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THE ANTITRUST CIVIL PROCESS ACT: THE ATTORNEY-GENERAL'S PRE-ACTION KEY TO COMPANY FILES

By DAVID D. SIEGEL[†]

NOWHERE IN THE litigation process are the facts more involved, the records more voluminous and the trial more complex than in the antitrust suit, and it is the Attorney General who is charged with the enforcement of the antitrust laws. It is his office, the Department of Justice, which must carry out the Government's duty of commencing the antitrust action; and so it is upon his shoulders that the massive facts of that action are carried into court.

The process of litigating is difficult enough. When the Antitrust Division has amassed facts which it believes show the violation, and it is decided that suit will be brought, the steps immediately following are difficult but feasible. The facts are at hand. It is now a matter of organizing them into a case and bringing the case to court. If more facts are necessary, if the proof must be expanded, the disclosure provisions of the Federal Rules of Civil Procedure will step forward to assist the Government as soon as the suit is commenced.

The foregoing, in the context of a potential antitrust suit, contains quite an assumption. It assumes that the Attorney General "has amassed" the facts of an antitrust suit. How did he get them? The facts do not organize themselves and drop in on the Attorney General unsolicited. They result from his painstaking investigations; and the investigatee does not ordinarily greet the investigator with open arms. Company cooperation has been the rule rather than the exception, true enough, but what does the investigator do when he is seeking

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to investigate one of the exceptions? What are the remedies available to him to get at the files of the uncooperative corporation — to *amass* the facts that will make possible a determination of *whether* the law has been broken?

As this article will show shortly, the Attorney General has had, and made use of, various devices to gather the determinative facts. But the consensus has been that they, all of them, have for one reason or another (also to be shown shortly) proved inadequate or impractical or even unlawful.

The Antitrust Civil Process Act of 1962¹ gives the Attorney General the tool requisite to his investigations. Its various provisions will be discussed at length in this article. For the moment it can be described, as indeed it is described in the Act itself, as a "Demand" served on a company which requires it to make "available for inspection and copying"² any documentary material "relevant to a civil anti-trust investigation."³

THE INADEQUACY OF THE FEDERAL RULES FOR INVESTIGATION PURPOSES

The history of the Act is an interesting one, but even before its history is examined certain preliminary inquiries are pertinent. These concern the Federal Rules of Civil Procedure. The Antitrust Civil Process Act has its genesis in the inadequacy of those Rules for pre-action investigations.

The Antitrust Civil Process Act⁴ provides only for what the Federal Rules would call "discovery."⁵ It requires only the production of "documentary material." It does not provide for depositions or interrogatories or admissions or any other device found in the Federal Rules as disclosure tools in litigation. This examination will therefore treat only those of the Rules' provisions regarding discovery.⁶

Rule 34 permits one party to secure of another "the inspection and copying" of documentary matter "relating to any of the matters within the scope of the examination permitted by Rule 26(b)." The latter is the basic deposition provision, and its scope is broad.

It permits examination regarding any unprivileged matter which constitutes evidence or which is merely "reasonably calculated to lead

1. Public Law 87-664, 76 Stat. 548, 15 U.S.C. §§ 1311-14.

2. *Id.* at § 3(b)(3).

3. *Id.* at § 3(a).

4. Hereafter abbreviated to "ACPA."

5. See FED. R. CIV. P. 34.

6. Since the discovery provisions of the Federal Rules, Rule 34, adopts the criteria applicable to depositions, however, the latter will be at least tangentially involved.

to the discovery of admissible evidence.” Hence the “scope” of the examination is not the source of difficulty. The trouble lies in the *time* when discovery may be sought. Rule 34 speaks of discovery by motion to the court “in which an action is pending”, and a line of cases has construed this literally: an action must be pending.⁷

The deposition provisions themselves as contained in the Federal Rules would not avail for the kind of pre-trial investigation that the Antitrust Division must conduct. Rule 27(a) permits pre-action deposition taking, but its purpose is to perpetuate testimony; it is not available to a plaintiff who is only trying to determine whether he has a cause of action. Professor Moore states: “Where there is no danger of loss of the testimony . . . a person cannot take advantage of Rule 27 merely for the purpose of obtaining facts on which to base a complaint.”⁸ The cases in the Federal courts are even more restrictive. They indicate that even where the person can show that he has a cause of action, and that he wants disclosure only to aid him in the framing of his complaint, he still will not be permitted the use of Rule 27.⁹

The foregoing manifests the inadequacy of the Federal Rules in the solution of the Attorney General’s dilemma — how to get the facts to determine whether a cause of action exists in the first place.

PRE-ACPA INVESTIGATION METHODS

Before the ACPA, there were four methods whereby the Attorney General might get his facts. These were:

- (1) Reliance upon the voluntary cooperation of the company¹⁰ being investigated;
- (2) Using a grand jury and its subpoena powers, impanelling a grand jury for the purpose if that was necessary;
- (3) Seeking out the assistance of the Federal Trade Commission, thereby exploiting that agency’s investigative powers and process; or
- (4) Commencing an action with a “skeleton” complaint, making use of the Federal Rules’ disclosure provisions, which

7. See, *e.g.*, *Egan v. Moran Towing & Transp. Co.*, 26 F. Supp. 621 (S.D. N.Y. 1939); *United States v. American Locomotive Co.*, 6 F.R.D. 35 (D. Ind. 1946).

8. 4 MOORE, *FEDERAL PRACTICE* ¶ 27.07[4] at 1825 (2d ed. 1953).

9. See, *e.g.*, *Petition of Ferkauf*, 3 F.R.D. 89 (S.D. N.Y. 1943).

10. The word “company” is used in this article to designate any “person,” as defined in the ACPA. “Person” there is defined as anyone but a natural person, *i.e.*, it includes a “corporation, association, partnership, or other legal entity . . .” but specifically excludes a natural person. The word “company” would have been more appropriate in the statute (ACPA § 2(f)).

thereby became available, and then, having accumulated the facts in full, amending the complaint to set them out.

