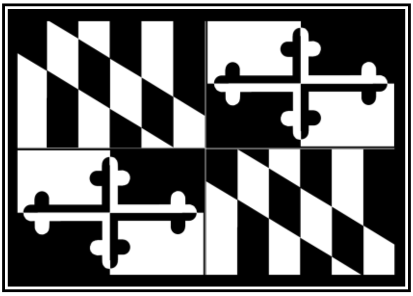

ANTITRUST HANDBOOK

FOR BUSINESSES AND CONSUMERS

OFFICE OF THE

MARYLAND ATTORNEY GENERAL

200 St. Paul Place, Baltimore, MD 21202

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I. INTRODUCTION

Competition is the most important principle of a free market system. In a competitive market, businesses need to compete with each other to attract customers. This type of market helps consumers by ensuring lower prices while stimulating new and better goods and services. Anticompetitive practices harm markets and consumers because they incentivize the raising of prices and the stagnation of innovation. We want businesses to compete and succeed. This handbook is meant to let businesses and consumers know where to turn with questions or complaints about anticompetitive practices.

Laws throughout the United States that protect competition are called antitrust laws. Their goal is to guarantee a fair fight among businesses in order to protect consumers in the market. The Supreme Court of the United States has described the antitrust laws as being:

> "[A]s important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is freedom to compete." United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

The Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act are federal antitrust statutes that are designed to protect consumers in interstate commerce. In Maryland, we have the Maryland Antitrust Act, which addresses both interstate and intrastate commerce that affects Maryland.

In Maryland, antitrust laws are enforced by the Attorney General of Maryland (OAG), the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC). Businesses and consumers can turn to these public agencies with questions or complaints about anticompetitive activities. These agencies can also act on their own accord. If they believe there has been a violation of the antitrust laws, they may file a lawsuit to stop the illegal practices. The Attorney General of Maryland can also bring actions on behalf of the citizens of Maryland damaged by anticompetitive practices. These lawsuits, where a state acts on behalf of its citizens, are called *parens patriae* actions.

In antitrust claims, whether brought in a private legal action or brought by Maryland on behalf of its citizens, those damaged may sue to recover three times (treble) the amount of monetary damages that were suffered plus attorneys' fees and costs. The reason that the amount recovered is three times the actual damage is to incentivize those damaged by these practices to bring a lawsuit and to try and prevent businesses from acting in an anticompetitive manner in the first place. Violations of the antitrust claims can also result in fines and orders to stop the offending actions. The antitrust laws are designed not to hinder or stop businesses from succeeding or doing better than their competitors but instead to protect consumers from the harm that arises when businesses use unfair and anticompetitive methods to do so.

II. WHY DO WE WANT COMPETITION?

Competition allows higher quality goods and services to be provided at lower prices. In theory, when sellers and suppliers compete for customers, each seller or supplier will try its best to lower its price or improve its quality so that the consumer will choose its product instead of another seller's. This means that when markets are competitive, consumers won't have to pay as much for the things they buy.

Competition also encourages efficiency and innovation through lower prices. In order to gain more customers through lower prices, each seller or supplier has the incentive to try and reduce its own costs of production. This can be accomplished by finding new and innovative ways to produce goods more efficiently than previously. Thus, competition makes firms look for new and more efficient ways of doing business. Consumers benefit from this because they get better products at lower prices.

Lowering prices benefits consumers because it allows some people to buy more of a product they want and allows other people who would have been unable to afford a product at a higher price to now purchase the product. This means that when businesses compete, consumers can purchase more and more consumers can purchase.

On the other hand, if sellers agree not to compete or if they join together as one company, consumers are likely to have to pay higher prices and get lower quality goods and services. If sellers do not have to compete to attract customers, they will have less incentive to lower their prices or raise the quality of their goods or services. In fact, they probably will raise their prices without making their goods or services better because they will not fear losing their customers to competitors with lower prices.

Similar results happen when there is just one seller in the market—a "monopolist." In most cases, a monopolist will have no reason to sell its goods and services at the lower price a competitive market would create. Instead, it will raise its price, maximizing its own profits while shrinking the market and reducing consumer's wellbeing. When a business has a monopoly and charges these higher monopoly prices, some consumers can be forced out of the market and the remaining consumers are forced to pay these higher, anticompetitive prices.

III. THE SCOPE OF THE ANTITRUST LAWS

The federal antitrust laws deal with anticompetitive activities that involve commerce between companies located in different states. Maryland's antitrust law covers both activities that occur between Maryland and other states and activities that happen only within Maryland.

1. THE FEDERAL ANTITRUST STATUTES

The Sherman Act (1890) was the first general federal antitrust law and was designed to protect consumers from actions that harm competitive markets. The Sherman Act focuses on two different types of anticompetitive actions:

- Collusion- Agreements and conspiracies between businesses that unreasonably restrain interstate trade.
- Exclusion- Monopolization and conspiracies or attempts to monopolize any part of interstate commerce.

A violation of the Sherman Act is a felony. It carries a maximum fine of $100 million for corporations, and a maximum fine of $1 million and up to 10 years in prison for individuals.

The Clayton Act (1914) aims to further prevent anticompetitive behavior of businesses by addressing specific known practices that can harm competitive markets. The Clayton Act targets:

- Price Discrimination - When businesses charge people different prices for the same product in an attempt to get the maximum price that each person is willing to pay.
- Tying Products - When a business requires the purchase of one item in order to purchase a second item.

- Exclusive Dealing Arrangements - When a business makes deals that prevent the consumer from also dealing with the business' competitor.
- Mergers of Businesses – Business mergers can be harmful when combining the businesses reduces competition in a market.
- Interlocking Directorates – The potential anticompetitive effects of someone acting on the boards of competing businesses leads this practice to be scrutinized.
- Other stock or asset acquisitions that may lessen competition substantially or tend to create a monopoly.

The Clayton Act allows those injured by violations of either Act to bring federal court actions for treble damages. Injunctive relief is also available. An injunction is a judicial order that stops the conduct in question. The Hart-Scott-Rodino Act added a section to the Clayton Act allowing a state attorney general to sue under antitrust laws on behalf of the state's citizens in a *parens patriae* action.

The Federal Trade Commission Act (1914) established the Federal Trade Commission to protect consumers. It also prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." The Act prohibits a broader scope of activity than other federal antitrust laws. The Supreme Court of the United States has said that all violations of the Sherman Act also violate the FTC Act. Thus, the FTC can bring cases against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that are harmful or potentially harmful to competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act or Clayton Act. Only the FTC brings cases under the FTC Act.

Among other things, the FTC has viewed the following practices as violations of the Act:

- Firms agreeing to raise or otherwise control prices
- Attempts to exclude competitors from a market
- Tampering with price structures
- Dividing sales territories to reduce competition
- Curtailing a competitor's sources of supply
- Restricting the freedom of independent customers to purchase or deal with competitors
- Uniform conduct by competing businesses that has the effect of stabilizing price

2. THE MARYLAND ANTITRUST ACT

The Maryland Antitrust Act was adopted in 1972. Its purpose is to "complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." Thus, it closely follows provisions of the federal antitrust laws. However, it applies to any trade or commerce in Maryland whether or not such trade or commerce is local or across state lines.

The Maryland Antitrust Act prohibits unreasonable restraints of trade or commerce (such as price fixing and price discrimination) and prohibits monopolization or attempts or conspiracies to monopolize. Willful violation of this act by an individual or business is a misdemeanor and those found guilty can be fined up to $500,000 and sentenced to up to six months in prison in addition to any damages awarded or injunctive relief granted.

The Maryland Antitrust Act is like federal antitrust laws both in the acts it prohibits and the remedies available to those harmed. It allows state and local governments, private individuals, and businesses to bring civil actions and to get three times the amount of actual damages suffered (treble damages). Injunctive relief that stops the anticompetitive conduct is also available.

3. EXAMPLES OF ILLEGAL ACTIVITIES

In a booklet of this size it is impossible to discuss all aspects of antitrust violations. Antitrust law is a complex area of the law which often depends on the facts and circumstances of each individual case. The hypothetical examples that follow simply outline areas of concern. Although these examples are simplified, they show the kinds of illegal activities that a business or consumer should question.

Price Fixing Agreements

Oriole Company and Raven Company make marbles. The presidents of Oriole and Raven meet some weekends to play golf. At such times, they often discuss business. They decide there is no reason for them to compete so hard on prices. They set a minimum price and agree that neither will sell its marbles below that price.

Every business is usually free to set its own prices. The antitrust laws, however, make illegal any agreement among competitors to raise, lower or maintain the price in order to restrict price competition. The ban on price fixing includes:

- Price fixing among sellers.
- Price fixing among buyers.
- Agreements affecting bidding practices.

- Price maintenance between different types, quantities or qualities of products.
- Fixed terms of sale, including credit terms.
- Agreements between businesses to reduce or eliminate discounts.

The Supreme Court has said that a price-fixing agreement is a violation of the Sherman Act regardless of whether it did actually affect the price. This means that a defendant is not allowed to argue, for example, that the prices were reasonable if a plain price fixing agreement is proved.

Bid Rigging

Harbor Company and Monument Company are engaged in the business of installing plumbing. In response to a Request for Proposals by the State of Maryland, Harbor and Monument agree that Monument will be awarded the contract. Harbor knowingly submits a bid higher than that submitted by Monument to ensure that Monument gets the contract. Harbor and Monument are engaged in bid rigging, a violation of the antitrust laws.

Bid rigging occurs when two or more competitors agree in advance which firm will win the bid. The competitors of the "winner" submit higher bids which camouflage that the bids are not competitive. Bids submitted with a design toward one entity winning a contract are rigged and violate the antitrust laws. Bid rigging is also deemed to constitute criminal conduct.

Resale Price Maintenance

Annabel Lee owns a retail store and sells Poe Ballpoint Pens. The Poe supplier notifies her that she must sell the pens to consumers at $3.50 a pack. Annabel objects, saying that she could sell more pens if she lowered the price. The Poe supplier says that the $3.50 price must be kept the same to ensure the image of Poe as a quality pen company. Also, he points out to Annabel that other dealers will report any of her sales below $3.50 to Poe. Poe Pens may have set up a resale price maintenance scheme.

Agreements between suppliers and retailers may violate the antitrust laws if they involve setting a price or minimum price level. However, a manufacturer may in some circumstances unilaterally decline to sell goods to a retailer who does not sell according to the manufacturer's pre-announced prices.

Group Boycotts

The Clothing Store buys its garment goods from three companies: Rose Clothing, Tulip Apparel, and Daisy Garment. At the beginning of the buying season, Tulip and Daisy together demanded that the Clothing Store no longer deal with Rose. They threatened that if the Clothing Store continued to buy Rose's clothes, Tulip and Daisy would no longer sell to the Clothing Store. The Clothing Store agreed, and as a result, Tulip and Daisy got bigger shares of the Clothing Store's purchases. Rose Clothing is the victim of an illegal group boycott.

A group boycott may occur when firms act together to keep other firms out of the market. A group of wholesalers, for example, may ask retailers not to buy from wholesalers who are not in the group. Accompanying this demand is the express or implied threat that if the retailers do not comply, the boycotting wholesalers will stop selling to them or otherwise harm them. The result may be that the boycotted firms will be unable to compete effectively at the wholesale level.

Tying Arrangements

Small Auto Supply Co. decides to expand its advertising efforts and contacts the only television station in town to buy commercial time. The Media Company, which owns the only television station and one of multiple radio stations, replies that Small can buy TV time only if Small agrees to also buy radio time from the company. The Media Company may have established a tying arrangement in TV and radio time.

A tying arrangement is another type of practice that may violate the antitrust laws depending on the facts and circumstances. It exists when a seller with a product that buyers want (the "tying product") refuses to sell that product unless a buyer also buys another product (the "tied product") from the seller. That seller competes unfairly because it gets a bigger share of the market for the tied product only because it has so much market power in the market for the tying product.

Market Division

Cal and Manny both distribute appliances. They agree that life would be simpler if each were active only in his own county. They agree not to advertise or try to attract customers in the other's county. This arrangement is a geographic or territorial market division, reducing competition within each county and may violate the antitrust laws.

Agreements to divide markets among competitors are illegal. Market divisions in violation of the antitrust laws include agreements among competing firms to parcel out exclusive geographical territories, customers, or products. These arrangements are essentially agreements not to compete: “I won’t sell in your market if you don’t sell in mine.” Market and customer allocation schemes of this kind are frequently found to constitute criminal conduct.

Other Antitrust Violations

Agreements among competitors that are not inherently harmful to consumers are judged under a flexible “rule of reason” standard. That standard tries to decide the agreements’ overall competitive effects. The focus is on the nature of the agreement, the harm that could arise, and whether the agreement is reasonably necessary to achieve competitive benefits. Examples of conduct judged under the rule of reason include: agreements to restrict the amount or content of truthful and non-deceptive advertising; ethical rules to unreasonably restrict the ways professionals may compete; and business associations made up of competitors withholding benefits from non-members to keep prices high.

Other examples of antitrust violations arise when one firm gets such a large share of the market that it can set prices without being competitive. Mergers raise concerns about the creation of a monopoly or an entity with market power. Mergers can also be tools used by entities banding together to collude or otherwise violate the antitrust laws. These kinds of mergers may be subject to attack under the antitrust laws.

Some monopolies are allowed and therefore don’t violate antitrust laws. For example, in the case of public utilities like an electric company, the government has decided that the utility service is best provided by a monopoly. The government strictly regulates these monopolists to try to prevent the consumer harm monopolies can cause if left unchecked. While monopolies willfully obtained through anticompetitive practices can violate antitrust laws, those monopolies obtained by a "superior product, business acumen or historic accident" may not violate the antitrust laws.

IV. ENFORCEMENT

1. MARYLAND ANTITRUST DIVISION

The Maryland Attorney General has authority to look into and prosecute violations of the state antitrust law. Both civil and criminal cases are possible. The Attorney General can bring state criminal actions along with the State's Attorney for the county where the prosecution is brought. The Attorney General can bring civil enforcement actions to get injunctive relief and fines up to \$100,000 per violation. The Attorney General may also sue for money for Maryland citizens and government entities. Unlike the Justice Department and the FTC, Maryland's Antitrust Division is not restricted to cases involving interstate commerce. It is, therefore, able to bring local cases as well as cases of national importance.

The Attorney General can investigate possible violations of the Maryland Antitrust Act. If he or she thinks a person has knowledge related to an investigation of a possible violation, the Attorney General may serve a Civil Investigative Demand. This means that the person must testify under oath, through interrogatories or a deposition. If the Attorney General thinks a person has any documents that are relevant to that investigation, the Attorney General can inspect those documents. The Attorney General can't do this in a criminal case, but can use grand jury subpoenas and other criminal investigatory powers.

When the Attorney General thinks some behavior violates the Maryland Antitrust Act, he or she may accept an "Assurance of Discontinuance" from that person. This means that the person has to stop the activity that the Attorney General believes broke the law. By doing so, the person doesn't admit he or she did anything illegal but is supposed to stop the activity in question. However, if the person agrees to stop the activity but instead continues to do it, he or she violates the Act.

The Maryland Attorney General can't give official advisory opinions to private parties. He or she may, however, issue "business review letters." These are statements of the Attorney General's enforcement plans under Maryland antitrust law about proposed business practices. Also, the Antitrust Division advises the state's executive and legislative branches of government on antitrust law and other matters involving competition.

2. THE DEPARTMENT OF JUSTICE

The Antitrust Division of the U.S. Department of Justice has the power to enforce criminal violations of the Sherman Act. Possible criminal violations of the Sherman Act are investigated by the Department of Justice, using the FBI, grand juries, and other criminal investigators. The Department of Justice's Antitrust Division shares civil enforcement of the Clayton Act with the Federal Trade Commission.

The Antitrust Division of the Department of Justice may also bring civil actions to stop violations of the Sherman Act. It also can issue Civil Investigative Demands to require production of documents or to get testimony from witnesses. The Division also advises executive departments and helps with proceedings of the regulatory agencies. It also issues "business review letters" stating its enforcement plans for proposed business activities.

3. FEDERAL TRADE COMMISSION

The FTC may investigate and sue businesses that act unfairly or deceptively, or use unfair methods of competition. The FTC also enforces the Clayton Act sections relating to price discrimination, tying arrangements, interlocking directorates, and mergers.

The Commission has power to stop business practices that restrict competition or that deceive or otherwise injure consumers, as long as these practices fall within the legal scope of the statutes, affect interstate commerce and involve a significant public interest. Such practices may be stopped by cease and desist orders issued after an administrative hearing or by injunctions issued by a federal court. Violation of a final cease and desist order means the violator may be required to pay penalties of over $40,000 per day for each violation.

The FTC also defines acts that violate the law so that businesses may know their legal obligations and consumers may recognize which practices are illegal. By issuing these Trade Regulation Rules, the FTC states what practices it believes are "unfair or deceptive." The Commission is also allowed to sue for civil penalties against violators of its consumer protection Trade Regulation Rules.

V. ROLE OF THE PUBLIC

If you come across business behavior that appears to break antitrust laws, the Antitrust Division of the Maryland Attorney General's Office encourages you to report this conduct to one of the enforcement agencies. Please write or call the division at this address:

Office of the Attorney General
Antitrust Division, 19th Floor
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6470
antitrust@oag.state.md.us

For more information, please visit the FTC and DOJ websites at
https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws
https://www.justice.gov/atr