

# Ocean Law Memo

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## ANTITRUST LAWS AND THE FISHING INDUSTRY

Just about everyone involved with fishing knows by now that the fishing industry is and has been under scrutiny by state and federal authorities looking for violations of the various antitrust statutes. The United States attorney in San Francisco in conjunction with a federal grand jury is conducting a broad investigation of the West Coast fishing industry. Several hundred subpoenas have been issued to processors and marketing associations requesting information about marketing practices over the last five years. Aggrieved private parties are also showing interest in private enforcement of antitrust laws.

These developments have generated a lot of confusion about antitrust laws and how they limit certain activities in the fishing industry. This Ocean Law Memo attempts to clarify the situation by discussing the policy justifications for having such laws and by describing the relevant state and federal laws and their possible applicability to the fishing industry.

### Economics of Competition

Antitrust laws, both state and federal, are legislative enactments to control private economic activity. The basic aim of these laws is to preserve for society the benefits of free and open competition. To this end they condemn and provide punishment for activities which tend to restrict competition or restrain trade.

Justifying the existence of these laws requires justifying their aim, the preservation of competition. Various arguments have been advanced supporting competition as a desirable condition in the market place. Among the most convincing are:

(1) Competition promotes efficiency and progress. Competitors must attempt to reduce their costs and improve their pro-

ducts to maintain their market positions. Competition also forces the movement of capital from areas of decreasing demand to areas of increasing demand. As certain business activities become marginally profitable because of competition for the available buyers, business capital will tend to move into areas or activities where competition is not so great. The winners theoretically are all of us in our role as consumers; we get a better product at a lower price.

(2) Competition provides economic stability; competition induces continuous market adjustments through the economics of supply and demand. Ruinous plunges in market conditions are avoided by spreading recessionary effects out over time.

(3) Competitive pricing tends to encourage the distribution of income proportional to an individual's productive efforts. It helps insure that rewards (income) are distributed rationally according to success in meeting the needs of the market place.

(4) Competition has value independent of its effects on the market place. The opportunity to compete in a free market can be valued as an aspect of liberty; an opportunity to carry on business and succeed or fail on the basis of merit.

(5) Competition checks the power of giant corporations or combines to control market conditions. At the same time it helps minimize the effects of financial power in its social and political aspects. Our inherent distrust of concentrated power is eased by the knowledge that competitive market conditions will, in most cases, help keep an economic power under control.

To preserve these benefits of competition certain conditions must be maintained in the market place. For any commodity or service:

(1) There must be an appreciable number of

both suppliers and customers.

(2) No trader can be so powerful that the other traders lack the capacity to take over at least a substantial portion of his trade.

(3) Traders must be responsive to the incentives of profit and loss.

(4) Pricing and business decisions must be decided by each trader separately without agreement with his rivals.

(5) New traders must have opportunities to enter the market.

(6) There should be no deliberately created obstacles, such as artificial pricing systems, between buyers and sellers.

(7) There must be no preferential status within the market for any important trader or group of traders on the basis of law, politics or commercial alliances.

As a matter of public policy it has been decided that, in most cases, these market conditions should be maintained to secure the benefits of competition. The antitrust laws were enacted for this purpose.

#### The Federal Laws

Congress recognized the need for some controls on business activity nearly 100 years ago. In response to post Civil War excesses of big business, Congress created the Interstate Commerce Commission to regulate the railroads in 1887 and the Sherman Act in 1890 to condemn monopolies and trade restraints. By 1914 it was clear that for effective enforcement of the Sherman Act an administrative agency was necessary. The Federal Trade Commission Act provided the needed agency and extended its area of concern to "unfair trade practices." The year 1914 also saw passage of the Clayton Act which, among other things, abolished discriminatory pricing that had the effect of lessening competition or tended toward creation of a monopoly, unless price differentials were justified by conditions of the sale.