Each of the above procedures was found to have substantial drawbacks.

Reliance on the voluntary cooperation of the investigatee was fine, if the investigatee volunteered. In fact, most of them did volunteer. It has been noted that voluntary cooperation "has often been sufficient", but the notation is immediately followed by the observation that cooperation is not always forthcoming and "compulsory processes are required in some cases."¹¹ Even if the percentage of cooperation were 95%, some kind of mandatory process would be necessary for the recalcitrant 5%.

The use of a grand jury and its subpoena powers to secure data for a possible civil suit is on its very face a perversion of that process. It is often the case that the only action contemplated, even remotely, against a company is a civil one. The prospect of a criminal prosecution may be nowhere in the picture. Yet, for want of a civil device to get needed information, the Attorney General has had to resort to a procedure reserved strictly for criminal cases. The Attorney General's National Committee to Study the Antitrust Laws itself observed that

the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's [Justice Department's] policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.¹²

If that were not sufficient, there is a terse final word that might be added to lay to rest any notion that the grand jury might continue to furnish the Attorney General with his investigative tool. Just a few years after the Committee's Report, from which the above quotation is taken, the United States Supreme Court condemned the practice of using such criminal means to attain civil ends.¹³

Nor is the Attorney General's reliance on the Federal Trade Commission for assistance in his investigation a viable alternative. There is statutory provision for this inter-agency activity.¹⁴ The House Re-

11. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 342 (Mar. 31, 1955). The Report, by a Committee of distinguished attorneys, further noted that "a Government agency should not be in a position of sole dependence upon voluntary cooperation for discharge of its responsibilities." The Report will hereafter be referred to as ANTITRUST REPORT.

As to a trend toward a refusal to cooperate, see Decker, *The Civil Investigative Demand*, 51 KY. L.J. 449, 452 (1963).

12. ANTITRUST REPORT, *op. cit. supra* note 11, at 343.

13. United States v. Procter & Gamble, 356 U.S. 677 (1958).

14. See, *e.g.*, 15 U.S.C. § 46 (part of the Federal Trade Commission Act), permitting the F.T.C. on the Attorney General's request to make investigations on his behalf. This method is not on the list of alternatives open to the Attorney General as

port on the ACPA observed that this method "has never been used" and that, in any event, the statute did not make clear whether or not the Federal Trade Commission was under an obligation to respond to the Attorney General's request.¹⁵ It has also been considered by both the Justice Department and the Federal Trade Commission to be an unworkable procedure because it divests the Justice Department's attorneys of "control of such investigation on the one hand" and constitutes a "drain on the [Federal Trade] Commission's budget and its manpower resources on the other hand."¹⁶

Finally, the commencement of an action with a "skeleton" complaint (with the aim of resorting to disclosure under the Federal Rules and thereafter amending and filling out the complaint) also proved unsatisfactory. Such practice is obviously a poor one. It is often wasteful of the time and effort of all concerned: the plaintiff, the defendant and the courts. It may be that there is no cause of action, and that full investigation will reveal just that. Yet here was the Government compelled, for the sole purpose of seeking disclosure, to bring a cause of action when it was not yet certain that it had one. Resort to such premature suit meant that court calendars were needlessly imposed upon and the attention of judges drawn to matters which could be cared for by a pre-action device as simple in concept as the present ACPA. Moreover, a Committee of the Judicial Conference of the United States, speaking directly of this premature litigation designed to exploit the Federal Rules' disclosure devices, said that such procedure is no more justifiable for the Government than it is for any other plaintiff.¹⁷

This last method should be, and should have been, condemned for what seems to this writer a still more important reason. This has to do with the economic impact that the mere commencement of an anti-trust action may have on the defendant company and its shareholders, especially when the company's shares are listed on a national exchange. This impact will often be felt as soon as it is learned that the complaint

noticed in the Antitrust Report, though the other three are. ANTITRUST REPORT, *op. cit. supra* note 11, at 342. It is, however, one of the four listed by the district court in *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963), *aff'd "on the basis of" the district court's opinion*, 325 F.2d 1018 (8th Cir. 1964) (to which case more detailed reference will be made later on).

Curiously, the House Report on the ACPA omits to specify the "skeleton" complaint alternative (#4 on the list set forth in the text), but it does list the F.T.C. as a source of antitrust investigation assistance. See H.R. Rep. No. 1386, 87th Cong., 2d Sess., set forth in U.S. CODE CONG. & AD. NEWS 3096-097 (1962). That Report will hereafter be cited as H.R. Rep. No. 1386.

The foregoing indicates that there is not even a consensus as to what pre-ACPA devices the Attorney General could or did use.

15. H.R. Rep. No. 1386, *supra* note 14, at 3097.

16. *Ibid.*

17. *Judicial Conference of the United States, Report on Procedure in Antitrust and Other Protracted Cases*, 13 F.R.D. 62, 67 (1951).

has been filed. And there is no guarantee that the status quo will return if, after use of the disclosure devices for which the action was brought, it is determined that there is no antitrust violation after all (with the result that the action is discontinued).

These pre-ACPA remedies were insufficient for the variety of reasons previously set forth. Yet the Attorney General was, and remains, chargeable with enforcement of the antitrust laws. Enforcement implies the power to determine whether there is anything to enforce, which in turn requires a power to investigate. In that light, the Antitrust Civil Process Act may be regarded not as a unique device¹⁸ conferring some new and despotic power on the Attorney General, but as a long overdue concomitant of his duty to enforce the antitrust laws.

