HJR

42

9- anti trust

January 27, 1975

Jan Van Dort
Faulkner, Banfield, Doogan,
Gross & Holmes
Suite 201
311 Franklin Street
Juneau, Alaska 99801

Dear Mr. Van Dort:

Thank you for your comments regarding the anti-trust bill. We will probably be working on HB 42 some time next week. We will certainly notify you of the meetings.

I would be interested in obtaining a copy of a report mentioned in Mr. Banfield's letter of March 12, 1971, "Insurance Underwriting Under Antitrust" by Mr. Edwin M. Zimmerman.

Sincerely,

Terry Gardiner
Representative

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January 24, 1975

The Honorable Terry Gardiner
Chairman, House Judiciary Committee
Pouch V, State Capitol
Juneau, Alaska 99801

Re: House Bill No. 42

Dear Mr. Chairman:

As a representative of the American Mutual Insurance Alliance, I am interested in House Bill No. 42, which would provide an anti-trust law for the State of Alaska. House Bill No. 42 appears to be identical to Senate Bill No. 5 which was identical to House Bill 142 which was introduced in the previous legislature. None of these bills contained an exemption for the insurance industry when it was introduced. I am enclosing a copy of a letter which Mr. Banfield wrote to Mr. Jalmar Kerttula on March 12, 1971 when he was the Chairman of the House Commerce Committee. This letter describes the impact of an earlier bill on the insurance industry and explains why the industry should be exempt from the bill's provisions.

The House Commerce Committee which considered the bill recognized the problems that the bill created for the insurance industry and therefore prepared a substitute bill which contained the following exemption:

> Persons engaged in the business of insurance, to the extent they are regulated under AS 21, are exempt from the provisions of this chapter.

I would appreciate the opportunity to discuss this subject with your committee when the bill comes up for

consideration. Please let me know when work sessions or committee hearings will be held on House Bill No. 42.

Very truly yours,

FAULKNER, BANFIELD, DOOGAN & HOLMES

By Jan Van Dort

JVD/aw

Enc.

March 12, 1971

The Honorable Jalmar M. Kerttula
Chairman, Commerce Committee
House of Representatives
Juneau, Alaska 99801

Dear Mr. Chairman:

Re: H.B. No. 164, Anti-Trust Bill

I previously wrote to you on February 23, as a representative of American Mutual Insurance Alliance, stating I would investigate the impact which H.B. No. 164 would have on the insurance industry in Alaska and report to you.

Congress has the right to regulate the insurance industry by reason of the fact that it is engaged in interstate commerce. In 1945, it passed the McCarran-Ferguson Act (15 USCA 1011,et seq), which provides that the business of insurance shall be subject to the laws of the several states which relate to the regulation and taxation of the industry. It also provided that the Sherman Anti-Trust Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Anti-Discrimination Act would not apply to the business of insurance until June 30, 1948, and after that date said Acts shall be applicable to the business of insurance "to the extent that such business is not regulated by state law." Therefore, the states have the right to regulate monopolies and combinations in restraint of trade in the insurance industry. Many states have anti-trust statutes such as proposed by H.B. 164, but New York is the only state which did not exempt the insurance industry. However, when New York did enact such a law on January 1, 1970, it specifically exempted the setting of rates through rating bureaus. The reason various states other than New York have not attempted such regulation is that the Insurance Departments have complete control over discrimination, unfair trade practices, etc., under the Insurance Code. The Insurance Departments, therefore, have control insofar as they care to exercise it, but they recognize that rating bureaus are an absolute necessity. There are other practices in the industry which might be said to be combinations in restraint of trade, such as formulating and adhering to standard insurance policies, the content of which are, in turn, under the control of the State Commissioners. The State Commissioners have their own

association to which the industry goes for guidance with the result that the standard fire insurance policy is used everywhere and any deviations from it can be used only with the approval of the State Director of Insurance. You can understand what a chaotic situation would be created, especially for the consumers, if you had 200 different types of insurance policies in Alaska and how difficult it would be for the Director to regulate the industry.

The reason the companies use rating bureaus to recommend how much they should charge and the State Commissioners use the same bureaus to ascertain what they should allow to be charged, is because the loss experience of all the companies in an area especially under standard policies, is more reliable for rate making than individual loss experience. Therefore, our Director is a subscriber to and pays to support the various bureaus which specialize in rate making for particular purposes. These must be continued, but H.B. No.164 would prohibit such use of, rating bureaus.

