

GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
JOINT STATE GOVERNMENT COMMISSION
HARRISBURG

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174-179

SUBJECT: Anti-Trust Law

TO: Louis B. Kozloff
Executive Director, House Consumer Protection Committee

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Background Information

Most of the background information that I am discussing in the next several pages was furnished from a study entitled "State Anti-Trust Laws and Their Enforcement," published by the National Association of Attorneys General, October, 1974. This study not only contains background information, but also contains comparative analysis between the proposed Pennsylvania Statute (hereinafter referred to as Model Act, see Appendix A) and statute proposed by the National Conference of Commissioners on Uniform State Laws (hereinafter referred to as the Uniform Act). ^{All B}

I. Reason for State Laws: (1) The Federal government cannot and should not bear sole responsibility in this area.

(2) Attorney General of the State is the people's ⁰advocate, and requires him to combat abuses of the marketplace through not only anti-trust, but also consumer protection programs.

(3) Great growth in public procurement, and the fact that the State is now a major purchaser of most items; therefore a vigorous anti-trust program can save substantial sums in govern-

ment purchasing.

(4) Deterrent effect of act of enforcement program on the local as well as the Federal level.

(5) Anti-Trust efforts are necessary to prevent increased organized criminal activity in the economy.

(6) A recent decision by the U.S. Supreme Court apparently exclude^s the operation of Federal Anti-Trust laws from intrastate activities even though such ^{activities} may affect interstate commerce.

(Philadelphia Inquirer, December 18, 1974, Page 8B). As soon as a copy of the ~~is~~ opinion is available, I shall forward a detailed analysis of the opinion in a supplementary memorandum.

II. Number of States Involved

All but 10 states do have anti-trust legislation of varying effectiveness. Pennsylvania is the most heavily populated state without one. Within the past decade, 12 states have enacted new anti-trust statutes.

III. Relationship Between Federal and State Law

The current judicial view is supportive of the extension of State anti-trust regulation to include conduct and practices that, while possessing a local connection, nonetheless affect or are in interstate commerce. The Federal Anti-Trust laws have not preempted intrastate. *STATE ACTION, MA IS SURE ACTION RE-
STATE ACTION MA (EX-
CLINER)*

The current position of the Justice Department in Washington is that anti-trust is one area where the states and the Federal government ^{SHOULD} work together to enforce basic National policy. In this regard, it should be noted that a few states have obtained grants from the Law Enforcement Assistance Administration (LEAA) for anti-trust activities. Alabama - \$300,000; Iowa - \$108,000;

Wisconsin - \$120,000; Louisiana - \$176,000 and Florida - \$126,000.

IV. Areas of State Action

This is a partial list of areas where states have enforced anti-trust laws: Air Freight, Asphalt, Auto Repair, Bakeries, Florists, Diaper Service, Milk, Tires, Tobacco Warehouses.

Price fixing appears to be the most common violation.

Price fixing may take many forms, including fixing list prices, setting uniform discounts, or establishing minimum mark-ups. It may involve a conspiracy between manufacturers ^{and/or} ~~dealers or manufacturers and dealers.~~ _{dealers}

A single investigation may involve a variety of anti-trust violations. One former assistant attorney General of Illinois gave the following hypothetical example: XYZ Diaper Co. ^{contracted} ~~contracted~~ a "friendly" linen supply company which agreed to lend XYZ funds to get started in business on the condition that it not use competitors' linens (exclusive dealing and unlawful tying); XYZ was also promised a 10% discount on its linen purchases (discriminatory pricing); XYZ, at a meeting with its two competitors, agreed to an increase in list prices (price fixing); the three companies also decided that one company would take the black community, and one, the Puerto Rican, the third, the white (allocation of customers); XYZ eventually began to cut prices, because of its lower cost, in an effort to force its competitors out of business.

This hypothetical illustrates the possibility that there may be many anti-trust violations in one investigation of one set of circumstances.

Comparative Analysis of
the Model Act and
the Uniform Act

SUMMARY

1. Prohibited Conduct

Model Act

Requires an unlawful purpose only in the case of an attempt.

Uniform Act

Requires that the forbidden act must have been instituted for unlawful purpose.

2. Exemptions

Model Act

Does not require proof of relevant markets in a ~~conspiracy case~~.

Uniform Act

Does require proof of relevant market in a ^{ALL} conspiracy case.