DEVELOPMENT OF THE ACPA¹⁹

Informal suggestions to the effect that the Attorney General should be equipped with an investigative device to aid him in his antitrust enforcement chores had been voiced, at least since 1955, when the Attorney General's National Committee to Study the Antitrust Laws formally recommended legislation to supply it.²⁰ The related suggestions had generally favored giving the Attorney General the subpoena power, analogous to that conferred on regulatory agencies. The Committee felt, however, that the Attorney General's position as a prosecutor made unwise the broad process of subpoena.

The grant of subpoena powers suggests broader regulatory powers, structural organization, a system of hearing officers and a panoply of administrative procedural protections which the Committee is

18. It is not unique for obvious reasons. See *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1963). There at 394 it is noted that "numerous federal officials also had visitorial powers of a like nature [to that implemented for the Attorney General by the ACPA] to aid them in the performance of their duties," and the statutory sources of those powers, some of which relate to other cabinet officials.

19. Many historical details relating to the precursor of the present ACPA, including excerpts from Congressional hearings, appear in Perry and Simon, *The Civil Investigative Demand: New Fact-Finding Powers for the Antitrust Division*, 58 MICH. L. REV. 855 (1960), to which article the reader is referred. The "history" offered in the instant article will be more general, and will embrace mainly the steps that led finally, in 1962, to enactment of the ACPA.

The title of the Michigan Law Review article, "New Fact-Finding Powers for the Antitrust Division," might reflect the notion of its authors that the then-proposed act broadened the scope of the Attorney General's investigative authority in re antitrust violations. To the extent that the original draft of the bill purported to do so, the title may be apt. But if the authors would apply that title to the ACPA as finally adopted, this writer would dissent from it insofar as such title intends to indicate a broadened scope of investigation. As this article will endeavor to show *infra*, the ACPA does not broaden or narrow or in any wise reflect on the scope of the investigation; it does no more than provide a device, which device is to be used within whatever scope of investigation is afforded the Attorney General under other relevant statutes.

20. ANTITRUST REPORT, *op. cit. supra* note 11, at 341-47.

not prepared to recommend. We would, in addition, disapprove any subpoena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath in the absence of a hearing officer and like safeguards. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary.²¹

The Committee recommended, instead, that the Attorney General be authorized to use a more limited device which the Committee called a "Civil Investigative Demand." An ostensible difference between this "Demand" and a subpoena²² is that disobedience of the latter is per se contemptuous. Disobedience of the "Demand" is clearly not a contempt; proceedings must first be taken to have a district court order compliance with the "Demand", after which disobedience of the court order would constitute the contempt.²³

The difficulty with that supposed distinction is its assumption that an administrative subpoena is the perfect counterpart of a judicial subpoena (*i.e.*, one issued out of a court), and that its disobedience therefore permits the administrator to institute contempt proceedings summarily. That is not necessarily the case. It may be so — and in any event a statute giving subpoena powers to a given agency or administrator may make it so — that disobedience of such subpoena is not ipso facto a contempt; that the administrator's remedy is to seek a court order compelling obedience to the previously disobeyed subpoena; and that it is only disobedience of such a court order which furnishes ground for punishment for contempt.²⁴ Yet, if the subpoena must first be made the subject of a judicial enforcement order, the chief characteristic whereby it might otherwise be distinguished from the ACPA's "Demand" is absent; and, in its absence, there appears to be no substantial difference between the two devices. In fact, it was Congress' apprehension that the "Demand" might be construed to go *farther* than the subpoena which led it to adopt, by subdivision (c)(3) of the Act, the limitations applicable to a subpoena duces tecum. All of this indicates that the Committee's reservations about conferring outright subpoena powers were, and remain, unwarranted. By express words Congress allows the "Demand" to do *no more* than a subpoena would have done. What appears to have been overlooked is the fact that, as

21. *Id.* at 343-44.

22. Since the "Demand" is available only to get at documentary material, the analogy is to the subpoena duces tecum, and it is that subpoena to which the text has reference. The eliciting of testimony is not involved in the ACPA, therefore, is not involved in this article.

23. ACPA § 5(d).

24. See *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942).

formulated in the ACPA, the "Demand" does *no less*. If there is a difference at all, it would be a psychological one at best. "Demand" has a less fearful connotation than "Subpoena"; but under the ACPA it does not have narrower scope.

However that may be, the terminology of "Civil Investigative Demand" has been retained as the name of the device — though the act itself is the "Antitrust Civil Process Act."

Bills to enact the "Demand" were introduced shortly after the Report of the Attorney General's National Committee. They were put in at both the 84th and 85th Congresses but did not pass.²⁵ The Senate passed a "Demand" bill at the 86th Congress, but the House did not act on it. That Senate bill was S.716.²⁶ Though substantially the same in outline as the present ACPA, there are a number of significant differences between the two. Several of the more important variations may be traceable to an article critical of S.716 which appeared in the Michigan Law Review,²⁷ and may be seen by comparing the present ACPA with S.716 as treated in that article. Action was finally taken by the 2d Session of the 87th Congress in 1962; the product is the present ACPA.²⁸

The ACPA is at present two years old and it has been frequently utilized by the Department's antitrust staff. Yet there was as of July, 1964 only one fully reported case on it.²⁹ That fact, though far from an unimpeachable indicium, is some evidence that the "Demand" procedure is not creating any unusual difficulties. However, certain aspects of the Act suggest that such difficulties may arise sooner or later.³⁰

PROCEDURE UNDER THE ACPA

The Act consists of seven sections. The first is merely its title. Section 6 is a conforming amendment of 18 U.S.C. § 1505. The latter makes criminal and punishes obstructions of administrative proceedings; the amendment includes among the listed obstructions any trifling with the documentary subject matter of the "Civil Investigative Demand."

25. See H.R. Rep. No. 1386, *supra* note 14, at 3098.

26. 86th Cong., 1st Sess. (1959), introduced by Senator Kefauver. That bill will hereafter be cited as S. 716.

