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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

80-10

January 21, 1980

Gordon Weil, Commissioner
Department of Business Regulation
State House
Augusta, Maine 04333

Dear Commissioner Weil:

In your letter of December 12 you ask whether a violation of antitrust law, specifically 10 M.R.S.A. § 1101, would occur if, after the information gathered under your voluntary Consumer Credit Guide program is published, the interest rates or the terms and conditions of loans in any marketing area become uniform as the result of independent bank decision and in the absence of any agreement between or among the banks. While it is our opinion that the proposed program will serve a truly significant consumer benefit and, further, that any antitrust issue raised by the program is at best problematical, it is possible under the circumstances which you describe that a violation of the antitrust laws could be found to have occurred.[1] However, the likelihood of such a violation occurring may be remote if the information exchanged

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1/ It is important to note that the voluntary program is not an activity "directed" or "compelled" by the State of Maine. The participants in the program will not enjoy any particular protection or immunity from application of the federal antitrust laws, simply because it is a state-sponsored program. See, Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943), Cantor v. The Detroit Edison Co., 428 U.S. 579, 96 S.Ct. 3110 (1976). The federal Sherman Act (15 U.S.C.A. § 1) and the Federal Trade Commission Act (15 U.S.C.A. § 45) as well as State law govern this program. The standards for determining the lawfulness of the program are, however, the same under State and Federal antitrust laws.

through the proposed program is not information upon which lending institutions rely to predict the interest rates to be charged by their competitors.

To violate 10 M.R.S.A. § 1101 competitors must enter into a combination, contract or conspiracy to restrain commerce.[2] The element of agreement, either direct or implicit agreement, must be found before competitors will be deemed to have combined or conspired. An agreement can be found through a course of conduct; it does not need to emerge from direct communication between or among competitors. U.S. v. Container Corp. of America, 393 U.S. 333, 89 S.Ct. 510 (1969). The fact that lending institutions agree, albeit on a purely individual basis, with the Department of Business Regulation to participate in the consumer credit reporting program with the knowledge of what type of information will be exchanged and with the knowledge that competitors will also participate in the program would probably constitute sufficient evidence of an agreement to combine or conspire to exchange and receive interest rate information. Container Corp., supra, U.S. v. U.S. Gypsum Co., 98 S.Ct. 2864 (1978). By creating the program, the Department has, in effect, created the combination.[3] Competitors do not have to explicitly agree to stabilize rates (fix prices) in order to

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2/ "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce in this State is declared to be illegal;..." 10 M.R.S.A. § 1101.

3/ It is important to note that there is no reported case in which an unlawful program providing for the exchange of price information has been created by any person other than the competitors themselves. However, the fact that the program was not instituted or created by the lending institutions relates to the lawfulness of the purpose of the combination rather than to its effect. A combination entered into with a lawful purpose will still be an unlawful combination if the effect is that of restraining trade by stabilizing prices.

violate the antitrust statute.

A general statement of the dangers implicit in any exchange of price information can be found in the Gypsum case, supra, at 2875, n.16:

> "The exchange of price data and other information among competitors does not invariably have anti-competitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more rather than less competitive.... A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in dividing the pro or anti-competitive effects of this type of interseller communication.... Exchanges of current price information of course, have the greatest potential for generating anti-competitive effects and although not per se unlawful have consistently been held to violate the Sherman Act."

The essential question, therefore, is not whether an agreement has been entered into or a combination formed, but rather, whether the combination is an unlawful combination. Does the proposed program, or is the proposed program likely to, result in the unlawful restraint of commerce? That is to say, will it have an uncompetitive stabilizing effect upon rates or terms of loans?

A violation of antitrust law based upon an exchange of price information can occur in two ways: if the information exchange program on its face will inevitably lead to stabilization or the fixing of interest rates at a noncompetitive level, the participation in the program will constitute a violation; if the exchange program does not on its face appear to lead to stabilization, but over time one or more

participants take advantage of the reported figures to fix or stabilize their interest rates, a violation will also have occurred but it occurs at the point in time where some competitor acts in reliance upon exchange of the information. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940), American Column & Lumber Co. v. U.S., 257 U.S. 377, 42 S.Ct. 114 (1921). In the latter instance, all members of the combination will be similarly liable even those who did not in fact change their interest rates in reliance upon the exchanged information.

