Michigan Law Review

Volume 62 | Issue 6

1964

Antitrust Civil Process Act-Requirements for a Civil Investigative Demand

Mary Mandana Long
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Antitrust and Trade Regulation Commons, Civil Law Commons, and the Civil Procedure Commons

Recommended Citation
Mary M. Long, *Antitrust Civil Process Act-Requirements for a Civil Investigative Demand*, 62 MICH. L. REV. 1041 (1964).
Available at: https://repository.law.umich.edu/mlr/vol62/iss6/6

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ANTITRUST CIVIL PROCESS ACT—REQUIREMENTS FOR A CIVIL INVESTIGATIVE DEMAND—Petitioner sought an order from the United States District Court for the District of Minnesota modifying or setting aside a Civil Investigative Demand served upon it by the Antitrust Division of the Department of Justice. The demand was issued pursuant to the Antitrust Civil Process Act,[1] which provides a compulsory pre-complaint procedure through which the Department of Justice may obtain documentary information upon which it can make a determination of whether there has occurred a violation of the antitrust laws.[2] Section 1312(b) of the act requires that the demand state the nature of the conduct constituting the alleged viola-

1 76 Stat. 548 (1962), 15 U.S.C.A. §§ 1311-14 (1962).

2 "Whenever the Attorney General, or Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served on such a person, a civil investigative demand requiring such person to produce such material for investigation." 76 Stat. 548 (1962), 15 U.S.C.A. § 1312(a) (1962).

tion, recite the provision of law applicable thereto, and describe the class or classes of material to be produced with sufficient certainty so that it can be fairly identified.[3] Petitioner contended that since the demand served upon it failed to comply with these requirements it constituted a "fishing expedition"—a result not intended by Congress—and was violative of the constitutional right to be free from unlawful searches and seizures guaranteed by the fourth amendment. *Held,* order denied. The power granted to the Attorney General by the act does not violate the fourth amendment, and the demand complies with the standards of section 1312(b).[4] *In re Gold Bond Stamp Co.,* 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam,* 325 F.2d 1018 (8th Cir. 1964).[5]

The purpose of the act is to enable the Department of Justice to obtain documentary evidence during the course of a civil investigation to enforce the antitrust laws.[6] Prior to the enactment of this statute, in order to obtain such information during the pre-complaint stage of an investigation the Antitrust Division had to depend mainly upon the voluntary cooperation of those under investigation. If such cooperation was not forthcoming, the Division attorneys had only three alternatives. They could file a skeleton civil complaint and use the discovery processes of the Federal Rules of Civil Procedure, resort to a grand jury, or request the Federal Trade Commission to investigate.[7] This system was unsatisfactory for civil enforcement needs. Voluntary cooperation has often been sufficient; many companies, however, give only partial cooperation, while others refuse to cooperate at all.[8] A governmental agency should not be dependent solely upon voluntary cooperation for the discharge of its responsibilities.[9] The initiation of a civil complaint supported by little or no evidence is both unfair and unwise when its only purpose is to utilize the discovery mechanisms provided by the Federal Rules of Civil Procedure. It places upon the defendant the burden of preparing a costly and time-consuming defense to a suit which may be unwarranted and, likely as not, will be abandoned by the government before it goes beyond the preliminary stage.[10]

[3] 76 Stat. 548 (1962), 15 U.S.C.A. § 1312(b) (1962).

[4] Petitioner's alternative request that the court stay compliance with the order until the Federal Trade Commission completed its investigation of two of its competitors was also denied. Principal case at 398.

[5] The circuit court adopted the district court's reasoning *in toto* in its per curiam opinion; the following discussion, therefore, is based entirely upon the district court's opinion.

[6] H.R. REP. No. 1386, 87th Cong., 2d Sess. 3 (1962).

[7] Federal Trade Commission Act § 6, 38 Stat. 721 (1914), 15 U.S.C. § 46 (1958).

[8] See Decker, *The Civil Investigative Demand,* 21 A.B.A. SECTION ANTITRUST L. 370, 373 (1962).

[9] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 343-48 (1955).

[10] The procedure authorized by the Civil Process Act will necessarily involve the expenditure of a certain amount of time and money in the gathering and duplication of the requested documents. However, this will vary with the number of documents required and the method of record keeping of the company involved, and in the majority of cases should be far less expensive and time consuming than the preparation of an adequate defense to an inaccurate or indefinite charge.

Unwarranted litigation places an unnecessary and costly burden on already congested courts. The Judicial Conference of the United States has expressed its disapproval of the practice.[11] While evidence obtained in a grand jury investigation can be used in a civil prosecution,[12] use of the grand jury where civil proceedings are contemplated from the outset subverts the grand jury's function and debases the law by attaching a taint of criminality to citizens who have committed no crime.[13] Finally, the power of the Federal Trade Commission to make investigations for the Attorney General is limited and unworkable.[14]

Thus handicapped, the Department of Justice had often been unable to obtain factual information necessary to a proper determination of whether a civil antitrust prosecution is justified. The method prescribed by the Antitrust Civil Process Act for obtaining this essential information is not new. Numerous federal agencies and officials have similar powers, and at the time of the passage of the act seventeen states authorized such a procedure for enforcement of state antitrust laws.[15] The first impetus for

[11] No plaintiff, including the Government, may pretend to bring charges in order to discover whether actual charges should be brought. *Procedures in Antitrust and Other Protracted Cases Adapted by the Judicial Conference of the United States,* reproduced in Yankwich, *"Short Cuts" in Long Cases,* 13 F.R.D. 41, 67 (1952). "[T]hose rules . . . were not intended to make the courts an investigatory adjunct to the Department of Justice." *Ibid.*

[12] United States v. Procter & Gamble Co., 356 U.S. 677, 684 (1958); FED. R. CRIM. P. 6 (e).

