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State Antitrust Provisions

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TABLE OF CONTENTS

STATE ANTITRUST PROVISIONS

UNFAIR COMPETITION AND PENAL VIOLATIONS: STATUS IN OHIO

PART I

PART II

THE VALENTINE ACT

MUNICIPAL REGULATION OF BUSINESS IN OHIO

NOTES

State Antitrust Provisions

The current interest of states in enforcing their existing antitrust laws and in enacting new laws is comparable to that of the "trust busting" era prior to World War I. The impetus of this activity can be traced to 1957 when the New York State Bar Association conducted a comprehensive study of the antitrust laws of that state.[1] The committee concluded that a genuine need for more effective enforcement of the New York antitrust laws existed and made several recommendations to that effect.

Since then the federal government has encouraged the enforcement of state antitrust laws in a number of ways. In 1960, state antitrust law enforcement was the principal topic discussed at the National Conference on Consumer and Investor Protection.[2] Also, the proposed uniform state antitrust law has been a product of federal-state cooperation.[3] The reluctance of some states to actively enforce their existing antitrust laws has been attributed, in part, to the possible pre-emption and usurpation of this area by effective congressional legislation.[4] Through active federal encouragement of state enforcement, fear of federal-state conflict appears to be eliminated.[5] Hence, there seems to be little reason for the several states to have misgivings about rejuvenation of long-neglected state antitrust laws.

HISTORY OF STATE ACTIVITY

The number of constitutional and statutory prohibitions by states and territories against trusts and monopolies prior to passage of the Sher-

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1. N.Y.S.B.A., REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS (1957).

2. See CCH ANTITRUST LAW SYMPOSIUM 19 (1961); N.Y. Times, March 11, 1960, p. 15, col. 6 (city ed.), The Wall Street J., Aug. 11, 1960, p. 1, col. 6.

3. See Stern, *A Proposed Uniform State Antitrust Law: Text and Commentary on a Draft Statute,* 39 TEXAS L. REV. 717 (1961).

4. For an excellent discussion in the field of possible pre-emption of state law by federal activity, see Note, 61 COLUM. L. REV. 1469 (1961).

5. See, *e.g.,* Address of Assistant Attorney General Robert A. Bicks (Head of the Antitrust Division) and Earl W. Kinter (Chairman of the Federal Trade Commission) at Antitrust Conference, Consumer Council Division, Massachusetts Att'y Gen., Boston, Oct. 6, 1960, Dept. of Justice Press Release, Jan. 2, 1961, which summarized the efforts of the Justice Department in stimulating enforcement of state antitrust laws.

man Act[6] generally is not recognized. Consequently, it is interesting to note that prior to the passage of the Sherman Act, at least fourteen states and territories had antitrust prohibitions in their constitutions,[7] and at least thirteen had statutory prohibitions.[8] Today all but six states[9] have antitrust regulations in their constitutions, statutes, or in both.

The objectives of these state enactments basically have been twofold: (1) to apply criminal penalties to contracts and agreements in restraint of trade or commerce, which at common law were merely unenforceable; and (2) to prohibit further tactics, such as price cutting and exclusive dealing, which might lead to the formation of monopolies and restraints of trade. Despite such objectives, the most frequent result of the state acts was merely a restatement of the common law with an attempt to define infractions. The infractions, however, while recognized at common law to be unethical and unenforceable, were practiced without statutory restraint.[10]

Although the antitrust laws of the various states are so radically different that a practice strongly prohibited in one state may not even be mentioned in the statutes of another,[11] they do cover substantially the same activities. The following brief review will indicate the general nature of this legislation.

