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A Review of the Uniform State Antitrust Act

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This article presents a summary and analysis of the important provisions of the Uniform State Antitrust Act. Work on this act by the National Conference of Commissioners on Uniform State Laws started in 1961 and at least two drafts were developed (1963 and 1965)¹ before this final version was approved on August 2, 1973.² The act was also approved by the American Bar Association House of Delegates on February 5, 1974. To date, Arizona is the only state which has adopted the act.³

The Commissioners believed that there was a need for a state-level antitrust act because some restraints of trade are solely intrastate in nature (and not, therefore, subject to federal jurisdiction) and some states do not have anti-trust laws to reach such restraints;⁴ moreover, there is a tremendous diversity of legislation between those states which do have such legislation and the drafters believed compliance would be promoted through the adoption of a uniform act.⁵

Definitions and Exclusions

The act covers all legal persons. This includes individuals, corporations, business trusts and partnerships or any other legal entity.

A violation must occur in a relevant market which is defined both geographically and according to product by Section 1. The geographic market is the area of actual or potential competition. The product market is defined as a line of commerce. All or any part of this relevant market must be within an individual state.⁶ Since the act does state "parts" of markets may be within states it may be assumed that the entire relevant market may extend beyond state lines and thus may be interstate in character. When this is true both private and governmental plaintiffs will have a choice of using the state or federal courts. For the reasons stated below, non-government plaintiffs would certainly choose the federal system.

In language identical to that of the Clayton Act,⁷ labor, agricultural or horticultural organizations instituted for the purpose of mutual help are excluded. The labor of a

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human being is also excluded as not being a commodity or article of commerce.

Violations

Sections 2 and 3 are the operative parts of the act and are quoted below in their entirety:

Section 2. A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.

Section 3. The establishment, maintenance or use of a monopoly, or an attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding competition or controlling, fixing, or maintaining prices, is unlawful.

Section 2 of the act combines the conspiracy aspects of Section 1 of the Sherman Act⁸ with the establishment of monopoly aspects of Section 2 of the Sherman Act, thus declaring conspiracies in restraint of trade or contracts or conspiracies to monopolize to be illegal. Joint activity is the key to a violation of Section 2.

Section 3 contains two major elements. Not only must monopoly power or an attempt to use or establish it be proved, but the purpose of the monopoly must be to exclude competition or control price. By adding the last element of unlawful purpose, the drafters are making it clear that a violation would occur only upon proof of an anti-competitive intent. In the absence of proof of this intent, monopolies would be legal. The drafters recognized that monopolies (by definition, one seller in a relevant market) do exist in many smaller communities because the economic base in such communities cannot support more than one seller.⁹

Investigations

The longest and most detailed portion of the act concerns "official Investigations." It provides that if the state attorney general has reasonable cause to believe that a person has information or evidence relevant to an investigation for a violation, he may examine that person under oath, or demand the production of tangible evidence. This demand may be made before an action is initiated (emphasis mine).

The express right of the attorney general to demand this evidence from any person before filing suit is, potentially, the strongest and most noteworthy provision of the act. Currently, only fifteen states expressly provide within their respective antitrust statutory schemes for the power

to compel disclosure of evidence before suit.¹⁰ However, in some states, the attorney general may have this power otherwise conferred by existing law. Nevertheless, an attorney general with a consumer-oriented perspective might wield substantial power in the use of this demand-for-evidence provision by asking pertinent questions about pricing practices or requesting certain evidence. The comments to the act state that this power to demand evidence extends beyond that provided in federal law since tangible objects may be discovered (rather than "documentary materials" as allowed by federal law¹¹) and the demand may be made of any person, not just the one under investigation.¹²

The act, however, provides substantial protection for the one from whom the information is sought. This protection may easily thwart the investigatory power outlined above. Section 6(b) provides that if a person objects, the attorney general must go to a court where the person resides or has his principal place of business to request a petition ordering disclosure of the information. The court must find that there is reasonable cause to believe there has been a violation of the act and the information sought is relevant to this violation. So, in cases where the attorney general attempts to demand evidence before trial, the one subject to the demand may force the issue into court by objecting. Most prudent attorneys for potential defendants will most likely object, thus, one must conclude, the investigatory powers are substantially reduced and may add nothing new to the powers most attorneys general already have.