[13] United States v. Procter & Gamble Co., *supra* note 12, at 683-84 (dictum); ATT'Y GEN. NAT'L COMM. REP. 343 (1955).

[14] The power of the Federal Trade Commission to investigate applies only with respect to corporations and their relationship to partnerships and associations, 38 Stat. 721 (1914), 15 U.S.C. §§ 46(a), (b) (1958), whereas the present statute applies to partnerships and associations. It applies only to enjoin future violations, not to prosecute past violations. There is uncertainty as to whether the Commission is required to make such a pre-complaint investigation for the Attorney General, although upon application of the Attorney General the Commission is required to investigate whether there is compliance with a final decree against a corporation in an antitrust suit. 38 Stat. 721 (1914), 15 U.S.C. § 46(c) (1958). The Department of Justice attorneys would be unable to maintain control of their investigations if reliance on the FTC were necessary. It would also be a considerable drain on both the manpower and budget of the Commission. H.R. REP. No. 1386, *supra* note 5, at 4.

[15] Federal agencies and officials having similar power are: Federal Trade Commission, 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958); National Labor Relations Board, 49 Stat. 455 (1935), as amended, 29 U.S.C. § 161 (1958); Atomic Energy Commission, 68 Stat. 948 (1954), as amended, 42 U.S.C. § 2201 (1958); Census Bureau, 13 U.S.C. §§ 221, 223, 224 (1958); Civil Aeronautics Board, 72 Stat. 766 (1958), 49 U.S.C. § 1377 (1958); Federal Aviation Agency, 72 Stat. 792 (1958), 49 U.S.C. § 1484 (1958); Securities Exchange Commission, 53 Stat. 1174 (1939), 15 U.S.C. § 77uuu (1958); 48 Stat. 899 (1934), 15 U.S.C. § 78u (1958); Federal Communications Commission, 48 Stat. 1078 (1934), 47 U.S.C. § 220 (1958); Interstate Commerce Commission, 41 Stat. 484 (1920), as amended, 49 U.S.C. § 12 (1958); Federal Power Commission, 41 Stat. 1065 (1920), as amended, 16 U.S.C. § 797 (1958); National Science Foundation, 72 Stat. 353, 42 U.S.C. § 1872a (1958); Secretary of Agriculture, 49 Stat. 1497 (1936), 7 U.S.C. § 7a (1958); 52 Stat. 65 (1938), as amended, 7 U.S.C. § 1373 (1958); 53 Stat. 1289 (1939), 7 U.S.C. § 1603 (1958); Secretary of the Army, 49 Stat. 671 (1935), 33 U.S.C. § 506 (1958); Secretary of Labor, 64 Stat. 1271 (1950), 5 U.S.C. § 780 (1958); Veterans

this legislation came, in 1955, from the Attorney General's National Committee To Study the Antitrust Laws.[16] Since that time the purpose sought to be achieved by the act has encountered no appreciable opposition. Rather, the act has been unanimously endorsed by government officials and by private parties.[17] The statute was designed to provide the Antitrust Division with an effective means of investigation where civil proceedings are initially contemplated and voluntary cooperation fails, in order that it may more fairly and adequately enforce the antitrust laws. While there has been general accord with the purpose of the statute, there has also been considerable fear that it might be used for "fishing expeditions" into the private affairs of companies. These fears were expressed by several congressmen during debate on the bill.[18] They were assured that the requirements of the statute as to the content of a demand provided more than adequate safeguards against misuse.[19] Since the passage of the act there has been a great deal of speculation as to how the new authority would be used.[20]

The demand served upon the petitioner in the principal case read:

> "This . . . Demand is issued . . . in the course of an inquiry for the purpose of ascertaining whether there is, or has been, a violation of the provisions of Title 15 United States Code Secs. 1, 2, 3, 13, 14 and 18 by conduct of the following nature: Restrictive practices and acquisitions involving the dispensing, supplying, sale, or furnishing of trading stamps and the purchase and sale of goods connected therewith."

Obviously, the Department of Justice intends to construe the requirements of the act which were intended as safeguards against abuse as generally as

Administrator, 72 Stat. 1237, 38 U.S.C. § 3311 (1958); Secretary of the Treasury, REV. STAT. § 3649 (1875), 31 U.S.C. § 548 (1958); 26 U.S.C. § 7602 (1958).