27. See note 19.

28. 76 Stat. 548, 15 U.S.C. §§ 1311-14.

29. Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1963). The case recognizes that it is the first one on the ACPA and offers extensive treatment of the background, history and purpose of the Act. Its discussion of the constitutional question raised in the case (the Search and Seizure objection) will be adverted to shortly.

30. A later subtitle in this article, "Possible Exploitation of the Demand by the Investigatee to Avoid Disclosure to Others," treats one such difficulty that the ACPA might present.

Section 7 is a saving provision. It clarifies that the Act is not to be construed as interfering with the Attorney General in his investigation of possible criminal aspects of antitrust enforcement, especially as it may involve a grand jury. And it further resolves a matter as to which Senate and House differed.³¹

The difference concerned whether or not a natural person would be subject to punishment for disobedience of an order secured to enforce a "Demand". The question is an important one because the "Demand" itself is directed to an entity only; it is made expressly inapplicable against a natural person.³² Yet it is obvious that whether or not the procedure is complied with will be determined by the individuals representing the investigated entities. The House version prevailed on this matter. Section 7 of the Act subjects a natural person to punishment for disobedience of a court order or process issued to enforce the "Demand". The provision is probably indispensable to effective court enforcement of the "Demand" procedure. If the entity alone were punishable, it might occasionally be decided by the individuals in charge that the penalties — which would then involve fines only — would be preferable to obedience. That might be so even if all concerned were resigned to the fact that the disclosure would have to be made sooner or later. This recalcitrance might secure nothing more than a delay, but a delay might be the very thing sought. By subjecting to punishment the individuals responsible for the entity's acts (or omissions), different and more telling considerations come to bear. Now it is not only a fine that is threatened; the even more convincing threat of imprisonment is at hand to impel obedience.

Section 2 of the Act contains its definitions. Subdivision (a) of this section defines the "antitrust law" whose enforcement the "Demand" is designed to assist. It is a broad definition, even including statutes "hereafter enacted" which provide civil remedies "with respect to . . . any restraint . . . monopolization . . . or . . . unfair trade practice" of or concerning interstate or foreign commerce.

Definition (c) permits the procedure to be used for the purpose of ascertaining "whether" there has been an antitrust violation. This seems to condone the "fishing expedition", a cliché so often thrown up as a defense by the one investigated. Indeed, the sole reported case³³ confirms the right of the Attorney General under the Act to cast his net about broadly.

31. See *Conference Report No. 2291*, U.S. CODE CONG. & AD. NEWS 3100 (1962).

32. ACPA § 2(f).

33. *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1963).

Definition (f) concerns the "person" investigated, which includes corporations, associations, partnerships and any "other legal entity", but which expressly excludes a natural person.

Sections 3, 4 and 5 contain the operative provisions of the Act. Section 3 provides the method whereby the Attorney General initiates the Civil Investigative Demand. Section 4 provides for an "Antitrust Document Custodian" to whom the materials demanded shall be given and who shall have the responsibility for their use and return. Section 5 supplies judicial aid to enforce the "Demand" and the punishment for disobedience of court orders so issued. These three "core" sections will now be separately treated, in the course of which treatment several additional aspects of the legislative history and background will be integrated.

MAKING THE DEMAND: ACPA § 3

The "Demand" may be issued prior to commencement of an action whenever the Attorney General or the Assistant who heads the Antitrust Division "has reason to believe that any person under investigation" has or controls "documentary material relevant to a civil antitrust investigation. . . ." Note that it is only the "person under investigation" who is subject to the "Demand". Should the material perchance be possessed or controlled by a third person, the "Demand" may not run against him (or it). The Senate-House Conference took note that this limitation "may somewhat restrict the use of this procedure" but that "the essential purpose of the bill is clearly still fulfilled. . . ."³⁴ The Conference apparently believed that if the material was controlled by X Company, X Company would itself be a "person under investigation" under Section 3(a) of the Act though the more immediate purposes (perhaps it is better to say "motive") of the "Demand" might be to look the material over for its possible bearing on Y Company. This may often be the case, but it will not always be so. There will likely be instances when the third person cannot by any standard be deemed a "person under investigation" so as to be included in the broad sweep of entities that might be subjected to the "Demand". If the person is a natural person, moreover, he is expressly exempt from the "Demand" by Section 2(f) of the Act, so that material in his possession concerning an investigatable entity would not — unless he were employed or in some way controlled by the entity³⁵ — be attainable by the "Demand".

34. *Conference Report No. 2291, supra* note 31, at 3101-102.

35. In such instance, the "Demand" would still be directed to the entity being investigated, but the court may, when the notice is disobeyed, order compliance under

Note also that the "Demand" may be used only with reference to a "civil" investigation, although once validly secured the materials are admissible in criminal court proceedings as well. This, too, was the subject of special Congressional attention; the "civil" was added by the House to the Senate version.³⁶ As has been noted, however, it is the grand jury subpoena which is the investigative weapon for the criminal aspects of enforcement, and the Saving Provision³⁷ preserves it intact.

The "Demand" must be in writing.³⁸ Its specific content is the subject of subdivision (b) of Section 3, the more significant aspects of which are treated in the *Gold Bond* case.³⁹ The first requirement is that the "Demand" shall:

state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto

In the *Gold Bond* case the "Demand" cited the applicable provisions and stated the nature of the inquiry to be whether or not, under them, there have been any:

restrictive practices and acquisitions involving the dispensing, supplying, sale or furnishing of trading stamps and the purchase and sale of goods and services in connection therewith.