Both consumer organizations and closely regulated activities (public utilities, professions) are exempt.

2. (EXEMPTION)

Neither consumer organizations nor activities closely regulated by the Federal or State government are exempt.

3. Enforcement Authority

Model Act

The district attorney has as much right to file suit as the Attorney General.

Uniform Act

The district attorney must seek permission of the Attorney General to file suit.

4. Cooperation Among Public Officials

Model Act

Requires cooperation among public officials.

Uniform Act

Has no similar provision.

5. Civil Suits

Model Acts

Permits the Attorney General to file suit on behalf of Pa. citizens who have suffered damages; this act provides for distribution of funds awarded by the Court.

Uniform Acts

Has no similar provision.

6. Notification of Action

Model Acts

Requires that copies of all civil complaints filed by persons other than the Attorney General must be mailed to the Attorney General.

Uniform Acts

Has no similar provision.

7. Jurisdiction of the Courts

Model Acts

Provides for filing of suits in the Common Pleas Court, and permits the Attorney General to file ~~public~~ action in county in which the State Capitol is located (Commonwealth Court)

Uniform Acts

Provides for instituting of suit in the equivalent of the Common Pleas only.

8. Civil Investigative Demands

Model Acts

Permits examination of documents and records but not other tangible objects.

Provides 20 days within which to answer a demand.

Uniform Acts

Does permit examination of other tangible objects.

Does not specifically provide any day but merely a reasonable period.

Civil Investigative Demands (cont'd.)

Model Act

Uniform Act

Sets out specific procedures for service of the demand.

Service to be made in the manner required by the State.

If information demanded would not be allowed under subpoena, it is forbidden under this act.

No comparable provision.

Authority to conduct the examination restricted to the Attorney General or his authorized representative.

No similar provision.

All testimony must be recorded and transcribed.

No similar provision.

The witness has a right to copy the documents or to obtain a transcript of the statement.

No similar provision.

Witness has a right to be advised by counsel, although counsel does not have a right to participate in the investigation.

No similar provision.

If the person upon whom demand is served objects to any or all of the contents of the demand, he must file a motion to quash; therefore, burden is upon the person served in that respect.

The burden on the Attorney General to prove that his demand is justified.

9. Witness Immunity

Provides for witness immunity

No similar provision.

10. Civil Damages

Treble damages are mandatory for private and public plaintiffs.

Treble damages are authorized for private plaintiffs only, and are not mandatory.

11. Civil Penalties

Model Act

The maximum is \$100,000
or \$500 per day.

Uniform Act

\$50,000 per violation.

12. Criminal Penalties

Provides criminal penalties
for "knowing" violations.
Maximum is 5 years in prison
or \$200,000,000 or a \$1,000
per day whichever is greater
or both fine and imprison-
ment.

No criminal penalty.

13. Revocation of Charter
or dissolution of
Corporation

Model Act

Provides this for both
domestic and foreign
corporations.

Uniform Act

Has no comparable
provisions.

14. Consent Decree in
Criminal Actions

Provides for such a
consent decree.

Has no comparable
provisions.

15. Anti-Trust Revolving
Fund for Monies Re-
ceived by the Attorney
General from Anti-Trust
Actions

Model Act

This is provided for.

Uniform Act

No comparable provisions.

16. Judicial Construction

Model Act

Directs courts to
follow Pa. Common Law
and judicial interpre-
tations of comparable
Federal statutes.

Uniform Act

Requires courts to
carry out the purpose
of making the law uni-
form in all states with
respect to anti-trust
enforcement.

Comparative Analysis of
Model Act and Uniform Act

1. Prohibited Conduct - Model Law contains simple prohibitions against restraint of trade and monopolization. Sec. 4 and 5. In the definition section of this draft "person" is defined to include "any natural person" or the estate thereof, or trust or association of persons, whether formal or otherwise, or any corporation, partnership, company or any other legal or commercial entity. "Trade or commerce" is defined to include "all economic activity involving or relating to any commodity, service or business activity". Therefore, forbidden activity is broadly defined.

The drafters of the Uniform Act have also adopted the Federal Sherman Act standards of "contract, combination or conspiracy", but with an important difference. Sec. 2 of the Uniform Act says that "A contract, combination or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful". The preceding section, Sec. 1 defines "person" as any individual, corporation, business trust, partnership, association or any other legal entity. "Relevant market" is defined as geographical area of or actual potential competition in a line of commerce, all or part of which is within the State.

