Anti Trust; Applicability to State Laws
12 MRSA, 4301-A

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The Joint Standing Committee on
Marine Resources
Senator John Chapman
Representative Bonnie Post
January 4, 1978
Dear Senator Chapman and
Representative Post:

This is in response to the request for an opinion from the Joint Standing Committee on Marine Resources dated November 14, 1977. As I understand your question, you ask whether it is a violation of federal or state antitrust laws for a State of Maine statute, 12 M.R.S.A. § 4301-A(2), to prohibit licensed marine worm diggers from selling their worms to anyone other than another licensed marine worm dealer. You also ask whether this statutory prohibition is an unlawful restraint of trade.

The leading case discussing whether federal antitrust laws would be violated if the state passed a statute permitting anti-competitive activity is Parker v. Brown 317 U.S. 341 (1943). In that case the United States Supreme Court held that Congress did not intend the Sherman Act to apply to state agents acting in the furtherance of state policies or to private parties acting under the direction of state law.

The Court assumed, without deciding, that the State program would have violated the Sherman Act if it had been organized by private parties and that Congress, in the exercise of its commerce power, could have preempted the program by statute. It held, however that Congress had intended the Sherman Act to reach individual and not state action. Two alternative reasons for that holding are given in the opinion. First, the Court held that the "state in adopting and enforcing the anticompetitive marketing program made

no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly". Consequently, the language of the liability provision of the Sherman Act did not cover what the state had done. The second reason for the Court's opinion was a concern for the impact of a contrary decision on federalism and state's rights. The Court said:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress". Parker, supra. at 350-351.

Based upon the decision in Parker, it is our opinion that no state agent violated the federal antitrust laws by enacting and enforcing 12 M.R.S.A. § 4301-A(2).

With regard to your question of whether 12 M.R.S.A. § 4301-A(2) would violate state antitrust laws, the answer is also no. The Legislature clearly has the authoity to enact the laws of this State. M.R.S.A. Const. Art. IV, Pt. Third, § 1. In carrying out this function, the Legislature may create exceptions to general laws prohibiting contracts in restraint of trade such as 10 M.R.S.A. § 1101, Maine's version of the Sherman Act. The creation of a statute allowing marine worm diggers to engage in anticompetitive activity is in effect an exception to the Maine statute prohibiting contracts in restraint of trade.

Finally, you ask whether 12 M.R.S.A. § 4301-A(2) violates

statutes prohibiting "unfair methods of trade." We assume that you are referring to the "unfair method of competition" language in 15 U.S.C. § 45(a) (hereinafter the Federal Trade Commission Act) and 5 M.R.S.A. § 207 (hereinafter the Unfair Trade Practices Act). These statutes have not been considered antitrust laws, although they have been used to enjoin anticompetitive activity.

Although the Parker state action exemption is firmly established, the precise scope of the exemption remains a matter of conjecture. In particular there has never been a definitive court ruling on whether the state action exemption also prohibits suits under the Federal Trade Commission Act to restrain "unfair methods of competition...in or affecting commerce". Most commentators and cases have assumed that Parker immunized state action from all antitrust enforcement action. However, it is apparent that the Federal Trade Commission does not agree with this assumption. The applicability of Parker, to the Federal Trade Commission Act will be tested in court when challenges are made to recently proposed Federal Trade Commission rules that seek to overturn state laws prohibiting certain anticompetitive activities. Until the Federal Trade Commission's authority to preempt state law by regulation has been tested in the courts, we are unable to render an opinion as to whether or not 12 M.R.S.A. § 4301-A(2) could be preempted by the Federal Trade Commission Act.

With regard to 5 M.R.S.A. § 207, the State version of the Federal Trade Commission Act, 5 M.R.S.A. § 208 exempts from the application of that statute "transactions or actions otherwise permitted under laws administered by any regulatory board or officer acting under statutory authority of the state or of the United States". Consequently, Title 5 M.R.S.A. § 207 could not be used to set aside Title 12 M.R.S.A. § 4301-A sub. ¶2.

Very truly yours,

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RAF/sjn