The "Demand" used in *Gold Bond* was broad, to say the least. The Court itself noted that it was but a "short and somewhat terse statement" which did not "specify the particular offense or offenses under investigation." But the Court sustained the "Demand", noting that the purpose of the Act is such that "general terms" are all that might be expected. This being an investigation to determine whether there has *been* an offense, it would be inappropriate to require that a particular offense be specified. The Congress, noted the Court, specifically rejected an American Bar Association proposal that "the particular offense be specified in the demand. . . ."⁴⁰ It held the test to be

ACPA § 5(a). Failure to comply with that order would constitute a contempt for which the responsible individual may be personally chargeable under the express terms of ACPA § 7.

36. *Conference Report No. 2291, supra* note 3, at 3101.

37. ACPA § 7.

38. ACPA § 3(a).

39. 221 F. Supp. 391 (D. Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1963).

40. *Id.* at 397. The "Demand" in *Gold Bond* was a good deal less specific than was generally contemplated. See, *e.g.*, Decker, *supra* note 11, at 459. Still, a failure of specificity, if in any case it be found by the court, should result in a vacating of the "Demand" as beyond the intent of the Act; the Act itself should be safe from constitutional attack in view of its language and legislative history. The text will expand on that point shortly.

subjective; the query is whether "the person being investigated" is enabled "to determine the relevancy of the documents demanded for inspection." It is of no moment that a stranger to the business of the investigated entity might find the "Demand" too vague.⁴¹

When the "fishing expedition" charge was raised, as might be expected, the Court labeled it "hackneyed"; acknowledged that the "Demand" was "in one sense of the term a 'fishing expedition'"; referred to the "no fishing" signs that are constantly urged upon the courts against agencies; and laid the matter to rest by noting that Congress in the ACPA has "virtually eliminated" the sign.⁴² Set out in affirmative words, the Court is saying that within the limits of the statutory safeguards, broad latitude is permitted in the selection of information.

Subdivision (c) of Section 3 applies to the "Demand" the criteria of the subpoena duces tecum, including an exclusion of privileged matter. Subdivision (d) provides that the "Demand" may be served by any "antitrust investigator or . . . marshal or deputy marshal" and that it may be served "at any place within the territorial jurisdiction of any court of the United States." The latter phrase should obviate questions about the geographical scope of the "Demand".

Subdivision (e) provides for the methods of service. The House Report said that the methods so provided are "similar to the provisions for service of complaints in civil cases under the Federal Rules of Civil Procedure."⁴³ That conclusion is justified only insofar as the Federal Rules may have suggested some of the steps embodied in the three service alternatives actually adopted by Section 3(e). Subdivision (e)(1) is analogous to F.R.C.P. Rule 4(d)(3). Subdivision (e)(2), which provides for service by "delivering a duly executed copy [of the "Demand"] to the principal office" of the entity, has no precise analogue in Rule 4; nor has subdivision (e)(3), which permits service by registered or certified mail to the entity's principal office. Though in some ways Rule 4 is broader⁴⁴ than the ACPA, the latter's simple alternatives of either delivery to the principal office⁴⁵ or registered or certified mailing to that office⁴⁶ appear to make service of an ACPA "Demand" generally easier than service of a summons and complaint under the Federal Rules.

41. *Ibid.*

42. Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 396 (D. Minn. 1963).

43. H.R. Rep. No. 1386, *supra* note 14, at 3098.

44. *E.g.*, Fed. R. Civ. P. 4(d)(7), allows service by any means that would be authorized under the law of the state "in which the district court is held." There is no such provision in the ACPA.

45. ACPA § 3(e)(2).

46. ACPA § 3(e)(3).

THE ANTITRUST DOCUMENT CUSTODIAN: ACPA § 4

Section 4(b) of the ACPA provides that the person upon whom the "Demand" is made

shall make such material available for inspection and copying or reproduction to the custodian designated therein. . . .

and shortly thereafter adds that the person

may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

The foregoing seems to make quite clear that the investigatee's obligation is fulfilled if he merely permits the Government to make copies of the material. He need not surrender the originals for any purpose other than "copying or reproduction" and hence need not be without them for any time longer than that necessary to make such copies or reproductions.

Whether the Government makes its own copies, or by agreement the originals are furnished, they will all be in the possession of one whom the act calls an "Antitrust Document Custodian." Section 4(a) requires the chief of the Antitrust Division to "designate an antitrust investigator to serve as antitrust document custodian;" and, if he finds it necessary, he may designate additional antitrust investigators to be the custodian's deputies.

The office of custodian, so created, solves any number of problems that might otherwise arise. It is he who will collect the material furnished or make the copies of it and, more important, it is he who is responsible for the safekeeping of the material⁴⁷ and for its use and return.⁴⁸

The "principal place of business" of the investigatee is the place at which he is required to furnish the material.⁴⁹ The quoted phrase is sometimes troublesome, but there are "principal place of business" provisions in other statutes which have an ample caselaw to furnish guides to what the "principal" place is.⁵⁰

Section 4(c) provides that only "a duly authorized officer, member, or employee of the Department of Justice" may be permitted access

47. The safekeeping of the material is of greatest moment when the originals of the material have been furnished; it has less importance, of course, when the custodian has made copies and kept only those.

48. ACPA § 4(c).

49. ACPA § 4(b).

50. See, *e.g.*, 28 U.S.C. § 1332(c), the diversity of citizenship provision.

to the material, unless the investigatee consents to its examination by others. It was the express purpose of that provision to exclude even other Federal agencies, in particular the Federal Trade Commission, from use of the surrendered material.⁵¹ The investigatee himself is to be permitted to examine such material as he produced if after its production he should have need to. That much is provided in Section 4(c) expressly, and it furnishes a safeguard to the investigatee in his preparation for trial.

