sup>16</sup>

(1) *The Sherman Antitrust Act of 1890*<sup>17</sup> declares illegal contracts and conspiracies in restraint of trade, monopolization and attempts to monopolize.

(2) *The Clayton Act of 1914*<sup>18</sup> as amended by Cellar-Kefauver Act of 1950<sup>19</sup> makes illegal certain practices including exclusive dealing and tying contracts, mergers, and acquisitions where their practices may substantially lessen competition or tend to create a monopoly.

(3) *The Robinson-Patman Act of 1936*<sup>20</sup> declares certain types of price discrimination illegal.

(4) *The Federal Trade Commission Act*<sup>21</sup> declares unfair methods of competition and unfair acts or practices in the conduct of trade or commerce illegal.

### B. Maine Trade Regulation Laws<sup>22</sup>

(1) Maine's monopolies & profiteering law<sup>23</sup> is modeled on the federal Sherman Act. This statute prohibits a broad range of activities that tend to decrease competition or restrain trade. Specifically, 10 M.R.S.A. § 1101 prohibits agreements in restraint of trade (including price-fixing, bid-rigging, market allocation, group boycotts and tying agreements). It is important to note that not every agreement restraining trade violates antitrust laws. Rather, courts have consistently held that only unreasonable restrictions on competition—those whose anticompetitive effects outweigh efficiencies or procompetitive benefits—are illegal. Certain practices however, are considered per se unlawful, (e.g., price-fixing among competitors).

<sup>15</sup> 10 M.R.S.A. § 1102-A (1997); see, e.g., *State of Maine v. Connors Bros. Ltd.*, 1988-2 Trade Case. (CCH) ¶¶ 68, 237 (Ken. Cty. Super. Ct. 1988).

<sup>16</sup> These Federal laws are available online at <<http://www.law.cornell.edu/uscode/>>

<sup>17</sup> 15 U.S.C. §§ 1-7 (2000).

<sup>18</sup> 15 U.S.C. §§ 12-27 (2000).

<sup>19</sup> 15 U.S.C. §§ 18, 21 (2000).

<sup>20</sup> 15 U.S.C. §§ 13-13c; 21a (2000).

<sup>21</sup> 15 U.S.C. §§ 41-52 (2000).

<sup>22</sup> Maine laws are available online at <<http://janus.state.me.us/legis/statutes/>>.

<sup>23</sup> See generally 10 M.R.S.A. §§ 1101 to 1109 (1997 & Supp. 2000).

Such per se offenses are condemned without the need of an elaborate inquiry into anticompetitive effects. Section 1102 prohibits attempts at monopolization and monopolization, while section 1102-A bars anticompetitive mergers and acquisitions.<sup>24</sup> Courts interpret these laws in light of their federal counterparts and relevant case law.<sup>25</sup>

- (2) Chapter 3 of this Consumer Law Guide is devoted to the *Unfair Trade Practices Act* and discusses in detail the parameters and construction of the UTPA. For antitrust purposes, a violation of the Maine's monopolies & profiteering law is also *ipso facto* violation of the UTPA.<sup>26</sup> Independent of any violation of the monopolies & profiteering law, the UTPA itself has the potential to address anticompetitive activity since there is no black letter definition of what constitutes unfair or deceptive practices; rather, the determination is made on a case-by-case basis.<sup>27</sup> Conduct that may not constitute, but is a prelude to, a violation under the antitrust laws, such as a widespread invitation to a group boycott might be deemed a violation of the UTPA. The U.S. Supreme Court has repeatedly articulated that the FTC Act (the federal counterpart to Maine's UTPA to which courts look in interpreting the UTPA) was intended in part to arrest anticompetitive actions that had not yet matured into Sherman Act violations.<sup>28</sup>

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<sup>24</sup> 10 M.R.S.A. §§ 1101, 1102, 1102-A (1997).

<sup>25</sup> See *Tri-State Rubbish v. Waste Management, Inc.*, 875 F. Supp. 8, 14 (D. Me. 1994) citing *Tri-State Rubbish v. Waste Management, Inc.*, 998 F.2d 1073, 1081 (1<sup>st</sup> Cir. 1993); *Onat v. Penobscot Bay Med. Ctr.*, 574 A.2d 872, 875 (Me. 1990)

<sup>26</sup> As noted elsewhere above, both the monopolies & profiteering law and the UTPA are interpreted in accordance with doctrine developed under their federal counterparts. See *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1081 (1<sup>st</sup> Cir. 1993) (interpreting state antitrust law in light of federal Sherman Act, 15 U.S.C. §1); *Bartner v. Carter*, 405 A.2d 194 (Me. 1979) (interpreting state UTPA in light of Federal Trade Commission Act, 15 U.S.C. §45(a)(1)). Moreover, the prohibitions of the FTC Act encompass and include those set forth in Section 1 of the Sherman Act. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

<sup>27</sup> 5 M.R.S.A. § 207(1) (1989); *State of Maine v. Shattuck*, 747 A.2d 174 (Me. 2000) (holding that conduct of motel owner which repeatedly frightens, terrorizes or physically endangers the traveling public is unfair); *Binette v. Dyer Library Ass'n*, 688 A.2d 898 (Me. 1996) (holding that failure to disclose *unknown* information when there is a duty to disclose is unfair); *Guigey v. Bombardier*, 615 A.2d 1169 (Me. 1992) (holding that failure to disclose known material information is unfair).

