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Uniform State Antitrust Act: Toward Creation of a National Antitrust Policy

Alan Arnold* and Tom Ford

The National Conference of Commissioners on Uniform State Laws, along with the American Bar Association, is now considering a tentative draft of a uniform statute designed to prohibit certain anti-competitive activities.¹ This proposed statute, prepared by the Legislative Research Center of the University of Michigan, is called the Uniform State Antitrust Act.²

Although Commerce Clearing House states that "basically, the proposed Uniform State Antitrust Act follows the federal antitrust laws,"³ some startling innovations are embodied in this statute which find no parallel either in the Sherman Act,⁴ the Clayton Act,⁵ the Robinson-Patman Act,⁶ or the Antitrust Civil Process Act.⁷ In quantity alone, there is a considerable difference, for the proposed Uniform Act contains more sections than the cited federal statutes combined.

Ohio's Valentine Act: A Comparison

Only a few superficial similarities may be found between the sixteen ingenuous provisions (including penalties) of the Ohio regulatory statute known as the Valentine Act⁸ and the proposed Uniform Act, which is

* The views expressed are solely those of the authors and do not reflect the opinions or policies of the Antitrust Division.

1. This effort might be considered as complementary to the Uniform Commercial Code, now effective in Ohio. See OHIO REV. CODE chs. 1301-09. (Hereinafter cited as CODE.)
2. Referred to in the text as the Uniform Act. (Hereinafter cited in footnotes as ACT.)
8. CODE §§ 1331.01-99.
composed of forty complex sections. The Valentine Act hardly passes as a model of draftsmanship. The heart of the statute prohibits the formation of a “trust.” A trust is defined in the Ohio law as a combination formed for any of the following purposes: (1) to restrict trade; (2) to limit production of a commodity or fix its price; (3) to prevent competition in a commodity; (4) to fix a commodity at a standard or figure whereby its price is controlled; (5) to contract or agree (a) not to sell a commodity below a common standard figure or fixed value, (b) to maintain the price at a fixed or graduated figure, (c) to “settle the price” so as to restrain competition, directly or indirectly, or (d) to unite so as to affect the price. For purpose of this short summary, it is sufficient to observe that there is a lack of mutual exclusivity in the list of forbidden purposes, and that clarity as an aid to enforcement is not a virtue of the Ohio statute.

The proposed Uniform Act, on the other hand, verbalizes the prohibited activities in terms parallel to federal antitrust law as it now appears to stand in the light of Supreme Court interpretation of the pertinent federal statutes. The three most essential of the substantive sections forbid: (1) combinations in unreasonable restraint of trade; (2) exercise of monopoly power to exclude competition or fix prices;
(3) combinations formed to establish monopoly power;\footnote{21} (4) combinations by persons "in competition"\footnote{22} (a) to fix prices,\footnote{23} (b) to control production for purposes of price regulation,\footnote{24} (c) to allocate markets;\footnote{25} (5) combinations to bid collusively on public contracts;\footnote{26} and (6) combinations between persons refusing to deal,\footnote{27} with certain "exceptions" which may or may not be exceptions, depending on court interpretation.\footnote{28}

The enforcement provisions of the Valentine Act are simple. A contract in violation of the law is declared void.\footnote{29} Foreign business organizations which violate the statute are prohibited from doing business in Ohio.\footnote{30} Private double-damage actions are sanctioned.\footnote{31} A "forfeiture" of $50 to the state is sanctioned for each day of violation after receipt of notice from the state attorney general or any county prosecutor,\footnote{32} and the state may recover this "sum"\footnote{33} in any county where the offense is committed or where the offenders reside.

On the criminal side, participation in an unlawful trust bears a penalty of $50 to $5,000, or six months to one year.\footnote{34} Quo warranto and the usual forms of injunctive relief also are available to the attorney general in any county where the business exists, does business, or has a domicile.\footnote{35}

The simplicity of the remedial provisions of the state statute, however, finds no correlative in the proposed Uniform Act. For example,
the Ohio law contains no provision which provides for a post-conviction forfeiture. None is needed, for the availability of the broad quo warranto power ensures against repeated violations by the same business organization. The Uniform State Antitrust Act, on the other hand, contains three sizable sections delimiting these remedies, including proceedings for (1) forfeiture of charter rights and privileges of domestic associations, (2) dissolution of such associations, (3) forfeitures of the privileges of foreign associations to do business in the state, (4) revocation or suspension of a limited number of privileges belonging either to domestic or foreign corporations, and (5) court refusal of the privilege to do business in the state of a person or organization who succeeds to the rights of one subjected to (2) or (3) above.