Section 4(d) permits use of the material by any U. S. Attorney "before any court or grand jury in any case or proceeding involving any alleged antitrust violation." Thus, though the Investigative Demand is a "Civil" one, the material secured by it may be used in criminal proceedings either before the court or a grand jury. And it is contemplated that the material may be "passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding." That appears to be the only contingency upon which the U. S. Attorney using the material is discharged from the responsibility of returning it to the custodian. Section 4(e) provides for the custodian's return of the material to the investigatee when both the investigation and the court proceeding (if any) is concluded. But only originals need be returned; if the Department made copies, under § 4(e) it may retain them. Again, the custodian is relieved of responsibility for returning the material only if it has "passed into the control" of a court or grand jury.

Section 4(f) puts a "reasonable time" limitation on the Department's use of the material, after which the investigatee may demand its return if no proceeding has been brought. But it is a reasonable time "after completion of the examination and analysis of all evidence assembled in the course of such investigation," which criterion does not limit the length of the investigation itself.

Section 4(g) merely provides for the custodian's successor on any of several stated contingencies.

COURT AID TO ENFORCE THE DEMAND: ACPA § 5

The third "core" provision of the ACPA is Section 5. Its five subdivisions concern intervention by the district court to enforce the "Demand" and to solve problems arising from it.

51. See *Conference Report No. 2291*, *supra* note 31, at 3102. The Decker article, *supra* note 11, though appearing in the Spring 1963 edition of the *Kentucky Law Review* (the ACPA having become law September 19, 1962), appears to be based upon a former version of the ACPA which included the Federal Trade Commission among those who might use the material elicited.

Subsection (a) permits the Department to "petition for an order of [the district] court for the enforcement of this act," supplying the contingencies on which the petition may be made and the venue of the proceeding.

Subdivision (b) permits the person served with the "Demand" to "petition for an order . . . modifying or setting aside such demand", similarly providing venue and providing also for the time of such petition.⁵² The petition may be based upon

any failure of such demand to comply with the provisions of this Act or upon any constitutional or other legal right or privilege of such person.

While the custodian has the material, the investigatee is permitted by subdivision (c) to petition for an order "requiring the performance by such custodian of any duty imposed upon him by this Act." Again, venue is provided.

Subdivision (d) confers all necessary jurisdiction on the district court "to enter such order or orders as may be required to carry into effect the provisions of this Act." Appeal is provided for "pursuant to section 1291 of title 28." Disobedience "of any final order" of the district court is contempt.

Subdivision (e) adopts the Federal Rules of Civil Procedure to govern the proceedings on any of the aforementioned petitions to the extent that they not conflict with the ACPA.

As previously indicated, a natural person is subject to the punishment for contempt if he is responsible for the disobedience of a court order under the Act. That is provided by the saving provision, which is ACPA § 7.

QUESTION OF CONSTITUTIONALITY

Reference has already been made to the *Gold Bond* case⁵³ and its treatment of the "fishing expedition" contention. By way of expanding that point now, it should be noted that the *Gold Bond* treatment arose as part of a constitutional question raised by the investigatee in the case. Its predicate was the Search and Seizure clause of the Fourth Amendment, and that clause appears to be the chief basis for the constitutional point involved.

52. The petition must be filed within 20 days after the "Demand" is served or at any time before the return day specified in the "Demand" itself, "whichever period is shorter."

53. *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1963).

The point is extensively treated in *Gold Bond*, but a short summary is in order.⁵⁴

In sustaining the constitutionality of the ACPA against the Search and Seizure contention, the court in *Gold Bond* relied primarily on the two leading Supreme Court cases: *Oklahoma Press Publishing Co. v. Walling*⁵⁵ and *United States v. Morton Salt Co.*⁵⁶ Hence, the limitations on the Civil Investigative Demand, in view of the *Gold Bond* case, will be the same as those which apply to grand jury investigations, as held in the *Oklahoma* case with reference to the constitutionality of

54. A number of the constitutional objections voiced by Perry and Simon, *supra* note 19, were aimed at a precursor of the present ACPA. That precursor was S. 716, *supra* note 26. Many of those objectionable features have been removed from the ACPA. To this writer, the only substantial question that may arise in ACPA litigation is whether the Act itself has been complied with. As the text will elaborate shortly, there is nothing in the ACPA itself except a procedural device whose scope is to be measured by other statutes. If there is any constitutional objection, those other statutes should be the source of it. All the ACPA provides is a device to assist the Department of Justice in its elsewhere-authorized antitrust enforcement duties.

Taking the position that the application of the Act in *Gold Bond* was unconstitutional because "the potential violations on which the demand was based were of both a criminal and a civil nature," a comment in 13 CATHOLIC U.L. REV. 49, 54 (1964), states that the judge in the *Gold Bond* case was apparently misled by the term "civil investigative demand." The comment's premise is apparently that because the evidence obtained is admissible in criminal as well as civil proceedings, it is irrelevant that the "Demand" is designed for civil investigations. It is submitted that that fact is not irrelevant at all. The word "civil" resulted from careful Senate-House Conference deliberations (see Conference Report No. 2291, *supra* note 31, at 3101), and evinces an intent that the "Demand" be usable only when a bona fide civil investigation is under way. That the evidence obtained might be used in criminal proceedings if the need arise seems to be an indispensable proviso, lest the investigatee accord itself immunity from criminal prosecution by mere (and in that event eager) surrender of the material sought by a valid Civil Demand. See, in this regard Decker, *supra* note 11, at 464, and the discussion in 111 U. PA. L. REV. 1021, 1024 (1963).

The Catholic University Law Review comment takes a generally dim view of the Act's constitutionality; the Pennsylvania article appears to answer the former by pointing out that:

it is clear that it would be an improper application of the civil process demand to seek documents solely for use in criminal prosecutions.

It draws that conclusion "from the legislative history" of the Act, a conclusion well founded. Is it not true, therefore, that such use of the "Demand" (difficulties of proof of such use to one side) will violate the Act itself? And will that factor not avoid the constitutional question?

