February 1979

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THE NEW WEST VIRGINIA ANTITRUST ACT FROM THE DEFENSE PERSPECTIVE*

JAMES F. RILL**

Sharply heightened attention is currently being paid to antitrust enforcement at the state level. In 1976, Congress appropriated approximately $30,000,000 in federal funds to the states for the maintenance of antitrust actions and other programs.¹ A fertile field is being made available for the expenditure of these funds by the focus of the federal antitrust enforcement agencies on the larger structural cases with a corresponding decline in enforcement actions against "routine" practices. In this climate, the opportunities for state actions are extremely favorable, especially in light of the generally high political marks to be achieved by state Attorneys General, who are typically elected officials, in the commencement of antitrust suits. As stated by Stephen J. Greenvogel, Massachusetts’ antitrust division chief, "It looks good for an AG to say he’s suing this company or that company on antitrust grounds."²

Not every state, however, has a fully developed antitrust statute to provide the framework for the intensified state enforcement program. Legislatures are acting to fill the void. The most ambitious and comprehensive action in this regard was the adoption by West Virginia of an all-inclusive antitrust act in 1978.³ At first blush from the defendant’s standpoint, it is difficult to view the new West Virginia Antitrust Act with overwhelming enthusiasm. The Act basically follows the outlines of federal law while resolving most open questions in favor of the government or private plaintiff. Nevertheless, in part because of the parallel to federal law, and the incorporation of federal decisional law under section 16 of the new Act, there are numerous opportunities for all parties to take some comfort from the provisions of the statute.

Several objectives manifest themselves in the new Antitrust Act. First, there appears to be an attempt not merely to track the

substantive provisions of the Sherman Act but also to clarify its specific applications. Second, the West Virginia Antitrust Act seeks to provide the Antitrust Division with strong investigatory and enforcement powers, also patterned after, but diverging from, federal provisions. Finally, the Act is far more plaintiff-oriented than federal law in its provision for parens patriae actions by the Attorney General on behalf of citizens or residents of the state. Substantial unresolved questions lurk beneath each of these statutory objectives, however, and the courts will undoubtedly be required to make major decisions in the near future which will give shape to the new Act and possibly stimulate further legislative modifications. An examination of the provisions of this Act is instructive not only for its application to practices in or affecting West Virginia but also for the pattern it may set for the legislative actions of other states. This analysis, while attempting to provide a general overview, is designed to anticipate and discuss some questions which might occur to defense counsel in attempting to deal with the new statute.

I.

As to the substantive provisions of the new Act, an attempt is made to identify practices which by definition "shall be deemed to restrain trade or commerce unreasonably and are unlawful." The intent seems to be to isolate and condemn practices traditionally unlawful per se under the Sherman Act: price-fixing, supply control, market division, and boycott conspiracies. The effort to define per se offenses may, however, have produced a result somewhat more expansive than that reached by the federal courts in construing the Sherman Act.

Two examples will illustrate the point. Consider a small appliance manufacturer who is seeking to enter the West Virginia market and provide competition for larger, more established firms. In order to obtain the maximum in-depth distribution of his product and to entice distributors to handle it, the manufacturer, of his own volition, seeks to establish exclusive territories. He agrees with each of his new distributors that he will not sell to more than one dealer in an assigned zone and exacts from the dealers the promise that they will not sell to customers outside their assigned territory.

4 Id. § 3(b).
It is at least theoretically possible that this arrangement would be condemned as unlawful per se under section 3(d)(1)(C) of the state Antitrust Act as an agreement between two or more persons allocating geographic markets. After a long and tortured passage through the federal courts, however, vertically imposed territorial restrictions have come to be treated under the rule of reason in Sherman Act litigation. The Supreme Court's reluctance to condemn vertically-established territorial exclusivity in the case of *White Motor Company* was followed shortly by a sweeping per se condemnation in *Schwinn* based partly on the "ancient rule" disfavoring restraints on alienation. Finally, the Supreme Court overruled *Schwinn* in its 1977 *GTE Sylvania* decision, and held that henceforth vertical restraints would, in the absence of price-fixing, be judged on the basis of their reasonableness. The issue considered by the courts in assessing reasonableness is essentially the impact of the restraint on overall market competition, balancing the limitation on intrabrand rivalry against the actual or anticipated benefit to competition regarding all products in the relevant line of commerce.