INVESTIGATIVE PROVISIONS

The most drastic innovations sponsored by the framers of the Uniform State Antitrust Act are found in the provisions for the investigation of violations. By no means are these bold, hydra-headed investigatory weapons to be construed as a copy of the new federal Antitrust Civil Process Act.

The first four of these sections in the Uniform Act, to be sure, parallel the federal statute both in length and ambiguity. These sections permit service of a civil investigative demand on a person under investigation for violation of the antitrust laws. That, however, is only the beginning. Section 27 of the Uniform Act authorizes the attorney general to apply to a trial court for an order requiring "any person not under investigation for violation of the antitrust laws to make documentary material "available for inspection and copying." A problem arises as to what constitutes the "inspection" which logically must precede "copying." May the representative of the attorney general blithely thumb through a mass of material and then declare that the entire file is pertinent and must be copied? Or, must the representative engage in a thorough examination of each document before selecting those which must be copied?

An important provision of these investigative statutes is found in § 23(g) of the Uniform Act. This section requires a suspected violator to make documentary material "available for inspection and copying." A problem arises as to what constitutes the "inspection" which logically must precede "copying." May the representative of the attorney general blithely thumb through a mass of material and then declare that the entire file is pertinent and must be copied? Or, must the representative engage in a thorough examination of each document before selecting those which must be copied?

This "conscious parallelism" with federal law appears to be a misnomer. Why limit the use of the process to civil investigations? Although it is true that the federal act is so limited, this restriction is not particularly desirable, especially when immunity is provided. Moreover, the draftsmen of the Uniform Act probably anticipated that the "CID" would be available in investigations in which "civil" penalties are contemplated. Act § 11. If, however, a common-sense judicial approach should regard as non-binding this characterization of penalties, the "CID" would be available only when injunction is the sole remedy contemplated.
vestigation" to make documentary material available to the attorney general or another authorized state employee for inspection or copying. Only "reason to believe" that such person has access to the material proven to be necessary for investigation of a possible violation is required in obtaining the court order.  

The power of local officials to investigate violations of state antitrust law under the proposed Uniform Act does not end with examination of documents in the hands of persons not under investigation. In one of the most unusual investigative procedures ever outlined in a state statute, section 28 of the Uniform Act permits the attorney general to subpoena "an individual" whom he "has reason to believe" possesses "information or knowledge of a possible violation of the act, . . ." to appear before him and give oral testimony "in accordance with the rules governing depositions . . . ." All of these machinations may be accomplished without application to a court.

The draftsmen of the act provided immunity for witnesses in section 31. This section resolves a problem which the federal courts have not yet settled by denying immunity to members of an association or partnership who are not called to testify or whose association documents are produced pursuant to court order.

46. Emphasis added.
47. Compare KANS. GEN. STAT. ANN. § 50-153 (1949); LA. REV. STAT. § 51:143-45 (1950); MO. REV. STAT. § 416.320 (1959); N.C. GEN. STAT. § 75-10 (repl. 1960); OKLA. STAT. tit. 79, § 82 (1961). These statutes grant similar powers, but annotations reveal that they seldom have been invoked.
48. A few state attorneys general possess similar, unused powers. KANS. GEN. STAT. ANN. § 50-153 (1949); LA. REV. STAT. § 51:143-45 (1950); MO. REV. STAT. § 416.310 (1959); N.Y. GEN. BUS. LAW § 343; N.C. GEN. STAT. § 75-10 (repl. 1960); OKLA. STAT. tit. 79 § 82 (1961); TEX. PEN. CODE art. 1636 (1953). None of these statutes offers the following combination of high-handed measures found in the Uniform Act: (1) "reason to believe" that an individual has information or knowledge of a possible violation as sufficient excuse for issuance of the subpoena; (2) "appearance before himself [the attorney general];" (3) administration of the oath by the attorney general; (4) taking of the testimony by him; (5) power of the attorney general to apply to court for subpoenaing a witness more than one hundred miles from the hearing; and, most importantly, (6) no need for a court order or application to a magistrate before issuance of a subpoena.
49. Nonchalantly, the comment appended to § 28 regards as noteworthy only that portion of the section which requires court approval to subpoena a witness from beyond a 100 mile radius.
50. The comment to § 28 (investigation through oral testimony) relies on the "automatic immunity" provided in § 31. The immunity section, however, is not so worded as to be clearly automatic. To be sure, § 31 specifies that the privilege against self-incrimination need not be claimed in order for immunity to be extended. The explication does not serve the cause of interpretation; for, with the offering of immunity, no privilege remains to be claimed. See United States v. Monia, 317 U.S. 424 (1943).
NEED FOR A UNIFORM ACT

The first tentative draft of the Uniform State Antitrust Act does not have a preamble setting forth the purposes of the proposed legislation. In a prefatory note, however, the draftsmen have stated their views with respect to the reasons for and goals to be achieved by this legislation.

