

The Maryland Antitrust Act:

AN OVERLOOKED STATUTE

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Since the General Assembly enacted the Maryland Antitrust Act (“MAA”) in 1972, Maryland lawyers have brought antitrust claims under federal statutes such as the Sherman Antitrust Act of 1890, occasionally adding pendent claims under the MAA. The MAA is analogous to the federal statute in its enumeration of prohibited activity and in many other respects. Although federal antitrust law is sufficiently broad from a jurisdictional standpoint, lawyers who bring state court actions under the MAA may reap strategic benefits. In selected cases, the MAA is broader in its prohibition of anticompetitive activities than federal antitrust statutes. As a result, Maryland attorneys should consider the MAA when analyzing potential antitrust claims based on anticompetitive conduct in the state.

Overview of the MAA

The General Assembly intended the MAA to complement federal antitrust laws regarding restraints of trade and other anticompetitive conduct.¹ The core of the statute prohibits contracts, combinations, and conspiracies that unreasonably restrain commerce; monopolizing, attempting to or conspiracy to monopolize; discrimination in the price of commodities or services of like grade and quality, where the discrimination may harm competition; other forms of price discrimination, such as rebates or provisions of services or facilities to customers who are not on terms accorded all purchasers on a proportional basis; and exclusive dealing arrangements of a nature that may harm competition.²

In addition to criminal and civil enforcement by the state Attorney General, the statute provides private rights of actions for damages or for injunctive relief.³ Similar to federal private treble damage claims, the state statute grants causes of action to persons injured in their business or property by a violation of the MAA. Damage awards are automatically trebled and coupled with an award of costs and reasonable attorneys fees.⁴ If an injunction is issued, then the complainant is also entitled to costs and reasonable attorney’s fees.⁵

Both of the substantive prohibitions and enforcement mechanisms of the MAA are comparable to those of federal antitrust law, prohibiting unreasonable restraints of trade, monopolization and price discrimination and exclusive dealing of a nature and magnitude that may be anticompetitive. Indeed, the MAA provides that its interpretation is guided by the interpretation of

relevant federal statutes by federal courts.⁶ This admonition has been accepted by state courts, which have commonly cited and relied upon federal decisions in applying the MAA.⁷

Private Litigation under the MAA

Litigants have made limited use of the MAA. Many claims are simply pendent claims filed in federal antitrust cases alleging that the asserted federal violations also violated state law. The state antitrust counts in these cases were typically redundant and disposed of in the same fashion as the federal claims. For example, in *Neugebauer v. A.S. Abell Co.*,⁸ a newspaper carrier alleged the defendant newspaper publisher squeezed him from the market.⁹ The court ruled that because the federal antitrust causes of action failed, the duplicative state law claims failed as well.¹⁰

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Some MAA cases brought in state court reflect an effort to avoid established interpretations of federal law precluding a federal claim. In *Davidson v. Microsoft Co.* class action plaintiffs alleged that Microsoft overcharged for the Windows 98 operating system, and sought to use state law on behalf of indirect purchasers.¹¹ Five years after the Supreme Court’s decision in *Illinois Brick Co. v. Illinois*¹² prohibiting indirect purchasers from suing under the Sherman Act, the Maryland legislature in 1982 amended the MAA permitting the state and its agencies to sue as indirect purchasers. However, the amendment did not extend to private litigants.¹³ As a result, the Davidson court ruled that private litigants could not sue as indirect purchasers, pointing to the rejection of a senate bill that would have permitted private indirect purchasers to sue alleged violators.¹⁴

Similarly, *Baltimore Scrap Corp. v. Joseph* reflected a possible effort to avoid the federal antitrust doctrine, known as Noerr-Pennington doctrine, which provides that those who petition government for redress are generally immune from antitrust

liability under state statute if federal immunity would extend under Noerr-Pennington.¹⁵ The state court, however, adhered to Noerr-Pennington in applying the MAA.¹⁶

At first blush, these cases suggest little or no role for use of the state statute by private antitrust litigants. The jurisdictional reach of federal antitrust statutes is exceedingly broad, reaching to the full extent permissible under the Commerce Clause. For example, in *Ottensmeyer v. Chesapeake & Potomac Telephone Co. of Maryland*, the appellant owner of a state telephone answering service relied on the Sherman Act to seek recovery against a state telephone service provider for allegedly trying to eliminate competition by instigating a police search and seizure of the appellant's business premises.¹⁷ Even this localized business sought relief under federal law.