The Pennsylvania article (at page 1025) then poses its own constitutional questions about the Act, addressing them primarily to the use of the "Demand" against associations and partnerships rather than corporations (as against which it believes the Act constitutional). The Catholic University Law Review comment appears to have drawn no distinctions between entities; it contemplated an Eighth Circuit reversal of the *Gold Bond* case (which was later affirmed in 325 F.2d 1018). The Pennsylvania article (at page 1027), states its doubts about constitutionality but owns (at page 1027, note 60), that Congress, anticipating these problems, specifically included the requirement of reasonableness applicable to grand jury subpoenas. Thus, it concludes, the Act would exempt "documents 'unreasonably' demanded because not relevant to the investigation." To this writer, that requirement of reasonableness and the concurrent exemption of privileged matter (both contained in ACPA § 3(c)) appear to cloak the Act in an armor that should deflect every constitutional attack to the more appropriate question: Is the "Demand" trying to get what the Act excludes?

55. 327 U.S. 186 (1946).

56. 338 U.S. 632 (1950).

the Fair Labor Standards Act; and the inquiry need not be limited "by forecasts of the probable result of the investigation."

Then, citing and quoting *Morton*, the Court in the *Gold Bond* case notes that a given investigation "may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." But, continuing the quotation,

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.

There does not appear in the ACPA any indication of when an antitrust investigation may be undertaken. The Act merely presupposes that such an investigation is being conducted and *on that supposition* it provides that the "Demand" may issue when there is "reason to believe that any person under investigation may be in possession" of the material sought. Hence the Act itself should not be the subject of a constitutional attack. Even in *Gold Bond*, where the constitutional question was treated, the inquiry seemed not so much directed to whether the Act was constitutional as to whether the Department had gone beyond what the Act allows.

All the ACPA does is provide an investigative device. Its use is *in* an antitrust investigation, but whether or not the investigation is permissible should not in any sense depend on the ACPA. It should depend on the substantive law provisions that involve the Department in antitrust matters, *e.g.*, the Sherman Act, the Clayton Act, etc. (Section 2(a) of the ACPA defines what an "antitrust law" includes.) If it be found that there is no ground whatever for an antitrust investigation, the factual predicate of the ACPA is missing, and the "Demand" would not lie. It would not lie in such case not because of anything the ACPA offers, but because the jurisdiction of the Department does not extend to the matter involved. That it does not so extend will invariably be traceable to jurisdictional limitations imposed on the Department by other statutes or by constitutional restrictions read into *those* statutes.

Indeed, there is a recent case (not as yet reported) in which a Civil Investigative Demand was set aside because the documents sought were held to be exempted by other Federal statutes (in this instance the Miller-Tydings and McGuire Acts).⁵⁷ The matter under investigation was found to be within State rather than Federal jurisdiction, so

⁵⁷. Petition of Chattanooga Pharmaceutical Ass'n, Civ. No. 4251 (E.D. Tenn. 1964).

that a Federal investigation was held not permissible. A Federal investigation precluded, the "Demand" could not be used.

The more likely question will be whether or not the factual premise of the ACPA — the pendency of an authorized investigation — is present. If it is, the ACPA is available. If it is not, the ACPA is not.

In a word, the ACPA does not authorize an investigation; it merely supplies a useful device in the event, based on other laws, an investigation is permitted. If the other laws, whether themselves or by constitutional restrictions read into them, preclude an investigation, the illegality or unconstitutionality of the "Demand's" use traces to the other laws, not to the ACPA. The Civil Investigative Demand in such case should be held unavailable on mere statutory grounds: that the necessary foundation of the ACPA, according to its own terms, is a permissible investigation and there is no such foundation at bar.

If the ACPA assists a fishing expedition to any extent at all, it is because the Department of Justice may go fishing because of its elsewhere-authorized antitrust powers. The ACPA *only* assists, a mere matter of procedure. Such narrow constitutional questions as may arise from the Act itself are thus necessarily narrow and can concern only whether or not the Department may be given the procedural device that the Civil Investigative Demand constitutes. Under the *Oklahoma Press*⁵⁸ opinion, there appears to be little doubt but that, given the powers of investigation, the "Demand" is surely a valid tool for it. The *Gold Bond* case (which cites and relies on *Oklahoma*), while appearing to treat the constitutionality of the "Demand" procedure, is really investigating the permissible constitutional scope of the investigation itself, regardless of what procedural device is used to carry it out. Prior to the ACPA, the Department had other (albeit inadequate) devices, such as the grand jury subpoena. If the "Demand" be looked at as having no more scope than the grand jury subpoena, the *Oklahoma* case would indicate that it would still be constitutional. The reflection of the suggestion that subpoena powers be conferred on the Department in lieu of the "Demand" procedure,⁵⁹ however equivalent the "Demand" might be to such subpoena in practice, evinces a *statutory intent* to restrict the "Demand". Thus, the scope that the ACPA can have merely as a matter of statutory construction indicates that, at maximum, it can go up to, but not beyond, the limits which restrict the grand jury subpoena. But at any point within those limits it would find itself on constitutional terrain.

58. 327 U.S. 186 (1946).

59. ANTITRUST REPORT, *op. cit. supra* note 11, at 343.

If the ACPA is given the function which its legislative history accords it, the only inquiries will be whether the "Demand" is within the Act, not whether the Act is within the Constitution. The particular "Demand" used in the *Gold Bond* case has already been discussed; it was terse and general but was nonetheless sustained. It was really sustained based upon the broad investigative sphere in which the Department functions because of its extensive substantive antitrust enforcement obligations. If the "Demand" roams wide it does so because of the statutes that impose those obligations on the Department and not because of anything in the ACPA itself.