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6. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

7. ARK. CONST. art. II, § 19 (1874); CONN. CONST. art. I, § 1 (1818); GA. CONST. art. IV, § 2 (1877); IDAHO CONST. art. XI, § 18 (1889); KY. CONST. § 198 (1850); MD. CONST., DECLARATION OF RIGHTS art. 41 (1865); MONT. CONST. art. XV, § 20 (1889); N.C. CONST. art I, § 31 (1868); N.D. CONST. art. 7, § 146 (1889); S.D. CONST. art. 17, § 20 (1845); WASH. CONST. art. XII, § 22 (1889); WYO. CONST. art. I, § 30 (1889). It should be noted that most of these enactments were concerned primarily with prohibiting land monopolies in the form of fee tails or colonial charters. Maryland was the first of this group to specifically mention commerce in connection with monopolies.

8. Since laws of various states have been frequently amended and since codes often omit the date of passage of a statute, no attempt has been made to list, with full citation, each of these orginal state enactments. However, see FORKOSCH, ANTITRUST AND THE CONSUMER 407-16 (1956) for a list of twenty such early state statutes.

9. Alaska, Delaware, Nevada, Oregon, Pennsylvania and Rhode Island. 4 TRADE REG. REP. ¶¶ 30201-35585. Maryland, while having no statutory law of general application in this area, does have a constitutional provision which states "that monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." MD. CONST., DECLARATION OF RIGHTS art. 41. Also, Alaska, when a territory, was subject to § 3 of the Sherman Act and § 1 of the Clayton Act. Since statehood, Alaska has had an antitrust bill of general application pending in its legislature.

10. In von Kalinowski & Hanson, *The California Antitrust Laws: A Comparison With the Federal Antitrust Laws*, 6 U.C.L.A.L. REV. 533, 535 (1959), it was noted that several recent California decisions have stated that the Cartwright Act merely articulates in greater detail the common law covering restraint of trade. See also cases cited p. 535 n.24 of the above article.

11. See, *e.g.*, ARK. STAT. §§ 70-130 to -143 (1947) for a detailed statute against coercion in the automobile dealership business, as opposed to forty-seven other states which have no such provision.

MONOPOLIES

The extent of state action against "monopolies," as opposed to the broader concept of "trusts," is largely a matter of statutory and constitutional interpretation. Fourteen states, however, use the word "monopoly."[12]

The constitutional provisions are more or less sweeping in form and present a very general statement of the prohibition.[13] Many of the statutes attempt to define monopoly,[14] while others are content to merely prohibit it.[15]

RESTRAINT OF TRADE

Only three states — Louisiana, Oklahoma, and New Mexico[16] — have constitutional prohibitions against restraint of trade. Of these, the latter two merely direct the legislature to enact laws to prevent contracts, conspiracies, or combinations in restraint of trade. Twenty-three states have statutory prohibitions.[17]

Contracts not to compete necessarily are included among restraints of trade, and statutory enactments concerning such contracts fall into two basic categories: (1) those which tend to define or restrict the common-law rule that contracts not to compete are legal between vendor and purchaser or between apprentice and employer if they are reasonable and do not act as an unfair restraint of trade;[18] and (2) those which recognize

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12. Alabama, Arkansas, Hawaii, Idaho, Indiana, Louisiana, Maine, Massachusetts, New York, South Dakota, Texas, Vermont, Virginia, Washington. 4 TRADE REG. REP. ¶¶ 30201-35585.

13. *Compare* MD. CONST., DECLARATION OF RIGHTS art. 41, *with* N.C. CONST. art. I, § 31, where it is declared that "perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."

14. See, *e.g.*, TEX. REV. CIV. STAT. art. 7427 (1960) which states that a monopoly is "a combination or consolidation of two or more corporations when effected in either of the following methods: 1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter. 2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

15. "No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state." LA. REV. STAT. § 51-123 (1950).

16. LA. CONST. art. 19, § 14; OKLA. CONST. art. 5, § 44; N.M. CONST. art. 4, § 38.

17. Alabama, California, Colorado, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Washington, Wisconsin. 4 TRADE REG. REP. ¶¶ 30201-35585.