<sup>28</sup> "All of the committee reports and the statements of those in charge of the [FTC] Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit every trade practice, then existing or thereafter contrived, which restrained competition *or might lead to such restraint if not stopped in its incipient stages.*" *FTC v. Cement Institute*, 33 U.S. 683 (1948) (emphasis added). The term unfair competition "belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931). "It is... clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as 'unfair methods of competition' existing violations of them." *FTC v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394-95 (1952) (emphasis added); see also *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966). "[I]t was the object of the Federal Trade Commission Act to reach *not only in their fruition but also in their incipiency* combinations which would lead to these and other trade restraints and practices deemed undesirable." *Fashion Originators Guild of America v. FTC*, 312 U.S. 457, 466 (1941). The Supreme Court continues to restate this basic proposition when considering actions under Section 5. See, e.g., *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) ("[t]he standard of unfairness ... encompass[es] not only practices that violate the Sherman Act and other antitrust laws but also practices that the [Federal Trade] Commission determines are against public policy for other reasons" [citations omitted]).

- (3) The *Unfair Sales Act*<sup>29</sup> declares below cost pricing by retailers and wholesalers to be unlawful under certain circumstances. Below cost pricing can be harmful to consumers if its purpose and effect is to force rivals out of business, resulting in a reduction in competition and ultimately, higher prices. Predatory below cost pricing by a monopolist which threatens to drive competitors from the marketplace may also constitute illegal monopolization in violation of Maine's monopolies & profiteering law (*see above*). The Attorney General has consistently adopted a conservative enforcement position with regard to these provisions. Overly aggressive enforcement could have the undesired effect of chilling legitimate competition, and raising prices to consumers.
- (4) *The Petroleum Market Share Act*<sup>30</sup> requires annual reports to the Attorney General by wholesalers and refiners of petroleum products. The confidential data gleaned from these reports assists the Attorney General to accurately assess the impact of proposed mergers and acquisitions on competition in affected markets. In addition, the Attorney General employs this data as the basis for an annual report to the Legislature on the competitive health of petroleum markets in the State. Finally, the statute bars refiners from securing control of a retail petroleum outlet within a two-mile radius of another outlet already under its control; and reiterates the UTPA prohibition against unfair methods of competition and unfair or deceptive acts or practices in the context of Maine's petroleum markets.

## § 30.5. Enforcement

### A. Private Enforcement

Private parties (including businesses) who have been injured directly or indirectly by acts which violate the monopolies & profiteering law may sue to recover three times the amount of damages suffered as a result of the Defendants' conduct (known as "treble" damages); in addition, attorney fees and costs are available to a prevailing Plaintiff. In some instances, private Plaintiffs may also be entitled to injunctive relief (*i.e.*, a court order barring a continuation or repetition of the offending conduct).

Similarly, a private consumer injured by conduct violative of the UTPA may seek injunctive or monetary relief under that statute; again, a prevailing Plaintiff is entitled to attorney fees and costs. There is also provision for private suits by injured parties under the Unfair Sales Act and the Petroleum Market Share Act.

### B. Public Enforcement

The Attorney General is vested by law with the legal authority to protect the state's sovereign interests, the integrity of its marketplace and the interests of consumers by enforcing the State's antitrust laws.<sup>31</sup>

Under the monopolies & profiteering law, violations of the prohibitions against agreements in restraint of trade and monopolization may be prosecuted either civilly or criminally; a violation of either provision is a Class C crime, exposing the perpetrator to a maximum of five years incarceration,

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<sup>29</sup> *See generally* 10 M.R.S.A. §§ 1201-1209 (1997).

<sup>30</sup> 10 M.R.S.A. §§ 1671-1682 (1997 and Supp. 2001).

<sup>31</sup> 10 M.R.S.A. § 1104 (1997); 5 M.R.S.A. § 213 (2002).



four years' probation, \$5,000 in fines, and an order for restitution. Violations of Maine's merger statute are exposed only to civil prosecution.<sup>32</sup>

When the Attorney General proceeds civilly under the monopolies & profiteering law, he may seek injunctive relief (a court order) to restrain violations, and (in the case of agreements in restraint of trade and monopolization offenses) a civil penalty not to exceed \$100,000 for each violation. In addition, he may seek treble damages on behalf of injured state agencies, or as *parens patriae* (literally "parent of the state") on behalf of consumers injured directly or indirectly by the offending conduct.<sup>33</sup> The Attorney General may also proceed civilly under the UTPA, and in that context may seek injunctive relief, restitution on behalf of injured consumers, and, in the case of intentional violations, a civil penalty not to exceed \$10,000 for each violation.<sup>34</sup>

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<sup>32</sup> 10 M.R.S.A. §§ 1101-1102, 1104 (1997).

<sup>33</sup> 10 M.R.S.A. § 1104 (1997); *Lund ex rel. Wilbur v. Pratt* 308 A.2d 554, 558 (Me. 1973); *see also Federal Trade Commission v. Mylan Laboratories, Inc.* 99 F.Supp.2d 1, 7 (D. D.C. 1999) (reinstating a dismissed antitrust claim for damages brought by Maine Attorney General as *parens patriae* under Maine's monopolies & profiteering law).

<sup>34</sup> 5 M.R.S.A. § 203 (2002).