From the foregoing, I think it is evident that the industry should be exempt from H.B. No. 164 since it is completely regulated in the same respects by the Insurance Code. If the state should decide to do like New York and prohibit monopolies and regulate the insurance industry under a bill of this type, then it is necessary to work out some specific exemptions such as has been done in New York. Whereas New York is the state in which most of the big companies are incorporated and it is the insurance center of the Western Hemisphere, Alaska is at the opposite end of the spectrum and is in no position to competently regulate the insurance industry except through its Director of Insurance. Therefore, unless the industry is exempt from the provisions of this bill there is a need for specific amendments which can be patterned after the recent New York law. I am furnishing to your staff and particularly Mr. Rhode, a copy of a report made by Mr. Edwin M. Zimmerman, of Washington, D.C., who talked on "Insurance Underwriting Under Antitrust" at a meeting of the 1970 Mutual Insur-

ance Technical Conference at Philadelphia, last November. It will give him some idea of the complexity of the subject of trying to regulate insurance companies under limited exemptions such as are contained in the New York Act.

Yours very truly,

N. C. Banfield

c.c. Mr. Charles A. Brown
Mr. Kenneth H. Nails
Mr. F. O. Eastaugh
Mr. W. W. Fritz
NCB:k

GOV

February 10, 1975

Page 156-159 of journal

The Honorable Mike Bradner
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. Speaker:

Pursuant to the Uniform Rules of the Legislature, I am transmitting a bill to prohibit monopolies and combinations in restraint of trade.

Mor than forty states have already enacted antitrust legislation. Consequently, we have had the benefit of reviewing a large and diverse body of state antitrust law in preparing this bill. In addition, antitrust bills have been introduced in the Alaska Legislature regularly for several years. The attached bill retains many of the provisions of these earlier bills but also attempts to improve upon those provisions which were weak or deficient, and adds provisions which are lacking in earlier bills.

The substantive provisions of this bill follow closely the language of the corresponding federal law. The advantage to using language closely paralleling the federal antitrust laws is that a large body of case law interpreting this language is already in existence.

SECTION-BY-SECTION ANALYSIS

Section 10 prohibits combinations and conspiracies in restraint of trade. For example, this prohibits price fixing agreements, agreements between competitors to allocate markets, exclusive dealing contracts, tying arrangements, and group boycotts, to name but a few.

Section 20 prohibits monopolies and attempts to monopolize.

Section 30 prohibits agreements and conditions which would have the effect of limiting a purchaser or lessee from using products of the seller or lessor's competitor. Examples of this might include exclusive dealing arrangements and tying arrangements. This will at times overlap with section 10, but it also covers situations which would not be reached by section 10 (such as where no agreement exists).

Section 40 prohibits unfair competition and deceptive practices. This provision prohibits many of the acts proscribed above, but also some which might not be covered; for example, price discrimination and boycott by one individual firm.

Section 50 makes unlawful mergers which substantially lessen competition or tend to create a monopoly. It applies to acquisitions by private individuals as well as acquisitions by corporations. The court is authorized to order divestiture in such cases if that is necessary to eliminate the injurious effect.

Section 60 proscribes interlocking directorates and other arrangements of a similar nature. The attorney general is given authority to bring an action to terminate the interlocking relationship.

Section 70 provides the customary exemptions for labor unions, agricultural organizations, and commercial fishermen. In addition, exemptions are provided for bank holding companies organized under AS 06.05.236 and for organizations established under the Cooperative Corporation Act, AS 10.15.

Section 100 makes any contract or agreement made in violation of this chapter voidable by either party, but allows the court the latitude to prevent unjustified gain by a guilty party.

Section 110 provides that persons suffering injury as a result of a violation (including the state, a city, borough, or other government entity) may sue for treble damages, an injunction, or both.

Section 120 makes it a misdemeanor punishable by a fine and imprisonment not exceeding one year to restrain trade (section 10), monopolize or attempt to monopolize (section 20), or make agreements or conditions of sale not to deal with competitors (section 30).

Section 130 authorizes the attorney general to bring an injunctive action, even if the State is not an injured party (for which case the attorney general would be authorized to maintain an injunctive action under section 110). Thus, the attorney general might seek an injunction in combination with an action charging a criminal violation.

Section 140 states that actions under this chapter must be brought in the superior court.

Section 150 acknowledges the use of consent judgments and establishes rules for entry of such judgments in court. It allows any interested party to file objections to the consent judgment or decree during a 60-day period after which it is filed and provides for a hearing on the objections.

Section 160 permits a final judgment in an action brought by the State to be used as prima facie evidence in any subsequent action brought by the State or other party. A consent judgment or decree may not be used in this fashion.

Section 170 establishes a four-year statute of limitation with a tolling of the statute once an action is commenced by the attorney general.

Section 200 gives the attorney general the power to compel production of documents or testimony during investigation for possible antitrust violations and prior to commencement of any action in court.

Section 210 establishes specific guidelines for the contents of the demand and method of serving the demand upon a person, where the material demanded is documentary evidence. It provides that no demand may seek material which is privileged nor may it be unreasonable. Subsection (e) forbids disclosure of the documentary evidence to anyone other than an authorized state employee without the permission of the person who produced the material. Finally, it is made a misdemeanor to disobey or deliberately thwart the demand; however, if the demand is improper, the person on whom it is served is authorized to obtain a court order protecting him from compliance.

Section 220 is substantially identical to section 210, but deals with the procedures for compelling testimony. It provides that when a witness declines to give testimony on the grounds of self-incrimination, he may be given "transactional immunity" and then compelled to testify.

Section 300 contains definitions for the terms "asset," "documentary evidence," and "trade and commerce." "Documentary evidence" is defined to cover all possible forms business records might take.

SUMMARY

Article 1 contains the substantive provisions. It prohibits restraints of trade, monopolies and attempts to monopolize, agreements not to deal with competitors, unfair competition and deceptive practices, mergers which substantially lessen competition or tend to monopoly or interlocking directorates. It also exempts certain organizations from coverage.

Article 2 of the bill contains the provisions on enforcement. Any person injured by a violation of the act may bring a civil action for treble damages, or an action to enjoin the unlawful practice, or an action for both. This remedy is available to the State, a city, borough, or other government entity, as well as all private persons. In addition, any contract made in violation of the anti-trust law is voidable by either party.

Violations of the provisions prohibiting combinations in restraint of trade, monopolies and attempts to monopolize, and transactions and agreements not to use or deal in commodities or services constitute a misdemeanor punishable by a fine, imprisonment not exceeding one year, or both. It is desirable that these violations constitute a misdemeanor since that penalty will no doubt provide a strong deterrent to those who might otherwise engage in such unlawful activities. Furthermore, there is no question of unfairly criminalizing the legitimate activities of businessmen since these violations are seriously harmful to the public and quite easily understood as such by the business community. On the other hand, violations of these provisions prohibiting unfair competition and deceptive practices, mergers which lessen competition, and interlocking directorates, are not made criminal acts

since they pose a less serious threat to the public and may be more difficult for the businessman to understand. Furthermore, in those instances where violation of these provisions is blatant and seriously injurious to the public, it may also constitute a violation of those provisions prohibiting restraints of trade and monopolies or be covered by the Unfair Trade Practices and Consumer Protection Act, AS 45.50.

Article 3 of the bill grants to the attorney general the power to compel production of documents and testimony prior to filing an action in court. Several states have enacted similar provisions. The federal government also has similar powers to compel production of documents but is not authorized to compel testimony. A provision of this nature is desirable because detection of violations of the antitrust laws is often a difficult matter requiring review of numerous business transactions which have occurred over an extended period of time.

The theory behind Article 3 is to provide the attorney general with the power he needs, but also to provide detailed procedural controls which will prevent unfair and arbitrary action by the attorney general. Section 210 of the bill prescribes the contents of a demand and establishes limits on the breadth and scope of the demand. Section 210(f) grants to any person upon whom a demand has been served the right to petition the court for relief from any demand if it exceeds the statutory standards and also gives that person the right to obtain a court order commanding the attorney general to perform any duty imposed upon him by Article 3.

Sincerely,

Jay S. Hammond
Governor

Need

1. 40 states Have
2. ~~No Action by Feds in Alaska~~
3. Protect Capitalism - (Economic System)
   if no anti-trust to protect businessman
   then govt regulation to prevent abuses
   of economic system

3a. NO Federal Action in state
   1. lack of jurisdiction
   2. inadequate fed staff
      1. We can provide advisory & surveillance
      of activities to the Fed staff

"Monopoly by itself is not illegal"

Utilization of power to fix, control prices of
to eliminate competition

John Holt

(1.) Follow 8 U.S. Form of Uniform Code
(2.) Exemption of Utilities, insurance - regulated industries
(3.) Can State enforce Clayton act provisions?
(4.) How valuable are treble damages provision
example of ~~shoe~~ shoe stores in small town

Apply only to

Sherman Act is general Policy statement)
controls by "private governments"; control by
private individuals of economy - should be govt. function

If you have a monopoly soon govt. will have to interfere
with regulation

Monopoly nature of oil companies bread govt. regulation

Reasons for State Anti-Trust

1. not Fed jurisdiction
2. inadequacy of Fed. enforcement staff
~~3.~~ advisory & surveillance activities keep Fed staff busy
3, Feds want state help

SS SBS

Uniform State Anti-Trust Laws

1. Gain advantages of Fed Case laws definitions etc.
2. Minimize application of Fed "Doctrine of Pre-emption"
3. Sherman Act was design to supplement State Laws
4. ~~Obvious~~ Attorneys will have problem advising clients on uniform Anti-Trust Law; not very extensive adoption SBS will actually cause more uniformity

020 020 - wording against "monopolize"

this language in Sherman Act

clear distinction "Monopoly by itself is not illegal"
in Fed court cases

Power to fix, control price - eliminate competit

have to utilize power - Predatory behavior

exercising ~~Predatory~~ Monopoly power in predatory manner

O Hertail - utilities interstate

Public utility used transmission monopoly (legal)
to influence Elbow to be Utilities

030 A Inter Phasing with Regulatory Commissions
Different Issue Hogey + Spencer

040 040 - from FTC act
Is this in Consumer Protection Act
Was made for Commission enforcement not Judicial enforcement

050 Sect. 7 of Clayton Act
is useful + appropriate
Sometimes easier to enforce 050 before they
commit 020 + 030

Mergers foster Anti Competitive activity

660 Sect 8 of Clayton - goes beyond Fed statute
Native Land Claims - if permits or requires by Fed
Statute then it pre-empts our anti-trust bill

070 Exemptions

1. Doctrine of "primary jurisdiction"

if an activity is ~~or~~ within scope of agency is exempt.

Truckers Unlimited - use of protest power

explicit exemption on govt regulated activities
070 B (put exemption here

Unitization in small fields have been held to be "reasonable" restraints of trade

State unitization act exempts from anti-trust

divide unitization from operation & production of field

unless such actions or arrangements occur or are used in a manner clearly beyond the scope of such statutes.

of processing of selling in markets other than those in retail sales.

of delivering to processors for valve.

Any Activity of a govt. regulated Corp that is required by law of regulation is exempt.

Anti-Trust

Andrew Hogey – Regulated industries

R.E.A. Co-operatives telephone; electric
Certificate public convenience + necessity

Rate bureau – internal procedure for setting rates
file them with ATC of ICC
Commission then can suspend
want to exempt the rate making process

ICC Act 5A + 5B exempt carriers from Sherman + Clayton Acts

John Spencer

Can't conceive of any activity by utilities that aren't regulated by Commissions

Bill Hopkins James Tingle San Francisco

drafted Uniform Bill - favors a bill

anti-Trust Committee of ABA

1966 draft finished - National Conference on Uniform Laws 1972

Arizona adopted uniform act

5535 enact Sect 1 + Sect 2 of Sherman act
if parallel to Sherman Act - State courts
would have benefit of federal case law

040 way written citizen could receive damages
030 050 060 — from Clayton Act

Sherman act - applies to conduct
"unreasonable restraint of trade"

Clayton - reasonable prospects of such activity

Alaska & any other state could it enforce
"Clayton Act" type restrictions

Flagrant violation should be only cases of
Treble damages

Uniform Act has civil penalties - procedures
for bringing suit are less complex
Sherman ~~Statute~~ Act doesn't have criminal ~~sanction~~

Treble damages is deterrent - also encourage suits "private enfolcement"

1. How

Need exemption for public utilities - Cartwright Act in California has exemptions

If state orders such an action that are illegal Courts have held that Sherman Act doesn't apply

060 - Any problem with native Corp?
Are they exempted by Native Lands Claim Act.

suggestion from Ann - Automatic treble damages in per se cases

☼ willful & flag instead of flagrant