Therefore, the conduct of the voluntary program and the structure of the market for lending institutions in any particular market area must be considered in determining the likely effects of the proposed combination.

CONDUCT OF THE PROGRAM

The proposed program provides for a limited exchange of information: namely, commonly charged interest rates on types of consumer loans as of a particular day each month. What must be considered is whether interest rates alone as reported in the proposed program would be enough to permit competing lending institutions to predict with relative certainty what their competitors' rates are likely to be at any point in time. That is to say, is it likely that the reporting of the interest rates alone will stabilize rates or will stabilization only occur if other essential information is also exchanged? Information such as the amount and availability of reserves, numbers and types of loans transacted or the cost of doing business for each participant may be necessary before a lending institution could reliably predict the future conduct of competitors. If such is the case, the proposed program could not be expected to result in the stabilization of prices. Further, participating lending institutions are not obligated under the proposed program to make loans at the reported rates. In fact, they specifically have the unrestricted option to change their rates or the number of loans at any time. The lack of a policing mechanism which would require competitors to stay at reported rates is a relevant consideration which weighs in favor of the legality of the propose program. SULLIVAN, LAW OF ANTITRUST, 265-274 (1977).

A particularly important pro-competitive consideration is that the market can reasonably be expected to become perfected through the provision of fairly up-to-date interest rate information to consumers. Consumers possessing interest rate information will likely act upon it, choosing to do business with those institutions which provide more favorable rates and terms. Similarly, consumers will be unlikely to borrow from institutions with high rates, or to borrow from institutions generally during a period of high interest rates. The selective buying decision of consumers should, in a healthy market, affect rates by pushing them into a more competitive stance.

MARKET STRUCTURE

Lacking particular knowledge of the market structure (the number of institutions and their relative share of the lending business) of lending institutions in the State, it is impossible for this office to predict whether the market structure might inevitably lead to stabilization of interest rates once the proposed program is in effect. In Container Corp., supra, and Gypsum, supra, the United States Supreme Court found that an oligopolistic market is much more likely to experience a stabilization or fixing of prices as a result of a program permitting exchange of price information. It may be that in some more remote areas of this State the market for lending institutions is more oligopolistic in character than in the larger commercial districts. For example, if there are three banks in an area, one with 70% of consumer loan business and the other two sharing the remaining 30%, it may be likely that the smaller two banks would be inclined to match or follow the rate of the larger banks. Again, however, if one assumes that current commonly charged interest rates are not in themselves a significan indicator of what rates and terms a lending institution is likely to adopt next, the likelihood of price stabilization may be minima even in an oligopolistic market.

In conclusion, it is our opinion that the proposed voluntary program could lead to the violation of antitrust law, but the likelihood of a violation occurring may be remote. Further, it is somewhat difficult for this office to envision a plaintiff likely to bring such action. This office would not exercise its

enforcement authority unless an uncompetitive stabilization became clear. At such time, we would request that the program be discontinued and only after such notice had been given and ignored would we exercise our prosecutorial prerogatives. As a practical matter, the U.S. Department of Justice, Antitrust Division would not be likely to bring such an entirely local action. Private suits are not likely to occur either unless stabilization and harm became readily apparent. You realize, however, that we cannot speak with absolute certainty as to whether any lawsuit will or will not be brought other than our own.

The antitrust implications are, in our opinion, somewhat ephemeral as compared to the substantial consumer benefit to be conferred by the program. However, once the program is instituted, we recommend that the Department carefully monitor its effect upon interest rates to determine whether rates reflect competition or whether they may be trending towards uncompetitive stabilization in any specific market area. The Department should look for evidence of stabilization (up or down) that could not expect to have occurred but for the existence of reported rates through the program. If evidence of stabilization is found, the program should be promptly terminated. For our part, we would be happy to lend whatever service we can provide in helping you to analyse what affect the program is having on interest rates.

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