18. For the general common law rule on this type of statute, see United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898).

a strong public policy against contracts directed at control of markets or prices.

The contract not to compete which violates antitrust principles should be treated differently than the contract limiting the activity of the apprentice, the retiring partner, or the proprietor selling his business. A study of the state statutes, however, reveals that states themselves do not differentiate between the "classical"[19] contract not to compete and those contracts which are truly in restraint of commerce. As a result, these statutes create a broad sweeping prohibition against *all* forms of restrictive covenants. Generally, no exception is made for contracts not in harmful restraint of trade, *e.g.*, a purchaser attempting to maintain the good will of a business or an employer attempting to protect a trade secret.

The following examples will illustrate the haphazard legislative approach of various states and the influence of particular pressure groups. New Mexico has a statute prohibiting contracts between railroads not to compete.[20] An Indiana statute specifically prohibits division of territory by buyers of live stock.[21] In Texas, a combination to abstain from business is a trust[22] and, therefore, is prohibited. A North Dakota statute provides that a seller may agree not to compete so long as the effect of the contract is limited to the geographical territory of a city, town, or county.[23] South Dakota arbitrarily provides that an employment contract of this nature is void if the territory exceeds twenty-five miles.[24] Other states prohibit contracts whereby an employee agrees not to enter a competing business after termination of his current employment. In these states, all contracts restraining the pursuit of a profession, trade, or business are void. The acts then enumerate certain exceptions, but covenants with employees is not listed as one of them.[25]

POOLING AGREEMENTS

Pooling agreements are prohibited by the constitutions of Kentucky and Louisiana[26] and by statute in seven states.[27] Only North Dakota,

19. The "classical" contract not to compete is a restrictive covenant in connection with the sale of a business or employment contract.

20. N.M. STAT. ANN. § 62-2-19 (1955).

21. IND. STAT. ANN. § 42-921 (1952).

22. TEX. REV. CIV. STAT. art. 7426(7) (1960).

23. N.D. CENT. CODE § 9-08-06 (1959).

24. S.D. CODE § 10.0706 (1939).

25. See, *e.g.*, Fortna v. Martin, 158 Cal. App. 2d 634, 323 P.2d 146 (1958); CAL. BUS. & PROF. CODE § 16601; MONT. REV. CODE ANN. §§ 13-080 to -809 (1955); OKLA. STAT. ANN. tit. 15, §§ 217-19 (1937).

26. KY. CONST. § 198; LA. CONST. art. XIX, § 14.

27. Alabama, Colorado, Iowa, Kansas, Minnesota, Missouri, North Dakota, and Utah. 4 TRADE REG. REP. ¶¶ 30201-35585.

however, attempts to define "pooling," and there it is merely a synonym for "trust."[28] The Kentucky and Louisiana Constitutions render pools illegal where interests are combined to control the prices of articles of commerce.

Generally, statutory prohibitions follow the form of the Alabama pooling law. This act prohibits any person or corporation from entering into a pool "to regulate or fix the price of any article or commodity to be sold or produced" or "to fix or limit the quantity of any article or commodity to be produced, manufactured, mined or sold."[29]

In some states, only pooling for special purposes is specifically prohibited. Kansas, Montana, and Nebraska[30] prohibit combinations of grain dealers, Mississippi prohibits pools for bidding on public works,[31] and Washington forbids sales commission pools.[32]

PRICE CONTROL

At least half the states have constitutional or statutory provisions prohibiting price-fixing.[33] Most of these states prohibit selling a commodity at a lower rate in one community than in another. The Kansas statute is typical. It prohibits combinations of capital, combinations of skill, or the acts of two or more persons from: (a) increasing or reducing the price of merchandise, produce, or commodities; (b) controlling insurance rates; (c) fixing any standard or figure controlling the price of a commodity sold to the public; (d) agreeing not to sell, manufacture, or transport a commodity below a common standard figure, or maintain the price at a standard figure; (e) pooling or combining interests to affect the price of an article manufactured or transported.[34]