Another area where the per se proscriptions of the West Virginia law may extend beyond those developed under the Sherman Act involves exchanges and publication of statistical information. Typically, trade associations organized on state and regional bases, as well as on the national level, assemble and disseminate aggregate data concerning the production and shipments of industry products in transactions over preceding monthly or annual periods. The collection and distribution of these aggregated statistics do not involve the competitor-to-competitor exchange of current price information on a customer-by-customer basis, condemned directly in *United States v. Container Corporation* and in dicta in the *U.S. Gypsum* case. Rather they are the sort of associational information program sanctioned by several Sherman Act decisions of the Supreme Court. Significantly, the Court in its 1925 lodestar *Maple Flooring* decision upheld the legality of these programs, notwithstanding their incidental stabilizing effect on production and price. It seems almost inevitable that an exchange of produc-

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tion and shipment reports will have such a stabilizing effect. Even in a market which approaches perfect competition, historic supply data is likely to be used by competitors to adjust their own output to anticipated overall production and price levels. Similar action by all competitors, based on the same information, would produce a restricted supply and alter the horizontal aspect of the demand curve. Nevertheless, there seems little question but that, particularly in a competitively structured industry, such a program would not be condemned in spite of its possible effect on market price. This result under federal law could conflict with that made possible under a literal construction of the state law's absolute prohibition of agreements "with the effect of . . . controlling or maintaining the market price."\textsuperscript{12}

The potential inconsistency between the new state Antitrust Act and federal law also affects the monopoly provisions of section 4 of the West Virginia Act. "Monopoly" is not an offense under the Sherman Act; monopolization, conspiracies and attempts to monopolize are offenses. The difference lies in greater tolerance under federal law of monopoly achieved by superior skill, foresight and ingenuity or by proximity to sources of supply or market outlets.\textsuperscript{13} Despite some contrary suggestions in Justice Douglas' Griffith decision,\textsuperscript{14} a monopolist who legally obtains that status does not violate section 2 of the Sherman Act each time he does business. Noted authorities suggest that a monopolist may, for example, lawfully set the price of his products at any level other than one that is predatory.\textsuperscript{15} Indeed, by setting a profit-maximizing price (the most anticompetitive course in the short run) the monopolist is most likely to attract new competition (the most pro-competitive in the long run). In this instance, the West Virginia statute may produce a questionable result. The language of section 4 of the Act unqualifiedly proscribes "[t]he . . . use of a monopoly . . . for the purpose of excluding competition . . . or maintaining prices."\textsuperscript{16} The firm with monopoly power cannot comply: if the price is lower than the profit-maximizing level, competition may

\textsuperscript{13} United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
\textsuperscript{14} United States v. Griffith Amusement Co., 334 U.S. 100 (1948).
\textsuperscript{15} P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 710-11 (1978).
\textsuperscript{16} W. VA. CODE § 47-18-4 (Cum. Supp. 1978). Carried to an even more startling extreme, the West Virginia statute seems to condemn the acquisition and use of patent protection, which, after all, is an attempt to establish a monopoly for the purpose of excluding competition.
be excluded; if higher, monopoly is being "used" to maintain prices.

Does this analysis suggest that because of the legislature's attempt to specify offenses, West Virginia practitioners must now advise their clients to abrogate exclusive territories, abolish industry statistical information programs and dissolve their companies if they may be deemed to have a monopoly in any line of commerce in the state? Hopefully and probably not, but some judicial sculpting will be required.

The courts of this state could properly view the statutory enumeration of offenses in the context of an underlying mandate to prohibit anticompetitive conduct. On this basis, the examples given—vertical territorial restraint by a new entrant, statistical information programs in a competitive industry, and the non-predatory pricing of a monopolist—would probably pass muster. None would seem to involve private action which is anticompetitive in the sense of misallocating resources or impairing productive efficiency.

Nor would the courts of the state be writing on a clean slate in so construing the new law. The legislature prudently instructs the courts to interpret the Act's substantive provisions "liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes." This statutory guidance should furnish the courts ample flexibility for avoiding overly restrictive constructions of the new law and the creation of a host of unintended and anticompetitive per se offenses.

II.