The Attorney General objected to the requirement of relevant market. He believes that Federal case law requires determination of product and geographic market before an analysis of monopolization is possible; however, neither case law nor economic theory is clear on whether proof of relevant market is necessary in showing attempts to monopolize and the law is clear that such proof is unnecessary in a conspiracy to monopolize case, where the act of conspiring is the critical element of the offense.

Sec. 3 of the Uniform Act prohibits only monopolies established for the purpose of excluding competition or controlling, fixing or maintaining prices. He believes that the question of purpose or intent is relevant only in connection with the separate offense of an attempt to monopolize.

For an example of a statute which does list specific offenses see Appendix C, Minnesota.

The benefit to be gained from a ^{RAIA} ~~board~~ definition is flexibility in judicial interpretation so that the law will be able to use various economic and judicial concepts since this is a complicated area. *But price and demand like RAIA, attempt*

2. Exemptions - The exemptions found in the Model Act, are those traditionally found in anti-trust laws. These are: (1) activities of any labor organization; (2) activities of any agricultural or horticultural cooperative organizations; (3) activities of consumer organizations. The Uniform Act, Sec. 4 does not exempt consumer organizations.

The Model Act, Sec. 6 also specifically exempts "activities authorized or approved under Federal or State regulatory scheme to the extent that such scheme is so comprehensive that enforcement of this act would either be unnecessary", or, alternatively, "disruptive of that regulatory structure due to a plain repugnancy between this act and the regulatory provisions." This exemption would apply for example to Public Utilities and professions. The Uniform Act does not include a similar provisions.

3. Enforcement Authority - The Model draft authorizes either the attorney general or district attorneys to investigate suspected violations and institute proceedings. The Attorney General may also direct the district attorney of any county where proceedings are brought to assist in such investigations and proceedings (Sec. 7). The Uniform Act gives less authority to the local prosecutors. It authorizes the Attorney General, or the district attorney "with the permission of at the direction of the attorney general" to institute actions (Sec. 7).

4. Cooperation Among Public Officials - Sec. 8(m) of the Model Act requires all State officials and their assistants "and all other persons" to furnish to the Attorney General all assistance and information within their power, when so requested. Sec. 21 authorizes the Attorney General to cooperate with Federal officials and officials of other

states. The Uniform Act does not have a similar provision.

5. Civil Suits - Sec. 10(b) of the Model Act permits the Attorney General to bring suit on behalf of the State and other public bodys^{ies} of the State. ~~Suit may be brought in Federal court for violation of Federal law, as well as under this act.~~ The Uniform Act has a similar provision Sec. 8(a).

Furthermore, 10(c) of the Model Act permits the Attorney General to file suit as parens patriae (a type of representative action brought by the Commonwealth respecting damages to the general economy of the State or to citizens of the State for damages dustained by them.) *The Uniform Act has no such provision*

Sec. 10(d) provides that the Attorney General, in suits under 10(b) and (c) may recover aggregate damages sustained by public bodies and citizens without separately proving their individual claims. *The Uniform Act has no such provision.*

Proof maybe based on "statistical sampling methods", the proportional allocation of excess profits to sales within the State, "or such other reasonable system of estimating aggregate damages as the court in its discretion may permit".

Provision is made for distribution of funds received from actions under this section. The Attorney General shall pay into an anti-trust revolving fund an amount attributable to the recovery of the State and either the amount awarded

him as attorneys' fees or an amount equal to the cost of the case whichever is greater. Other funds are to be distributed according to rules promulgated by the Attorney General, so as to afford citizens and public bodies other than the State an opportunity to secure proportional shares attributable to their respective claims. (10(e)) €

unif
act
sec
10

The Model Act also authorizes the Attorney General to enter into agreements with any other plaintiffs who brought a similar action relating to the investigation and litigation of an action (Sec.(f)).

unif Act
sec 10

6. Notification of Action - Sec. 14 of the Model Act requires the copy of any civil complaints filed under this Act (other than by the Attorney General) must be mailed to the Attorney General. The action may not proceed until proof has been served that such notice has been filed.

unif Act
sec 14

7. Jurisdiction of Courts - Sec. 5 of the Uniform Act provides that all actions shall be brought on the equivalent of the Common Pleas court. The Attorney General also recommends the addition of a provision to permit the Attorney General to file public actions in the county in which the State Capitol is located. The Model Act meets this recommendation by authorizing actions to be brought in the Commonwealth Court, as well as the Court of Common Pleas (Sec. 9(a)).