Several states have adopted the wording of the Robinson-Patman Act, in prohibiting discrimination within the same locality. Discrimination "between different purchasers of commodities of like grade and quality" is prohibited in Idaho,[35] Oregon,[36] and Utah.[37] Selling "at a lower

28. N.D. CENT. CODE § 51-08-02 (1959).

29. ALA. CODE tit. 57, § 106 (1960).

30. KAN. GEN. STAT. ANN. § 50-136 (1959); MONT. REV. CODE ANN. § 94-1115 (1949); NEB. REV. STAT. § 59-201 (1943). Nebraska also specifically forbids pools and pooling agreements in bridge contracting, NEB. REV. STAT. § 59-602 (Supp. 1960), coal dealers, § 59-401 (Supp. 1960), and fire insurance companies, § 59-301 (Supp. 1960).

31. MISS. CODE ANN. § 1095 (1956).

32. WASH. REV. CODE § 19.86.050 (1961).

33. Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming. 4 TRADE REG. REP. ¶¶ 30201-35585.

34. KAN. GEN. STAT. ANN. § 50-101 (1949).

35. IDAHO CODE ANN. § 48-202 (1947). See 26 Stat. 732 (1914), 15 U.S.C. § 13 (Supp. IV 1963).

36. ORE. REV. STAT. § 646.040 (1955).

37. UTAH CODE ANN. 13-5-3 (1953).

price or rate to one person . . . than to another" is prohibited in Oklahoma.[38] Discrimination "between persons . . . in any locality" is prohibited in Wisconsin.[39]

COMPETITIVE METHODS

In addition to a general prohibition of business tactics designed to limit competition, restrain trade, etc., a number of the states have prohibited certain specific practices which were designed to secure those ends. Statutes forbidding local price discrimination are the most common of such prohibitions. The Massachusetts statute is typical and provides that no person, firm, association, or corporation dealing in a commodity in general use

> shall maliciously, or for the purpose of destroying the business of a competitor and of creating a monopoly in any locality, discriminate between different sections, communities, towns or cities of the commonwealth or between purchasers by selling such commodity at a lower rate for such purpose in one section, community, town, or city than is charged for such commodity by the vendor in another section, community, town or city in the commonwealth.[40]

A general prohibition against restraints on resales appears in statutes of Idaho, Nebraska, and North Dakota.[41] Exclusive contracts are prohibited by five states: Louisiana, Massachusetts, Michigan, North Carolina, and Virginia.[42] Combinations or agreements to refuse to deal with persons, firms, etc., also are prohibited by five states: Indiana, Missouri, Nebraska, South Carolina, and Texas.[43]

PUNISHMENT AND ENFORCEMENT PROVISIONS

Although general similarity to the Sherman Act prevails in several respects, there is no uniformity among the states in providing criminal sanctions.[44] The acts commonly provide criminal penalties of fines up to three thousand dollars and imprisonment for maximum periods ranging from six months to ten years.[45]

Since no state specifically mentions the general consumer's direct in-

38. OKLA. CONST. art. 9, § 45.

39. WIS. STAT. § 133.17 (1959).

40. MASS. GEN. LAWS ch. 93, § 8 (1957).

41. IDAHO CODE ANN. § 48-202 (1947); NEB. REV. STAT. § 59-801 (1943); N.D. CENT. CODE § 51-09-11 (1959).

42. LA. REV. STAT. § 124 (1950); MASS. GEN. LAWS ch. 93, § 1 (1957); MICH. STAT. ANN. § 28.51 (1962); N.C. GEN. STAT. § 75-1 (1960); VA. CODE ANN. § 59-22 (1950).