A second area of the new Act with which defense counsel will want to closely compare the applicable federal law is the governmental investigatory and enforcement scheme. West Virginia does not have a counterpart of the Federal Trade Commission, with its sweeping powers to conduct inquiries and order business firms to file extensive reports based on nothing more than idle bureaucratic curiosity. The investigative powers under section 7 of the new Act are conferred only on the Attorney General and are circumscribed by its provisions. These powers are in some respects broader, in some respects narrower, than those vested in the U.S. Department

of Justice under the Antitrust Civil Process Act as amended by the Hart-Scott-Rodino law.¹⁹

There appear to be a number of issues to which counsel for respondent should be alert in deciding how, or whether, to answer the Attorney General's discovery process issued under section 7. First, the section appears to relate to investigations of past conduct where the Attorney General has probable cause to believe that a person has engaged in conduct violative of the section which may warrant an investigation. Thus, the investigative power does not appear to extend to practices about to occur, such as a merger which might create a monopoly potentially in violation of section 4.²⁰ This pre-1976 limitation on U.S. Department of Justice civil demands was eliminated in the Hart-Scott-Rodino Act.²¹

Second, the probable cause requirement and the provision that investigations be conducted to determine if a violation has occurred suggest both a scope and relevancy limitation to the Attorney General's powers. Investigations under section 7 may be conducted only to uncover violations of the Antitrust Act, and any investigative process which strays from that subject matter could presumably be quashed as being beyond the authority conferred by section 7. Further, the constitutional guarantee against unreasonable search and seizure probably entitles a respondent to reasonable notice of the purpose and scope of the investigation.²² The government would appear to be obligated under section 7 of the Act at least to notify a respondent of the nature of the suspected unlawful practice, and the claim could be made that any inquiry not reasonably related to that practice is irrelevant and discovery process related thereto could not be enforced. This conclusion is corroborated by the phrase in section 4(a) pertaining to the discovery of "matter reasonably calculated to lead to the discovery of relevant evidence."²³

A third significant feature of section 7 is its failure to authorize the use of investigational interrogatories. The Federal Trade Com-

²⁰ Cf. Petition of Gold Bond Stamp Co. for an Order Modifying or Setting Aside Civil Investigative Demand No. 0016, 221 F. Supp. 391 (D. Minn. 1963), aff'd per curiam sub nom. Gold Bond Stamp Co. v. United States, 325 F.2d 1018 (8th Cir. 1964).
mission has relied on pre-complaint interrogatories (more precisely termed orders to file special reports) as its ultimate inquisitorial weapon, using them, for example, in its apparently successful attempt to secure line-of-business operating data from major corporations.

Unlike the Antitrust Civil Process Act and the FTC's rules pertaining to investigative proceedings, section 7 of the West Virginia Act seems somewhat vague regarding the rights of witnesses and those called upon to produce documents. The Antitrust Civil Process Act provides that counsel may accompany the witness, advise him in confidence, object to questions, and instruct the witness not to answer any question on grounds of constitutional or other legal privilege. The FTC rules accord similar rights to counsel in investigative hearings. Counsel advising a respondent who receives a subpoena under section 7 should keep in mind the possibility that these rights and others available under parallel federal law are also available under reasonable interpretations of the West Virginia Antitrust Act. It is important to note in this regard that section 16 of the Act requires the entire statute to be liberally interpreted in harmony with federal standards, including procedural as well as substantive provisions.

A closely related concern of respondent's counsel is the manner in which discovery is to be enforced under section 7(c) of the Act. It appears that the Attorney General's discovery orders are not self-enforcing and that no penalty will accrue for failure to comply prior to the issuance of a court order, assuming that the respondent has at least a good faith doubt as to the validity of the discovery order in question. Pre-complaint documentary and hearing subpoenas under the FTC Act are currently enforced in the same manner, and courts have held that no penalty attaches for non-compliance with such an administrative order. Thus, assuming the good faith of the respondent and counsel, there should be ample opportunity to secure judicial determinations regarding the rights of witnesses in investigatory proceedings under section 7.