8. Civil Investigative Demands. Section 8(b) of the Model Act and Sec. 6(a) of the Uniform Act empower the Attorney General to authorize service of a written investigative demand when the Attorney General has reason to believe that the person to be examined has relevant knowledge or possesses relevant documents; under both acts, ^{the} demand would require the person to be examined under oath, to answer written interrogatories under oath, and provide documentary materials ~~for~~ inspection or copy. Both provisions had their origin in the Anti-Trust Civil Process Act. Both, however, extended the Federal concept by allowing demand to be served on any person, rather than just the person under investigation. The Uniform Act also broadens the Federal law by authorizing use of the demand for "other tangible objects", in addition to documentary materials (6(a). (^{was taken from Bell for the Act} _{ANS from the Act})

Procedures and content for the investigative demand are specified as follows in the Pennsylvania draft, Sec. 8(c): It shall: (1) State the section or sections of this act, the alleged violation of which is under investigation and the general subject matter of the investigation; (2) Prescribe reasonable return date no less than 20 days from the date of the demand; (3) Specify time and place at which the person is to appear and give testimony or produce documentary materials, and furnish answers to interrogatories, or do any or a combination of the aforesaid; (4) Describe by class any documentary material required to be produced,

so as to clearly indicate what is demanded; and (5) Contain any interrogatories to which written answers under oath are required. The Uniform Act is similar (Sec. 6(a)).

The Model Act sets procedures for service of a demand 8(b); on the contrary, the Uniform Act merely says it shall be served in a manner required in the State 6(a). The Model Act also provides that it is sufficient for the person from whom information is required to specify the records from which the answer may be derived and to afford the Attorney General reasonable opportunity to examine such records and to make copies or summaries (8(e)). Both the Pennsylvania draft and Uniform Act contain provisions to safeguard the rights of individuals served in investigative demand, although these provisions differ. Subsection 6(c) of the Uniform Act provides that any procedure, testimony or material produced under this section of the Uniform Act shall be kept confidential before an action is brought, unless confidentiality is waived by the person being investigated and the person who testified or produced material, unless disclosure is authorized by the Court. This section is intended to provide protection for the witness and also to encourage compliance with demands. The Model Act also insures that information and material submitted pursuant to a demand shall not be made public (8(i)).

The Model Act contains a number of safeguards not found in the Uniform Act. Section 8(d) states that no

demand shall contain any requirement which would be unreasonable or improper if contained in a subpoena or shall require disclosure of any privileged information (lawyer-client relationship). Section 8(h) restricts the authority to examine persons to the Attorney General or his representative, who must be designated in writing. All statements made must be recorded and transcribed. *8(R) ACM* Sec. 8(i) gives any person the right to retain a copy of any document he produces and a transcript of his statements. The right to be accompanied by counsel is also assured, although counsel does not otherwise have the right to participate in the investigation.

Both the Model and the Uniform Act provide for "enforcement of a demand." The Model Act requires the person under investigation to raise his objection to an investigative demand by way of a motion to quash, 8(g) while the Uniform Act places the procedural burden on the procedural burden on the Attorney General to justify his demand (6(b)).

The Model Act allows a person upon whom an investigative demand is served to file a petition for an order of court modifying or setting aside a demand. The petition may be filed within 20 days after service of the demand or at any time before the return date specified. The petition must specify each ground upon which the petitioner relies in seeking relief, and may be based on a failure of a demand to comply with the provisions of the act or upon

any Constitutional or other legal right or privilege
(8^g(~~m~~)).

The Uniform Act provides that, if a person fails to comply with the demand served on him, the Attorney General may file a petition for an order to enforce the demand. Notice of hearing, the petition and a copy of the petition must be served upon the person, who may appear at the hearing. The Court shall order compliance, subject to whatever modification¹⁷ shall prescribe if it finds that there is reasonable cause to believe that there has been a violation of this act, and that the information sought is relevant to the violation. The Court may make any further order that justice requires to protect the person from unreasonable annoyance or embarrassment (6(b)).

9. Witness Immunity - The authority to compel a witness to testify over a claim of his privilege against self incrimination by offering him immunity¹⁵ as a basic prosecutorial tool. Sec. 8(1) of the Model Act requires that the Attorney General must establish the need for a grant of immunity through a court hearing (no similar provision in the Uniform Act).