In considering any proposed uniform legislation, it first must be determined that the subject matter of the legislation lends itself to such uniform treatment. The authors agree that there is a paramount need for additional legislation in this area and that, to be truly effective, it must be uniform.

As outlined above, the present law in Ohio is antiquated and hence inadequate. The authors have found this and other defects present in most of the state antitrust laws. As a result, "local" market restraints have contributed to deterioration of the economic climate in certain areas of the United States. The states cannot and should not rely on the agencies of the federal government to remedy these "local" restraints. Federal jurisdictional and budget limitations preclude such agencies from investigating and remediying every "local" restraint. In addition, in areas where state and federal agencies have concurrent jurisdiction, the state remedy, as the draftsmen note, may be more appropriate.

The authors suggest that there should be a spirit of "cooperative federalism" between the federal and state antitrust agencies in areas of concurrent jurisdiction. This would consist primarily of notification and coordination between these branches with respect to their respective interests and responsibilities. In addition to referrals of private complaints by one branch when the other branch is more appropriate, the federal and state branches, as the draftsmen suggest, should also develop areas of "primary responsibility." These areas, of course, would be the subject of discussions between federal and state officials. The draftsmen suggest, however, that generally the states should have primary responsibility for

52. Such policy statements are not common in uniform state laws. When the proposed statute propounds the basic economic policy of the state government, the insertion of a preamble is nonetheless advisable as an aid to interpretation.


restraints "in retail distribution and wholesaling and manufacturing for essentially local consumption, as well as ... wholly intrastate restraints."^56

Cooperative federalism can be achieved effectively only if the states have uniform antitrust acts parallel to the federal antitrust laws. If state antitrust laws were uniform, compliance with the state acts usually^57 would be assured by compliance with the federal laws. More importantly, uniform legislation on the state level will provide a remedy for "local" restraints which will have an impact similar to that of the federal antitrust laws, provided that the state laws are enforced adequately in each state.

The policy of the federal and state laws should coalesce, for coalescence would provide a salutary counter-force to the anti-competitive trends in our economy. Only a uniform state law can accomplish total policy coordination. Assuming that this proposed Uniform Act were adopted and adequately enforced,^58 some question arises as to whether it provides local enforcement authorities with sufficient legislative weapons to meld federal and state anti-monopoly policies. Without this melding, local restraints, which often constitute incipient interstate restraints, cannot be eliminated with consistency.

**Some Suggested Modifications**

In their prefatory note, the draftsmen consider this proposed legislation as supplemental to the federal antitrust laws, and the authors agree that supplementation is the sound approach. Unfortunately, the proposed Uniform Act is not sufficiently complementary to the federal laws to render supplementation effective. Certainly, some provisions, such as that with respect to unreasonable restraint of trade and commerce," substantially parallel the federal laws. Other sections, however, have no place in a state act. For example, section 27 provides for the use of the civil investigative demand to secure documents from those persons not under investigation."^59 Aside from the practical difficulties of passage of an act containing such procedures,"^60 these provisions are out of touch with

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56. See Prefatory Note, op. cit. supra note 55, at 3.
57. Occasions might arise in which local interpretation would be more stringent than that followed by federal courts and federal enforcement agencies. Under these rare circumstances, compliance with federal standards would not be sufficient to assure freedom from local prosecution.
58. The authors have recently interviewed the Honorable William Saxbe, Attorney General of Ohio. He indicated that improvement of the law definitely would be followed by greater enforcement by his office. But see note 17 supra.
59. ACT § 2.
60. But see note 20 supra.
61. See also ACT § 28 with respect to testimony to be compelled by civil investigative demand.
62. The political pressure to which state attorneys general and prosecutors must respond
the supplementary character of the state legislation. Certainly, provisions such as these should be enacted first on the federal level.63

The proposed Uniform Act does contain some provisions not found in the federal laws.64 These provisions do not detract from its supplementary character. Notably absent from the proposed uniform legislation, however, are any provisions restricting mergers and acquisitions. The framers indicate that the reason for this absence is that the states should "be slow to take on complex economic issues especially associated . . ." with this matter.65 Further, it is contended that this is apparently not a matter for state antitrust concern.66 The authors disagree.