Remedy

The remedy provisions are separated into two major sections. The first, Section 7, allows the attorney general, or a prosecutor with the attorney general's permission or at his request (emphasis mine) to ask for injunctive relief or a civil penalty or not more than \$50,000 for each violation. It is the court that assesses this penalty for the benefit of the state. It should be emphasized that the privilege of asking the court for this penalty or injunctive relief is tied directly to the permission of the state's highest law enforcement officer. The reasons for this do not appear in the official comments to the act. One may argue that a local prosecutor, for political reasons, would be hesitant to bring a suit requesting the penalty against a local violator; but, under the above Section 7, he should ask for the penalty if the attorney general requests him to do so. If this is the drafters' intent, should there not have been included a provision in the act requiring a local prosecutor to inform the attorney general when the prosecutor is contemplating an antitrust suit? Without this provision, the attorney general may not learn of the alleged violation and thus the potential for recovering the penalty.¹³

Or, one may imagine a situation in which a local prosecutor wants to request the penalty of the court, but this

is not allowed because the attorney general withholds permission for political or other reasons. It seems that this contingency is a real possibility since the act does require a request from the prosecutor to the attorney general in every instance. It may be argued that this provision will protect local violators from prosecutors who hold a grudge; but, the violator is already protected from this by providing that the court assess the penalty upon the request of the prosecutor.

Perhaps these objections to this provision are ill founded since in reality local prosecutors do not have the expertise to try an antitrust suit; therefore, almost all prosecutions will be initiated by the attorney general. Nevertheless, it is rare that a local prosecutor's judgment as to selection of the penalty is usurped by the attorney general. Certainly the pros and cons of this potential political aspect of the act should be debated by the several legislatures.

Finally, it should be noted that the severity of this fine (\$50,000) is minimal in light of the fact that some states presently provide for revocation of a corporation's charter upon conviction of an antitrust violation.¹⁴

The second damage section contains two subsections. Section 8a provides that the state, a political subdivision or any public agency may sue a violator for injunctive relief and damages actually caused. Taxable costs and attorney's fees may be assessed by the court.

Section 8b provides that a person (defined in Section 1 as an individual, corporation, business trust, partnership, association, or any other legal entity) may request appropriate injunctive relief, damages and, to be determined by the court, costs and a reasonable attorneys' fees. It further provides:

If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of three times the damages sustained.

A potential interpretation problem is created by allowing "persons . . . or any other legal entity" to request treble damages when it appears to be the obvious intent of Section 8a to provide for (and yet limit) the recovery of governmental agencies to single damages. The language of Section 8b should have expressly excluded public agencies, because allowing "any legal entity" to ask for treble damages creates an ambiguity. Also, a definition of public agency in Section 8a would be helpful. For example, is a government owned utility or a housing authority a public agency?¹⁵

The greatest weakness of the act is confining the recovery of treble damages to those instances in which the trier of fact finds the violation flagrant. A flagrant violation is not defined in the act, nor are the elements of a flagrant violation familiar to the law.¹⁶ Of the 15 states presently providing for multiple damage recovery,¹⁷ only New Hampshire limits the recovery to wilfull or flagrant violations.¹⁸

There is no case law in New Hampshire which adds meaning to the phrase of "wilfull or flagrant" violations. By first of all limiting the private treble damage action to a finding of a flagrant violation on the part of the trier of fact and then by failing to define flagrant, the act discourages private actions.

It is quite obvious that some of the drafters viewed the private, treble-damage remedy not as it was intended, to involve the private sector in antitrust enforcement,¹⁹ but as a burdensome penalty.²⁰ This circumstance is extremely unfortunate. It is common knowledge that the trial of an antitrust case demands specialized talents and expertise. This expertise exists in the private sector and in the Justice Department and Federal Trade Commission of the United States. Since the latter must confine their efforts to interstate violations, this places the burden for antitrust enforcement of intrastate violations on the private sector. By limiting private litigants' recovery to undefined instances of flagrant violations, a large incentive to the private litigant is eliminated. It is obvious that if it can be argued reasonably that the violation is interstate in character, all private litigants will opt for the federal courts. Indeed, some states with treble damage provisions in their current laws have experienced few or no attempts to use the state law and courts.²¹ With private litigants discouraged from using the act because of the above reasons, the burden of enforcing the act must fall on the states' attorneys general office, institutions which, generally speaking, lack the specialized knowledge to prosecute the antitrust violator.²²

Other Important Provisions

A final judgment in favor of the state is prima facie evidence against the defendant in a subsequent private action. But, this applies only to those matters finally adjudicated between the state and the defendant.