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28 FTC interrogatories (orders to file reports) are self-enforcing, and failure to respond or obtain judicial stay within the prescribed time period can result in civil penalties of $100 per day. 15 U.S.C. § 50 (1970).
The requirement that all affected persons be notified of a judicial enforcement proceeding raises several intriguing questions which will be referred to in passing and which will no doubt be the subject of litigation. First, can the provisions of section 7 be construed as authorizing only an investigation of those who are suspected of having committed a violation? The parallel references to the term “person” in sections 7(a) and 7(b) so suggest; however, the notice provisions of section 7(c) indicate a contrary result. If the investigatory power under section 7 is not so limited, are there other rights that a suspected offender is entitled to, such as a notice of a judicial subpoena enforcement proceeding or the right to be present during investigatory hearings? The provisions of section 7(d) seem to call for a negative answer, but these are possibilities that imaginative counsel for a target company may wish to explore.

Turning briefly to the powers of the Attorney General to enforce the substantive provisions of the Act, it appears that the circuit courts may exercise broad equitable and remedial powers. Although the language of the first paragraph of section 8 relative to the granting of injunctions to restore and preserve competition may seem somewhat ominous, it probably encompasses no greater power than that exercised by the federal courts under section 4 of the Sherman Act. In remedying Sherman Act offenses, federal courts have used antitrust injunctive decrees not only to require dissolution and divestiture, but also to impose limits on the type of market entry, market share, and pricing activities as well. Defense counsel should be wary of other remedial attempts by the enforcement agency which are of very questionable propriety. For example, it is not at all clear that the state courts could order the licensing or dedication of a trademark to remedy a violation of section 4. The Federal Trade Commission has not yet been successful in securing this relief in its monopoly proceedings. Further, there would probably be serious constitutional questions as to

whether the attempted imposition of such a remedy on an inter-
state seller might not create an unreasonable burden on interstate
commerce.

The civil penalty provisions of the new law are, at best, incon-
gruous and contrary to the trend of federal antitrust law. The
$200,000 penalty which could be imposed for a violation continuing
for slightly more than a year applies to any violation of the Act.
Yet, as explained above, sections 3 and 4 of the statute do not
establish distinct standards and may be construed to prohibit con-
duct which is lawful under the Sherman Act. The penalty san-
cctions of section 8 are undeniably punitive and are very similar to
fines which might be levied for criminal conduct. For years, the
U.S. Department of Justice has initiated criminal actions only
where well-established hard core, per se offenses are involved.
More recently, the Supreme Court has held that criminal prosecu-
tion can only be successfully maintained under the Sherman Act
if it is proven that the defendant willfully committed a violation
or acted with knowledge that the probable consequences of his
conduct would be to restrain competition.37 It seems likely that the
limits imposed by federal law on Sherman Act criminal prosecu-
tions will be imposed on civil penalty actions under section 8 of the
West Virginia Antitrust Act. The breadth of the two laws is similar
and the essentially punitive nature of both criminal and civil pen-
alty sanctions evokes comparable treatment.38

III.

Questions arising under the sections of the West Virginia Anti-
trust Act providing for damages to injured parties will almost cer-
tainly generate as much, if not more, litigation than identification
of the substantive offenses. These sections authorize individual
treble damage actions39 and parens patriae suits.40

At least three observations are merited regarding section 9.
First, as is the case with section 4 of the Clayton Act, damage
actions are authorized for injury to the plaintiff's business or prop-
erty. There is a line of authority exemplified most recently by the

38 See United States v. J. B. Williams Co., 498 F.2d 414 (2d Cir. 1974). A
may be entitled to trial by jury.
40 Id. § 17.
Eighth Circuit decision in *Reiter v. Sonotone Corp.*, holding that the statute limits recovery to instances of injury to commercial interests and excludes from its coverage actions by consumers. If this reasoning is approved by the Supreme Court, a not altogether likely prospect in light of the Court's recent acknowledgement that the antitrust laws are designed principally to benefit consumers, then section 16 of the West Virginia Antitrust Act would seem similarly to limit private actions under section 9.

Second, there is no provision in the new law comparable to section 16 of the Clayton Act which authorizes suits by private parties for injunctive relief. Thus, unlike the state, private litigants are limited to monetary redress. Under its Antitrust Act, West Virginia will not confront such perplexing issues as whether dissolution may be ordered in actions initiated by private plaintiffs.

Third, the state Attorney-General is authorized to initiate actions on behalf of state, county, and municipal bodies and agencies. This provision also differs from federal law in authorizing treble damages for governmental entities, whereas section 4A of the Clayton Act provides for recovery of only single damages for federal agencies.

Perhaps the most aggressive extension of the West Virginia law beyond federal standards is found in section 17 dealing with *parens patriae* actions. The new state law is much more favorable to plaintiffs than the federal statute. In comparison, the principal thrust of the 1976 Hart-Scott-Rodino statute was to authorize state Attorneys General to maintain *parens patriae* actions for state residents injured as a result of violations of the federal antitrust laws. Easily the most hotly contested segment of the 1976 law, this provision was the subject of extensive debate in the House and Senate Judiciary Committees and on the floor of both Houses of Congress. As a result, a compromise measure evolved which reflected concessions by the opposing sides. The state legislature in approving the West Virginia Antitrust Act seems to have swept

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43 For an example of this issue, *see* Int'l Tel. & Tel. Corp. v. General Tel. & Elecs. Corp., 380 F. Supp. 976 (M.D.N.C. 1974).
aside all concessions to defendants and to have created a complicated, plaintiff-oriented structure which could furnish little or no actual relief for the citizens of the state.

The nature of the action which might be maintained is not at all clear. Presumably, the authorization to the state Attorney General to maintain actions under the federal antitrust laws means to maintain actions in federal courts under, and subject to, the limitations of section 4C of the Clayton Act. As to actions under article 18, section 17 is ambiguous. Actions may be initiated only on behalf of natural persons, yet the only action "under this article" providing for any form of private recovery is the section 9 authorization for private actions for injury to business or property. Thus, while it is clear, as under federal law, that a parens patriae action may not be brought on behalf of business entities, unlike federal law, section 17 actions appear to be only for injury to business or property. This distinction could substantially undercut the intended impact of section 17, especially if the Eighth Circuit decision in Reiter v. Sonotone Corp. becomes controlling federal law. But even if it does not, the dependence of section 17 on other provisions of article 18 for its operation, rather than its having created an independent cause of action as is the case with section 4C of the Clayton Act, raises some interesting opportunities for defendants.

It is apparent under the structure of the new law that the Attorney General stands in no better position under section 17 than does a private plaintiff under section 9, with the possible exception of his role as a class representative. The class members, however, must themselves have been in a position to maintain the action; that is, they must be capable of showing sufficient standing and injury to have been able individually to prosecute section 9 actions. Since section 16 of the new law incorporates federal decisional law, the federal antitrust law governing standing and remoteness apparently applies to parens patriae actions. Most importantly, the principles enunciated in the Supreme Court's Illinois Brick Co. v. Illinois decision seem fully applicable to state actions under section 17, although probably not to parens patriae actions by the West Virginia Attorney General under federal law.

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*Id.*

*Id.*


*431 U.S. 720 (1977).*
Even if Congress were to effectively overrule the *Illinois Brick* decision, the road to recovery under section 17 will remain difficult. It will still be necessary to prove the fact of damage, that is, that the alleged impact of an article 18 offense has been passed on in a specific aggregate amount to the persons on whose behalf the section 17 action is brought. This burden of showing the fact and extent of damage to the class is not alleviated by the provisions of section 17(f). Even though this provision extends well beyond the scope of section 4C of the Clayton Act, which limits assessment of damages to individuals by statistical methods in price-fixing cases, section 17(f) should properly be construed as establishing a means of allocating damages among potential claimants, not as alleviating the Attorney General's burden of proving the existence and overall amount of injury. Nor does the duplicate recovery provision of section 17(f)(1), which reduces recovery only by amounts actually paid to others for the same injury, necessarily create a disproportionate share of compensation for citizens and residents under section 17. It would seem essential in proving the fact of injury to business or property of the section 17 class members that the amount by which they were not actually damaged be deducted; in other words, the amount properly allocable to others, such as business entities, is not included in the chain of impact. 49

Finally, unlike section 4C of the Clayton Act, section 17 of the West Virginia Antitrust Act contains no prohibition against contingency fees. 50 It can be expected, however, that fee awards for outside counsel retained by the state will be subject to the federal trend of awarding compensation for work actually performed and not principally for the aggregate amount of recovery for the class.

In the final analysis, while the new law seems somewhat more slanted in favor of the government and private plaintiffs, the tilt is not decisive. The percipience of the legislature shows through in the adoption of federal decisional law applicable to the whole of article 18. There is ample latitude for a balanced construction of the Act, and numerous opportunities appear for defendants' counsel to raise issues which will promote such a construction.

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