Numerous states have considered this problem of sufficient importance to merit the passage of anti-merger provisions. Some of these acts parallel67 section 7 of the Clayton Act,68 and some impose much more stringent limitations on mergers and acquisitions.69 A provision similar to section 7 of the Clayton Act would provide the states with an opportunity to retard the trend toward industrial concentration.70 As the draftsmen point out,71 the states can reach certain mergers under the provisions regarding unreasonable restraints.72

Section 2 of the Uniform Act, however, is not enough. Without a specific anti-merger section, state enforcement agencies remain in the same position in which the United States Department of Justice found itself prior to the passage of section 7 of the Clayton Act. By the time a series of inter-company acquisitions had reached sufficient propor-

63. The authors are not proposing that the states must yield to federal leadership in the area of antitrust investigative procedures. Rather, the political bombshell inherent in the drastic investigative powers proposed renders their insertion inadvisable. On the other hand, should enforcement agents find a need for such powers, they can later pressure the legislatures for relief. Meanwhile, the vital substantive provisions of the Uniform Act should not be sacrificed as a result of the political dangers embodied in inserting investigative procedures not yet found necessary even at the federal level.

64. ACT §§ 8, 9, relating to forfeiture of charter rights or the right to do business in the state, as the case may be.


66. Ibid.

67. Hawaii Laws, act 190, § 5 (1961); LA. REV. STAT. § 51:125 (B) (1950); MISS. CODE ANN. tit. 8, § 1094 (1942); N.J. STAT. ANN. § 14:3-10 (1939); TEX. REV. CIV. STAT. art. 7427 (1960).


69. See ARK. STAT. ANN. § 70-105 (1947); OKLA. CONST. art. 9, § 41; OKLA. STAT. tit. 79, § 31 (1951); S.C. CODE § 66-61 (1952).

70. STAFF OF SENATE TEMPORARY NATIONAL ECONOMIC COMM., 76TH CONG., 3D SESS. (1941) (Monograph 16).


72. ACT § 2.
tions to constitute an unreasonable restraint of trade, the problems of
divestiture were so complex that an effective remedy was not available.\textsuperscript{73} Meanwhile, many potential competitors had been laid in their economic
graves. This economic history gives even greater reason for not leaving
the states in a similar position. What a wonderful opportunity is pre-
sented for halting mergers in their incipiency if local governments may
step in before interstate commerce is affected.

The authors also must disagree with the contention that such a pro-
vision would prove too difficult to enforce on the state level.\textsuperscript{74} The pri-
mary source of investigative complexity in federal merger cases is the
problem of determining the line of commerce involved (the product mar-
ket) and the section of the country affected (the geographic market).
These complexities are reduced substantially when the anti-merger pro-
vision is adapted for state antitrust purposes.

Other predatory economic practices which at least merit careful con-
sideration by the National Conference of Commissioners on Uniform
State Laws are price discriminations of the type prohibited by the Rob-
inson-Patman Act\textsuperscript{75} and sales below cost. Both of these activities usually
take the form of a large, economically powerful organization using its
accumulated wealth to remove from competition or wring economic con-
cessions from small, local businesses. Most states have found it desirable
to enact laws specifically prohibiting these activities,\textsuperscript{76} occasionally for
the stated purpose of insulating local businesses against the onslaughts of
large interstate corporations.\textsuperscript{77}

CONCLUSION

The proposed Uniform State Antitrust Act is an important first step
toward the creation of a national antitrust policy. If modified in light
of the need for creation of such a policy and for halting the trend toward
economic concentration, it will merit passage by state legislatures.

\textsuperscript{73} See H.R. REP. NO. 1191, 81ST CONG., 1ST SESS. 5 (1949).
\textsuperscript{74} Prefatory Note, \textit{op. cit. supra} note 55, at 4.
\textsuperscript{76} See the reference to these laws in Table of Contents to State Laws, 4 \textit{TRADE REG. REP.} § 35001-008.
\textsuperscript{77} \textit{ARIZ. REV. STAT. ANN.} § 44-1462 (1956).