State statutes which have authorized such procedure are: ARIZ. REV. STAT. ANN. § 44-1407 (1956); HAWAII REV. LAWS § 205A-16 (Supp. 1961); IDAHO CODE ANN. § 48-105 (1948); KAN. GEN. STAT. ANN. § 50-153 (1949); LA. REV. STAT. § 51:144 (1950); ME. REV. STAT. ANN. ch. 137, § 48 (1954); MO. REV. STAT. § 416.310 (1949); MONT. REV. CODES ANN. § 51-115 (1947); NEB. REV. STAT. § 59-807 (1943); N.Y. GEN. BUS. LAW § 343; N.C. GEN. STAT. § 75-10 (1960); OKLA. STAT. ANN. tit. 79, § 82 (1951); S.C. CODE ANN. § 66-111 (1962); TEX. REV. CIV. STAT. ANN. art. 7439 (1960); UTAH CODE ANN. § 76-58-3 (1953); WASH. REV. CODE ANN. § 19.86.110 (1961); WIS. STAT. ANN. § 133.20 (1957).

16 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 346-47.

17 H.R. REP. No. 1386, *supra* note 5, at 5.

18 108 CONG. REC. 4000, 4002 (1962) (remarks of Representatives Smith and Whitener).

19 "The bill . . . provides every conceivable safeguard for the company to which a civil investigative demand is addressed." *Id.* at 3998 (remarks of Representative Celler).

"The grant of a civil process to the Attorney General does not mean, however, that he shall now be permitted to engage in fishing expeditions. . . . [T]he Committee has imposed effective safeguards to insure that the tool will not be converted into a weapen." *Id.* at 3999 (remarks of Representative McCulloch).

"The . . . Act contains many important safeguards, and could in no way be used for fishing expeditions." *Id.* at 4002 (remarks of Representative Patman).

20 As one antitrust attorney stated, "The Department of Justice now has the opportunity to prove that the proponents were correct." Von Drehle, *Significant Antitrust Developments*, MICH. S.B.J. Dec. 1962, p. 17-18.

possible so as to reduce the specificity required of a demand and thus facilitate investigation. However, the decision of the court in the principal case sanctioning this demand cannot be said to end speculation as to how far the courts will allow the government to carry this interpretation. The court treated the petitioner's contentions separately. It first held that the power granted to the Attorney General does not violate the search and seizure clause, as the Supreme Court has said that "the gist of the [fourth amendment] protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable,"[21] and that modern views are more tolerant of administrative investigations.[22] The court then held that the demand justified a liberal interpretation in view of the circumstances and that it fairly complied with the requirements of the act. The difficulty of determining the effect of this case arises from the fact that the court in these holdings did not resolve the issue presented to it. The petitioner's contention was that the demand failed to meet the requirements of the act and constituted a "fishing expedition"—a result not intended by Congress—and therefore was an unconstitutional search and seizure. The very authorities cited by the court in sustaining the constitutional validity of the act uphold the petitioner's claim that if the demand was unreasonable and not within the authority of the statute, it violated the fourth amendment.[23] The statements of congressmen to the effect that the restrictions embodied in the act were intended to safeguard the person on whom the demand is served from "fishing expeditions" support petitioner's contention that if the demand does not meet these requirements it constitutes a "fishing expedition" outside the authority granted by the statute. Thus, the vital question is whether the requirements are to be strictly or narrowly interpreted so as to include or exclude the demand in question. The interpretation of the requirements will depend upon the view one takes as to what is necessary to effectuate the purpose of Congress in passing the act. The court in the principal case felt that to insist upon too much specificity would defeat the purpose of the act and encourage frequent challenges directed against the sufficiency of the demand. The test as envisioned by the court in the principal case is whether the person being investigated is sufficiently informed and whether the relevancy of the documents may be determined. Thus, since petitioner apparently understood

21 Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946).

22 United States v. Morton Salt Co., 338 U.S. 632, 642 (1950).

23 "The . . . investigative function, in searching out violations . . . is essentially the same as the grand jury's or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he [the investigative official] shall not act arbitrarily or in excess of his statutory authority. . . ." Oklahoma Press Publishing Co. v. Walling, 377 U.S. 186, 216 (1946).

"Of course a governmental investigation . . . may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." United States v. Morton Salt Co., *supra* note 22, at 652.

the scope and intent of the demand, the requirements were satisfied. However, it is equally arguable that a strict construction of the requirements ought to be followed, especially since such a construction would place little or no hardship on the government and would not impede its investigations to any substantial extent.[24] Nor would it encourage the challenging of demands. As long as standards are specifically stated and consistently applied one should be able to determine whether the demand meets such limits, regardless of whether the standards set wide or narrow limits. As the intent of Congress was clearly to provide a tool, not a weapon, the utmost care should be taken to see that the process does not evolve into a ready vehicle for the examination of the private records of any company which might incur the disfavor of the Department of Justice. The implications of the principal case in antitrust law, however, will not be clear until other courts have had occasion to test its rationale in future litigation.

Mary Mandana Long

24 "There would appear to be no hardship on the Government to prepare a descriptive statement of the desired information. Since much of the investigatory work is done by FBI agents, something of this kind is already being prepared." Decker, *supra* note 8, at 373.