As enforcement of these laws began to have widespread effect on commerce it became apparent that, due to the peculiar nature of some industries, enforcement of the antitrust laws against them was harmful to the overall public good. Among the various exceptions to the antitrust laws carved out over the last half century is one of special interest here: The Fishermen's Collective Marketing Act of 1934. Recognizing the desirability of certain cooperative efforts among fishermen, Congress provided fishermen's associations limited protection from federal antitrust laws.

There are a number of other federal antitrust laws. The ones already mentioned, however, provide the backbone. Although the current federal investigation of the fishing industry may take an unexpected turn, indications are that Section 1 of the Sherman Act will provide the basis for any future legal actions. This portion of the Memo therefore focuses on the Sherman Act § 1 and the protections offered fishermen under the Fishermen's Collective Marketing Act.

#### Sherman Act § 1

"Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . , is hereby declared to be illegal." Thus, in broad language does the Sherman Act § 1 prohibit a wide range of economic activity. The essential elements of a violation consist of (1) a contract, combination or conspiracy, (2) resulting in restraint or interference with trade, (3) in some line of interstate trade or commerce. It has been largely up to the courts to define each of these elements.

The terms "contract, combination . . . , or conspiracy" can be roughly translated to mean concerted action among competitors. The phrase reaches agreements whether formal or informal, express or implied. The statute's aim is to prohibit competitors from working together to stifle market forces, and the courts have applied its prohibitions to almost every conceivable form of concerted action.

Since in the classic case the wrongdoers seek to hide or disguise their conduct, direct evidence of their agreement is often lacking. But express agreements are not always necessary to prove § 1 violations. The U.S. Supreme Court has said, "Where the circumstances are such as to warrant a . . . finding that [there was] a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." United States v. Paramount Pictures Inc., 334 U.S. 131, 142 (1948). Circumstantial evidence can include "conscious parallelism," parallel business behavior among competitors in such areas as pricing, conditions of purchase or sale, etc., where each competitor is aware of the others' behavior and each acts similarly on the basis of that awareness. Such parallel behavior is evidence of an unspoken agreement among the competitors to follow the same path. Although such uniform conduct can often be explained as independent response to uniform business conditions, it can be evidence, though by itself inconclusive, of a conspiracy within the meaning of § 1.

The Commerce Clause of the United States

Constitution gives to Congress the power to regulate only interstate commerce. The Sherman Act therefore only applies if the activity objected to is in the course of commerce between two or more states or between a state or states and a foreign country. Regulation of commerce within a single state is a power retained by the individual states.

Modern business practices and judicial expansion of the term "interstate commerce" have brought much if not most commerce within reach of federal law. Although a single transaction or level of business (e.g., the production level) might occur exclusively within a single state, if the product of an industry is eventually sold or traded interstate the original transaction or transactions are said to be in the "flow" of interstate commerce. Any business activity in the flow of interstate commerce, or which substantially affects it, is within the reach of the commerce clause of the Constitution and, thus, the Sherman Act.

Given this definition of commerce there is no doubt that most business activities associated with fishing are in the flow of interstate commerce. From catching to processing to shipping and final retail sales, the fishing industry is within the scope of the Sherman Act because eventually a large part of the product is sold between states or to foreign nations.

The heart of § 1 is the language prohibiting "restraint of trade." Since nearly every business agreement restrains trade in at least some small way, the law obviously does not mean that every restraint of trade is illegal. The legal standard that has evolved against which business activity is measured for prohibitive levels of trade restraint is known as the "rule of reason." The "rule of reason" must be flexible enough to cover all kinds of businesses, business activity, and the facts of an infinite variety of possible cases. The standard provided by the rule is best described in the following, often quoted excerpt from a Supreme Court opinion:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business. . . ; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting

the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because good intention will save an [otherwise objectionable restraint of trade]; but because knowledge of intent may help the court to interpret facts and to predict consequences. Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

Courts have recognized that some kinds of concerted conduct among competitors are so obviously unreasonably anticompetitive that there is no need to resort to the "rule of reason" to determine if the conduct is prohibited. These kinds of blatant trade restraints are called unreasonable "per se." If the objectionable activity or agreement falls into a per se category the objecting party, be it a prosecutor for the government or a civil plaintiff, need not produce additional proof that the restraining conduct is unreasonable; only the existence of the agreement and some act in its furtherance need be proved. The burden is then shifted to the offending party to prove that the conduct is not an unreasonable restraint of trade.

Included within the category of per se violations are agreements among competitors to fix prices. Price fixing is a per se violation because it has no other purpose except the elimination of price competition. When individual competitors agree to sell only at a specified price the market conditions necessary to produce the benefits of competition are destroyed. Buyers too can be guilty of price fixing. Courts have found that agreements among purchasers to set prices at which they will buy raw materials are price fixing and as such are per se violations. A relevant example of this occurred in Florida in 1976. Four Florida fish dealers were convicted of conspiring to fix prices to be paid fishermen for the purchase of fish. The fish dealers were found guilty of anti-trust violations and were fined \$10,000. United States v. Hudgins Fish Co., Crim. 76-8003-CR-CF (D.C. West Palm Beach, filed Jan. 19, 1976).

#### Fishermen's Cooperative Marketing Act

"[P]ersons engaged in the fishing industry, as fishermen, . . . , may act together in associations, . . . , in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate . . . commerce, such products of said persons so engaged." By this language Congress has exempted fishermen acting within established associations from some of the prohibitions of the antitrust laws. The exemption is limited, however. An association of individual fishermen who are normally considered competitors may work together to accomplish any of the objectives listed

in the language of the statute. This includes joint marketing of their products -- a practice which otherwise would be considered price fixing and a per se violation of the Sherman Act. The exception also permits associations to enter the processing phase of the industry. Although there are currently few association-owned processing plants on the West Coast, at least one association has recently expressed interest in moving into the processing field. All-Coast Fishermen's Marketing Association has been negotiating the acquisition of the former Peterson's Seafood plant in Charleston, Oregon. If negotiations are successful it would be Oregon's first association-owned processing facility. The advantages to fishermen who participate in such ventures are unavailable to competitors in other industries where antitrust exemptions like the Fishermen's Cooperative Marketing Act are lacking.

The limits of the exception are important to note. First, they extend only to fishermen who act together in associations or cooperatives. Individual fishermen who act together outside of such associations may still be subject to antitrust laws. Processors remain generally outside the exception and are subject to antitrust prohibitions.

Second, the exception permits only certain listed activities, which may be accomplished only by acceptable means. A number of cases have arisen where associations used violence, threats of violence and other forms of coercive pressure tactics against processors and non-association fishermen to accomplish their goals. In Gulf Coast Shrimpers and Oystermen's Association v. United States, 236 F.2d 658 (5th Cir. 1956), the court said the association exceeded its exemption when it attempted to exclude from the market all persons not buying and selling in accordance with its fixed prices. Objectionable tactics included fines against non-conforming association members, boycotts of non-conforming fish dealers, picketing, forceful prevention of non-member and out-of-state fishermen from operating in the association's area, and coercion of them to join the association in order to force compliance with its price schedules. In Local 36 of International Fishermen v. United States, 177 F.2d 320 (9th Cir. 1949), illegal activities included preventing non-cooperating dealers from obtaining fresh fish from other sources, interference with such dealers' shipping or transportation, preventing non-member fishermen from fishing or delivering fish, and pressuring non-members to join the association by threats of violence. The Fishermen's Cooperative Marketing Act does not condone such tactics and, when used, they are unreasonable restraints of trade subject to antitrust penalties.

Third, the exception is only as to federal antitrust laws. Individual states also have antitrust laws for which the federal exemption provides no protection. Some but not all states have exemptions similar to the Fishermen's Cooperative Marketing Act. It therefore becomes important for associations to seek competent legal advice to determine whether certain activities are permitted under both federal and state law.

#### The Penalties

The value to society of maintaining a free and competitive market system is reflected by the severity of the penalties for antitrust violations. Violations of § 1 of the Sherman Act are felonies punishable by fines up to one million dollars if the violator is a corporation or association or, if a person, fines of up to \$100,000 or three years in prison or both. Corporate liability can also reach the responsible officers of the offending corporation or association. Such officers may be subject to sanctions available against individual offenders.

Besides the criminal sanctions the law provides private parties "injured [in their business or property] by reason of anything forbidden by the antitrust laws . . ." the opportunity to recover up to three times the damages actually incurred, plus costs and legal fees. Recently the Alaska Independent Fishermen's Marketing Association, a group of Bristol Bay salmon fishermen, filed suit against Peter Pan Seafoods and other processors alleging violations of various federal antitrust laws. Alaska Independent Fishermen's Marketing Association v. Peter Pan Seafoods, Inc., Civ. No. C80-752 (W.D. Wash., filed July 3, 1980). Although not specified in the complaint, the damages, if the suit is successful, could be tremendous due to the treble damages provision. In addition, the fishermen are asking for other equitable relief that could conceivably change the nature of the Bristol Bay salmon fishery. The potency of such private actions is obvious.

#### The State Laws

Although the laws vary in their particulars and exceptions, the antitrust statutes of Oregon, Washington and California can be viewed as "little Sherman Acts." The basic aim of the state laws is the same as that of the federal antitrust scheme. Oregon law declares: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal." The law also establishes that this provision is to be interpreted to be substantially the same as the federal Sherman Act. The Washington law regarding contracts, combinations and conspiracies

has exactly the same wording as the Oregon law and presumably a similar interpretation. California prohibitions on contracts, combinations or conspiracies in restraint of trade occur in scattered provisions but are essentially the same as in Oregon and Washington.

A good example of the applicability of state antitrust law exists in the recent case of Oregon v. All-Coast Fishermen's Marketing Association. The case is reminiscent of federal antitrust cases even though it was brought under the laws of the state of Oregon. The complaint alleged that All-Coast attempted to "fix and stabilize the price at which raw seafood was sold to buyers by discouraging and preventing non-member fishermen from selling their seafood directly to buyers, retailers, and the general public; by preventing non-member fishermen from selling their catch on different terms than those established by [All-Coast]; by preventing non-member fishermen from fishing and selling their catches during times when members were refusing to fish; by preventing buyers from purchasing the catch of non-member fishermen during times when members were refusing to fish; and by boycotting such non-member fishermen." The complaint also states that in the furtherance of these illegal objectives the defendants used threats of physical violence and sabotaged non-members' boats and fishing equipment. The case ended with a consent decree, whereby All-Coast admitted no guilt but agreed to cease the activities complained of. The reach of the state law was nonetheless made clear.

A question that has recently surfaced, and was previously mentioned in this Memo, is whether state laws prohibit formation of fishermen's associations where specific state exemptions for them are lacking. Under the federal laws it is clear that without the Fishermen's Cooperative Marketing Act associations would be prohibited by federal law. Some states have taken this lead and created similar exemptions to their state laws. For those that have not it remains to be seen whether the existence of marketing associations can stand up to a serious legal challenge. In states where no specific statutory exemption exists it has generally been the unstated policy of state officials charged with authority to enforce the antitrust laws to allow associations to operate if conducted in a manner acceptable to federal law. The question involves complex issues of Constitutional law and federal preemption and a complete discussion is beyond the scope of this Memo.

#### Conclusion

Future issues of the Ocean Law Memo will deal with the on-going federal investigation should there be significant developments. It is not yet clear what

results, if any, that investigation will yield.

It is clear that the fishing industry is going through a period of dramatic change. Fishing is moving out of a period where it has been dominated by small investment and individual ownership, a "mom and pop" era, into a time where survival mandates large investment and sophisticated business acumen. As this transition occurs fishing will be associated with what it is becoming--big business--and in the eyes of the law will be treated as such. Application of the antitrust laws is just another feature of the new face of the fishing industry.

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