It is difficult to imagine exclusionary or anticompetitive conduct that affects intrastate commerce but does not have a sufficient effect on interstate commerce to permit claims of federal violations. Because federal courts have exclusive jurisdiction over federal antitrust claims, such a claim must be brought federally. Hence, any claim under the MAA typically becomes a redundant pendent claim whenever a federal action is brought.

Is There Any Utility to the MAA for Private Litigants?

Private litigants should not overlook the MAA because there are situations in which it may be exceptionally useful. A private litigant may prefer bringing an action in state court over federal court for several reasons. For example, the court location may be more convenient and accessible, the resident jury panel may possess greater knowledge of local conditions and be more sympathetic towards a local plaintiff, and litigants may prefer some state discovery procedures (e.g., limits on the time of costly depositions without leave of court). Perhaps more significantly, a federal case against a non-resident defendant may entail the risk of a venue transfer to a distant, non-Maryland federal court. Such a change in venue would not be available in a MAA case brought in state court unless diversity jurisdiction existed and the case could be removed to federal court.

Finally, there may be situations in which the MAA is broader than federal antitrust law. Notably, if price discrimination is at issue, then the federal Robinson-Patman Act applies only to *commodities*.¹⁸ In contrast, the comparable prohibition under the MAA prohibits discrimination in price of *services* in addition to commodities. The other statutory elements of price

discrimination must also be satisfied: services of “like grade and quality” and discrimination that has anticompetitive consequences as required by the statute. While there may be few cases that satisfy the statutory elements of discrimination, an aggrieved party can attempt to seek redress under the MAA where discrimination of the price of services is alleged, but is left without recourse under the analogous federal statute.

Conclusion

In summary, whenever a Maryland plaintiff is considering an antitrust suit, federal antitrust law should not be the sole focus.

The plaintiff should also consider the MAA, and not simply as a pendent claim. There are situations in which a state court action, heard only under the MAA, would be strategically advantageous. **BLB**



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¹ See MD. CODE ANN., COM. LAW § 11-202(a) (West 2005) (the “MMA”).

² See *id.* at § 11-204(a)(1)-(6).

³ See *id.* at § 11-209(b)(2).

⁴ See *id.* at § 11-209(b)(4).

⁵ See *id.* at § 11-209(b)(3).

⁶ See *id.* at § 11-202(a)(2).

⁷ See *Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663, 665-66 (Md. 1984) (analogizing to the Sherman Act in determining whether defendant lessor conspired to restrain trade and attempted to monopolize a shopping center).

⁸ 474 F. Supp. 1057, 1071 (D. Md. 1979).

⁹ See also *Purity Products, Inc. v. Tropicana Products, Inc.*, 702 F. Supp. 564, 569 (D. Md. 1988) (declaring that if plaintiff's federal antitrust claims are without merit, then there can be no recovery under the Maryland Antitrust Act); *Imaging Ctr., Inc. v. W. Md. Health Sys.*, No. 04-2177, 2005 WL 3403627 (4th Cir. 2005).

¹⁰ See *Neugebauer*, 474 F. Supp. at 1071.

¹¹ 792 A.2d 336, 341 (Md. Ct. Spec. App. 2002).

¹² 431 U.S. 720 (1977).

¹³ MD. CODE ANN., COM. LAW § 11-209 (b)(2)(ii) (West 2005).

¹⁴ See 792 A.2d at 342. See generally Christopher Paul Dean, Comment, *Davidson v. Microsoft Corporation: Reexamining Maryland's Illinois Brick Bar Against Indirect Private Purchasers*, 33 U. BALT. L. REV. 69, 84 (2003).

¹⁵ 81 F. Supp. 2d 602, 612 (D. Md. 2000).

¹⁶ See *id.* at 621.

¹⁷ 756 F.2d 986, 997 (4th Cir. 1985).

¹⁸ 15 U.S.C. § 13 (2007) (emphasis added).