43. IND. ANN. STAT. § 148-1 (1956); MO. REV. STAT. § 416.020 (1949); NEB. REV. STAT. § 59-501 (Supp. 1960); S.C. CODE 66-65 (1952); TEX. REV. CIV. STAT. art. 7428 (1960).

44. Approximately three-fourths of the states have provisions similar to the Sherman Act. (26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).)

45. See, *e.g.*, TEX. PEN. CODE art. 1635 (1953).

terest, it is only by granting him standing to sue that the protection of his rights may be assured. In this light, it is important to note that less than half of the states statutorily prescribe private damage suits based upon violations of the antitrust laws.[46] Many of these statutes follow the form of section 4 of the Clayton Act,[47] which provides for the recovery of treble damages, court costs, and attorney fees.

State antitrust provisions, generally, are peculiar, and the punishment and enforcement area is no exception. Louisiana, for example, authorizes only injunctive relief.[48] North Carolina provides standing to sue *only* "if the *business* of any person, firm or corporation shall be broken up, destroyed or injured . . . ."[49] As a result, the verbiage of damage to property, as opposed to business, is omitted. Oklahoma adds civil liability to its general criminal penalty section, but only to the extent that a *competitor* has suffered loss or injury.[50]

Individuals participating in a corporate violation frequently are covered by a separate penal section. An unusual Tennessee provision imposes joint and several liability upon all persons and corporations that become members of a prohibited combination. Participants in these combinations are liable for the debts of every other member as fully as if all were partners in the creation of such debts.[51]

State attorneys general commonly are charged with the duty of instituting proceedings to restrain the violation of the various acts;[52] hence,

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46. States which grant permission for a private individual, firm, or corporation to sue are: California (CAL. BUS. & PROF. CODE § 16750); Hawaii (HAWAII REV. LAWS § 11 (1961)); Idaho (IDAHO CODE ANN. § 48-114 (1947)); Indiana (IND. STAT. § 23-122 (1950)); Iowa (IOWA CODE § 553.12 (1962)); Kansas (KAN. GEN. STAT. ANN. § 50-108 (1949)); Louisiana (LA. REV. STAT. § 51.129 (1950); Maine (ME. REV. STAT. ANN. ch. 53, 62 § 45 (1954)); Michigan (MICH. STAT. ANN. § 28.38 (1962)); Mississippi (MISS. CODE ANN. § 1092 (1956)); Missouri (MO. REV. STAT. § 416.090 (1949)); Nebraska (NEB. REV. STAT. § 59-821 (1943)); New Mexico (N.M. STAT. ANN. § 229-8 (1953)); North Carolina (N.C. GEN. STAT. § 75-16 (1960)); Ohio (OHIO REV. CODE § 1331.01)), Oklahoma (OKLA. STAT. ANN. tit. 79, § 7 (1951)); South Carolina (S.C. CODE § 66-50 (1952)); South Dakota (S.D. CODE § 37.1913 (1939)); Tennessee (TENN. CODE ANN. § 69-106 (1955); Utah (UTAH CODE ANN. § 59-26 (1950)); Washington (WASH. REV. CODE § 1986.09 (1961)).

47. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958). "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold damages by him sustained and the cost of suit, including a reasonable attorney's fee." *Ibid.*

48. LA. REV. STAT. § 51.129 (1950).

49. N.C. GEN. STAT. § 75-16 (1960). (Emphasis added.)

50. OKLA. STAT. ANN. tit. 79, § 7 (1951).

51. TENN. CODE ANN. § 69-105 (1955).

52. The Attorney General has exclusive responsibility in the following states: Arkansas, Idaho, Louisiana, Maine, Missouri, Montana, New Hampshire, North Carolina, North Dakota, and Utah. The district or county attorney has the same exclusive responsibility in Colorado, Connecticut, Puerto Rico, West Virginia, and Wyoming. In the following states the attorney general and/or the county attorney may proceed to prosecute: Alabama, Arizona, California, Florida, Hawaii, Iowa, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, New York, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee,