February 23, 2000

REPORT OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION ON H.R. 3138, THE FREE MARKET ANTITRUST IMMUNITY REFORM ACT OF 1999

These views are presented only on behalf of the Section of Antitrust Law ("Antitrust Section") of the American Bar Association ("ABA"). They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

SUMMARY

H.R. 3138, introduced by Representative Henry J. Hyde, would repeal the antitrust immunity currently enjoyed by ocean carriers under the Shipping Act of 1984. The Hyde Bill, which would be known as the "Free Market Antitrust Immunity Reform Act of 1999," would eliminate antitrust immunity for ocean carriers. It would preserve antitrust immunity only for marine terminal operators, which are largely public port authorities accountable to the legislatures that created them.

The Section of Antitrust Law of the American Bar Association ("Antitrust Section") supports the Hyde Bill and supports the elimination of the antitrust exemption for the ocean shipping industry for the reasons explained in detail below. The Antitrust Section disfavors antitrust exemptions directed at specific industry categories or conduct. The antitrust laws are designed to provide general standards of conduct for the operation of our free enterprise system. Special exemptions from these standards rarely are justified: they often are not necessary to eliminate the risk of antitrust liability for procompetitive conduct, and the goals for such protection often can be achieved in a manner consistent with established antitrust principles and enforcement policy. The Antitrust Section -- consistent with its opposition to other antitrust exemptions[2] -- strongly endorses the introduction of competition in ocean shipping to develop competitive and efficient markets and to benefit consumers.

LEGISLATIVE BACKGROUND

The ocean shipping industry has been largely immune from the operation of the antitrust laws for more than 80 years. Under the Shipping Act of 1916, carriers were required to file conference agreements with the U.S. Shipping Board. If approved by the Board, those agreements permitted the member carriers to fix rates and engage in other collective activity without fear of antitrust challenge. The 1916 Act was amended in 1961, in part to require common carriers and conferences to file tariffs showing all of their rates and charges with the Federal Maritime Commission ("FMC"), and to keep them open for public inspection.

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[2] *See, e.g.,* Reports of the Antitrust Section on the Quality Health-Care Coalition Act of 1999, Antitrust Health Care Advancement Act of 1997, the Television Improvement Act of 1997, the Major League Baseball Antitrust Reform Act of 1997, the Curt Flood Act of 1997, and the Major League Baseball Antitrust Reform Act of 1995 (all available at http://www.abanet.org/antitrust).

The 1916 Act, as amended, was subsequently replaced by the Shipping Act of 1984, the currently operative shipping statute. The 1984 Act continued essentially the same legislative scheme as the earlier one. It provides, in part, that certain types of carrier arrangements are exempt from otherwise applicable antitrust laws, but the agreements must be approved by, and the rates filed publicly with, the FMC. In October 1998, Congress amended the 1984 Act by adopting the Ocean Shipping Reform Act ("OSRA"), which enlarges the right of shippers and carriers to enter into private, confidential contracts at off-tariff rates; it provides greater protection of each carrier's right of independent action; and it continues antitrust immunity for collective actions by carriers under approved agreements.

PROPONENTS AND OPPONENTS

Proponents of the Hyde Bill include shippers, shipper associations, and the Antitrust Division of the U.S. Department of Justice. Representatives of shipper interests testified in favor of eliminating the exemption at an oversight hearing before the House Judiciary Committee in May 1999.[3] In general, they argued that the removal of antitrust immunity was necessary to check apparently coordinated price increases like the one that occurred the previous year in connection with the Asian economic crisis.[4] When rates and charges were publicly filed and deviations from published rates were prohibited, they said, shippers had the same access to rate information in the marketplace as carriers did. With the advent of private, confidential contracts, however, the shippers claimed that they were generally forbidden by contract from disclosing the terms of their confidential agreements with carriers to other shippers, while the carriers used the protection of antitrust immunity to pool information from the confidential contracts among themselves. The carriers' ability to exchange such information among themselves, argue the shippers, provides them with an unfair advantage in rate negotiations, artificially inflating carriage rates. Shipper representatives also argued that, since a relatively small proportion of ocean carriers are U.S.-owned, the principal beneficiaries of antitrust immunity are foreign interests.

The Antitrust Division has long opposed antitrust immunity for ocean shipping. During the Judiciary Committee's oversight hearing, John M. Nannes, Deputy Assistant Attorney General, testified that antitrust immunity should be ended. The Division stated that the ocean shipping industry does not appear to be an exception to the general proposition that competition is the most effective way of providing consumers with the best products and services at the most affordable costs, and that the ocean shipping industry does not possess any unique characteristics that warrant departure from normal competition policy.

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[3] Copies of all statements at the oversight hearing before the House Judiciary Committee can be found at the Committee's web site: http://www.house.gov/judiciary.

