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WASHINGTON CONSUMER PROTECTION ACT—ENFORCEMENT PROVISIONS AND POLICIES

JOHN J. O'CONNELL*

With the enactment of the Washington Consumer Protection Act,[1] the Washington attorney will be meeting for the first time a comprehensive "antitrust" act designed to operate on the local or "intra-state" level.[2] Because this act is, for the most part, unprecedented in this state,[3] and because it involves, in addition to most of the complexities of federal antitrust law, a few novel features of its own, some sort of introduction to its provisions might be helpful to members of the Washington bar. There appears elsewhere in this issue an examination of the substantive provisions of this new law; my observations will be narrower in scope, and will deal mainly with the enforcement provisions. More particularly, I wish to outline the legal "tools" which can be used to enforce the act, some of the policy decisions which were made in fashioning these tools, and the policies—or, perhaps less pretentiously and more accurately—the attitudes, which are likely to guide my administration of this act and my use of these tools. Any attempt

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[1] Wash. Sess. Laws 1961, ch. 216.

[2] This act may be considered as simply compliance by the legislature with the mandate given to it by the Washington Constitution, article XII, § 22. "MONOPOLIES AND TRUSTS. Monopolies and trusts shall never be allowed in this state, and no incorporated company, co-partnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any co-partnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises."

"It cannot be said that the makers of the constitution understood § 22, above quoted, to be self-executing, since they expressly provided that the legislature shall pass laws for its enforcement." Northwestern Warehouse Co. v. Oregon Ry. & Nav. Co., 32 Wash. 218, 227, 73 Pac. 388, 391 (1903). This provision, adopted before the enactment of any of the present federal antitrust legislation, is "simply a recognition of the common law on the subject reduced to definite terms and made the fundamental law of the state." American Export Door Corp. v. Gauger, 154 Wash. 514, 519, 283 Pac. 462, 465 (1929). A violation of its provisions will support an action for damages or a suit for an injunction by the party injured. Group Health Co-op. v. King County Medical Soc'y, 39 Wn.2d 586, 237 P.2d 737 (1951). But this would seem to be the only sense in which this provision could be deemed "self-executing."

[3] There are a number of previously adopted provisions generally implementing art. XII, § 22. Prior to the adoption of Wash. Sess. Laws 1961, ch. 216, however, no legislative attempt to provide a comprehensive statute dealing with the problem appears to have been made. See RCW 9.22.010; RCW 19.90; RCW 24.04.100.

to promulgate a full-blown enforcement policy in advance of its immediate application would be, of course, not only hazardous but probably impossible.

To put the enforcement provisions of this act into proper perspective, a quick glance should be made at the substantive provisions, for the enforcement devices available will depend upon the particular substantive provision which is being violated.

There are roughly three categories of conduct which the act covers.

First, section 2 deals with the same types of business activity as are covered by section 5 of the Federal Trade Commission Act and reads as follows: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

This language is intended to embrace a persistent epidemic of practices which, under the guise of legitimate commerce, take an unfair advantage of competitors and consumers alike, and range from the use of over-zealous selling devices to outright fraud and swindle.[4]

The wideness of scope and the generality of this language result from the difficulty of providing any specific standards and definitions which would cover all such conduct. In drafting the Federal Trade Commission Act, Congress saw this problem very clearly:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.[5]

The second category comprises principally anticompetitive acts which are made illegal per se. These include acts which because of their "pernicious effect on competition and lack of any redeeming virtue"[6] are made illegal regardless of their actual impact upon competition. This category includes contracts, combinations, and conspiracies in restraint of trade, and monopolization or attempts to mo-

[4] For examples of such activity see Consumer Advisory Council, Report to the Governor 41-42 (1960). See also Research Index to FTC Court Cases (1952).

[5] H.R. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).

[6] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

nopolize, and is covered in sections 3 and 4 of the act, modeled after sections 1 and 2 of the Sherman Act.[7]

Sections 5 and 6 deal with a third category, viz., conduct which experience has indicated, if left to flourish, will eventually result in restraint or the elimination of competition. In order to "nip in the bud" any serious interference with free and open competition, these two sections prohibit the acquisition of stock of one corporation by another, and exclusive dealing contracts, if and only if, such acquisitions and such contracts may result in a restraint of trade or commerce or a substantial lessening of competition.

Although application of these sections must meet the "rule of reason," incorporated in section 20 of the act, both of these sections are applicable to conduct which may *tend* to impair significantly the vigor of competition. The language is based on sections 3 and 7 of the Clayton Act.[8]

Before outlining the specific enforcement devices contained in the act, attention should be directed to two devices which were deliberately omitted. Neither criminal procedures, similar to those available to the U.S. Justice Department in its enforcement of the federal antitrust laws, nor administrative regulatory authority, similar to that of the Federal Trade Commission, have been provided.

The omission of criminal procedures is in accord with my view of the proper role of such legislation. While they do serve the purpose of discouraging blatant violations, criminal prosecutions are often too slow, cumbersome, or unpopular to regulate effectively business conduct. This has been demonstrated in this state as well as in others. The purpose of any such controls should be basically to foster public protection rather than to punish for violations. Where, as in the case of outright swindles for example, public protection dictates the necessity of punishment, the prosecuting attorneys will continue to bring criminal proceedings.

There has been created no state counterpart of the Federal Trade Commission, with all of its regulatory powers. The Washington Consumer Advisory Council, which drafted the basic language of the act, recommended that whatever controls are necessary should be administered within the framework of an existing state agency. This was

[7] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1958).
[8] 38 Stat. 730 (1914), 15 U.S.C. § 14 (1958); 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

based simply on the desire to avoid the creation of an additional public agency, with its additional expense to the public.[9]

The following is a summary of the act's enforcement tools:

1. *Civil Investigative Demand.* This device, made available by section 11, authorizes the attorney general to compel the production of documentary material during the pre-complaint stage of antitrust investigation. Several states have similar investigatory provisions.

It should be noted that authority to resort to investigatory demands is limited to possible violations of only those sections of the act dealing with conspiracy to restrain trade, monopolization, exclusive dealing, and corporate acquisition (sections 3, 4, 5 and 6).

2. *Injunction.* Section 8 enables the state to obtain an injunction from the superior courts to restrain violations of any of the substantive provisions of the act.

3. *Assurance of Discontinuance.* Section 10 provides that the attorney general may accept written agreements to discontinue practices which are deemed to be in violation of any of the substantive provisions of the act. Such agreements must be filed with and are subject to the supervision of the superior courts.

4. *Civil Penalty.* Section 14 imposes a civil penalty of not more than twenty-five thousand dollars for a violation of section 3 or section 4 of the act. Violations of other substantive provisions of the act are not subject to the penalty unless there is a violation of an injunction issued to restrain conduct in violation of any such provision.

5. *Corporate Dissolution.* Section 15 provides that, upon petition by the attorney general, an order of dissolution or forfeiture of franchise may be entered against any corporation in violation of sections 3 and 4, or the terms of any injunction issued pursuant to the act.

I would like to review briefly some of the considerations which went into the forging of these enforcement tools, and some of my attitudes toward their utilization.

The investigatory demand authorized by section 11, because of its breadth, must be employed with a great amount of discretion. Violations for which it may be employed do not include conduct prohibited by section 2, since the wide scope of this section might well provide too many occasions for unwarranted "fishing expeditions."

Despite the potential danger in such a summary procedure for in-

[9] Consumer Advisory Council, Report to the Governor 3 (1960).

vestigation, the adoption of this provision seems to me to have been wise, and may be of value not only to the investigator, but to the investigated as well. As the Attorney General's Committee to Study the Antitrust Laws has stated:

> The inevitable generality of most statutory antitrust prohibitions renders facts of paramount importance. Accordingly, effective enforcement requires full and comprehensive investigation before formal proceedings, civil or criminal, are commenced. Incomplete investigation may mean proceedings not justified by more careful search and study . . . .[10]

Whether a complaint should be filed often can be determined only after careful analysis of company books or records. Understandably enough, the company is likely to be a bit uncooperative when it is asked to hand such records over voluntarily, yet the filing of skeleton complaints, simply to obtain compulsory discovery techniques, seems highly undesirable. As the Judicial Conference of the United States has put it, no plaintiff should "pretend to bring charges in order to discover whether charges should be brought."[11]

Moreover, section 11 contains a number of safeguards against possible abuse. Thus, subsection 3 provides in general that any material not properly obtainable by a subpoena duces tecum is not obtainable through the investigatory demand. Subsection 6 controls the disclosure of material to parties other than the court itself or authorized employees of the attorney general, and requires court approval before presentation to the court of material containing trade secrets. And subsection 7 authorizes petitions in superior court for extensions of the return date of the demand, and for the modification or setting aside of the demand.

The use of the injunction, it is hoped, will provide a relatively swift and inexpensive method of formal enforcement. However, the procedure should be pursued, in most cases, only after adequate steps have been taken and failed to effect an assurance of discontinuance. There will of course be situations where an abuse is immediately detrimental to the consuming public and in which the swiftest possible action is desirable. Yet even in these cases, especially in other than section 2 violations, temporary injunctions, while they might seem useful, should be requested with considerable reluctance.

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[10] ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 343 (1955).

[11] JUDICAL CONFERENCE OF THE U.S., REPORT ON PROCEDURE IN ANTITRUST AND OTHER PROTRACTED CASES, 13 F.R.D. 41, 67 (1951), quoted in ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 345 (1955).

The language of the provision authorizing assurances of discontinuance was suggested as a substitute for the consent decree available to the Justice Department, since the former device is more flexible and less formal.

The section authorizing forfeiture of a corporate franchise permits the courts, in their discretion, to order an ouster or charter forfeiture in case of corporate violators. This device has express constitutional authorization and its use is not unprecedented in this state.[12] It is most effective in the case of foreign corporations which may not be sufficiently vulnerable to other enforcement devices.

Since such an order may amount to corporate capital punishment, it should be requested and granted only in the most flagrant cases, where other enforcement devices have failed.

Finally, a few remarks about the general role of this act as I conceive it. First, the underlying purpose of this legislation is to complement the body of federal law governing restraints of trade and unfair or deceptive acts or practices in commerce. While the breadth of federal jurisdiction under the commerce clause has seemingly become almost boundless, the states have not lost their responsibility in this area.[13] And since the United States Department of Justice gives priority in assigning its manpower to practices affecting the national economy rather than to those with primarily a local impact,[14] the states abdicate this responsibility only at their own peril. However, because of limited financial resources and manpower, it will be necessary on the state level to use a system of priorities similar to those used by the Justice Department, by dealing only with those problems which pose the most imminent and serious threat to the state's business and consumer climate.

Second, freedom rather than restraint should always be the rule; freedom from excessive business regulation as well as freedom from

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[12] See RCW 9.22.030 quoted note 2 *supra*, and State *ex rel.* Hamilton v. Standard Oil Co., 176 Wash. 231, 28 P.2d 790 (1934). See also, RCW 7.56.010.

[13] The legislative history of the Sherman Act supports this conclusion. Senator Sherman made clear that the states were not to be ousted from their traditional jurisdiction in this area: "This bill ... has for its ... object to invoke the aid of the courts of the United States to deal with the combinations ... when they affect injuriously our foreign and interstate commerce ... and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States ...." 21 CONG. REC. 2457 (1890).

[14] See DEPARTMENT OF JUSTICE, STATE ANTITRUST LAW REFERENCE HANDBOOK 2 (1960).

anti-competitive restrictions. If regulation of business to any degree is required, it should be limited to the absolute minimum essential to maintaining a fair bargaining position for the consumer, with the least possible interference with freedom of commercial enterprise because business and industry in this state and in the nation are fundamentally legitimate and honest.

Thus, business regulation should be designed to assist industry in policing itself, and governmentally enforced controls should be asserted only in those dark corners of the business community where self-regulation is ineffective.

Third, there is a real need for a framework within which the adjustment of abuses may be accomplished informally. My feeling is that the use of such "pre-legal" procedures will facilitate and stimulate the achievement by business of self-regulation and avoid, to some extent, the necessity of expensive and time-consuming litigation in each individual case that arises.

Such a program as I have in mind for effecting this approach to the administration of the act embraces several general efforts:

1) A constant effort at public education, to the end that consumers may be generally equipped to better protect themselves from undesirable business practices. Such an approach, if effective at all, necessarily must be, to a great degree, restricted in its application to section 2 violations. Consumer action can do little to alter the course of the market conduct prohibited by the Sherman and Clayton Act provisions.

2) Attempts to assist business and industry in the establishment of an effective atmosphere of self-regulation.

3) Employment of the less formal "assurance of discontinuance" wherever possible not only to prevent further abuses with regard to substantive provisions of the act, but also to provide some working guides to the specific kinds of conduct considered to be in violation.

4) Vigorous formal enforcement of the act where flagrant or repeated abuses occur, especially with respect to public bidding and purchasing, and section 2 violations.

One device which has no formal sanction in the act, the trade conference, has been fruitfully utilized by the Federal Trade Commission and can, I believe, be fostered on the local level with even more rewarding results. Industry-wide attempts, within state confines, to reach commonly acceptable definitions of fair conduct are likely to

arouse more public awareness and business responsibility precisely because they are closer to the "grass roots." It is my hope that our office will be able to sponsor and encourage a number of such conferences as problem areas are uncovered.

Especially where section 2 violations are concerned, an active program of informational exchange and enforcement cooperation with Better Business Bureaus, local law enforcement offices, applicable federal agencies, and other state attorneys general should go far to stem the undesirable commercial activities, and secure to consumers the fruits of our system of free enterprise.