Finally, the state must bring its action within four years after the cause of action accrues. Private parties must begin suit for damages within the same time or within one year after the conclusion of a suit initiated by the state, whichever is later.

Conclusions

It is noteworthy that the act does not expressly mention mergers. One may surmise that a merger or acquisition which would be a violation under Section 7 of the Clayton Act²³ would be a violation of either Section 2 of this act (a contract or combination to monopolize) or Section 3 (an attempt to establish a monopoly). Yet, if the drafters wanted to deal with mergers and acquisitions why were they not more explicit? Also, unfair trade practices are an obvious omission.

One cannot argue with the proposition that if all states adopt this act an obvious measure of uniformity would be achieved. This uniformity would certainly make it easier for a corporation to defend itself against alleged violations brought by more than one state. Also, the act does give state attorneys general an explicit investigatory prerogative which may not be enjoyed at the present time. The wise use of this power may thwart some restraints of trade.

Against these benefits one must weigh what might be lost by adopting this act in its present form. Practically, by limiting the treble damage recovery to flagrant violations,²⁴ the private sector enforcement potential is lost. If the federal experience has been that private enforcement of the antitrust laws is both desirable and effective, then the public interest is not served by eliminating this potential for enforcement on the state level.

In short, the weaknesses of the act in tying the request for a civil penalty to the permission of the attorney general in cases by the government, in not defining "public agency" in Section 8 and in predicating the recovery of treble damages upon the finding of a "flagrant" violation, outweigh whatever strengths or benefits which might accrue because of uniformity. If the act could be rewritten eliminating these weaknesses, then considerably more enthusiasm for the act may be generated.

It is true that many state antitrust laws were adopted in the late 19th century and have never been enforced. A reasonable approach for finding an explanation for this inactivity would have been to survey all of the attorneys general of the states with such laws. If the antitrust laws of the several states were needlessly complex or too severe in the potential penalty or antiquated for numerous reasons, then a model act, one which could be amended, and not a uniform act, predicated upon unsubstantiated notions of increased compliance because of uniformity, would have been the logical remedy.

Footnotes

1. National Conference of Commissioners on Uniform State Laws, Unpublished Proceedings, 81st Annual Conference, August 10, 1972, San Francisco, Calif., p. 3.
2. 4 CCH Trade Reg. Rep. ¶ 30,101 (1974). A copy of the final draft which includes official comments may be found in, Handbook of the National Conference of Commissioners on Uniform State Laws, 361-366 (1973); or a copy with a prefatory note and comments may be obtained by writing the National Conference of Commissioners on Uniform State Laws, 645 North Michigan Avenue., Suite 510, Chicago, Illinois 60611. The final draft of the act with the prefatory note and comments is hereafter referred to as the "Final Draft."
3. Ariz. Rev. Stat. 344-1411 et. seq. (1973) (4 CCH Trade Reg. Rep. 30,402, 1974).
4. The following nine states have no specific statutory provisions prohibiting combinations and conspiracies: Alaska, Delaware, Kentucky, Nevada, Oregon, Pennsylvania, Rhode Island, Vermont and West Virginia.
5. Final Draft, *Supra*, note 2,3-4. Whether or not the adoption of a uniform act by the several states will promote compliance is a speculative proposition. One may conclude that since 41 of the states currently have statutory provisions prohibiting combinations and conspiracies and since few of the attorneys general in these states have ever prosecuted violators of these laws, widespread compliance exists. In light of the fact that some attorneys general are now becoming more active in this area suggests, however, that for whatever reason, violations existed but were not prosecuted. Illinois, for example, one of the states presently relatively active in antitrust enforcement, did not experience one reported case reflecting the successful application of its antitrust acts by the state or private litigants from 1909 to 1962. Univ. of Ill. Legal Services, *The Law of Competition in Illinois*, 39 (1962). However, currently, Illinois is very active in this area. See Atkins, *The Illinois Attorney General's Role in Consumer Protection-Illinois Antitrust Act, Consumer Fraud Act and Other Available Remedies*, 15 *Antitrust Bull.* 369 (1970).
6. No market analysis is needed if the state court finds the activity to be unreasonable per se. Final Draft, Comment, *Supra*, note 2,5.
7. 15 U.S.C. § 17 (1914).
8. 15 U.S.C. § 1 (1890).
9. Similarly, the U.S. Supreme Court has said that the Sherman Act language does permit the existence of monopolies created by force of accident. *United States v. Aluminum Co. of America*, 148 F. 2d 416,

429-430 (2d Cir., 1945).