[4] FMC Commissioner Delmond Won testified about the collusive agreements reached by carriers during that period, which led to "lock step" uniformly higher prices for shippers because the "centralized information exchange system provides a forum in which all members could take advantage of the unusual market conditions in a coordinated manner."

Opponents of the Hyde Bill include carrier interests and the Chairman of the FMC. In testimony before the House Judiciary Committee during its oversight hearings, liner company executives testified, in part, that continued antitrust immunity was necessary to help dampen fluctuations in unstable markets for ocean shipping services. They stated that the ability to discuss trade conditions and seek similar pricing strategies provides carriers with a means of justifying the large investments of capital necessary to maintain and expand capacity in an historically volatile industry. The executives added that the FMC has a broad array of powers to ensure that carriers do not abuse their antitrust exemption.

Chairman of the FMC Harold J. Creel, Jr. also testified in support of retaining antitrust immunity, though less vigorously than the carriers. Noting that the laws of many nations govern the ocean shipping industry, he suggested that the need to maintain international comity and harmony is a compelling reason for taking a cautious approach to antitrust immunity. A representative of the American Association of Port Authorities testified that antitrust immunity remained necessary for port authorities to better plan the allocation and investment of funds for the development and operation of public port facilities. He opined that the existence of immunity did not represent a threat to competition at the port authority level since port authorities are public entities that act in the public interest and are accountable to the state legislatures that created them.

RECOMMENDATION

The Antitrust Section does not believe that the ocean shipping industry has characteristics that are sufficiently unique to justify exemption from the antitrust laws. Especially with the advent of confidential contracts, and the resulting loss of transparency on the shipper side, continued immunity for carriers is likely to result in inflated carriage rates, the costs of which are ultimately borne by consumers. As in other industries, enhanced competition is likely to be the most effective way to respond to fluctuations in an unstable market. Collusion rarely yields benefits for consumers. As other countries strengthen their own antitrust laws and enforcement, moreover, international comity alone cannot justify the preservation of antitrust immunity.[5]

The concerns raised by opponents of H.R. 3138 in support of their view that the antitrust exemption for ocean shipping should be maintained are not persuasive, and certainly are not unique to the ocean shipping industry. The arguments of opponents, and the Antitrust Section's views on each argument, include the following:

- The industry is subject to regulatory oversight so the antitrust laws are not necessary.

  → Many other industries, including airline transportation, trucking, telecommunications, and the defense industry, are also subject to extensive regulation. But the application of the antitrust laws to those industries has resulted in the usual benefits of competition: more choices for consumers, better products, and lower prices. There are no differences in ocean shipping that compel any different result.

[5] The bill preserves antitrust immunity for marine terminal operators, which are largely public port authorities.

→ Indeed, it has been suggested that H.R. 3138 was motivated in part by abuses in the Transpacific trades during 1998, and that those abuses are already subject to regulatory oversight. The failure of regulation either to prevent or correct those abuses is a classic illustration of the reasons that competition could benefit this industry.

→ Indeed, it appears that the FMC has now closed its investigation into this incident without taking any enforcement action, which is yet another example of why competition works better than regulation—in this case, regulation has failed to correct abuses by industry.

- In the absence of an antitrust exemption, the market would devolve into an oligopoly.

  → Firms that enjoy an antitrust exemption can engage in oligopoly behavior with impunity. Eliminating antitrust exemptions is likely to minimize the risk of both overt collusion or oligopoly conduct, such as the recent conduct of ocean shippers.

- There has been excess capacity in the industry, and the antitrust exemption has allowed carriers to avoid a "highly destructive" market with unstable rates and service.

  → In other industries, customers and consumers typically benefit from over-capacity in the form of greater competition and lower prices.

  → Moreover, immunized cartels, by their very nature, tend to cause higher prices and to attract additional (excess) capacity. The existence of excess capacity suggests that the market needs more competition, not less.

- An exemption is necessary to justify large capital investment in a volatile industry.

  → Other industries -- such as petroleum exploration and refining, construction, automobile manufacturing, and other heavy industries – also involve large capital expenditures and uncertain supply and demand conditions. But these industries all operate without any antitrust exemptions. It is difficult to understand why ocean shipping should be different.

- An antitrust exemption is necessary to maintain a U.S. flag fleet.

  → The reality is that there are virtually no U.S. flag ocean carriers today (or at least few, if any, ships owned by U.S. firms), so the exemption largely protects foreign ship owners, many of whose customers are U.S. firms that are paying higher prices than they would pay in a competitive market.

  → Moreover, if there is a national interest in maintaining U.S. flag carriers, there are far more efficient, procompetitive ways to do so than by maintaining an antitrust exemption.

For all of these reasons, the ABA Section of Antitrust Law urges Congress to enact H.R. 3138 so ocean carriers will be forced to operate in a competitive market and so shippers and other customers can enjoy the benefits of that competition.