PRACTICAL USE BEING MADE OF THE DEMAND

Perhaps to the chagrin of some potential defendants, the "Demand" is being used in many instances where, previously, the Department would have relied on company cooperation, and the company would have cooperated. The bar is by no means unanimously in sympathy with that company attitude. From defense counsel's point of view, the "Demand" will often make things easier. If no "Demand" were used and a company were asked to cooperate with the Department by opening its files, it would in most instances consult its attorney. It would then be his duty to determine whether, and to what extent, he should advise the company to supply the requested data. The company would not want to furnish any more material voluntarily than it would have to furnish pursuant to the "Demand", so the absence of the "Demand" puts an obviously greater practical onus on the attorney: the burden of picking and choosing would be entirely on him, in addition to his having to decide *whether* there should be voluntary compliance. The situation is analogous to that in which a witness apparently friendly to *P* is nonetheless subpoenaed by *P*. A cooperative but indecisive witness might debate with himself as to whether or not he should appear. The decision (absent a subpoena) is his and he wants to be sure his decision is right. The subpoena makes the decision unnecessary, so with the "Demand". If the "Demand" complies with the Act, the attorney's course leads unambiguously to advising the company to comply with it. There may still be a behind-the-scenes picking and choosing project — the so-called "antitrust audit" — as the company combs out its files but the presence of the "Demand" at least obviates deciding *whether* to comply.

Hence, from at least one point of view the lawyer's task is eased by the ACPA. The only investigatees who are likely to complain about

being served with the "Demand" are those which would not have been disposed to cooperate voluntarily. Hence it would be those against whom the "Demand" is most functional. As to investigatees which would have cooperated without the "Demand", how does the "Demand" make any serious difference? The "Demand" should be confidential. Its very issuance ought to be held in confidence by the Department. The Department would be inviting public censure and possible legislative action if it were to use any threats of publicity to achieve otherwise legitimate ends. In the fact that the ACPA makes the date elicited confidential⁶⁰ there is evidence of a legislative intent to have even the fact of the "Demand" kept in confidence.

POSSIBLE EXPLOITATION OF THE DEMAND BY THE INVESTIGATEE TO AVOID DISCLOSURE TO OTHERS

Section 4(b) of the ACPA provides that the originals of the material sought may be given to the custodian if the investigatee and the custodian so agree. (There is no problem such as contemplated here if only copies are made, because the originals in such instance would remain with the investigatee.) Assume that they so agree and the custodian gets the originals. Under section 4(c) the custodian may not, without the investigatee's consent, expose the materials to any but Department of Justice employees. Now assume that an ordinary civil action is brought against the investigatee by a private person, in which action the materials are relevant evidence. Or assume that another Government agency has brought suit against the investigatee and the materials are relevant there. Can the investigatee in those actions be excused from producing the materials because the custodian has them pursuant to the "Demand"?

The answer should be flatly negative. If the investigatee has retained copies, the copies might be acceptable. If he has not kept copies, his adversary should point to the requirement that (under reasonable conditions prescribed by the Attorney General):

documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representative of such person.⁶¹

Therein lies ample remedy for any attempt by the investigatee to avoid disclosure in an action or proceeding by a third person because

60. ACPA § 4(c).

61. *Ibid.*

of surrender of the material to the custodian. The court in that other action or proceeding can simply order the investigatee to make copies of the materials (which the custodian must make available to him under the above quoted provision) and to make them available to the other party. Or the court might permit the investigatee to designate the other party his "representative" under Section 4(c), requiring materials in the custodian's possession to be furnished to the party as such "representative."

The time in which the foregoing is to be done might be extended by the court in the pending action or proceeding. But the court should by no means deem itself unable to order disclosure of competent and relevant material merely because it has been surrendered into the possession of the custodian as part of an antitrust investigation.⁶²

CONCLUSION

The Act appears to have been the product of thoughtful attention to detail. The lack of precise precedent for a "Civil Investigative Demand" might, by that fact alone, lead some to question its legality. But the Act must be read in context, and the context is one in which not only regulatory agencies, but cabinet officers too, have been given even broader powers to carry out analogous functions.⁶³

Moreover, the ACPA is so framed as to be usable only when, from other statutes, the Attorney General's powers of investigation are invoked. The first possible constitutional question that may arise pertaining to it is thus deflected.

The second possible constitutional question, this one more legitimately aimed at the Act itself, is whether the device is authorized when the Attorney General's investigative powers are present. Nothing more should have to be cited to settle that matter than that the "Demand" has a broader scope than a subpoena,⁶⁴ and a subpoena itself could doubtless have constitutionally been made available by mere analogy to the grand jury subpoena used by the Attorney General

62. Perry and Simon, *supra* note 19, at 861, expressed some apprehension about possible "restriction on discovery rights." These related to original S. 716 and do not appear to embrace the kind of problem treated here. The "restriction" there referred to concerned material elicited by a Civil Investigative Demand from third persons. The present ACPA does not permit the "Demand" to run against third persons; it is limited to the investigatee itself. This was a limitation specifically intended and it was imposed at the request of the House. The Senate version had planned to let the "Demand" run against third persons. See Conference Reports Nos. 1184 and 2291, U.S. CODE CONG. & AD. NEWS 3100, 3101 (1962).

63. See note 18, *supra*.

64. The proposal to give the Attorney General outright subpoena powers for civil enforcement was, as indicated in the text, rejected. ANTITRUST REPORT, *op. cit. supra* note 11, at 343-44.

to enforce the criminal aspects of the same antitrust enforcement obligation.⁶⁵

In that light, constitutional attacks on the validity of the Act are unlikely to find favor with the courts. It would prove to be a more fruitful approach to determine whether the Department's activity it within the Act.

65. As to questions of privilege, self-incrimination, reasonableness and the like, note simply that the ACPA (in § 3(c)) applies the same limitations as apply to a subpoena duces tecum. See note 54, *supra*.