10. These states are Hawaii, Idaho, Kansas, Maine, Maryland, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, South Carolina, Washington, Wisconsin, and Wyoming.
11. Antitrust Civil Process Act of 1962, 15 U.S.C. § 1312 (1962).
12. Final Draft, Comment, Supra, Note 2, 8.
13. The act thus implies that all criminal violations will be prosecuted by the attorney general and not a local prosecutor.
14. See, e.g., Burn's Ind. Stat. Ann. 24-1-1-2 (1897) (4 CCH Trade Reg. Rep. ¶ 31,701.02,1971).
15. It is reported that a federal judge in Philadelphia upheld the U.S. Government's position that the Tennessee Valley Authority was a "person" and was separate and distinct from the U.S. Government and that injury to it by certain heavy electrical equipment manufacturers could properly be the subject of treble damages. C. Bane, *The Electrical Equipment Conspiracies, The Treble Damage Actions*, 225 (1973).
16. There is no definition of this word in the 4th Edition of Black's Law Dictionary, 1951. However, the 1974 Cumulative Annual Pocket Part to 17 Words and Phrases does cite a case in which it is stated:

The word flagrant when present in a statute or regulation imports behavior which is open, notorious or wilful in nature and it means conduct which is shocking or outrageous. *Campbell v. England*, 185 A.2d 726, 727 (Mun. Ct. of App., Dist. of Columbia, 1962).
17. States providing for treble damages are California, Hawaii, Idaho, Illinois, Indiana, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Oregon and Washington; two states, Ohio and Michigan, provide for two-fold damages.
18. New Hampshire Rev. Stat. Ann., 356:11 (1966) (4 CCH Trade Reg. Rep. ¶ 33,202.11, 1973).
19. Justice Black described the potential treble damage remedy in federal legislation as a "vital means" of enforcing the United States antitrust policy. *Perma Life Mufflers, Inc. v. International Parts*, 392 U.S. 134 (1968). Likewise, the executive branch of the federal government has recognized that private antitrust suits provide a "substantial and meaningful deterrent" to restraints of trade. *Parker, Treble Damage Action-- A Financial Deterrent to Antitrust Violations*, 16 *Antitrust Bull.* 483 (1971) citing remarks by Richard W. McLaren of the Justice Department

20. One of the drafters of the act referred to the federal treble damage provision as, ". . . one of the greatest penalties in the law of the United States." National Conference of Commissioners on Uniform State Laws, Unpublished Proceedings of 82nd Annual Conference, July 26, 1973, Hyannis, Mass. 91. During these debates, the commissioners who had drafted the act indicated they had no evidence as to the potential penalizing effect of private suits in states which provided for treble damages. *Id.*, p. 95. Some evidence indicates that, at the federal level, the treble damage awards are usually less than the profit gained by the violating firm. Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Damages in Private Antitrust*, 5 *Antitrust Law & Economics Rev.* 101 (1972). Also see, Loevinger, *Private Action, The Strongest Pillar of Antitrust*, *Antitrust Bull.* 167 (1958) wherein it is argued that the award of treble damages involves no windfall to the plaintiff since his injuries such as loss of time and loss of productive effort are often not capable of direct proof.
21. Atkins, *Supra*, note 5.
22. Possible exceptions are New York, California and Illinois. Illinois for example, had six full-time lawyers and two investigators working in the area of antitrust in 1969-1970. Atkins, *Supra*, note 5, 373.
23. 15 U.S.C. § 18 (1950).
24. Since the act does not define this key word, flagrant, it is left to state court interpretation. One state court may define flagrant as wilful activity, another may define it as outrageous, clearly a separate concept. Thus, by failing to define this word, the act itself seems to promote diversity in one of the most important provisions of the act.