10. Injunctive Relief - The Model Act (Sec. 9) states that the courts may grant injunctions against violators, If irreparable damage is threatened by a violation or in order to prevent future violation. A similar provision is also in the Uniform Act (Sec. 8).

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~~Uniform Act is differed in that trebled damages are not mandatory and are not available to governmental entities (Sec. 8).~~

11. Civil Damages - The Model Act, Sec. 8 provides mandatory treble damages for both public and private plaintiffs (Sec. 10). The Uniform Act permits treble damages only for private plaintiffs, and even in those cases it is not mandatory (Sec. 8).

12. Civil Penalties - The Model Act authorizes a civil penalty. ^{^ and in cases of \$100,000 or \$500,000} Civil penalties are not mandatory (Sec. 9(e)).

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The Uniform Act, Sec. 7 provides a non mandatory penalty of ^{not more than} \$50,000 for each violation.

13. Criminal Penalties - A major difference between the ^{Model Act} ~~Mandatory~~ and the Uniform Act is that the former contains criminal penalties.

The ^{Model} ~~Mandatory~~ Act provides that the Attorney General ^{of} the district attorney ^{may} institute criminal action for persons who "knowingly" violate this act. Penalties are a maximum of 5 years imprisonment or a fine of 2 million or \$1,000 per day, whichever is greater, or both a fine and imprisonment. ^{(see (a))}

14. Revocation of Charter of Dissolution of Corporation - The Model Act (Sec. 12) provides for forfeiture of corporate privileges if a domestic corporation fails to comply with the terms of a final judgment rendered by a court for violation of the act. Proceedings for forfeiture may be brought

by the Attorney General. The Court "with due consideration to all relevant factors, including relevant public interest and competitive and economic factors" may order dissolution, suspend the privilege to conduct business, or provide other relief. In the case of a foreign corporation, the court may order revocation or suspension of the privilege to conduct business, following the same procedures. There is no similar provision in the Uniform Act.

15. Consent Decree - The Model Act authorizes the Attorney General and the district attorney to petition the court for entry of a consent decree dismissing any criminal anti-trust prosecution. The court must review the proceeding to determine if such decree is in the public interest. (11/d) There is no similar provision in the Uniform Act.

16. Limitation of Actions - Both the ^{Model} ~~Mandatory~~ Act (Sec. 18) and Uniform Act (Sec. ¹⁰~~11~~) provide for a four-year statute of limitation.

17. Judgment in Favor of State as Prima Facia Evidence - Sec. 16 of the Model Act is derived from the Federal Clayton Act and provides that a formal judgment or decree for the State, (other than a consent judgment or decree entered before any testimony has been taken) is prima facia evidence (on its face) against any person - and any other action under this act. There is a similar provision in the Uniform Act (Sec. ⁹~~19~~). This section allows plaintiffs to benefit from a finding of liability in a previous civil or criminal prosecution. Under this concept, the plaintiff is left with the

task only of ^{provision} ~~providing~~ standing (right to sue) and damages. The consent decree and decree entered before testimony is taken are made exception to this ^{provision} ~~proven~~ in order to grant incentive to defendants for immediate compliance.

18. Anti-Trust Revolving Fund - The ^{MUSCLE} ~~Mandatory~~ Act provides that all monies received by the Attorney General from anti-trust actions, including those brought under Federal law, shall be placed in ^{AM} "anti-trust enforcement fund". At the end of each fiscal year, any balance in excess of \$1,000,000 is to be deposited in ^{T/C} a General Fund. The enforcement fund can be expended only for anti-trust activities, and estimates of ^D expenditures must be approved in advance by the Governor. There is no similar provision in the Uniform Act.

(see 17)

19. Judicial Interpretation - Sec. 22 of the Model Act specifies that this act shall be construed in harmony with decisions based on Pa. common law and with all judicial interpretation of comparable Federal statutes. The act shall be interpreted to overrule the jurisdiction of State regulatory agencies, except when the regulatory scheme is so pervasive that it indicates the Legislature's intent to substitute governmental supervision of certain activities (public utilities, professions) ^F or governmental regulations of anti-trust activities. Sec. 12 of the Uniform Act also concerns statutory construction, but says that the act shall be construed to effectuate its general purpose to make

uniform the law with respect to the subject of this act
among those states that have enacted it.